HOW AND WHY REGULATION 71 OF THE NIGERIA POLICE REGULATIONS, 1968 WAS DECLARED UNCONSTITUTIONAL IN NPC & ORS V PSC & ANOR[1]

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Abstract

This paper critically reviewed the case of NPF & Ors v PSC & Anor where the power of the Police Service Commission to "appoint" police officers into the Police Force (except I-GP) under Paragraph 30 of Part 1 of the Third Schedule to the CFRN, 1999 as amended conflicted with the power of the Inspector-General of Police to "recruit" constables into the same Police Force under Regulation 71 of the Nigeria Police Regulations, 1968 and section 18 of the Police Act, 2022. The paper found that the judgment in the case proclaimed the supremacy of the Constitution over the lawmaking power of the legislature for which reason any law enacted in breach of constitutional provision is liable to be declared null and void. Furthermore, it was adjudged that power to appoint includes power to recruit. Accordingly, any power conferred on a person or entity by the Constitution cannot be curtailed or shared with anyone else unless the Constitution so provides. Consequently, both Regulation 71 of the Nigeria Police Regulations,1968 and section 18 of the Police Act, 2022 were declared unconstitutional, null and void for conflicting with the provisions of Paragraph 30 of Part 1 of the Third Schedule to the CFRN, 1999 as amended. It was therefore recommended that existing statutes such as Nigeria Police Regulations, 1968 promulgated prior to the extant Constitution should be modified to bring them into conformity with the Constitution failing which they will be declared null and void to the extent of their inconsistencies.

Keywords- Appoint, Constables, Police, Recruit, Unconstitutional

1.0 Introduction

The case of *NPF & Ors v PSC & Anor* (supra) is analysed in this paper to demonstrate the consequences of legislations (like *Regulation 71* of the Nigeria Police Regulations, 1968 and *section 18* of the Police Act, 2020) enacted in breach of constitutional provisions. For fuller discussion of the facts of the case, judgment and principles established therein, the paper is divided into the following segments namely: Facts of

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the case, issues and arguments of parties; Resolution of issues by the apex Court; Specific pronouncement on appropriate body to appoint and recruit constables into the Police Force; Specific pronouncement on unconstitutionality of *Regulation 71* of Nigeria Police Regulations, 1968; Specific pronouncement on unconstitutionality of *section 18* of Police Act, 2020; Summary of principles and useful lessons from the judgment Conclusion and recommendations.

2.0 Facts of the Case, Issues and Arguments of Parties

The appeal before the Supreme Court arose over resolution of the dispute of the power of the Police Service Commission to "appoint" and "recruit" constables into the Police Force. The Appellants (being the Nigeria Police Force,[2] Inspector-General Police[3] and Honourable Minister of Police Affairs) had been sued in the Federal High Court by the Respondents (being the Police Service Commission[4] and Attorney-General of the Federation) over the proper body statutorily charged with the responsibility of recruitment of constables. Despite the provisions of both *Paragraph 30 of Part 1* of the Third Schedule to the Constitution of the Federal Republic of Nigeria,[5] 1999 as amended and *section 6* of the Police Service Commission (Establishment) Act, 2001 that the Police Service Commission shall have power to appoint persons to offices (other than office of the Inspector-General of Police) in the Nigeria Police Force, the Inspector-General of Police laid claim to the responsibility of recruiting police officers relying on both *Regulation 71* of the Nigeria Police Regulations, 1968 and *section 18* of the Police Act, 2020 which now in its *section 18* vested the power to "recruit" constables on the Inspector-General of Police amongst other things. Therefore, the dispute was as to who, between the PSC and the NPF and the I-GP, is statutorily responsible for the recruitment of constables into the Nigeria Police Force.

At all material times, the Appellants conceded that the PSC was vested with the power to "appoint" police officers (except the Inspector-General of Police) under *Paragraph 30 of Part 1* of the Third Schedule to the CFRN, 1999 as amended. However, the Appellants argued that for the purpose of the issue relating to recruitment of constable, the word "appointment" is distinct from the word "recruitment"; and that while the powers of the 1st Respondent/PSC are in relation to the appointment, the powers of the 2nd Appellant/I-GP under *Regulation 71* of Nigeria Police Regulations, 1968 are for recruitment. The 1st Respondent repudiated these claims and asserted in opposition that

[2] Hereinafter abbreviated as "NPF".
[3] Hereinafter abbreviated as "I-GP".
[4] Hereinafter abbreviated as "PSC".
[5] Hereinafter abbreviated as "CFRN".

it had the constitutional power to appoint and recruit police officers (except the Inspector-General of Police) into the Police Force. The Federal High Court had dismissed the 1st Respondent's case as it held among other things that the powers of the PSC/1st Respondent to appoint officers into the NPF/1st Appellant except the 2nd Appellant does not include the power to recruit constables. The Federal High Court reasoned that *Regulation 71* of Nigeria Police Regulations, 1968 specifically confers on the Appellants, the power to recruit constables and the statutory powers of the 1st Respondent/PSC, in relation to the appointment of officers into the 1st Appellant/NPF, are only exercisable after the 2nd Appellant had exercised the power to recruit the said constables. The Federal High Court took the view that the PSC's/1st Respondent's powers of appointment are different from the I-GP's/2nd Appellant's power of recruitment. Dissatisfied, the 1st Respondent/PSC appealed to the Court of Appeal. The Court of Appeal overruled the Federal High Court and held that the power of appointment donated to the PSC/1st Respondent by the Constitution and its enabling Act encapsulates the power to recruit constables. Further, it was held by the Court of Appeal that the word "recruitment" is inherent in the word "appointment" and therefore connotes one and the same thing. Finally, when the present Appellants approached the Supreme Court, the key question for determination was the question who, as between the Appellants and the 1st Respondent, is vested with the statutory powers and responsibility of enlisting recruit constables or to put in another way, which body is by law charged with the duty to recruit constables.

3.0 Resolution of Issues by the Apex Court

From the arguments canvassed before the Supreme Court by the respective parties, there was no dispute on the position that the 1st Respondent/PSC is empowered by law to "appoint" officers into the Nigeria Police Force. The crux of the matter was whether the phrase "appoint persons to the offices in the Nigeria Police Force" as used in *Paragraph 30(a) Part 1 of the 3rd Schedule* to the Constitution and *Section 6(1)(a)* of the Police Service Commission (Establishment) Act should be construed to mean the same thing as "the enlistment of recruit constables" for the 1st Appellant as provided in Regulation 71 of the Nigeria Police Regulations, 1968. Itemised below are how the Supreme Court resolved some of the knotty issues.

(a) On the argument that by the provisions of *Regulation 71* of the Nigeria Police Regulations, 1968, the recruitment of constables was within the exclusive remit of the 2nd Appellant/I-GP, conclusively, the Supreme Court held as follows:

(i) The Nigeria Police Regulation, 1968 was made pursuant to *section 46* of the Police Act, 1990,[6] which provides as follows:

> The President may make regulations on the recommendations of -
>
> (a) the Nigeria Police Council with respect to the policy, organization and administration of the Force, including establishments and financial matters, other than pensions within the meaning of the Pensions Act.
>
> (b) the Nigeria Police Council with respect to appointments to offices in the Force, promotion, transfer, dismissal and disciplinary control of officers.

The apex Court quickly mentioned that under Police Act, 1990, the statutory powers relating to appointment, promotion, transfer, dismissal and disciplinary control of officer in the 1st Appellant/NPF, was hitherto reserved for the Nigeria Police Council but with the advent of the extant Constitution, the said powers have now been constitutionally conferred upon the 1st Respondent/PSC.

(ii) That undisputedly, Nigeria Police Regulations, 1968 was validly made by the President, acting on the regulations of the Nigeria Police Council, and pursuant to *section 46(b)* of Police Act, 1990.

(iii) The Appellants claim to the provisions of *Regulation 71* of the Nigeria Police Regulations, 1968 as the enabling legal regime which empowers the 2nd Appellant/I-GP to recruit constables into the 1st Appellant/NPF cannot stand as it was misplaced. This was because the said Regulations headed "recruitment officers" reads:

> 71. Subject to any necessary delegation of powers by the Nigeria Police Council and subject to the control of the Inspector-General, the officers responsible for the enlistment of recruit constables to the Force shall be-

[6] Cap 359, LFN, 1990.

> (a) The Commandant, Police College Ikeja, hereinafter called the recruitment officer, South, in respect of candidates from the Southern States; and
>
> (b) The Commandant, Police College Kaduna, hereinafter called the recruitment officer, North, in respect of candidates from the Northern States.

The Supreme Court held that without seeking aid or guidance from anywhere else, that the above provision is very clear and devoid of any ambiguity. The President, by the above Regulations had designated the respective Commandant of the Police Colleges at the relevant time as the recruitment officers for the enlistment of constables. Even though the exercise of such power was subject to the control of the 2nd Appellant/the I-GP, the power of enlistment nonetheless resided in the respective Commandants and not the I-GP/2nd Appellant as alleged by the Appellants.

(iv) The Supreme Court further clarified that, even if it is determined that the exercise of control was by the I-GP under *Regulation 71* of Nigeria Police Regulations, 1968, this provision will not stand in the face of the provisions of *Paragraph 30 of Part 1* of the Third Schedule to the Constitution and the establishment and powers of the PSC /1st Respondent under the Police Service Commission (Establishment) Act, 2001.

(b) On difference between "appointment" and "recruitment"

Appellants had argued that for the purpose of the issue relating to recruitment of constable, the word "appointment" is distinct from the word "recruitment"; and that while the powers of the 1st Respondent/PSC under *Paragraph 30 of Part 1* of the Third Schedule to the Constitution are in relation to the appointment, the powers of the I-GP/2nd Appellant under *Regulation 71* of the Nigeria Police Regulations, 1968 is for recruitment. The Federal High Court had accepted this submission when it held that the appointing powers of the 1st Respondent/PSC can be exercised post-enlistment, after the 2nd Appellant/I-GP had already recruited the constables. However, both the Court of Appeal and Supreme Court overruled this argument by reaching the conclusion that recruitment forms part of the larger process of appointment. The Supreme Court agreed with the the Court of Appeal which had relied on the definition of the word 'recruitment' contained in Chapter 2, Section 2, Number 020201 of the Public Service

Rules, 2008 Edition, which reads: "recruitment" means the filling of vacancies by the appointment of persons not already in the Public Service of the Federal Republic of Nigeria. It however excludes the transfer of officers from other Public Service in the

Federal Public Service." Clearly, going by the above definition, for the purpose of recruitment of constables into the 1st Appellant, the word "appointment" can be construed to encapsulate the word "recruitment". Conclusively, the Supreme Court held that except for dazzling legal semantics, recruitment/enlistment and employment into the NPF/1st Appellant mean, practically, one and the same thing and that the latter embodies the former for the purpose of engagement of all officers of the Nigeria Police, save for the I-GP/2nd Appellant, including constables who are defined as "officer below the rank of a corporal.[7]

4.0 Specific pronouncement on appropriate body to appoint and recruit constables into the Police Force

The Supreme Court also upheld the position taken by the Court of Appeal that, for all intent and purposes, the status of the PSC/1st Respondent as the appropriate body responsible for the "appointment" (which was interpreted to form part of the larger process of appointment) of officers into the NPF (1st Appellant), save appointment to the office of the Inspector-General of Police, under the legal regime in the aftermath of the Constitution (both the 1979 and the 1999), is undoubtedly that of the Police Service Commission/1st Respondent. The apex Court held that by dint of the provisions in *Paragraph 30(a), of Part 1 of the 3rd Schedule* to the CFRN, 1999 as amended the power to employ all officers of the 1st Appellant (NPF) except the 2nd Appellant, is vested in the 1st Respondent; including the recruitment/enlistment of police, recruits/constables into the Nigerian Police Force.

5.0 Specific pronouncement on unconstitutionality of *Regulation 71* of Nigeria Police Regulations, 1968

Before arriving at the conclusion that *Regulation 71* of the Nigeria Police Regulations, 1968 was unconstitutional, the apex Court maintained that the provisions of the Nigeria Police Regulations, 1968 must be construed in such a manner as to bring them into conformity with the Constitution. Where this cannot be achieved, the only option will be to declare the relevant Regulations, null and void to the extent of its inconsistency, in line with the clear provisions of *section 1(3)* of the CFRN, 1999 as amended. The law is firmly settled that any law enacted before the coming into force of the Constitution, which is in conflict or contradicts the provisions of the Constitution, must either be modified or repealed as required by *section 315* of the CFRN, 1999 as

[7] Per Garba, JSC (2023) LPELR-60782(SC) (P. 69, paras. B-D).

amended. Where the National Assembly has neither modified nor repealed the Act, same must be declared unconstitutional citing in support the case of *Ikine v Edjerode*.[8] Since the PSC/1st Respondent is now statutorily empowered to replace the Nigeria Police Council and has by the clear provisions of the Constitution been endowed with the power to appoint hitherto reserved for the Nigeria Police Council, it follows that any provisions of the Nigeria Police Regulations, 1968 made by the President pursuant to the recommendations of the Nigeria Police Council, which overlaps and are inconsistent with the provisions of the Constitution which empowers the PSC/1st Respondent to appoint officers including constables (and except the Inspector General of Police) shall, to the extent of their inconsistencies, be declared null and void. The Supreme Court, per Abubakar, JSC,[9] decisively held *inter alia* as follows-

> In Nigeria, the Constitution is the supreme law, the fundamental legal order of State - the grundnorm; it is the organic or fundamental law from which other laws or actions of government, either executive, legislative, or judicial derive their legitimacy. Both the Police Act (and the Regulations made thereunder) and the Police Service Commission (Establishment) Act, derive their validity and legitimacy from the Constitution. I say it again, the Constitution is the grundnorm, the *fons et origo.*

Consequently, any action purportedly taken by the 2nd Appellant, in this case the purported recruitment of constables, which infringes or runs contrary to the provisions of *Paragraph 30 of Part 1* of the Third Schedule to the Constitution is void ab initio. *See Section 1(1) and (3)* of the Constitution and the recent decision of this Court, per Eko, JSC, in *Udeogu v FRN & Ors* (2020) LPELR - 57034 (SC)

[8] (2001) 18 NWLR (Pt. 745)) 446.

[9] Per Abubakar, JSC (2023) LPELR-60782(SC) (Pp. 53-59, paras. E-A)

> Without hesitation, I am in agreement with the decision of the lower Court that the provisions of *Regulations 71* (and other relevant provisions) of the Nigeria Police Regulations relating to appointment of officers (including constables) into the 1st Appellant, cannot stand in the face of *section 6* of the Police Service Commission (Establishment) Act, 2001 and the said provisions are in violent conflict with the provisions of *Paragraph 30, Part 1* of the Third Schedule to the Constitution. The said provisions of the Nigeria Police Regulations are declared void.

Contributing, in concurrence, Ogunwumiju, JSC,[10] upheld the reasoning of the Court of Appeal that the provisions of *Regulation 71* of the Nigeria Police Regulations, 1968 are in violent conflict and grossly inconsistent with the provisions of *Paragraph 30 Part 1, of the 3rd* Schedule to the CFRN, 1999 as amended. It is trite that previous statutes promulgated prior to the grundnorm can only take effect with such modifications that bring them into conformity with the CFRN, 1999 as amended. Thus, where there is a sharp irreconcilable conflict between the provisions of an Act, and the Constitution, those provisions are void and must be struck down. Consequently, all the sections of the Police Regulations 1968 which purport to vest power of enlistment of recruit constables into the Nigeria Police Force in the I-GP/2nd Appellant are void.

6.0 Specific pronouncement on unconstitutionality of *section 18* of Police Act, 2020

Regarding *section 18* of the Police Act, 2020 which assigned the Inspector-General of Police with responsibility for the recruitment of recruit constables into the Nigeria Police Force and recruit cadets into the Nigeria Police Academy, the Supreme Court held that it was in violent conflict with the provisions of the combined reading of *section 153(2)* of the CFRN, 1999 as amended and *Paragraph 30 of Part 1 of the Third Schedule* to the Constitution, under which the Police Service Commission is statutorily empowered to appoint persons to offices (other than office of Inspector-General of Police). In resolving this conflict, the Supreme Court upheld the supremacy of the Constitution by holding that legislative powers cannot be exercised in breach of the

[10] (2023) LPELR-60782(SC) (Pp. 89-99, para. B-B).

Constitution. In the leading judgment, per Abubakar, JSC, the apex Court struck down the conflicting provisions of *section18(1) (2) and (3)* of the Police Act, 2020 when it held that

> The National Assembly made futile effort in enacting the Police Act, 2020 during the pendency of this appeal by specifically enacting *section 18(1) (2) and (3)* all in an effort to vest the power of recruitment in the second Appellant in this appeal. This is another attempt at strangulating the Respondents in this appeal, while it is within the powers of the National Assembly to make laws for the order and good Government in Nigeria, ... Any legislation made during litigation in contravention of the Constitution and enacted to steal a match against a litigant will be condemned and declared null and void. *Section 18* of the Police Act 2020 is obviously unconstitutional and must be declared null and void, it is so declared.[11]

On his part, Jauro JSC, while agreeing with the leading judgment, held that another offending provision was that contained in *section 18* of the Police Act, 2020 which provided that the responsibility for the recruitment of recruit constables into the Nigeria Police Force and recruit cadets into the Nigeria Police Academy shall be the duty of the Inspector-General of Police. It also created a "Recruitment Committee" for the "recruitment of recruit constables into the Nigeria Police Force." The Police Act, 2020 was enacted by the National Assembly during the pendency of the instant legal tussle and held that s*ection 18* of the Police Act, 2020 nevertheless offends *Paragraph 30 Part 1* of the Third Schedule to the CFRN, 1999 as amended and just like the offending provisions of the Nigeria Police Regulations, it is bound to suffer the same fate of being declared void. *Section 18* of the Police Act, 2020, is therefore declared void for being inconsistent with *Paragraph 30 Part 1* of the Third Schedule to the Constitution.[12]

[11] (2023) LPELR-60782(SC) (Pp. 67-68 paras. C).

[12] (2023) LPELR-60782(SC) (Pp. 159-171, paras. A-C).

7.0 Summary of principles and useful lessons from the judgment

Some of the useful fallouts or legal principles that can be denoted from the judgment of the Supreme Court in this case under review are as follows-

(a) Notwithstanding the doctrine of separation of powers which preserves the supreme lawmaking power of the legislature, the principle of supremacy of the constitution erected in *section 1(1) and (3)* of the CFRN, 1999 as amended remains inviolable. *Section 1* of the Constitution is emphatic on the position that if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.[13]
(b) The Constitution is not only supreme when another law is inconsistent with it, but also when another law seeks to compete with it in an area already covered by the Constitution.
(c) As the Nigeria Police Regulations, 1968 preceded both the 1979 and 1999 Constitutions, it is an existing law by virtue of *section 315(1), (2), (3) and (4)(b)* of the CFRN, 1999 as amended which shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution. Thus, where there is a sharp irreconcilable conflict between the provisions of any statute including an existing law and the Constitution, those provisions are void and must be struck down.
(d) Based on principle (c) above, *Regulations 71* (and other relevant provisions) of the Nigeria Police Regulations, 1968 relating to appointment of officers (including constables) into the Nigeria Police Force were declared void in the
(e) face of violent conflict with the provisions of *Paragraph 30, Part 1* of the Third Schedule to the CFRN, 1999 as amended.
(f) The provision of *section 18* of the Police Act, 2020 donating power to recruit constables to the Inspector-General of Police is no longer good law as it was struck down by the apex Court as a legislative provision enacted in breach of constitutional provisions.
(g) The constitutional power and responsibility of the Police Service Commission to appoint and recruit police officers (except the Inspector-General of Police) into the Police Force was upheld as the word "recruitment" is inherent in the word "appointment" and therefore connotes one and the same thing.

[13] *A-G Federation v A-G Lagos State* (2013) 16 NWLR (Pt. 1380) 249 at 329 cited in support.

8.0 Conclusion and recommendations

The case under review amply demonstrated how provisions contained in *Regulation 71* of the Nigeria Police Regulations, 1968 and s*ection 18* of the Police Act, 2020 were declared unconstitutional, null and void because they were enacted in violation of the supremacy of the Constitution. Specific to the Nigeria Police Regulations, 1968, it was adjudged to be an existing legislation via *section 315(1), (2), (3) and (4)(b)* of the CFRN, 1999 as amended which shall only have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution. Thus, the sharp irreconcilable conflicts between aspects of the Police Regulations with the Constitution presented a compelling need for them to be declared unconstitutional, null and void. From the foregoing therefore, it is recommended that all previous statutes promulgated prior to the extant Constitution of the Federal Republic of Nigeria, 1999 as amended which qualify as existing laws by virtue of *section 315* of the CFRN, 1999 as amended should be modified by the legislature to bring them into conformity with the Constitution failing which they are liable to be declared unconstitutional. It is further recommended that in the exercise of its supreme legislative powers, the legislature must uphold the supremacy of the Constitution as entrenched in *section 1(1)* of CFRN, 1999 as amended failing which under *section 1(3)*, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.