THE SEARCH FOR A FISCALLY AUTONOMOUS JUDICIARY IN NIGERIA

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INTRODUCTION

- This paper examines financial autonomy credited to the judicial arm of government.
- The paper contends that financial/fiscal autonomy at the Federal Level is utopian.
- The paper identifies gaps in the 1999 Constitution on fiscal autonomy of the judiciary.
- The paper concludes with suggestions for re-engineering of the Judiciary's financial independence.

FOUR PILLARS OF THE 1999 CONSTITUTION

- Federalism
- Fundamental Rights
- Rule of Law
- Separation of Powers

JUDICIARY- IMPORTANCE AND ROLE AS THIRD ARM OF GOVERNMENT

- Body of Judges entrusted with power to dispense justice.
- Key indicator of level of a Nation's constitutional democracy (one of the crown jewels of a democratic system).
- Third arm of government.
- Trustee of people's rights.

JUDICIARY- IMPORTANCE AND ROLE AS THIRD ARM OF GOVERNMENT

- Last hope of common man and first hope of persons whose FHR have been, are being or likely to be violated.
- Bulwark against abuse of power and excesses of other arms of government.
- A Nation without a Judiciary is in a state of nature and Rule of Men and arbitrariness will prevail.
- Slow pace of development in a Nation without strong and independent judiciary.

JUDICIAL INDEPENDENCE

- Need for confidence in the Judiciary by all litigants.
- Judicial arm is expected to decide cases without interference, pressure or sentiment.
- Ability of Judges to decide cases without financial worries, anxieties or fear of being sanctioned by another arm.
- Control by the Judiciary of its allocated funds.

INDICATORS OF JUDICIAL INDEPENDENCE

- Mode of Appointment of Judicial Officers.
- Security of tenure of office of Judicial Officers
- Financial Autonomies of Judiciary and Judicial Officers:
- (A) Institutional Independence/Fiscal Autonomy (Judiciary)
- (B) Individual Fiscal Autonomy (Judges)

OBJECTIVES OF THE DISCOURSE

- To demonstrate that the judicial arm at Federal and State levels are in practice not fiscally autonomous.
- Liberation of Judiciary and Judicial Officers from financial bondage.
- To offer suggestions on theoretical and practical fiscal autonomy of the judicial arm.

ISSUES EXAMINED

- Conceptual Clarifications:

-Separation of Powers

-Judicial Independence

-Fiscal Autonomy

- Provisions of 1999 Constitution on fiscal autonomy; Sections 81 (3), 84 (1) – (4), 121 (3), 162 (9), 291 (3) & (4)

- Fiscal Autonomy Questions:

-Federalism and the National Judicial Council

-Fiscal Autonomy of State Judiciary and Executive Order 10 of 2020.

- Lessons from other jurisdictions (USA, Canada, India & Pakistan)

SEPARATION OF POWER

- Contributions of:

- JOHN LOCKE – Constitutionally limited Government and division of powers among arms of government.
- MONTESQUIEU– Non-concentration of Governmental powers in an individual or group of persons.
- MADISON – No liberty where powers are concentrated in the same person or body of persons. No liberty where judicial powers are not separated from legislative and executive powers.

BENEFITS OF SEPARATION OF POWERS

- An insurance cover on good governance (Anti-totalitarian government).
- Promotion of efficiency in government, prevention of abuse of powers and friction among arms of government.
- Re-assurance that judicial powers will be exercised by Judicial Officers without fear, favour and sentiments.

LIMITS OF SEPARATION OF POWERS

- There is no absolute separation of powers.

- There are areas of overlap, co-operation and co-ordination among different arms of government.

DEVELOPMENT OF JUDICIAL INDEPENDENCE

- Lord Denning's account of the confrontation between Lord Coke & King James I of England over the King's attempt to personally try cases because he believed Law is based on reason.

- The King was persuaded to jettison the idea.

- American Constitution – The first written constitution that gave written expression to judicial independence (Chapter III).

- Judiciary as the basic standard for constitutional democracy.

- Sections 17 (2) (e) & 36 (1) of the 1999 Constitution give written expression to independence of the Judiciary in Nigeria.

FISCAL AUTONOMY

- ‘Fiscal’ is a finance related word.
- Fiscal autonomy of the judiciary means judiciary’s control over its finances/appropriated funds.
- Fiscal autonomy of judicial officers is an integral part of fiscal autonomy and includes:

- Adequate pay packages
- Non-alteration/non-downward review of pay packages of judicial officers.

- Fiscal autonomy of the judiciary is necessary in order to liberate the judiciary from status of ‘‘beggar arm’’ status or ‘‘whipping boy’’ of the other arms.

- No absolute fiscal autonomy. The Judiciary should account for funds appropriated to it.

- Judiciary is not immune from its account being audited by Auditor-General of the Federation and/State Auditor-General.

1999 CONSTITUTION AND FISCAL AUTONOMY

- Two indicators of fiscal autonomy:

- Institutional Autonomy – Judiciary as a body

  Sections

  81 (3), 121 (3), 162 (9)

- Individual Autonomy- Individual Judicial Officer

  Sections

  84 (1) – (4), 291 (3) & (4)

INDIVIDUAL FISCAL AUTONOMY OF JUDICIAL OFFICERS

- Remuneration, Salaries and Allowances of Judicial Officers are first line charges upon Consolidated Revenue Fund of the Federation.
- Salaries and Remuneration are immune from downward/detrimental review.
- Judicial officers are freed of worries and anxieties of likely reduction of salaries and remuneration.
- Allowances of judicial officers are not immune from downward review.

PENSION RIGHTS

- A judicial officer who has served for not less than 15 years in that capacity and who is not less than 65 years or not less than 60 years in the cases of Justices of the Supreme Court/Court of Appeal and of other Courts, respectively, is entitled to pension for life at a rate equivalent to his last annual salaries and allowances.

- A judicial officer with less than 15 years service on the bench and who retires at an age that is not less than 65 and 60 years in case of Justice of Supreme Court/Court of Appeal and other Courts respectively, is entitled to pro-rated pension for life, based on number of years which he served as judicial officer in relation to the period of 15 years.

- In addition, all allowances and other entitlements as he may be entitled to under terms and conditions of service are payable to the judicial officer.

- A judicial officer who has served in that capacity for less than 15 years and who retires prior to attainment of 65 and 60 years as a Justice of Supreme Court/Court of Appeal Justices and of other Courts respectively, is entitled to pension and retirement benefit as may be regulated by Act of the National Assembly or Law of a State House of Assembly.

RESTRICTIONS

- The protective provisions (Sections 84 (1) – (3), 291 (3) & (4)) apply only to judicial officers of Superior Courts established under Section 6 for the Federation and the States.

- See Sections 84 (4) and 318 of the Constitution on definition of Judicial Officers.

- Judges of non-superior Courts such as Magistrates are excluded from the provisions, despite their importance and heavy case docket.

INADEQUATE PAY PACKAGES OF JUDICIAL OFFICERS

- Pay packages of judicial officers have not enticed successful Legal Practitioners to the Bench.
- No Senior Advocate of Nigeria has been appointed Judge of High Court, Court of Appeal or Supreme Court.
- Pay packages of Judicial Officers were last reviewed/fixed in 2008.

SALARIES OF JUDICIAL OFFICERS

	YEARLY	MONTHLY
	=N=	=N=
CHIEF OF JUSTICE OF NIGERIA	3, 353, 972.52	279, 497.71
JUSTICES OF THE SUPREME COURT & PRESIDENT OF THE COURT OF APPEAL	2, 477, 110.00	206, 425.83
JUSTICES OF COURT OF APPEAL	1, 995, 430.20	166, 285.85
OTHERS	1, 804, 740.00	150, 395.00

- The above salaries are not tax free.
- The salaries are exclusive of allowances.
- Monthly salary alerts of =N=480, 766.89 and =N=757,000 are forwarded to Chief Justice of Nigeria and Justices of Supreme Court respectively after allowances and fringe benefits are added.

COMPARATIVE PAY PACKAGES

	NIGERIA	UNITED KINGDOM	UNITED STATES OF AMERICA	AUSTRALIA
SUPREME/ APEX COURTS	$22, 946	£206, 857	$280, 500	$596,220
HIGH COURTS	$18, 474	£181, 355	$231, 800	$541, 050

ADVERSE EFFECT OF INFLATION AND DEVALUATION OF NAIRA ON SALARIES

JUDICIAL OFFICERS	2008	2021
SUPREME COURT JUSTICES		
=N=750,000.00	$6, 200.00	$1,500.00
LAGOS STATE JUDGES		
=N=500,000.00	$4,100.00	$1,000.00

FINDINGS

- Inadequate and stagnated pay packages of judicial officers since 2008.
- Pay packages of judicial officers have adversely diminished due to inflation and devaluation of Naira.
- Judiciary is not attractive to successful legal practitioners because of the poor pay packages.
- Alleged enabling environment for corruption by judicial officers.

INSTITUTIONAL AUTONOMY:CONSOLIDATED REVENUE FUNDS AND FEDERATION ACCOUNT

- Section 81 (3) – payments due to Judiciary from Consolidated Revenue Fund of Federation are paid directly to NJC for disbursements to head of the respective Courts.

- Section 121 (3) - Any amount due to the judiciary from Consolidated Revenue Fund of a State shall be paid directly to heads of Courts.

- Section 162 (9) – Any amount due to the Judiciary from Federation Account shall be paid directly to NJC for disbursement to heads of Courts established for the Federation and the State.

- Recurrent Expenditure of judicial arm and remuneration and salaries of judicial officers are first line charges upon consolidated revenue fund of the Federation.

- There is no specific constitutional provision charging capital expenditure of the Judiciary to consolidated revenue fund either of the Federation or of the State.

- Third Schedule Paragraph 21 (E) of the Constitution- collection of capital and recurrent expenditure by NJC for disbursements to heads of Courts established for the Federation and the State.

NATIONAL JUDICIAL COUNCIL AND FEDERALISM

- Ideal v Co-operative Federalism

- Ideal Federalism/Federalists

-NJC as an agency of Federal Government.

-Unification of Judiciary through centralisation.

-Federal agency should not control a State's Judiciary and its funds,

-Federal principle, mutual independence and non-interference must be respected.

- Prof. Jadesola Akande (1988/89) Constituent Assembly endorsed non-centralisation of the judiciary.

- Co-operative Federalism/Federalists
- NJC is not an agency of Federal Government.
- NJC is listed as one of the bodies established for the **Federation/Federal Republic of Nigeria.**
- The Federation comprises Federal State and Local Governments.
- Federal Government differs from Federation.
- Federal Government is an integral part of the Federation.
- 1994/95 Constitutional Conference Report supports co-operative federal principle.

IDENTIFIED AREAS OF CO-OPERATION IN THE JUDICIARY

- Binding decisions of Supreme Court/Court of Appeal on State Courts.
- Transfer of cases by FHC Judges to State High Courts. S. 22 of the FHC Act.
- Appeals from State Courts to Court of Appeal and Supreme Court.
- Appointment of Judges of State Courts to Appeal Court and Supreme Court.

- Exercise of jurisdiction in respect of Federal causes by States Courts.
- Trial of Federal Offences by State Courts.
- Prosecution of State offences in State Courts by Federal Agencies/Prosecutors (ICPC/EFCC) in the name of Federal Republic of Nigeria.
- There is no ideal or identical federalism. Good leaders and good followers are necessary to develop a Nation.
- Wide powers of CJN to singlehandedly appoint most members of NJC is the greatest defect of NJC.

EXECUTIVE ORDER 10 OF 2020

- The Order is a child of necessity.
- It is a product of the recommendation by Presidential Implementation Committee which was set up by the President purposely to ensure financial autonomy of State Courts is respected by State Executives.
- Funds appropriated to Judiciary in State appropriation annual budget, Laws, are first line charge upon CRF of the State.

- Accountant-General of the Federation by virtue of the order or any other orders, issued by Attorney-General of Federation, can authorise deduction from source in the allocation due to a defaulting State from the Federation Account in respect of money due to but withheld from Judiciary by such State.

- Accountant-General of the Federation and Presidential Implementation Committee are responsible for implementation of the provisions of the order.

- The Order contains template on budgetary allocation of the judiciary in the State.
- State Governments are targets of the Order.
- The Order is inapplicable to the Federal Government.
- The Order is to be implemented in accordance with State Laws and subject to availability of funds due to the State from the Federation account.

UNCONSTITUTIONALITY OF THE ORDER

- Implementation of the Order is subject to availability of funds in the State.
- No role is assigned to Accountant- General of the Federation or Presidential Implementation Committee under Section 162 (3) of 1999 Constitution.
- The Order violates federal principles of mutual non-interference/independence of each tier of Government.

- The Order which authorises the Accountant-General of the Federation to deduct at source from the money due to a defaulting state negates rule of law and due process.

- Attorney-General of Lagos State v Attorney-General of the Federation (2004) 18 NWLR (Pt.904) 1 at 99 as case study.

LESSONS FROM OTHER JURISDICTIONS

- **UNITED STATES OF AMERICA**

- JUDGES OF FEDERAL COURTS
- Article III, Section 1 of US Constitution.
- Non-Alteration of Compensation Clause.
- Ensures payments of adequate compensation to judicial officers for their services.
- Compensation shall not be diminished during their continuance in office.

- Compensation clause and its non-alteration covers Federal and Inferior Courts.

- Compensation clause and its non-alteration apply to all compensation paid to Judges.

- There have been Litigation in defence of non-diminution of value of compensation.

- **Atkins v United States**
- **Wills v United States**

- ATKINS v UNITED STATES

- Class action by 140 Federal Judges on allegation of discriminatory diminution in value of compensation.

- Alleged discrimination was not proved by the Plaintiffs/Judges.

- No proof of how diminution of compensation affected judicial independence.

- Case was dismissed based on the finding that compensation clause is designed to protect judicial independence and not to guard against diminution in real value of the compensation paid to judges.

- **WILLS v UNITED STATES**

- Cost of Living (Adjustment) Act, enabled the President to issue Executive Orders for the purpose of making cost of living adjustments due to inflation.

- Some Executive Orders issued by the President and which were beneficial to the Judicial arm were almost aborted by Congress which passed Anti-Adjustment Laws.

- Thirteen Federal Judges challenged the Laws passed by Congress.

- The Laws passed by Congress were nullified because they devalued compensation payable to Judges.

FINDINGS FROM THE U.S EXPERIENCE

- The Cases of Atkins v United States and Wills v United States confirm the existence of judicial independence in theory and practice in the United States of America.

- Cases which were instituted by Judges were won and lost by them despite the fact that their brother Judges presided over these cases.

CANADA

- Sections 96 – 106 of Canadian Constitution Act deals with judicial independence.
- Salaries of judicial officers are determined by parliament.
- Financial autonomy of judiciary is guaranteed in the jurisdiction.
- Judicial officers salaries can be changed only by recourse to an independent commission (Judicial Compensation and Benefits Commission).

- Negotiations on salaries between Judges and Government are not allowed.

- Salaries of Judges are not expected to fall below minimum level.

- Salaries and benefits of federally appointed Judges are reviewed by the Judicial Compensation and Benefits Commission every four years based on:

- Prevailing economic situation in cost of living and financial position of Government.

-Role of financial security in sustaining independence of the Judiciary.

-The need to attract outstanding candidates to the Judiciary.

-Any other objective considered relevant by the Commission.

- No evidence that judicial independence has been compromised in the jurisdiction.

INDIA

- Salaries of Judges of Supreme Court and High Court are fixed by parliament.
- State Government fixes and pays salaries of District Judges.
- No equivalent of Revenue Mobilisation and Fiscal Commission in India.
- No evidence that Judicial independence has been compromised in the jurisdiction.

PAKISTAN

- Remuneration of Judges of Supreme Court are paid from Consolidated Revenue Fund of the Central Government.
- Judges of State Courts are paid from Consolidated Revenue Fund of the Province.
- No equivalent of NJC in Pakistan.

OBSERVATIONS

- The Judiciary is important to the survival and growth of our constitutional democracy.
- Notwithstanding the Judiciary's importance, it comes a distant third in everything including its finances compared to the other two arms of government.
- Judiciary and Judicial Officers evidently need liberation from financial bondage.

SUGGESTED REFORMS

- The provision of Section 84(3) of the Constitution should be amended in a manner which renders it impossible for allowances of Judicial officers to be altered to their detriment.
- An immediate upward review of pay packages of Judicial Officers which have remained frozen since the last review in 2008.
- Periodic review of pay packages of Judicial Officers in order to ensure non-diminution of real value of their take home pay.

- Expansion of the definition of Judicial Officers under Section 318 of the 1999 Constitution to include Judges/Magistrates of Lower Courts.

- Amendment of Section 291 (3) of the Constitution to ensure pensions are calculated on the basis of current salaries and allowances of serving Judicial Officers as against last annual salary of retired Judicial Officers.

- Capital and Recurrent expenditure of Judiciary should be made first line charges upon the Consolidated Revenue Fund of the Federation or the State as the case may be.

- The powers of the CJN, with respect to the appointment of most members of the NJC, should be revisited because it is prone to abuse and manipulation.

CONCLUSION

- Judiciary must be reminded that fiscal autonomy comes with accountability.
- Judicial Officers will be unable to claim immunity against arrests, interrogation and prosecution in respect of financial malpractice committed by them where they are directly involved in disbursements of funds allocated to the judicial arm.
- A Court administrator knowledgeable in accounting should be tasked with disbursement of funds and rendition of accounts in respect of expenditure under the supervision of a finance committee to ensure disbursement in accordance with approved public service guidelines.

- THANK YOU