Examining the Constitutionality of Funding the Judiciary from Federation Account against the Background of Financial Independence of the Judiciary

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Introduction

The Judiciary has been described as the last hope of the common man and political civilization is often judged by the degree of dispensation of justice by the judiciary.

According to Henry Sidgwick

> "In determining a nation's rank in political civilization, no test is more decisive than the degree in which Justice is defined by the law is actually realized in its Judicial administration, both as between one private citizen and another and as between private citizens and members of the government"[1]

Dispensation of justice by the Judiciary is only possible, however, if the Judiciary is independent. Of course, this does not mean freedom of Judges to do what they like but the decision of important and controversial cases and issues on the basis of merit and principle rather than on basis of expediency or to put it differently, rising above passion, public clamour and the politics of the moment and not being tied to the apron strings of the executive, legislative or other concentrations of power. Without judicial independence, no Judge however brilliant and hardworking or well prepared by qualities of heart, mind and professional training can give full effect to the enduring values enshrined in our Constitution or do justice to justice.

One way of ensuring the independence of the judiciary is to eliminate political consideration in the appointment of judicial officers and entrust the role of appointment, promotion and discipline of judicial officers in an independent body. The quest for this led to the establishment of the Judicial Service Commission. Today, the appointment, promotion and discipline of judicial officers are partially the responsibility of the Federal and State Judicial Service Commissions and the National Judicial Council which to a reasonable extent are independent bodies.

But these alone cannot guaranty judicial independence unless there is also financial independence of the Judiciary. One way to guarantee the financial independence of the Judiciary is to fund it from a source that is free from executive and legislative interference. One such source is the Federation Account. Recent allocation of funds from that account has shown that the Judiciary is now directly funded from it through the National Judicial Council which is the body constitutionally empowered to collect, manage and disburse funds for the Judiciary.2 This development has given rise to controversies amongst constitutional lawyers as to the propriety of the Judiciary deriving its funds directly from the Federation Account rather than the Consolidated Revenue Fund of the Federation and of the State or the normal executive budgetary allocation as has been the case. This paper intends to look at the relevant provisions of the Constitution with a view to ascertaining how far this practice accords with the law. Our approach shall be to first understand the key terms used in this paper, then we will examine the law and practice on funding of the Judiciary before and under the 1999 Constitution and then draw appropriate conclusions.

Meaning of Terms

Judiciary

For the purpose of this paper the term Judiciary refers to the Superior Courts of record listed in Section 6(5)(a)–(i) of the 1999 Constitution. These are the courts whose funding are covered by the Constitution3 and they are:

(a) The Supreme Court of Nigeria.

(b) The Court of Appeal.

(c) The Federal High Court.

(d) The High Court of the Federal Capital Territory, Abuja.

(e) The High Court of a State.

(f) The Sharia Court of Appeal of the Federal Capital Territory, Abuja.

(g) The Sharia Court of Appeal of a State.

(h) The Customary Court of Appeal of the Federal Capital Territory, Abuja.

(i) A Customary Court of Appeal of a State.

Federation Account

The Federation Account otherwise described as the "Distributable Pool Account"[4] consists of all revenues collected by the government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigerian Police Force, the Ministry or Department of Government charged with responsibility for foreign affairs and the residents of the Federal Capital Territory, Abuja.[5] It is the duty of the President of the Federation to table before the National Assembly proposal for revenue allocation from the Federation Account upon the advice of the Revenue Mobilisation, Allocation and Fiscal Commission[6] which is the body constitutionally empowered to monitor the accruals to and disbursement of revenue from the Federation Account and review from time to time, the revenue allocation formulae and principles in operation to ensure conformity with changing realities.[7]

Consolidated Revenue Fund

The Consolidated Revenue Fund of the Federation or State consists of all revenues or other moneys raised or received by the Federation or State (as the case may be) (not being revenues or other moneys payable under the Constitution or any Act of the National Assembly or law of the House of Assembly into any other public fund of the Federation or State established for a specific purpose).

For the purpose of this paper, the major distinction to note between the Federation Account and the Consolidated Revenue Funds is that while Federation Account consists of money jointly owned by all the tiers of government, the Consolidated Revenue Fund consists of money owned by the Federal government (in case of Consolidated Revenue Fund of the Federation) or by the State government (in the case of the Consolidated Revenue Fund of the State).

Funding of Judiciary before 1999 Constitution

Before the 1999 Constitution, the practice was that the Judiciary received its funding through the normal budgetary allocation of the Executive; however, salaries, remunerations and other recurrent expenditure being charged on the Consolidated Revenue Fund of the Federation (in the case of Federal Judiciary) and of a State (in the case of State Judiciary). This is linked with the provisions of Sections 78(2) and (6) and Section 116(2) and (6) of the 1979 Constitution which provided for remuneration, salaries, allowances and other recurrent expenditure payable to the holders of the offices so mentioned (including Judiciary) to be charged upon the consolidated revenue fund of the Federation and State (for Federal and State Judges respectively).

The history of funding of the Judiciary through the Consolidated Revenue Fund dates back to the colonial days and the measure has always featured in our Constitution since independence.[8] The system was borrowed from the United Kingdom as a fiscal measure for securing financial independence of the Judiciary. Under that system (United Kingdom) it was a device that the Parliament used by putting the funds which were appropriated for the Judiciary into a special vote known as consolidated fund. The amount in such vote was not discussed in Parliament and no member of Parliament was allowed to raise the issue of the adequacy or inadequacy of the amount of money paid to the Judges. This is probably the intention of the law makers in Nigeria as well when they provided in Section 75(2) of the 1979 Constitution that:

> "The heads of expenditure contained in the estimate (other than expenditure charged upon the consolidated revenue fund of the Federation by this Constitution) shall be included in a bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purpose specified therein."[9]

This provision exempt all expenditure charged on the Consolidated Revenue Fund from being included in the Appropriation Bill which is subject to debate by the legislature but it is doubtful if this provision was ever appreciated. The truth remains that despite the laudable objectives of the fund, it has really never been an adequate safeguard of the independence of the Judiciary. As Honourable Justice Ademola (Retired) asserted:

> "In times of economic difficulties, it has not been unknown either in the United Kingdom or in Nigeria for the Government to tamper with the salaries of the Judges that should have been put into the consolidated fund".[10]

It will be recalled that in Nigeria, before the economic stabilization measure of 1982/83[11] Judges were owed arrears of salaries for upward of three months in some States. Expenditure for the Judiciary was paid by the Executive in bits and pieces and then finally fifteen (15) per cent was taken off from the Judges salaries. This was in spite of the provisions of Sections 74–78 of the 1979 Constitution[12] which were thought to be an absolute guaranty of the financial independence of the Judiciary.

Funding of the Judiciary under the 1999 Constitution

As already stated, the current practice is that the Judiciary is now funded from the Federation Account. The question therefore is, what is the true position of the Constitution of the Federal Republic of Nigeria 1999 on the source of funding of the Judiciary. In other words, how should the Judiciary be funded under the 1999 Constitution. To answer this question correctly, it is important to reconcile the seeming conflict between the provisions of Sections 81(3), 162(9) and 121(3) of the Constitution.

Section 81(3) provides:

> "Any amount standing to the credit of the Judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and States under Section 6 of this Constitution"

Section 162(9) provides:

> "any amount standing to the credit of the Judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under Section 6 of this Constitution."

Section 121(3) provides:

> "Any amount standing to the credit of the Judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned"

First, it is submitted that Section 121(3) is a misnomer and is also in conflict with Section 81(3) since there is nothing in the Constitution that charges the expenditure (capital or recurrent) of the Judiciary on the Consolidated Fund of the State.[13] It is therefore not clear why that Section requires the moneys standing to the credit of the Judiciary in the Consolidated Revenue Fund of the State to be paid directly to the heads of the courts concerned.

In the alternative, it is submitted that Section 121(3) relates to those courts not mentioned in Section 6 of the Constitution since the courts mentioned are already covered by Section 81(3). However, since Section

121(3) does not say so, this later submission may be importing too much into the provision. We will therefore, for the purpose of this paper, regard Section 121(3) as covering the same field as Section 81(3) and it is on this premise that we will proceed with the interpretation of the above provisions.

The question that arises from the combined reading of the above quoted provisions therefore is whether the Judiciary should derive its funding from the Consolidated Revenue Funds pursuant to Section 81(3) or directly from the Federation Account pursuant to Section 162(9). In the light of other provisions of the Constitution, it seems more appropriate and consistent with the intention of the lawmakers and spirit of the Constitution for the Judiciary to derive its funds directly from the Federation Account pursuant to Section 162(9) rather than the Consolidated Revenue Fund pursuant to Section 81(3). This view is held because while Section 84(2) and (7) make only the remuneration, salaries, allowances and other recurrent expenditure of the judicial officers a charge on the Consolidated Revenue Fund of the Federation, the National Judicial Council is empowered to collect, control and disburse all moneys, capital and recurrent, for the Judiciary.[14] If the Constitution intended the judiciary to continue to derive its funding from the Consolidated Revenue Fund pursuant to Section 84(2),[15] where then should the National Judicial Council collect the capital expenditure of the Judiciary?

It should be noted that:

1. The National Judicial Council did not exist under the 1979 Constitution or any other previous Constitution that made provision for the derivation of the funds of the Judiciary from Consolidated Revenue Fund.

2. Section 162(9), which provides for direct derivation of the funds of the Judiciary from the Federation Account did not also exist under the 1979 Constitution or any other previous Constitution.

3. Under the 1979 Constitution, the Federal Judiciary derived its recurrent expenditure from the Consolidated Revenue Fund of the Federation while State Judiciary derived same from the Consolidated Revenue Fund of the State. In other words, both the Federal and State governments were responsible for the funding of the Judiciary.

It must therefore mean that a new state of affairs was intended by the framers of the 1999 Constitution. That state of affairs is that since the responsibility of funding (now including capital expenditure) is vested in a new single body (National Judicial Council), it becomes necessary for that new single body to collect such funds from a single source that will still involve both Federal and State governments. The only such single source provided for by the Constitution which will meet the constitutional responsibility of the National Judicial Council is the Federation Account under Section 162(9) and not the Consolidated Revenue Fund of the Federation under Section 81(3).

It is perhaps important to note that there is no provision of the Constitution that makes the running of the Judiciary (including legislating for them) the exclusive responsibility of the Federal government. This responsibility will however be foisted on the Federal government if the view that the Judiciary be funded from the Consolidated Revenue Fund of the Federation under Section 81(3) is adopted and this will be contrary to the spirit of the Constitution.

The alternative interpretation of these provisions is that the Judiciary should derive its recurrent funding from the Consolidated Revenue Fund of the Federation and State under Section 81(3) and 121(3) while the capital funding should be derived from the Federation Account under Section 162(9).

For the foregoing reasons, this interpretation is untenable. Another reason why this is not practicable is that while the National Judicial Council is charged with the responsibility of collecting, controlling and disbursing both capital and recurrent funds of the Judiciary, Section 121(3) provides for the payment of the amount standing to the credit of the Judiciary to the heads of the courts concerned. Therefore, even if one is minded to reason that the National Judicial Council should receive the funds of the Judiciary from the Consolidated Funds for recurrent expenditure and from the Federation Account for capital expenditure, such reasoning would still be faulted by the fact that Section 121(3) does not provide for the payment of the State Consolidated Fund to the National Judicial Council but to a different body and to that extent is in conflict with the other provisions of the Constitution already examined.

Section 162[16] which provides for sharing of the Federation Account mentions the tiers of government and not the arms of government. It is submitted that Section 162 is merely inclusive of the tiers of the government but not necessarily exclusive of the arms of the government or any other body as may be advised by Revenue Mobilisation Allocation and Fiscal Commission and approved by the National Assembly.[17]

Conclusion

The law as it is, is susceptible to various interpretations. This paper has adopted the interpretation that is most consistent with the intendment of the Constitution. There is still need to amend the Constitution to clarify the position. Happily the exercise is ongoing and it is hoped that this paper will be of some advantage. Until that is done, I think that Section 162(9) of the

Constitution affords enough support for the current fiscal measure of funding the Judiciary directly from the Federation Account through the National Judicial Council. This will make it possible for the National Judicial Council to perform its Constitutional duty of collecting, controlling and disbursing the capital and recurrent expenditure of the judiciary from a single source consistent with the intention of the lawmakers. It will, better than any other system (including the Consolidated Revenue Fund system), guaranty the financial independence of the Judiciary which the Consolidated Revenue Fund system has failed to achieve over the years.

Finally, it will involve all the tiers of the government and not just the Federal government alone and thus reflect the true spirit of Federalism.

NOTES

1. See Elements of Politics at 481 quoted in Laski, H. J. Grammar of Politics (George Allen & Unwin, London 1982) at 541

2. See item 25(e) in Part 1 of Third Schedule to Constitution of the Federal Republic of Nigeria 1999.

3. Ibid. s. 84

4. See the marginal note to S. 162 of the Constitution of the Federal Republic of Nigeria 1999

5. Ibid. S. 162(2)

6. Ibid. S. 162(2)

7. See item 32(a) & (b) in Part 1 of the Third Schedule to the Constitution.

8. See S. 123 of the 1960 Constitution, S. 129(1) of the 1963 Constitution and S. 78(2) 1979 Constitution

9. See S. 113(2) of 1979 Constitution for the States. There are similar provisions in S. 81(2) and 121(2) of the 1999 Constitution

10. See his lecture on Independence of the Judiciary: Problem and Prospects in Nigeria delivered at Sir Louis Mbanefo Memorial Lectures No. 4 1987 at Faculty of Law, University of Nigeria, Enugu Campus.

11. This came by way of enactment of the Economic Stabilization (Temporary Provision) Act 1982

12. These provisions deal with the Consolidated Revenue Fund. They are similar to S. 81-84 of 1999 Constitution.

13. See S. 84(2) & (4) 1999 Constitution

14. See item 25(e) in Part 1 Schedule 3 to the 1999 court.

15. As was the case under 1979 Constitution

16. 1999 Constitution

17. See S. 162(1) & (2) 1999 Constitution