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An Overview: Judicial Independence, Expenditure and Financial Autonomy

1.0 Introduction

No Constitution can be satisfactory unless it contains safeguards that protect the judges against influence, pressure and inducement. The Nigerian constitution should be no exception. In fact for there to be the rule of law the independence of the judiciary must be guaranteed.

Therefore Section 36 (1) of the Constitution guarantees for Nigeria "…a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'.

The extent and ambit of the independence whether in its operations as a service to the citizens or as to the control of all affairs incidental to its fundamental duty of determination of rights and obligations has become a matter of concern for policy makers and action groups across the common law heritage again Nigeria is no exception. Unfortunately, the term 'administration of justice' lends itself to several nuances that cannot be ignored. Whether it be to administer the word and spirit of justice or the court service or the entire value chain related to the delivery of justice in any form differs from usage and jurisdiction. However the notion of independence weaves through the entire concept of justice.

The very existence of judicial independence 'cannot be separated from adequate and proper judicial administration', because the latter requires that both policymaking and policy administration are controlled by the judiciary.

Former South Australian Chief Justice Leonard King, regarded it as an 'essential principle… that the judiciary has the constitutional responsibility for the administration of justice', and therefore should also be responsible for the administration of the courts[1]

For this purpose the Commonwealth Handbook 2017 known as "The Latimer House principles[2] " states:

> 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country'.

I would add this. The rule of law will not fully prevail unless the domestic law of a country allows the judiciary to thrive or guarantees it.

Executive Control of the Judiciary

Traditionally, the executive government had been in charge of court administration, which left judges poorly equipped to manage the courts and 'unmotivated to do anything strategic about it'.
Furthermore, because of their specific professional training and experience, judges had little inclination to work together as part of a court bureaucracy and assiduously sought to protect their individual independence, even in the performance of basic administrative tasks. Over time, however, all of these factors contributed to the sense of a deepening 'organizational "atrophy"[3] which fostered a growing realization among judicial leaders and policymakers that structural organizational change was one of the few remaining options left to transform the courts into modern, thriving and, above all, responsive institutions[4]

This overview reviews the recent structural reforms of court governance that have led to the establishment of judicial councils in Australia, Canada, Ireland, the Netherlands, Sweden, the United Kingdom ('UK'), the United States ('US') and other countries, which have been implemented largely in response to the identified challenges.

1 Chief Justice King, 'A Judiciary-based State Courts Administration – The South Australian Experience' (1993) 3 Journal of Judicial Administration 133, 136
2 The Commonwealth is an organisation of values, and the values – or Principles – of Latimer House are irreversibly embedded in the canon and the creed of this organisation. They were debated and adopted by Heads of Government in Abuja in 2003, and - in being so - they greatly strengthened the existing body of beliefs and goals of this organisation, as set down in Singapore in 1971,
3 Harare in 1991, and Millbrook in 1995 and 2013. The 2017 colloquium was the most recent publication of the adopted decisions.
Bunjevac, 'Court Governance in Context: Beyond Independence', 35
4 Gar Yein Ng, 'A Displine of Judicial Governance?' (2011) 7 (1) Utrecht Law Review 102

It is suggested that the transfer of responsibility for court administration (and funding) from the executive government to an independent judicial council has the potential not only to safeguard judicial independence, but also to improve court performance, achieve greater customer focus in the court system and bring about an institutional renewal of the judiciary as a whole.

In Nigeria, recent happenings such as questionable appointments of new judges, removal of judges without due process and the shocking inaction of the legislature clearly indicate that the judiciary is not entirely free from interference from the other arms of government.

Judicial independence is in compliance with established principles of separation of powers and rule of law. But rule of law will not prevail unless the constitution permits a judge to review the legitimacy of executive action. Best democratic principles require that actions of governments are open to scrutiny by the courts.[5]

Executive Order No. 10 and Judicial Independence

Section 121 (3) of the 1999 Constitution (as amended) 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'

The President acting under Section 5 of the 1999 Constitution (as amended) signed EO 10 with the aim of granting financial autonomy to State Legislature and Judiciary. A key provision in the executive order states thus;

> "The Accountant-General of the Federation shall by this Order and such any other Orders, Regulations or Guidelines as may be issued by the Attorney-General of the Federation and Minister of Justice, authorize the deduction from source in the course of Federation Accounts Allocation from money allocated to any State of the Federation that fails to release allocation meant for the State Legislature and State Judiciary in line with the financial autonomy guaranteed by Section 121(3)[6] of the Constitution of the Federal Republic of Nigeria 1999 (as Amended)"

The suggestion is that based on this Executive Order ('EO'), States of the Federation shall include allocations of the Legislative and Judicial arms of government into their Appropriation Laws

A number of problems arise:

1.It has long been established from the doctrine of separation of powers that the executive cannot legislate unless the power to do so is specifically delegated by statute. Similarly EOs cannot cover areas already covered by existing statute.
2.Presidential EO cannot authorize the President or anyone to do an act that he is not authorized to do by statute. The EO cannot replace statute.
3.A federal authority such as the President cannot direct action of a state functionary unless authorized by statute. This is a key feature of federalism.
4.S.162 of the constitution already prescribes the manner of distribution of public revenue in the distributable pool account an EO cannot derogate from it or vary it in any way however well-intentioned the motive;
5.The constitutional provision in S. 121 (3) is itself unambiguous to direct its compliance without encroaching on law making.
6.The suggestion that amounts standing to credit is the same as directing legislative appropriation is a misunderstanding of public revenue and budget process.

[5] Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales at 2007 Commonwealth Law Conference held at Nairobi, Kenya
[6] It provides that "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"

The office of the President is a creation of the Nigerian constitution, hence, no matter the right motives and good intentions of the President, his acts and orders must pass the validity test within the ambit of powers vested in him by the same constitution. The legitimacy of EO No. 10 must therefore be viewed not from the desire of the President to deepen the tenets of democracy but from the lens of the constitution which is the grundnorm.

The President cannot jettison the clear provisions of the constitution which recognize the autonomy of the states and arrogate to himself the power for the actualization of the independence of the state legislature and state judiciary by an unconstitutional executive order.

In compliance with constitutional provisions, the judiciary in each state of the federation must be fully independent. The state governors have no choice in the matter more so when there is a subsisting judgment compelling them to do so.[7]

Financial autonomy as is erroneously conceived to achieve judicial independence while at the same time violating the principles under which an EO is properly made and the autonomy of the states guaranteed in a federal constitution should not stand because it is contrary to constitutional provisions and democratic principles of separation of powers.

In the same vein financial autonomy is not meant for personal aggrandizement by members of the judiciary since it constitutes public funds, but meant to be utilized appropriately to aid justice administration through improving on infrastructure, personnel and technology.[8]

In response to the infrastructural needs of the judiciary, Article 6(1) of the Executive Order provides that "notwithstanding the provisions of this Executive Order, in the first three years of its implementation, there shall be special extraordinary capital allocations for the Judiciary to undertake capital development of State Judiciary complexes, High Court Complexes, Sharia Court of Appeal, Customary Court of Appeal and Court Complexes of other courts befitting the status of a court."

The above provision will once again find difficulty in surmounting the same challenges listed above.
There is an overarching need to develop an effective system of judicial administrative accountability that does not undermine judicial independence, and the second is to devise a policy framework for a judicial council and courts that is effective, relevant and accountable. In response to the first challenge, it is suggested that the introduction of formal and transparent administrative hierarchies within the judiciary is both justified and needed

The Latimer House Guidelines state:

> "Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary"

And comments as follows:

> 'The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints.'

7 **Judgment delivered on 14 January 2014 in Suit No: FHC/ABJ/CS/667/13 Between Judiciary Staff Union of Nigeria v. National Judicial Council & 2 ORS**
8 **http://justice-reform.org/our-mission/ last visited on 27/5/2020**

Lord Phillips the recent President of the UK Supreme Court comments on this point:

> "Although the guideline envisages that financial resources will be provided directly to the judiciary by the legislature, this is not always, or indeed usually, what happens. In some jurisdictions judges are responsible for running the court system and are provided with resources for this by the legislature. This is true of the Federal system in the United States and in Japan, which I recently visited, the judges run the courts. While such a system undoubtedly underpins the independence of the judiciary, *it is important that judges are not drawn into day to day administration,* as that should be for the administrative staff. Our role should be strategic decision making, *as after all our principal role is to judge cases"* [9]

How Feasible Is Sole Administration By The Judiciary?

It is important that judges should not be drawn into day to day administration of the courts, as this is the function of administrative staff.

In Nigeria Judges, particularly the senior ones – more than is presently the case – should re-embrace their principal role as adjudicators of rights and obligations of citizens. At present the more senior the judge the less time he or she spends deciding cases. Many Chief judges prefer administrative work to actual judging.

With increasing independence in administration, funding and accounting an increase in judicial interest in, and responsibility for, the management affairs of the courts has increased. However, an increase in judicial interest and responsibility for court administration does not automatically translate into a better court system or more effective court organization.

While increased involvement is clearly commendable, transfer of sole responsibility for court administration to the judiciary is far more complex than a simple handover to the chief judge of the High Court.

The immediate challenge is internal administrative accountability, a competence that is to some degree alien and as yet under-developed - within judiciary staffing.

Judicial Administrative Accountability and Independence

The above approach of a mere hand over of all funding, buildings, staffing, appointments and case work, as we have seen concentrates too much administrative power in the hands chief Judges (justices) and other heads, possibly at the expense of other judicial officers, and effective administration.

In Nigeria there is the added need to ensure fiscal responsibility and public procurement integrity that adds an additional burden to an otherwise ill-equipped judiciary to make the 100% leap to sole administration without interface with executive functioning.

The two most active and needy court systems in Nigeria are arguably the Federal High Courts and Lagos State High Courts. Both courts have had challenges in infrastructure provision, management and transparency when it comes to accountability in expenditure.

An all performing and multi-disciplinary functioning CJ is a unicorn at best. With the resulting effect that public records have not been voluntarily made available regarding expenditure in the same albeit limited way that their respective executive arms have been made to demonstrate.

[9] **Lord Phillips, op cit p. 7**

Whereas judiciary budgets between 2007 -2011 were approximately 0.5 – 1 % of the overall budget with a release of approximately 45% of the budgeted amount publication of spending was subject to rigorous legislative oversight along with general executive spending for the period.

With altered and increased control by the judicial arm of government limited oversight is conducted through the Chief registrar who is neither the ultimate decision maker or chief responsibility officer for the judiciary. The incongruity is heads of the courts do not wish to transfer these roles but do not and ought not submit themselves to the legislature for questioning.

This state of affairs invites opacity and diminished fiscal responsibility.

There are a number of reasons why judicial autonomy should not mean excision from other arms of government particularly the executive.

The first is capacity, the ability of the government to effectively deliver a suite of justice sector services to the public that are deeply intertwined with the work of courts, such as public prosecutions, power, road infrastructure, logistics and technology.

Secondly, the government also has a legitimate interest in the judiciary's decisions about issues such as the locations of court buildings, fees and charges and housing to say the least.

Thirdly, being an elected arm the executive have the electorate to answer to, that will always regard the administration of justice in the courts as an essential public service, which means that the government may be held to be politically responsible for the proper operations of the courts, regardless of who is formally in control of court administration.

The Present Administrative/Executory Functions of the Judiciary

In all court systems the office of the Chief Registrar is the effective head of the High Court, Court of appeal and Supreme Court administrative structure. Below him are a cohort of deputies and assistant chief registrars whose experience and qualification range from acting as senior magistrate or higher administrative cadre of public service.

Most of these administrative heads lack the necessary skills to be able to function efficiently, as funding from their trainings is usually sought from the executive arm of government. The skills gap is no justification for expecting salutary executive experience in managing critical public revenue and infrastructure meant for the judiciary, as the deficit in capacity and unsuitable statutory or human resource must not be ignored.

The design of arms of government for both checks and balances clearly contemplates function and capacity as qualification for office and whether the official is voted directly into office as with executive and legislative members or appointed in a selective way as with administrative and judicial staff. Each of these methods lending themselves to different approaches of public scrutiny and accountability.

Therefore it would be of grave danger for a judge – judicial officer who has no campaign agenda or political connection with the immediate constituency – to be held to the same level of questioning as an elected representative or a Governor for instance.

To ignore this is to precipitate chaos at the expense of a very vaguely worded constitutional provision:

Section 121 (3) of the Constitution:

'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'

To briefly consider the underlined portions.

"amount standing to the credit"

This presupposes that state funds are appropriated for the purpose of being executed and certainly the credit is cash and not a mere budget line stating a figure. One does not pay budget lines only cash balances. It is also noteworthy that money paid into the consolidated revenue fund is revenue collected for a particular purpose and not money without designation. Credit must have derived from the revenue generated.

"The heads"

The heads of court are either the Chief Judge, President of the Appeal Court or the Chief Justice of Nigeria. The power to credit amounts to these officers must be conferred by legislation of the National Assembly in the absence of constitutional provision.

"Shall be paid directly to the heads"

Payment of public revenue is itself strictly regulated by constitution and statute. This blanket statement is of no direction to known public office or person.

However the provisions taken together convey an intention of the constitution framers to ensure a well-funded judiciary and this must be addressed with the purpose in view.

Only legislation can cure this problem. The provision falls short of giving direct automatic authority without supporting legislation. It is not directed at the President or any other office. The possibility of sole control by the judiciary is both unworkable and challenges its sustainability

Partnership Solution

The Latimer House Guidelines provide:

> 'While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence'.

The Minister's ongoing involvement in court administration is found in England and Wales, where control over court administration is currently shared between the judiciary and the executive government in accordance with a formal partnership agreement.

Future institutional relationships between the judiciary and its stakeholders must be rooted in the concepts of organizational transparency and administrative accountability

Another area in which judicial entity and courts can emulate organizational best practices from the business sector is through the introduction of transparent internal administrative 'constitutions' and rules with clearly defined duties and responsibilities of judges and court staff.

In addition we have to protect the judiciary from inherent scrutiny in administration and procurement as this will be in tandem with respecting its independence.

The transfer of fiscal responsibility to an corporate judicial entity will partially resolves this anomaly, to the extent that the executive government and parliament have agreed to provide the courts with a global budget, while devolving the responsibility for the allocation of the funds to the judicial council.

Of 'Judge Time' And 'Administrative Time'

It is not impossible to formalize the fiscal relationship between the judiciary and the executive in a transparent and accountable manner, while also maintaining focus on the quality of justice.

The transfer of court administration to the judiciary requires a thorough reassessment of the judicial role in court administration, because it is difficult to imagine organizational improvements in any large organization without a robust system of administrative accountability. International experiences strongly suggest that greater internal administrative transparency and administrative 'corporatization' of the judiciary is essential at all levels of the judicial organization in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.[10]

A judicial body should ideally be governed by a small board of judge appointed members and non-judicial experts, who would be appointed for a fixed term based on merit. It can greatly improve efficiency, by promoting more active judicial involvement in court administration and by furthering their self-responsibility as autonomous organizations. Using expertise not accident of public office as a justification.

Whereas very few if any of the judiciary -controlled courts would survive disclosure requests regarding procurement of spending today. It is alarming and will continue to soil judiciary functioning until administrative structures are established for the judicature.

This way the judiciary will develop methods for administrative and financial accountability that are transparent, verifiable and more service-focused.

Conclusions

Cooperation and collaboration not unconstitutional EOs will achieve increased independent judicial funding.

Chief decision making, chief responsibility for budgeting cannot remain the responsibility of the head of the court while a chief of the registrars meant for registry integrity are used as administrative heads with no authority or decision making powers for budget spending. At the same time the CRs have no managerial expertise or corporate experience to deliver the services the courts are designed for.

It is imperative that the judiciary should be given the opportunity of providing robust capacity development for all of its staffs through and intentional and rigorous training program of a new cadre of court managment, thereby reducing the proliferation of incompetence and corruption in the system. Through management and service training the judiciary will be better positioned to discharge its duties effectively and contribute to the progress of justice administration.

[10]Bunjevac, 'From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration', UNSW Law Journal, Vol. 40(2), 806

A system reform of the linkage of the value chain of independence – expenditure and autonomy should be embarked on for the judiciary. For performance and therefore public confidence to be sustainable.

The Justice Reform Project must continue to advocate for a reform of this important aspect of the justice sector.

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