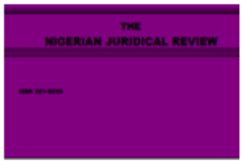

THE NIGERIAN JURIDICAL REVIEW

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS

ISSN: 2651-6055 Journal Homepage: https://www.tnjr.uneclaw.ng

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To cite this article: DG Shigaba, AA Epu and PI Ukam 'Judidical Reforms and the Imperative for True Fiscal Federalism in Nigeria' (2023) 18 *The Nigerian Juridical Review*, pp 56 – 78.

To link to this article issue: https://doi.org/10.56284/tnjr.v18i

JUDICIAL REFORMS AND THE IMPERATIVE FOR TRUE FISCAL FEDERALISM IN NIGERIA

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Abstract

Fiscal federalism is all about adequate financial provisions and autonomy to component units of a Federal State. It is an arrangement whereby revenue sources and allocations are shared amongst the three tiers of Governments in such a way that each of the level exists independently with enough resources and allocations to function as a Government properly. By the combined readings of Sections 81(3), 84(1) (7), 121(3), 124(1), 162(9) of the Constitution of the Federal Republic of Nigeria 1999, show that finances meant for the judicature is controlled by the Federal Government which bears down negatively on the functions of the judicature. The aim of this paper is to examine the need for judicial reforms in Nigeria which will bear on the quality of justice delivery in the country. It seeks to examine the present constitutional provisions on fiscal matters and how it affects judicial reform in Nigeria. The article delved into the legal framework to bring to the fore the necessity to put in place true fiscal federalism to the judiciary in order to have effective judicial reforms. It adopted the doctrinal method of research, and used primary and secondary sources such as the Constitution, relevant statutes, case law, textbooks and articles in journal. Findings from the study revealed inter-alia that the Judiciary has been starved of funds thus making it unable to make the much needed impact. The implication of these findings is that without quality fiscal federalism to the judiciary in Nigeria the much clamour for reforms will continue to be a mirage. The paper recommended inter-alia that the provisions of Executive Order No 10 2020 should be inserted in the Constitution so as to protect the finances of the Federal and State Courts.

Keywords: Federalism, Judicial Reforms, Imperative, Fiscal Federalism.

1. Introduction

Nigeria is a federation as enshrined in Section 319 of the Constitution which provides as follows: *'This Constitution may be cited as the Constitution of the Federal Republic of Nigeria.'* By this provision, Nigeria operates a federal system of government. Before 1946, Nigeria's colonial government was vested in the British officials, with the Governor who was the Commander in Chief.

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According to article 4 of the Northern and Southern Protectorate Orders in Council of 1899, the Governor was:

> authorized, empowered and commanded to exercise on HM's behalf all such powers and jurisdiction as HM at any time before or after the passing of this order had or may have within the said territories and to that end to take or cause to be taken all such measures and to do or cause to be done all such matters and things therein as are lawful and as in the interest of HM's service, he may think expedient; subject to such instruction as he may from time to time receive from H.M or through a secretary of state.[1]

The road to a fully-fledged Federal Constitution started with the enactment in 1954 of the Lyttleton Constitution. By the 1954 Federal Constitution, Nigeria was divided into three component units – the Northern, Western and Eastern regions with Lagos being the Capital of the Federation. The 1954 Constitution now contained two Legislative Lists i.e. The Exclusive List and the Concurrent List. The Exclusive Legislative Lists are the items within the exclusive sphere of the Federal Parliament, while the Concurrent Legislative list has items in which both the Federal and the Regional Legislature can legislate. All other matters not captured in the Exclusive and Concurrent Legislative lists were termed residual list and are within the Legislative competence of the Regions. The 1954 Constitution for the first time addressed the issue of fiscal federalism in the allocation of revenue. The central government was given the following matter to legislate on: (i) external affairs, (ii) Questions relating to aliens, naturalization, deportation and immigration, (iii) The police (iv) Defence (v) Export and import, excise duties. Collected revenues from these items were distributed to the regions base on derivation principles. The regions had control over mining rents, personal income tax, receipt from licenses, land registration. The derivation principle was applied in the distribution of taxes collected by the Federal Government. The first Federal Constitution granted full autonomy to each region in matters of internal affairs. The judiciary was established for each region with each region having a High Court from which appeals went to the Federal Supreme Court. The public service was established for each region in addition to the Federal Service Commission.[2]

The Independence Constitution of 1960 and the 1963 Republican Constitution were not much different from the federal principles already laid down by the

[1] BO Nwabueze, *A Constitutional History of Nigeria* (London, Longman Group Ltd, 1982) 35.
[2] SG Ehindero, *The Constitutional Development of Nigeria 1849-1989* (Jos, Ehindero Nig. Ltd, 1991) 21

1954 Constitution. The 1960 Constitution had 4 Constitutions in one document: the Constitution of the Federation, the Constitution of the Western Region, the Constitution of the Northern Region and the Constitution of the Eastern Region. The regional Constitutions were Schedules to the Federal Constitution[3]. This is in consonance with the fact that since a government presupposes a Constitution by which it is organized and its powers defined, it follows that under federalism Independence government, should strictly imply separate Constitution.[4] The 1960 Constitution introduced a bicameral legislature comprising of the House of Representative and a Senate. However, the 1960 Constitution retained the Queen as Head of State, represented by the Governor – General. The Queen was conferred with powers to appoint judicial officers. The 1963 Republican Constitution came into being on 1st October 1963. The Queen ceased to be Head of State and her functions were taken over by the President. Fiscal federalism is that aspect of federalism that deals with allocation of powers for revenue acquisition usually in the Constitution.

Under the 1960 Constitution, and replicated in the 1963 Constitution the following fiscal divisions of powers were enumerated: Exclusive Legislative List include: external affairs, passports and visas, defence (Naval, Military and Air Forces) currency, coinage and legal tender, exchange control, bills of exchange and promissory notes, banks and banking, customs and excise duties, including export duty, immigration and emigration, extradition and deportation, aviation, maritime shipping and navigation, posts, telegraph and telephones, railways, inter-state roads, weights and measures, patents, trademarks design, merchandise marks and copy rights, meteorology, company incorporate, insurance, taxation, statutory marriages, mines and mineral, including oil and natural gas, foreign trade. Matters in the Concurrent List are arms and ammunition, bankruptcy and insolvency, census, commercial and industrial monopolies, combines and trust control of the voluntary movement of people between territories, finger prints, identification and criminal records, higher education, individual development, labour and trade unions, legal and medical professions, prisons and other institution for the treatment of offenders, the maintaining and securing of public safety and public order, provision of essential services, registration of business names, scientific and individual research and statutes.

[3] BO Nwabueze, *Constitutional Democracy in Africa* (Vol 1, Ibadan, Spectrum books Ltd 2003) 23
[4] Ibid, 133.

The residual matters which only the regions are in charge included local governments, towns and country planning, primary and secondary education, health, land and property generally, chieftaincy and local customs, agriculture, forestry, regional roads, water supply, contract and tort[5].

The above enumerated items show the areas the central government and regional government can source their revenues for government business.

The incursion of the military into politics in Nigeria on 25th January 1966 altered fiscal federalism to the advantage of the center and to the detriment of the federating units. The military by its very nature operates a unified and hierarchical command and this had an impact on the federal system including fiscal federalism. The military cannot fathom a strict division of powers guaranteed under a Federal Constitution, so the Federal Military Government arrogated to itself power to legislate on all matters whatsoever. However the regional state governors were allowed to legislate on matters previously within the exclusive competence of a region i.e. the Residual List, and with the consent of the Federal Military Government on matters within the concurrent list.[6]

The military practice of arrogating to the Federal Military Government powers to make laws on almost all the subject matters of legislation impacted itself on the presidential constitutions of 1979 and 1999 of the Federal Republic of Nigeria. Thus 16 matters which in the 1960 and 1963 constitutions were in the concurrent legislative list are now made exclusive to the federal government. These are arms, ammunitions and explosives, bankruptcy and insolvency, census, commercial and industrial monopolies, combines and trust, drugs and poisons, finger prints, identification and criminal records, labour (i.e conditions of labour, industrial relations, trade unions and welfare of labour), prices, professional occupations as may be designated by the National Assembly, quarantine, registration of business names, regulation of tourist industry, traffic on federal trunk roads, public holidays, regulation of political parties, and service and execution in a state of the civil and criminal processes, judgments, decrees, orders of any court of law established by the legislature of a state.[7] This certainly has made the subject matters in which the federating units can get revenue become even with those of the Federal Government. However, with the Military Government, the Federal Government has more subject matters exclusive to it, the revenue sharing formula is more in favour of the Federal Government. Now

[5] Nwabueze (n 3) 139-141.
[6] Ehindero (n 2) 220.
[7] Nwabueze (n 3) 80-83.

95% of state revenue is derived from proceed of natural resources especially oil and other Federal taxable items controlled by the Federal Government. Pursuant to section 162 (1) (3) of the Constitution of the Federal Republic of Nigeria, section 1 of the Allocation of Revenue (Federation Account etc) Act, prescribes the following revenue formula:-

i. Federal Government = 48.5%
ii. State Government = 24.0%
iii. Local Government = 20%
iv. Special Funds = 7.5%

The military incursion into polities from 15th January 1966 truncated the federal principle in Nigeria and was replaced by unitary federalism because of the command structure of the military. Since then even the subsequent Constitutions of the 2nd, 3rd and 4th Republics were made up of unitary federalism. The subsequent Constitutions lacked the conditions for federalism which are:

i. The desire for political units to unionize and not unite for a common interest,
ii. The desire for the component units to preserve their independence in local matters,
iii. There is physical contiguity of "nations" that form the federation,
iv. There must be absence of marked inequalities amongst the component units and
v. The capacity on the part of the people to appreciate the meaning of a double allegiance to both the central and the component units thus able to prevent centrifugal forces to overcome the centripetal forces in the polity.[8]

From the foregoing analysis, it is cleared that under the 1960 and 1963 Constitutions of the Federal Republic Nigeria the regions had more legislative lists that they can source revenue therefrom. Thus enabling them to allocate more funds to the judiciary, thereby strengthening there reforms.

It should be noted that under the 1979 Constitution, the regions had been divided into 19 states due to military intervention in the polity as from January 1966[9]. And so under the said Constitution, the legislative list of the states were reduced

[8] A Appadorai, *The Substance of Politics* (Oxford, New York, Oxford University Press, 2004) 498-500.

[9] S Jeremiah and F Tony, 'The Impact of Military Rule on Constitutional Development in Nigeria' (2023) 3(2) *The Journal of Law and Policy* 237.

because of the fact that federal government had more items on the legislative list from where the derived their revenues.[10]

It is to be noted that the judiciary from the 1960 Constitution to the present 1999 Constitution have not been allocated directly its capital expenditure. Its capital expenditure is always determined by the executive[11]. In such scenario it can do little to judicial reforms. The judicial reforms that are being envisaged include financial independence of the judiciary,[12] situating the judiciary in accordance with federal principle, quality of appointment of judicial officers, speedy trial of causes and matters, quality of welfare of the judges, quality of infrastructure and equipment and strengthening of the appellate jurisdiction of superior courts of the state.[13]

This paper posits that without an improvement in fiscal federalism to the judicature there will be little or no reforms in the justice sector. This can be seen in the fact that there are a lot of clamour for judicial reforms for a long time, yet there has been no positive results.

This paper therefore examined the imperative for fiscal federalism in favour of the state and the judiciary so that the much needed reform needed in that sector can be realized.

2. Conceptual Framework

In this discourse, there are concepts that need defining: Federalism; Fiscal Federalism; Judicial Reform; Imperative and True.

2.1 Federalism

According to Black's Law Dictionary, federalism is the legal relationship and distribution of power between the national and regional governments within a federal system of government[14]. On the other hand according to the father of federalism, Wheare, federalism is the method of dividing powers so that the general and regional governments are each within a sphere coordinate and

[10] JO Arowosegbe, 'Techniques for Division of Legislative Powers under Federal Constitutions' <https://core.ac.uk/download/pdf/234649998.pdf> accessed 12 May, 2023

[11] AA Mustapha and others, 'The Executive, Legislature and the Judiciary: Toward Democratic Governance in Nigeria Since 1914' (2019) 6(1) *Journal of Economic Info* 43-48.

[12] Ibid.

[13] A Carl and P Ukata, *The Oxford Handbook of Nigeria Politics, the Judiciary in Nigeria Since 1999* <https://global.oup.com/academic/product/the-oxford-handbook-of-nigerian-politics-9780198804307?cc=us&lang=en&accessed> 9 December 2023.

[14] BA Garner, *Black's Law Dictionary* (9th edn St. Paul Minnesota, West Publishing & Co, 1999) 687.

independent.[15] It is in this regard that Alli defines federalism as an administrative and political system in which several states unite but keep control over their own internal affairs.[16] According to Nwabueze, federalism is an arrangement whereby governmental powers within a country are shared between a national, country-wide government and a number of regional (ie territorially localized) governments all equal in status as governments in such a way that each of the national and regional government exists separately and independently from the others and operates directly on persons and property within the territorial area of its jurisdiction, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others. Federalism is thus essentially an arrangement between governments, a constitutional device by which political powers within a country are divided among various units of governments, rather than among geographical entities comprising different people.[17] The Supreme Court in the case of *Attorney General of Abia State & 2 ors v Attorney General of the Federation of Nigeria & 35 ors*[18] *per Niki Tobi J.S.C* (as he then was) and of blessed memory defined federalism:

> as a legal and political concept, generally connotes an association of states formed for certain purposes, but the states retain a large measure of their original independence or autonomy. It is the coordinate relationship and distribution of power between the individual states and the national government which is at the centre. Federalism as a viable concept of organizing a pluralistic society such as Nigeria for governance does not encourage so much concentration of power in the centres which is the Federal Government. In federalism, the component states do not play the role of errand boys. The other extreme is also true and it is that they do not exercise sovereignty which only belongs to the Nation as a sovereign entity. States in Federalism rather exercises the middle role, if I may so, for lack of better expression of exercising legislative and fiscal autonomy as provided for in the Constitution.

From the foregoing definitions the following can be deduced as to the meaning of federalism:-

[15] KC Wheare, *Federal Government* (4th edn London: Oxford University Press, 1963) 11.
[16] WO Alli, 'The Development of Federalism in Nigeria: A Historical Perspective' in Aaron T Gana and Samuel G Egwu (eds) *Federalism in Africa; Framing the National Question* (Vol 1, Trenton, New Jersey, Africa World Press, 2003) 72.
[17] BO Nwabueze, *Constitutional Democracy in Africa* (Vol 4, Ibadan: Spectrum Books Ltd, 2004) 201.
[18] (2006) 28 NSCQR 161, 211-212.

i. It is a system of government suitable for a pluralistic society ie with numerous ethnic nationalities.
ii. It is a relationship where component unit states retain their independence, but share powers between them and the government at the centre, but the Federal Government cannot concentrate powers to itself.
iii. The components units relinquish their sovereignty for certain purpose and for the good of the whole.

2.2 Fiscal Federalism

According to Kapucu, fiscal federalism is the financial relation between units of governments in a Federal Government System. Fiscal Federalism is part of broader public finance discipline. It deals with the division of governmental functions and financial relations among levels of government.[19] *Black's Law Dictionary* defines Fiscal Federalism as relating to public finances or taxation.[20] Fiscal Federalism is the principle that guides the assignment of tax powers and expenditure responsibilities to the various tiers of government in a federation to promote healthy inter-governmental relations and synergy.[21] Fiscal Federalism is the division of responsibilities including finances among Federal, States and Local Governments to improve economic efficiency and achieve various public policy objectives.[22]

From the foregoing definitions, fiscal federalism is the monies and resources aspects of federalism ie the allocation of legislative items for purpose of revenue accruals to the centre and federating units. Fiscal federalism is an arrangement whereby revenue sources and revenue allocation are shared between national governments and a number of regional or states governments in such a way that each of the national and regional or states exists independently with enough resources and allocations to function as a government properly.

2.3 Judicial Reform

This concept has two words in it ie 'judicial' and 'reform'. The *Black's Law Dictionary* defines 'judicial' as relating to, or by the court or a judge; of or relating to a judgment.[23] 'Judicial' means – pertaining to judgment in court of

[19] K Naim, 'Public Finance' <www.britannica.com > ccessed on 25 July 2022.
[20] Garner (n16) 712.
[21] OE, Olabanji and others 'Fiscal Federation and Economic Development in Nigeria: An Auto-Regressive Distributed Lag Approach' (2020) 6(1) *Cogent Social Sciences* DOI 10.1080/23311886.2020.1789370.
[22] Congressional Research Service 'Fiscal Federalism: Theory and Practice' <https://crsreports.congress.gov > accessed 25 July 2022.
[23] Garner (n16) 922.

justice or to the administration of justice; pertaining to court of law or to judges; of or relating to a judge; inclined to make or give judgment; critical; discriminating; decreed, sanctioned, or enforced by a court; giving or seeking judgment as in a dispute or contest; determinative.[24]

'Reform' on the other hand is the improvement or amendment of what is wrong, corrupt, unsatisfactory etc.[25] 'Judicial Reform' in the circumstances is the improvement or amendment of what is wrong with the judicial proceedings, judicial function, judicial gravity, judicial mind, judicial decisions and judicial duels.[26]

In the context of this paper, fiscal federalism is important for reforming what is wrong with the judiciary.

2.4 Imperative

'Imperative' means absolutely necessary or required; unavoidable; of the nature of or expressing a command[27]. In the context of this paper, it means that for judicial reform to occur, it is absolutely necessary to put in place true fiscal federalism in Nigeria.

2.5 True

'True' as an adjective means being in accordance with the actual state or condition; conforming to reality or fact; not false, real, genuine, authentic, factual, veracious.[28] In the context of this paper, it means true fiscal federalism is an imperative to judicial reforms in Nigeria.

3. The Practice of Fiscal Federalism under the 1999 Constitution (as Amended)

The Federal Government has 68 items on the Exclusive Legislative list as its areas of Legislative powers[29]. For fiscal purposes, the Federal Government sphere of power include (i) accounts of the Government of the Federation and of offices, courts and authorities thereof, including audit of those account (ii) arms, ammunition and explosives (iii) aviation (iv) bankruptcy and insolvency (v) Banks, banking, bills of exchange and promissory notes (vi) commercial and

[24] See 'Judicial' Definition & Meaning | Dictionary.com available at: www.dictionary.com accessed 25 June 2023.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] See 2nd schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended).

industrial monopolies, combines and trust (vii) citizenships, naturalization and aliens (viii) control of capital issues (ix) copyright (x) currency, coinage and legal tender (xi) customs and excise duties (xii) designation of securities in which trust funds may be invested (xiii) Diplomatic consular and trade representation (xiv)drugs and poison (xv) Exchange Control (xvi) Export duties (xvii) external affairs (xviii) fishing and fisheries other than fishing and fisheries in rivers, lakes, waterway, ponds and other inland waters within Nigeria (xix) Immigration into and emigration from Nigeria (xx) Incorporation, regulation and winding up of bodies corporate, other than co-operative association, local government council and bodies corporate established directly by any law enacted by a House of Assembly of a state (xxi) Insurance (xxii) labour including trade union, industrial relation (xxiii) maritime shipping and navigation, (xxiv) meteorology (xxv) mine and minerals including oil fields, oil mining, geological survey and natural gas (xxvi) natural parks designated so by the Natural Assembly (xxvii) Nuclear energy (xxviii) passports and visas (xxix) patents, trademark, trade or business names, industrial designs and merchandise marks (xxx) pensions, gratuities and other like benefits payable out of the consolidated revenue fund or any other public funds of the federation (xxxi) posts, telegraphs and telephones (xxxii) prisons (xxxiii) professional occupations as may be designated by the National Assembly (xxxiv) Quarantine (xxxv) railways (xxxvi) regulation of of political parties (xxxvii) service and execution in a state of the civil and criminal processes, judgments, decrees of law outside Nigeria or any court of law outside Nigeria or court of law in Nigeria other than a court of law established by the House of Assembly of that state (xxxix) stamp duties (xxxx) taxation of incomes, profit and capital gain except as otherwise prescribed by this Constitution (xxxxi) establishment and regulations of authorities for the Federation or any part thereof – (a) to promote and enforce the observance of the fundamental objectives and directive principles contained in this constitution; (b) to identify, collect, preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national significance or national importance; (c) administer museums and libraries other than museums and libraries established by the Government of a State (d) to regulate tourist traffic and (e) to prescribe minimum standards of education at all levels (xxxxii) formation, annulment and dissolution of marriages including matrimonial causes relating thereto other than marriage under Islamic law and customary law (xxxxiii) Trade and commerce between Nigeria and other countries (xxxxiv) traffic on Federal trunk roads (xxxxv) weights and measures (xxxxvi) wireless, broadcasting and television

other than ones provided by the Government of a state; allocation of wave-length for wireless, broadcasting and television transmission[30].

The concurrent legislative list has 30 items in it. However list Nos 1, 3, 4, 7, 8, 11, 13, 16, 17, 21, 23, 25, 27, 28 expressly gives the National Assembly powers to legislate on them. These include (i) making provisions of public revenue (a) between the Federation and the States (b) among the states of the federation (c)between the States and Local Government Council and (d) among the Local Government Councils in the State (ii) antiquities and monuments as may with the consent of the state in which such antiquities and monuments are located be designated by the National Assembly as National Antiquities or National Monuments (iii) the National Assembly may make laws for the Federation or any part thereof with respects to the archives and public records (iv) by law prescribe how collection of capital gains income or profit of persons other than companies, documents or transactions by ways of stamp duties are to be carried out by the Government of a state or other authority of a state (v) registration of voters and the procedures regulating election to a Local Government Council (viii) enacting laws regulating electricity, establishment of electric power stations, generation and transmission of electricity in any part of the federation, the regulation of the rights of any person or authority to dam up water in any part of the federation, regulation of any arrangement of participation of the federation with another country for the generation, transmission and distribution of electricity, establishment and promotion of a national grid system, regulation of the right of any person or authority to use, work or operate any plants, apparatus, equipment or work designed for the supply or use of electricity energy; (vi) enacting laws for the establishment of an authority with power to carry out censorship of cinematograph films and to prohibit or restrict the exhibition of such films (vii) enacting laws for the federation or any part with respect to health safety and welfare of persons employed to work in facilities, offices or other premises or in inter-state transaction and commerce including the training, supervision and qualification of such persons regulation of ownership and control business enterprises, establishment of research centres for agricultural studies, and establishment of institution and bodies for the promotion or financing of industrial, commercial or agricultural (viii) enacting laws to regulate or co-ordinate scientific and technological research (ix) enacting laws with respect to statistics in any matter which the National Assembly has power to make laws and the organization of a co-ordinate scheme of statistics for the Federation or any

[30] Ibid.

part thereof on any matter whether or not it has power to make laws with respect thereto (x) enacting laws for the Federation or any part thereof with respect to trigonometric, industrial and topographical surveys (xi) enacting laws for the Federation or any part thereof with respect to university education, technological education or such professional education, including the power to establish university, post primary technological or professional education[31].

From the foregoing, the states are only left to legislate concurrently with the Federal Government on items 2, 5, 6, 9, 10, 12, 14, 15, 18, 19, 20, 22, 24, 26, 29, 30 on the concurrent list. These are (i) any House of Assembly may make provision for grants, or loans from and the imposition of charges upon any of the public funds of that state, revenue and assets of that state for any purpose notwithstanding that it relates to a matter with respect to which the National Assembly is empowered to make laws (ii) a House of Assembly may subject to paragraph 4 hereof (powers of the National Assembly) make laws for that state or any part with respect to archives and public records (iii) may enact laws for the collection of tax, fee or rate or for the administration of the law providing for such collection by a Local Government (iv) enacting laws with respects to elections to a Local Government Council in addition but not inconsistent with any law made by the National Assembly (v) enact laws on establishment in that state of electric power stations, generation transmission and distribution of electricity to area not covered in that state, but is limited to distribution from a sub-station to the ultimate consumer, maintenance, repairs or replacement of plant or equipment for the creation or generation of electrical energy, transmission from a power station to a sub-station (vi) enact laws for industrial, commercial or agricultural development of the state (vii) A House of Assembly may enact law for the establishment of institutions for the purpose of scientific and technological research (viii) enact laws for statistics and on any matter other than that covered by the National Assembly (ix) may enact law with respect to trigonometric, industrial and topographical services (x) enact laws for the establishments of an institution for purpose of university, technological or professional education (xi) enact laws with respect to technical, vocational, post primary, primary or other forms of education including the establishment of institutions for the pursuit of such education.

From the foregoing, it is to be noted that the states can only draw revenue from 11 items. Besides that, section 4 (4) (5) of the Constitution provides as follows:

[31] Ibid.

> (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-
>
> (a) any matter in the concurrent legislative list set out in the first column of part II of the second schedule to this Constitution to the extent prescribed with second column opposite thereto; and
>
> (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
>
> (5) If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency be void.

From the foregoing analysis, it is clear that fiscal federalism is heavily lopsided in favour of the centre ie the Federal Government. That is why the centre is so powerful with so much money that political power at the Federal Government is very attractive and the states have been cowed down, only contented with going to Abuja every month cap in hand to be handed over the crumbs that falls from the table of the all almighty Federal Government. The items the states can draw revenue from are so limited that the states have no money to conduct governmental affairs ie the provision of dividend of democracy.

It is worthy of note to say that the courts too have contributed to the impoverishment of the states on their revenue base through questionable interpretation of fiscal issues. For example in *Attorney General of Ogun State v Alhaja Ayinke Aberuagba & Ors*,[32] by an originating summons, the Respondent who were Plaintiffs at the High Court were wholesale purchasers of beer in Ogun State instituted the suit claiming against the Ogun State Government, a declaration that section 3 (1), 3 (4) (ii), 3 (7), 4, 5, 8 and 21 of the Sales Tax Law 1982 are inconsistent with the provision of the Constitution of the Federal Republic of Nigeria and accordingly void. The Supreme Court held *inter alia* as follows:

1. That State Legislatures can legislate on matter not included in the exclusive legislative list, and matters included in the concurrent list and any other matter in which the constitution empowers them to make laws thereto.
2. That since section 3 of the Ogun State Tax Law makes tax chargeable on product brought into the state, it becomes discriminatory tax law against inter-state or international trade and commerce which are within the purview of the exclusive regulating powers of the federation.

[32] (1985) LPELR 3164 (SC).

3. That every state within his concurrent legislative powers can legislate for sales tax within its own state provided that it does not restrict inter-state trade.

It is clear that the above judgment did not help the fiscal matters as pertains to the states. If states cannot derive revenue from sales tax, then how can they attain internally generated revenue? The courts instead of being proactive in protecting the fiscal interest of the states, have further weakened the revenue base of the states.

4. The Judiciary and Fiscal Federalism in Nigeria

The Judicature is established by section 6 (1) of the Constitution which provides as follows: 'The judicial powers of the federation shall be vested in the courts to which this section relates, being courts established for the federation.'

The courts recognized by the constitution as superior courts of records include the Supreme Court, the Court of Appeal, the Federal High Court, National industrial Court, High Court of the Federal Capital Territory Abuja, Sharia Court of Appeal of the States, the Federal Capital Territory Customary Court, High Court of a State, the Sharia Court of Appeal of the Federal Capital Territory Abuja, the Customary Court of Appeal of states, such other courts as may be authorized by law made by the National Assembly and such other courts as may be authorized by law of a State House of Assembly to exercise jurisdiction at first instance or on appeal.

Fiscal federalism (financial matters) in favour of the judicature is embodied in the 1999 Constitution. The Constitution provides that any money that the judiciary has access to in the consolidated revenue funds of the Federation must be paid directly to the National Judicial Council, which will then distribute them to the heads of the courts established for the federation and the states in accordance with Section 6 of the Constitution.[33] Similarly, the National Assembly may prescribe compensation, salary, and allowances for the holders of the posts specified in this section;[34] however, these payments shall not surpass the sum decided upon by the fiscal commission and revenue mobilization allocation.[35] The Federation's consolidated revenue fund will be liable for the recurrent expenses of the judicial offices within the Federation, aside from the

[33] Section 81 (3) Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[34] Section 81 (4) Ibid. (The offices mentioned as encapsulated in subsection 4 includes Justices of the Superior Courts of Record).
[35] Section 84 (1) Ibid.

salaries and benefits of the judicial offices specified in subsection (4) of this section.[36]

The Constitution also empowers the heads of the relevant courts to receive any money that is to the credit of the judiciary in the state's consolidated revenue fund directly[37]. While the holders of the positions specified in this section,[38] shall receive wages and other compensation as may be mandated by a House of Assembly, but not exceeding the amount as shall have been determined by the Revenue Mobilization Allocation and Fiscal Commission.[39] Finally, the constitution directs that any funds that belong to the judiciary in the Federation Account must be sent directly to the National Judicial Council in order for it to be distributed to the heads of court established for the Federation and states under section 6 of this constitution.[40]

A careful combined reading of the above provisions shows that finance meant for the Superior Courts are controlled by the Federal Government including States High Courts, Sharia Courts and Customary Courts of Appeal. It is to be noted that the amount standing to the credit of the judiciary is to be sourced from the consolidated revenue fund of the Federation and Federation account and not the states and is to be paid directly to the National Judicial Council for onward disbursement to the heads of Courts and not that it will be directly disbursed to the head of courts of the states. Again it is the recurrent expenditure of judicial officers including salaries and allowances that are to be charged upon the consolidated revenue fund of the federation not states. There is no provision for capital expenditure. By section 121 (3) of the constitution, any amount standing to the credit of the judiciary shall be paid directly to the heads of the courts in the state.

Despite the above, the judiciary has been starved of funds to execute their activities. There is prevalent poor remuneration, poor infrastructure which necessitated various court cases. Thus in *Olisa Agbakoba v Federal Government of Nigeria & 2 ors*[41], *Judiciary Staff Union of Nigeria v Government of 36 States in Nigeria,*[42] *and Olisa Agbakoba v AG Ekiti State,*[43] the trial courts held that

[36] Section 84 (7), Ibid.
[37] Section 121 (3), Ibid.
[38] Section 121 (4), Ibid, (the offices include the State Judicial Service Commission).
[39] Section 124 (1) Ibid.
[40] Section 162 (9) Ibid.
[41] FHC/Abj/CS/63/13.
[42] FHC/Abj/CS/667/13.
[43] NAD/56/2013.

monies meant for the judiciary should be credited to the National Judicial Council directly from the Consolidated Revenue Fund and Federation Account. However, the Governors were adamant in granting fiscal autonomy to the Judiciary.

In view of the sustained advocacy mounted by judicial stakeholders on the need to allow fiscal autonomy for the Judiciary, President Buhari on May 22, 2020, signed Executive Order 10 (EO10) meant to enforce the implementation of the 4th Alteration to the Constitution and provide a practical framework for the legislative and judicial arms of state governments to have financial autonomy.

The order provides as follows:

> In the exercise of the powers of the Executive President of the Federal Republic of Nigeria, President Muhammadu Buhari pursuant to Section 5 of the 1999 Constitution of the Federal Republic of Nigeria, he decides to give effect to the provision of (Fourth Alteration, No.4) Act, 2017 ACT No.7 Constitution of the Federal Republic of Nigeria 1999, by issuing the Executive Order No. 00-10 of 2020 granting the States Legislature & Judiciary financial autonomy.

The Fourth Alteration, which amended Section 121(3) of the Constitution, provides that any amount standing credit of the (a) House of Assembly of the state, and (b) Judiciary, in the Consolidated Revenue Fund of the state shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid directly to the heads of the courts concerned. Prior this amendment, Sections 81 and 121(3) of the Constitution provided autonomy for only the judiciary. Although EO10 was hailed by many, most state governors kicked against it, arguing that it amounted to a violation of the principle federalism.

The Supreme Court, however, took the wind out of the sail of the EO10 when, in a judgment on February 11, 2022 it struck down the order. In a split decision of six-to-one, the apex court declared as unlawful and unconstitutional the EO10 on the grounds that President Buhari exceeded his constitutional powers in issuing it[44].

In the lead majority decision, Justice Musa Dattijo Muhammad said:

> This country is still a federation and the 1999 Constitution it operates is a federal one. The constitution provides a clear delineation of powers between the state and the Federal Government. The President has overstepped the limit of his

[44] Suit No SC/CV/655/2020 filed by the 36 state governments against the Federal Government.

> constitutional powers by issuing the Executive Order 10. The country is run on the basis of the rule of law.[45]

The court further held that capital project for the state three superior courts cannot be funded by the Federal Government but should continue to be funded by the State Government.

It is to be noted that only Justice Uwani Abba-Aji in her dissenting judgment agreed with President Buhari on the Executive Order 10 and added that it was in line with the provision of the constitution to enforce the separation of powers and functions. She held as follows:

> We are not unaware of the hanky panky, subterfuge played by state governors against the independence and financial autonomy of state judiciary. It is a pitiable eyesore what judicial officers and staff go through financially at the hands of state executives, who often flout constitutional and court orders to their whims and caprices. Thus the Presidential Executive order 10 is meant to facilitate the implementation of the constitutional provisions. The Executive order is to aid the states legislature and judiciary in curing the constitutional wrong of their financial autonomy which the states have always denied. This is not unconstitutional.

However, as plausible as her reasoning can be, the decision of the majority is the law. The judgment of the Supreme Court thus effectively shut out the gains in judiciary fiscal autonomy in the cases of *Agbakoba and JUSUN*.

The financial position of the courts is made worse as it cannot even retain the proceeds of filing charges it makes from litigants. In *Inuwa v Governor of Gombe State*[46] the Court of Appeal held that by virtue of section 120 (1) of the 1999 Constitution which requires all revenue or monies payable to the state should be paid into one consolidated revenue fund, the implication of this is that the judiciary has no authority over revenue generated from all fines and dues other than to pay same into the consolidated revenue fund account of the state.

From the above discourse, it is clear that true fiscal federalism is imperative if the judiciary is to function properly within its jurisdiction.

5. The Imperative for True Fiscal Federalism to Judicial Reforms

The judiciary according to common parlance is the "last hope of the common man". How true is this statement? One can imagine what will happen to the

[45] Justices Centus Nweze, Ejembi Eko, Helen Ogunwumiju, Emmanuel Agim and Adamu Jauro agreed with the lead majority judgment.
[46] (2019) LPELR 47079 CA

society without an impartial judiciary. Within the legal profession, there have been clamours for the reform of the judiciary if it should continue to dispense justice according to law without fear or favour and hold its prestige with the other arms of Government. Over the years, especially with the coming into effect of the 4th Republic, there are noticeable areas the judiciary needs judicial reform. These include independence of the judiciary especially fiscal independence, situating the judiciary according to Federal Principles, quality of appointment of judicial officers, speedy trial of causes and matters, quality welfare of the judges, quality infrastructure and equipment, strengthening the appellate jurisdiction for superior courts of the states.

5.1 Fiscal Independence of the Judiciary

It is clear that many legal commentators have been clamouring for judicial independence especially in its monetary accruals. Despite the clear provision of the constitution that amounts standing to the credit of the judiciary be paid directly to the judiciary, the state governors have refused to let go. The Executive arms of Government hold their monies so that they can dictate to the judiciary and make its independence a mirage. He who pays the piper dictates the tune thus undermining the independence of the judiciary. A reform to this will require enacting the provisions of the Executive Order 10 of 2020 into the Constitution.

It is pertinent to note that of recent, a law attempting to stipulate salaries, allowances, and fringe benefits of judicial office holders in Nigeria has passed second reading in the Senate. [47] In line with Section 58(2) of the Federal Republic of Nigeria 1999 Constitution, as amended, President Bola Tinubu sent the bill, which is an executive bill, to the two Houses of the National Assembly. In summary, the law aims to end the long-term stagnation in judicial officers' compensation by prescribing salaries, allowances, and fringe benefits. The goal of the measure is to standardize the pay scale, benefits, and other allowances for holders of judicial officers at the federal and state levels. The proposed legislative framework is expected to yield substantial improvements in the areas of the judiciary's ability, independence, and welfare. These have been long-standing and controversial topics of discussion in the public sphere. It will further secure its independence in carrying out its

[47] Vanguard, 'Bill to Prescribe Salaries, Allowances, of Judicial Officers, Pass 2nd Reading' <https://www.vanguardngr.com/2024/05/bill-to-prescribe-salaries-allowances-of-judicial-officers-pass-2nd-reading> accessed 13 May 2024.

constitutional position as adjudicator of the temple of justice, as well as bringing about swift reforms and innovation in the judiciary[48].

5.2 Situating the Judiciary According to Federal Principle

The Federal principle is that the Central Government and the Federating units share powers as enumerated in the Constitution with each being independent of the other. In our unitary federal constitution of 1999 the judiciary is also placed along the line of unitary system. In the United States where we copied our Presidential system, the states have their Appeal and Supreme Courts, why not Nigeria? In the 1st Republic in line with Federal principles, the Western Region had its own Western Region Court of Appeal. The states should have its own Court of Appeal and Supreme Court for state causes and matters rather than the said matters moving to the Federal appellate courts i.e the Federal Court of Appeal and Supreme Court. This will help in the expeditious determination of matters brought to these courts. But in a situation whereby matters move from Area and Customary courts to the federal supreme courts do not help the federal principles in any way.

5.3 Quality of Appointment of Judicial Offices

There is a clamour of appointment and removal of judges be removed from the Executive and retained within the confines of the National Judicial Council in conjunction with the State Judicial Service Commission. This is to foster quality appointment of judicial officers. In certain cases, the interference of the Executive and the head of the courts has resulted in the selection of unqualified individuals, which has contributed to the bad administration of justice.

Recently, due to accusations of abuse of power and partiality in the performance of his duties, the Civil Society Consortium on Judicial Accountability (CSCJA) demanded that Justice Olukayode Ariwoola, the Chief Justice of Nigeria (CJN), retire immediately.[49] The CJN allegedly nominated his biological offspring as judicial officers.[50]

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[48] Ibid.

[49] G Tsa, 'Alleged Abuse of Office: Lawyers Call on CJN Ariwoola to Resign' *The Sun* <sunnewsonline.com> accessed 11 May, 2024.

[50] They said the CJN appointed his daughter Oluwakemi Victoria Ariwoola as a judge of the Federal Capital Territory's (FCT) High Court and his son Olukayode Ariwoola Junior as a judge of the Federal High Court.

It is our contention that the legal system must uphold the highest ethical standards to ensure that all citizens receive fair and equitable treatment under the law. Nepotism in judicial appointments not only violates principles but also threatens to weaken the rule of law in Nigeria. It is imperative that the judiciary remains free from personal bias and favouritism to safeguard the principles of justice.

5.4 Speedy Trial of Causes and Matters

The average years a non- political or election case goes from the trial court, be it Area Courts or Customary Courts and High Courts or National Industrial Courts to the Supreme Court is not less than 15 years. The introduction of frontloading and Trial Scheduling at trial superior courts, have not helped matters. If more Judges are appointed from the Supreme Courts to the lower courts with the number of turned out cases in mind, it will go a long way in enthroning speedy trial of cases in our courts. The Supreme Court should be subdivided to judicial divisions across the six geo-political zones of the country and the Court of Appeal expanded for speedy trial of cases.

5.5 Quality Welfare to the Judges

Welfare of Judges in terms of remuneration and allowance need reforms. This calls to mind the recent decision of the National Industrial Court in Sebastain Hon vs National Assembly & ors where the Justice Obaseki Osagie ordered the upward review of judges salaries to the following:-

i. Chief Justice of Nigeria = ₦10 million monthly
ii. Justices of the Court of Appeal = ₦9 million monthly
iii. Justices of the Court of Appeal and Heads of Superior Court of Records = ₦8 million monthly
iv. Other Judges of the Superior Court of record = ₦7 million monthly

Whether rightly or wrongly, the judgment shows that reform is needed in this area of quality welfare.

5.6 Quality Infrastructure and Equipment

Our Judges still sit in dilapidated court rooms and without modern equipment to assist them in proceedings. Our Judges still write in long hand. While there is improvement in federal courts, the States Courts are still worse off, thus necessitating reform.

5.7 Strengthening the Appellate Jurisdiction of Superior Courts of the State.

The Superior Courts of the State are the High Court, Sharia Court of Appeal and the Customary Court of Appeal. For the High Court it sits on its appellate

jurisdictions in Asizzes instead of a continuous sitting. This hampers smooth dispensation of justice. For the Sharia and Customary Courts of Appeal, they only have jurisdiction if the Grounds of Appeal is on questions of facts alone, yet the justices are trained lawyers who naturally understand question of law, mixed law and fact or facts. Most grounds of appeal are certainly an intertwine of law, mixed law and fact or facts and so to limit them to questions of facts alone hampers justice delivery, thus needing reform.

But the crux of the matter is that without adequate funding, the above needed reforms cannot be achieved. This goes to the fact that unless the states have adequate taxable items in the fiscal regime of the federating units in the constitution, to enable it allocate enough funds to the state judiciary, there cannot be judicial reform. The courts too should help the country by interpreting constitutional provisions towards true fiscal federalism. It is in this regard that we commend Hon. Justice Stephen Dalyop Pam of the Federal High Court Port Harcourt when he made a landmark proactive judgment which improved the fiscal base of Rivers State in the area of VAT collection. In an originating summons filed the Rivers State Government,[51] the court held as follows:

1. That the Federal Government is only empowered to enact laws in relation to stamp duties, taxation of income, profit and capital gains only. The 1999 Constitution has specifically designated the taxes that the Federal Government is empowered to impose and collect taxes in Items 58 and 59 of Part 1 of the 2nd Schedule and this must be read to exclude other species of taxes like VAT, withholding tax, education tax and technology.
2. That the provision of Item 7 (a) and (b) of Part II, 2nd Schedule to the Constitution limited the entities to whom the National Assembly can delegate the power to collect taxes in capital gains, income taxes or profits of power, other than companies, documents or transaction by way of stamp duties to only a State Government or a State Government authority. Any delegation to any other person or entity apart from State Government authority shall be null and void.
3. In view of the Court of Appeal judgment in *Uyo Local Government v Akwa Ibom State Government & Anor* (2020, LPELR 49691 CA, where the Court of Appeal nullified the Taxes and Levies Act for being inconsistent with the provision of the 1999 Constitution, the Taxes and Levies Act is unconstitutional.

With the above judgment one can imagine the rise in monetary accruals to Rivers State and which will naturally bear down to the improvement of the Judiciary's financial allocations.

[51] *Attorney General for Rivers State v Federal Inland Revenue Service & Anor*, Suit No FHC/PH/CS/149/2020.

If federalism is an arrangement whereby government powers within a country are shared between a national government and a number of regional or states governments all equal in status, then from the analysis of fiscal federalism enshrined in the 1999 Constitution, it is very clear that fiscal functions are arbitrarily skewed in favour of the national government to the detriment of the states. And without true fiscal federalism, there is no way judicial reform can be achieved. It is therefore imperative to uphold true fiscal federalism in order to have in place judicial reform.

6. Recommendations

There must be a sitting down again by all the federating units with a view to redistributing the revenue sources and revenue allocations between the national government and the states. We do not see why fiscal functions on drugs and poisons, finger prints, identification and criminal records, incorporation of companies, insurance, labour and trade unions, shipping and navigation on the River Niger and other waterways, meteorology, mines and solid minerals, patents, trademarks, trade or business names, industrial designs and merchandise marks, poisons, public holidays, quarantine, railway, services and execution of civil and criminal processes, judgments, decrees and orders in states, stamp duties, taxation of income, profits and capital gains, tourist traffic, formation, annulment and dissolution of marriages, produce, standards of goods and commodities, registration of business names, water sources affecting more than one state, weights and measures, broadcasting and television be under the Exclusive Legislative list. These items should be in the states lists exclusively.

Residual matters should be identified and exclusively added to the states. Section 4 (4) (b) of the constitution provide that in any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution. Unfortunately there is no list called Residual List in the Constitution. However, in *AG Ogun State v Aberuagba & ors*[52], the Supreme Court held that by residual power within the context of section 4 is meant what was left after the matter in the Exclusive and Concurrent Legislative Lists and those matters which the Constitution expressly empowered the federation and the states to legislate upon had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. That the Federation had no power to make law in residual matters. Over the years what are residual matters have been pronounced upon by the courts. Thus in *Attorney General of Lagos v Attorney*

[52] (1985) LPELR 31164 SC.

General of the Federation[53] the Supreme Court held that town and regional planning is a residual matter for the states and in the FCT it is a residual matter for the National Assembly. Similarly the public service of a state[54], the offences of armed robbery[55] power to enact commissions of inquiries[56], pool betting and casinos[57] etc have been pronounced as residual matters. A cue should be taken from the 1960 and 1963 Constitutions which specifically included matters such as Local Government, Primary and Secondary Education, Health, Lands and Properties, Chieftaincy and Local Customs, Contract and Torts as residual matters. These and more can be identified and included in the states' legislative lists.

Fiscal independence must be guaranteed to the judiciary. To that extent the provisions of Executive Order No 10 should be inserted in the constitution to protect the Federal and State Courts. This will automatically override the Supreme Court decision in *A.G Abia State & 35 ors v AG Federation.* The courts should be allowed to retain at least 50% of their internally generated revenue, so that they can channel it towards recurrent and capital expenditures bearing down on the reforms in the judiciary.

7. Conclusion

This paper examined the fact that without true fiscal federalism put in place in Nigeria, there cannot be meaningful reforms in the judiciary. The concern of stakeholders in the judicial system is for more fiscal functions to be vested in the states to increase their revenue base, and for more funds to be vested in the judiciary to enable it initiate laudable reforms in the justice sector. When the states are empowered financially, there will be positive bearing on the judiciary since Nigeria operates a constitutional democracy.

[53] (2003) LPELR 620 SC.
[54] *Cil Risk & Assets Management Ltd v Ekiti State Govt & Ors* (2002) LPELR 49566 SC.
[55] *Agosu v State* (2014) LPELR 23107 CA.
[56] *Amaechi v Governor of Rivers State & ors* (2017) LPELR.
[57] *Edet v Chagoon & Anor* (2007) LPELR 8164 CA.