

JUDICIAL FEDERALISM UNDER THE NIGERIAN CONSTITUTION

PRESENTATION OF HIS EXCELLENCY, MR. BABATUNDE R. FASHOLA, SAN AT THE 8TH ANNUAL GENERAL CONFERENCE OF THE SECTION ON LEGAL PRACTICE OF THE NIGERIAN BAR ASSOCIATION
UYO, AKWA IBOM STATE
NOVEMBER 11, 2014

Judiciary is universally acknowledged as the cornerstone of a civilized society. It is that arm of Government that is constitutionally empowered to adjudicate on disputes and frictions between persons and persons and authorities in a country. Without an organised means of dispute resolution, a society is nothing but a glorified forest. The attributes which mark judicial power apart from other governmental powers are not to be found in its compulsive character nor in the power of the court to determine disputed facts or interpret the law. No, the attributes lie in the power of a court to create enforceable rights and obligations by a binding decision between parties.¹ A discussion on judiciary is therefore of importance not only to members of the legal profession, but to every citizen in the country. Nigeria is Federation. *1 See generally, Ben Nwabueze, Federalism in Nigeria under the Presidential Constitution, Spectrum Books, 2nd Edition.*

This is much evident from the provision of Section 2(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which provides that: "Nigeria shall be a Federation consisting of States and a Federal Capital Territory." The defining feature of federalism is the recognition of the separateness and independence of each government that makes up the Federation. In his seminal book on the subject: **Federalism in Nigeria under the Presidential Constitution**, Professor Ben Nwabueze states that:

"Federalism is an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalised (i.e. territorially localised) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, 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 powers within a country are shared among two tiers of government.”²

2 Ben Nwabueze, Federalism in Nigeria under the Presidential Constitution, Spectrum Books, 2nd Edition, page 1

I believe the question that we need to ask is this: How federal is Nigerian Judiciary under the Constitution of the Federal Republic of Nigeria?

The starting point of any discussion of the Judiciary is to be found in the provisions of section 6 of the Constitution of the Federal Republic of Nigeria. It appears from the provision of the section that the Constitution intended that the Judiciary should be truly federal as pragmatically defined in the above quotation by Prof. Nwabueze. The Constitution draws a sharp line of distinction between the ‘Judicial Powers of the Federation’ and the ‘Judicial powers of a State’.

According to section 6(1) of the Constitution, “The Judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.” On the other hand, section 6(2) provides that: “the judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.”

That however is not the end. The Constitution further underscores the separateness of Federal Courts and State Courts by the delimitation it provided in its Chapter 7 which is headed ‘The Judicature’. Whilst Part I of the Chapter is headed ‘Federal Courts’, Part II is headed ‘State Court’. Under the Federal Courts, we have the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the National Industrial Court of Nigeria, the High Court of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of the FCT and the Customary Court of Appeal of the FCT.

For the State Courts, which are listed under Part II, these are; the High Court of a State, the Sharia Court of Appeal of a State and the Customary Court of Appeal of a State.

The federal structure of the Judiciary is however not limited to the Courts. The Constitution also delineates the administration of the Court between the Federation and the States. One of the bodies created for the Federation under section 153 of the Constitution is the Federal Judicial Service Commission. This is the body vested with the power to

advise the National Judicial Council in nominating persons for appointment to 'federal judicial offices'.

At the State level, we have the State Judicial Service Commission, which is one of the bodies established under section 197 of the Constitution, to exercise similar power as its federal counterpart.

From the foregoing, it appears, from parallel existence of the Judicature at the Federal and State levels, that there is judicial federalism in the Nigeria under the 1999 Constitution. Is that really the case?

Distinguished members of the Nigerian Bar, the answer to that seemingly simple question is not as elementary as it appears to be.

Unlike the Legislature and the Executive which have clear and stated mandates under the Constitution as between the Federation and the State, the judiciary does not benefit, in my humble opinion, from such precision.

A cursory look at the Constitution reveals that whilst sections 4 and 5 of the Constitution sets out in precise terms, the scope of legislative and executive powers as between the Federation and States, same cannot be said for the Judicature. Subsections 1 to 5 of section 4 expressly provide for the scope and extent of the federal legislative powers in sharp contrast to subsections 6 and 7 which deal with legislative powers of the State House of Assembly. The same scenario is to be found in section 5 where another line of distinction is drawn between the Executive power of the Federation (see section 5(1)) and the Executive powers vested in a State (see section 5(2)).

We can now compare the above with what is obtainable under section 6 of the same Constitution. After the structural delineation, which I referred to above, what we have in section 6(6)(a) and (b) of the Constitution is omnibus judicial powers which are vested in both Federal Courts and State Court. For purpose of clarity, the sub-sections provide that:

"The judicial powers vested in accordance with the foregoing provisions of this section – shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a Court of law...to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person."

It is arguable from the above that the framers of the Constitution did not intend a surgical separateness between the Federal Courts and State

Court as we have with the Legislature and the Executive. This is also the view of Professor Nwabueze who opined that the provision:

"...is not a definition of the extent of federal or state judicial powers. It is rather a definition of the nature of judicial powers, as a power for the determination of the civil rights and obligations of persons in justiciable matters brought before the courts by such regular proceedings as are recognized by law."³

If the foregoing is not conclusive of what I regard, for the purpose of this presentation, as 'Collaborative Judicature', the provisions of Part IV of Chapter 7 of the Constitution, I believe, is the icing on the cake. Section 286 empowers State Courts with jurisdiction in respect of 'Federal Causes'. It provides that:

"Subject to the provisions of this Constitution, whereby law of a State, jurisdiction is conferred upon any court for the hearing and determination of civil causes and of appeals arising out of such cause, the court shall have like

3 Ben Nwabueze, op cit. page 262

jurisdiction with respect to the hearing and determination of Federal causes and of appeals arising out of such causes.⁴

The implication of the provision is that the Constitution recognizes the fact that state judicial powers may extend to justiciable matters arising under laws made by the National Assembly. This underscores, again, the fact that separation between Federal Court and State is not in a watertight compartment.⁵

The existence of the Appellate Courts is also another indication of what I may, with greatest respect, refer to as 'unitary federalism' of Nigerian Judiciary. Whereas the Constitution recognizes the separateness and the parallel existence of the Federal High Court and the State High Court, the Sharia Court of Appeal of the FCT and the Sharia Court of a State, as well as the Customary Court of Appeal of the FCT and the Customary Court of Appeal of a State, there is no provision for the establishment of Appeal Court and the Supreme Court by the State under the 1999 Constitution. ⁶

In effect, there is only one Court of Appeal and only one Supreme Court for the entire Federation of Nigeria. It could therefore be argued that

whilst there exists federalism of some sort at the level of the High Court, the same argument cannot be

4 'Federal cause' is defined by section 286(3) to mean "civil or criminal cause relating to any matter with respect to which the National Assembly has powers to make laws."

5 This is what Nwabueze refers to a 'direct constitutional grant'. Nwabueze, op cit.

291.

6 Under the Republican Constitution of the Federation, 1963, the Regions had the option of establishing an intermediate appellate court between the High Court and the Supreme Court. See sections 52 and 53 of the Republican Constitution of the Western Region, the Court of Appeal Edict, No. 15 of 1967 and the Court of Appeal (Commencement of Provisions) Notice, 1967

convincingly made at the appellate court. The position of Professor Itse Sagay that: "In a federal system, there is no hierarchy of authorities, with central government sitting on top of others. All government have a horizontal⁷ relationship with each other" ⁸ could therefore not be applied, *mutantis mutandis*, to Nigerian Judiciary.

The concept of horizontal relationship is the hallmark of federalism.⁹ What we have, however, at the appellate level is a form of vertical relationship. In effect, appeals in cases arising under the Constitution and those arising under federal and state laws alike go from the lower Court (both Federal and State) to the Court of Appeal and thereafter to the Supreme Court. According to Nwabueze, the Court of Appeal and the Supreme Court are "...courts of appeal for the whole country in cases arising under federal as well as state judicial power."¹⁰

Distinguished Gentlemen of the Bar, we may need to look at the practice in the United States, in order to put Nigerian Judiciary in perspective. This is an exercise that had earlier been done by Prof. Nwabueze and he concluded that:

"While decisions by the state courts on issues of federal law may be appellable ultimately to it, the Supreme Court of the United States has no appellate jurisdiction whatsoever

7 Emphasis mine.

8 Itse Sagay, Anatomy of Federalism With Special Reference to Nigeria' in Trends in Nigerian Law: Essays in Honour of Oba DVF Olateru-

Olagbegi, page 188

9 See Wheare, Federal Government, 4th Ed., Oxford, 1963 – "The fundamental and distinguishing characteristic of a federal system is that neither the central nor the regional governments are sub-ordinate to each other, but rather, the two are co-ordinates and independent."

10 Nwabueze, op. cit. 297

over their decisions on matters arising under state laws. No federal court in the United States other than the Supreme Court in its original jurisdiction in cases in which the United States is a party or in cases between two states or in which certain other specified persons are parties, has jurisdiction to administer state laws."¹¹

If we compare the position in the United States what is obtainable in Nigeria under the Constitution of the Federal Republic of Nigeria, the question again is this: 'How federal is Nigerian Judiciary?'

Our examination of the topic 'Judicial Federalism Under the Nigerian Constitution' cannot be complete without a brief discussion of the role of the National Judicial Council in the Nigerian Judiciary. The National Judicial Council is one of the bodies established under section 153 of the Constitution as "Federal Executive Bodies."

One of the functions of the NJC is to recommend to the Governors from the list of persons submitted to it by the State Judicial Service Commissions persons for appointment to the offices of the Chief Judges of the States and Judges of the High Court of the States, the Grand Kadis and Kadis of the Sharia Courts of Appeal of the States and the Presidents and Judges of the Customary Courts of Appeal of the States.

11 ibid.

There is no doubt that the independence of the NJC and other bodies is enshrined in the Constitution. Section 158 provides that the NJC "...shall not be subject to the direction or control of any other authority or person." Therefore this paper is not about impartiality of that distinguished body. However, viewed from the prism of federalism, the fundamental issue is the appropriateness of such a body in a federal structure.

The federalist argument is that whilst the noble intention of the framers of the Constitution to create an independent body for the judiciary is not

in doubt, the existence of a single body for both the Federation and the States put a question mark on our federalism.

Having critically reviewed the place of the NJC under the 1999 Constitution, it is the view of Prof. Itse Sagay that one of the constitutional defects inherent therein is: "establishment of an essentially federally controlled National Judicial Council for the appointment, discipline and removal of judicial officers."¹²

Historically, under the 1979 Constitution, the power being exercised by the NJC was vested in the Federal Judicial Service Commission. The then FJSC had the power to "advise the President in nominating persons for appointment, subject to the approval of the Senate, as respects appointments to the Office of..." federal judicial officers.¹³ In the same vein, the State Judicial Service Commission ¹⁴ had the constitutional responsibility to

12 Sagay, op. cit, page 202

13 see the Third Schedule to the 1979 Constitution.

14 Established under section 178 of the 1979 Constitution

advise the Governor in nominating persons for appointment to State Judicial Offices.¹⁵

It is evident from the above comparison between the 1979 Constitution and the 1999 Constitution that whilst former was in consonance with the fundamentals of federalism, the latter appears to be a sort of hybrid between federalism and unitary structure.

Distinguished Gentlemen of the Bar, the topic assigned to me for discussion this morning is Judicial Federalism under the Nigerian Constitution. From the foregoing, it appears to me that Nigerian Judiciary is in the process of evolution. It is submitted, with greatest respect, that for our judiciary to be truly federal in nature and in character, the power of the State, as a coordinating government in the Federation, must be enhanced.

On a final note, Distinguished Ladies and Gentlemen, permit to conclude this presentation with the following quotation from my former lecturer, a professor of Law and a Senior Advocate of Nigeria, Prof Itse Sagay who opined that:

"...in order that our federation should survive, we must shed the current federal stranglehold on Nigeria and go back to true federalism, not only structurally, but also in spirit. We must imbibe and practice respect for the independence of the State, the rule of law, the solidarity of

***the centre with the Federating units in mutual cooperation.
That is the only way***
15 see the Third Schedule to the Constitution.
***forward for a united and harmonious Federal Republic of
Nigeria.”***

BABATUNDE R. FASHOLA, SAN
Executive Governor, Lagos
Lagos House, Ikeja