

**BEING TEXT OF PAPER DELIVERED BY EYITAYO JEGEDE SAN
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**“APPROPRIATE FUNDING OF THE JUDICIARY
THE CHALLENGES AND ASSOCIATED RESPONSIBILITY, THE
EXPERIENCE OF STATES JUDICIARY”**

PROTOCOL

INTRODUCTION

1.01 Before now, the agitation and worry concerning the administration of Justice, had been the perceived influence of the Executive Arm of Government in the affairs and pronouncements of our courts. The agitation and worry later turned on the abuse of Judicial power by a number of our Judges who at the prompting of litigants grant Ex-Parte Orders without affording the other side opportunity of hearing.

1.02 Of late however, the area of challenge has been the perceived underfunding of the Judicial Arm of Government, both at the Federal and state levels. This problem informed the position of resolution of Judiciary Staff Union of Nigeria (JUSUN) to press for full implementation of those constitutional provisions relating to the funding of the judiciary.

1.03 What would definitely be a long drawn battle, started with the demand for legislation for a self Accounting system for the judiciary. It was the belief, that a self accounting Law will guarantee adequate funding and financial autonomy of the Judiciary in the states of the Federation. That belief turned out to be misplaced. What followed was a round of negotiations, between JUSUN and the Executive Arm. That negotiation again yielded no positive result.

2. THE COURT ACTION

2.01. Interestingly, to press home the agitation for improved funding of the Judiciary, JUSUN initiated a claim against the National Judicial Council, the various Attorneys General of the states and the Attorney General of the Federation. That was suit FHC/ABJ/CS/667/13. The Federal High Court eventually delivered judgement granting all the reliefs claimed by JUSUN.

2.02 In that suit, His Lordship, Ademola J. ordered as follows:-

"A declaration is hereby made that the 2nd-74th Defendants failure, neglect and/or refusal to pay the Funds/Amount standing to the credit of the states Judiciary in

the Federation/consolidated Revenue Fund directly to the Heads of courts in the various states Judiciary is a constitutional breach which has to be abated forthwith.

- (1) "That an order is hereby made that the piece meal payments/allocation of funds through the states Ministry of Finance to the states judiciary at the 2nd -74th defendants pleasure is unconstitutional, unprocedural cumbersome, null, void and be abated forthwith".**
- (2) "That an order is hereby made mandating/ compelling the 2nd -74th Defendants to comply with the provision of section 81(3), (4) (3) and 162 (9) of the 1999 constitution (as amended) in the disbursement of funds to the head of courts forthwith".**
- (3) "That an order of perpetual injunction is hereby made restraining the 2nd -74th**

***Defendants, their agents, assigns, privies,
etc from committing any further breach of the
aforesaid constitution/statutory provisions”:***

2.03 Instructively, the then Chief Justice of Nigeria, Hon. Justice Mariam Aloma Muktah CON, CFR, GCON in a letter dated 6th August 2014 drew the attention of all the Governors in the country to the judgement and advised compliance “*in the interest of a good working relationship amongst Arms of Government*”. That letter was also copied to the Attorneys General of the 36 states of the Federation.

The position of the Chief Justice of Nigeria, I believe was informed by the threat of strike action from the leadership of JUSUN.

2.04 While the judgment of the Federal High Court “*ordered*” against piecemeal payments/allocation of Funds describing such instalmental releases as “*unconstitutional*”, “*unprocedural*”, “*cumbersome*”, “*null*” and “*void*”, the funds remitted to the states from Federation Account are received piecemeal or instalmentally depending on accruals into the Federation account (same for the Internally Generated Revenue). The periodic or installmental release of funds to states from

Federation account therefore, makes compliance with the order of the Federal High Court impracticable even with the best of intentions.

2.05 The other reason that militated against compliance with the Judgement of Ademola J. on the part of the States is the pronouncement of the Supreme Court which invalidated the provisions of Section 162(9) of the CFRC 1999 (as amended) That section was adjudged *super flous and otiose*. That is the decision in the case of **A.G. Federation v A.G. Abia State (No.2)(2002) 6 NWLR (Pt 764) page 542** delivered on 5th April, 2002. The pronouncement of the Supreme Court therefore constitute a potent challenge to the enforceability of the decision of Ademola J. in suit FHC/ABJ/CS/667/13.

3. Relevant Provisions of the Constitution

3.01 A good appreciation of the various sections relating to Funding of the Judiciary will start from a clear appreciation of the role and function of the Judicial Arm of Government in our democracy. It is only after that , that the provisions of the constitution relating to funding will be properly understood.

3.02. The Constitutional role and function of the Judicial Arm of

Government was captured in the pronouncement of, Mustapha J.S.C (as he then was) in the case of **Attorney General, Abia State vs Attorney General Federation and Ors (2006) 16 NWLR (Pt 1005) pg 265 at 454 para A-D**; Hear his Lordship:

"It is also important to bear in mind that the judiciary, especially the Supreme Court in particular is an essential integral arm in the governance of the nation. It is the guardian of the constitution, charged with the sacred responsibility of dispensing justice for the purposes of safeguarding and protecting the constitution and its goals. The judiciary when properly invoked has a fundamental role to play in the structure of governance by checking the activities of the other organs of government and thereby promoting good governance, respect for individual rights and fundamental liberties and also ensuring the achievement of the goals of the constitution and not allow the defeat of such good goals and intendment. It is the duty of the court to keep the government faithful to the goals of democracy, good governance, for

the benefit of the citizens as demanded by the constitution”.

3.03 My Lord Rhodes-Vivour, JSC, in **PDP vs Sylva (2012) 13NWLR (PT 1316) Page 85 at 139** quoting from the decision of Supreme Court in **Ameachi v INEC (2008) 5 NWLR (PT 1080) p. 227 at 324 paragraph A.-G.** put it this way:-

“This court and indeed all courts in Nigeria have a duty, to ensure that citizens of Nigeria, high and low get the justice which their case deserve. The powers of the court are derived from the constitution not at the sufferance or generosity of any other arm of Government of Nigeria. The Judiciary like all citizens of this country cannot be passive on looker when any person attempts to subvert the administration of justice and will not hesitate to use the powers available to it to do justice in cases before it”.

3.04 Now the relevant provisions of the constitution that should oil or lubricate or indeed give effective guarantee to a faithful and courageous performance of the constitutional role of our courts are Sections **6(1), (5), & (6), 80(2), 81(3), 84(1), (2) (4), & (7),**

162(3) (9), 231(1) & (2) 238(1) 249(1) 256(1) 266(1) 271(1) 276(1) and 292(1), of the Constitution of Federal Republic of Nigeria (1999) (as amended). The above provisions instructively deal with the powers of the courts, the manner of appointment, issue of funding and removal of Judicial officers from office.

3.05 I take the liberty to reproduce the provision of sections 80(3) 84(7) and 162(9) of the constitution, relating to funding of the Judiciary.

"80(3) Any amount standing to the credit of the judiciary in the consolidated revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the States under section 6 of this constitution

"84(7) the recurrent expenditure of judicial officers in the federation(in addition to salaries and allowances of the judicial officers mentioned in Subsection(4) of this section) shall be a charge upon the consolidated Revenue Fund of the Federation"

"162(9) Any amount standing to the credit of the Judiciary in the Federation account shall be paid

***directly to the National Judicial Council for
disbursement to the Heads of Courts established
for the Federation and the States under section
6 of this constitution”.***

3.06 In my view, and notwithstanding the interpretation given by our courts, a community reading of the above sections will show that it is the "recurrent expenditure" of Judicial officers and offices in the Federation including salaries and allowances that are charged on the consolidated Revenue Fund. See the Provisions of Section 84(2), (4) and (7) of the constitution, where recurrent expenditure and personnel cost of the judiciary is charged upon the consolidated revenue Fund of the Federation.

3.07 One issue that agitated the mind of the critical stakeholders involved in the implementation of the provisions that touches on the funding of Judiciary in the constitution, during the Jusun strike, is whether, the funds due to the judiciary and "*secured*" by the constitutional provisions will include the capital expenditure, or whether such capital expenditure should not be administered by the Executive arm of Government.

3.08 I will attempt to put across the argument advanced by the opposing

sides. It was argued that the Judiciary as an Arm of Government is independent, autonomous, and in addition to its constitutional responsibility, should be able to carry out some additional responsibilities. For instance it was argued that Judiciary should design, build and construct her court buildings, and develop her infrastructure. This is notwithstanding the establishment and existence of the various Ministries of Works, Housing, etc within each state, and at Federal level.

3.09 On the other hand, it was argued, in opposition that the independence of the judiciary is in respect of the judgements and the courts jurisdiction to determine cases brought before her, and the manner of appointment and disengagement of its officers. It was also argued that the provision of infrastructure by Government is an Executive Function, and that accounts for the setting up of various agencies of Government under the Executive Arm, to take care of the subject of provision of physical infrastructure and developments.

3.10 It is noteworthy that the various states of the Federation have different practices. While some states provide for both Recurrent and Capital expenditure and Funding under the control of the

Judiciary, a good number of states provide for recurrent budget and other ancillary operational costs under the budget of the Judiciary, while the Ministry of works & Housing is allowed to handle and supervise capital projects.

3.11 Again in my view, the issue of funding of **capital project**, will depend entirely on the budgetary provisions captured in the Appropriation Law of each State and the Federation. This is so because, the Constitution of Federal Republic of Nigeria, under section 84(2)(3) (4) and (7) have specific and definite provisions for salaries, allowances and other recurrent expenditure as a charge upon the consolidated revenue Fund of the Federation. There are similar provisions for first line charge on the consolidated Revenue Fund of the states (see section 121(2)(3) of the CFRN. 1999 (as amended)).

3.12 Instructively section 120(2) (3), and (4) of the constitution recognized the fact that moneys can be withdrawn from the Consolidated Revenue Fund of the state as may be allowed under each appropriation law of the state.

3.13 The debate on the dichotomy between the Recurrent Expenditure

and Capital Vote, as interesting and academic as it is, is in my view completely unnecessary. Capital vote and spending in my view, is in the domestic domain of the legislature. The framers of our constitution, in their wisdom, and I want to believe in a genuine effort to espouse the principle of democracy, and engender the spirit of "*checks*" and "*balances*" thought it fit, to allow the Legislature to superintend over matters of Legislation even on fiscal matters as permitted by the constitution. Capital Expenditure is one of those areas that the Legislature can exercise control.

3.14 Some have argued that the office of Chief Registrar of the Supreme Court, and other Courts including Chief Registrars of the state High Courts can superintend over critical capital budget, i.e. by engaging in construction of houses, courts buildings etc. This may be a distraction for the judiciary. The arm of Government that should be the guardian of our constitution, and arbiter in all disputes between individuals should ordinarily restrict itself to those constitutional roles earmarked for it in the Constitution of the country. Resolution of disputes is the responsibility and function of the judiciary, such should not extend to Executive responsibilities and functions. The

function and responsibility of making laws, and the function and responsibility to carry out Executive function remain on the strength of our constitution that of the Legislature and the Executive Arm respectively.

3.15 A judge is saddled with the function and responsibility to interpret our laws. The pronouncement of Tobi JSC in the case of Attorney General Abia State Vs. Attorney General, of the Federation and 37 ors. **(2006), 16 NWLR (PT 1005) page 265 at 382 para F.** is apt. This is the pronouncement of His Lordship:-

"As a judge, I am directed to interpret the Laws of this country which include the constitution and statutes. Where there is infraction of the law, I have a constitutional duty to say so and I must say so".

At page 383 para D-F. His Lordship continued

"Courts of law, including this court, have no Jurisdiction to question the law making power of the National/Assembly and the House of Assembly of states. This is because the power to make laws is vested in them and the court cannot by or through the common law remove the power from them. But where a statute is

enacted in breach of the constitution; the courts must come in to stop the breach. This the courts can do, only by one or more parties seeking the courts jurisdiction to declare a statute void”.

3.16 The point I am struggling to make, which is the reason that I seek to rely on the pronouncement of Supreme Court in the above case is to demonstrate that there are defined constitutional roles for each of the three Arms of Government, and none should seek to usurp the function of the other, under any puristic or patriotic motive.

3.17 It is desirable and important, that the independence of Judiciary be protected and preserved, it is equally important that those fine demarcations and appropriation of functions in relation to other Arms of government must be recognized and respected.

4. Section 162 (9) of CFRN 1999 (as amended) and the Case of AG Federation V. AG Abia (No 2)

4.01 Given the interest that Section 162(9) of CFRN has generated. It is important to set it out once again.

“Section 162(9) “any amount standing to the credit of the Judiciary in the Federation Account shall be paid directly to the National Judicial Council for

disbursement to Heads of Courts established for the Federation and the states under section 6 of this Constitution”

4.02 The decision of the Federal High Court in **Suit No. FHC/ABJ/CS/667/13** is predicated on section 162(9) of the Constitution. The Supreme Court in the case of **A.G. Federation V. A.G. Abia (2002) 6 NWLR Pt. 764 page 542** had earlier held that the judiciary had no fund assigned to it in the Federation Account, as the Funds in Federation Account is meant to be shared between the Federal Government, the States of the Federation and the Local Governments in the Country.

4.03 While the JUSUN Strike raged on in virtually all the States of the Federation, a former President of the NBA, Mr. J.B. Daudu SAN, published a profound exposition of law, drawing the attention of the JUSUN, and the Attorneys’ General of the States, to the decision of the Supreme Court in the case of **A.G. Federation V.A.G. Abia.**

This is what he said:

“As far back as 2002 in the celebrated case of Attorney General of the Federation V. Attorney General Abia No.2(2002) 6 NWLR Pt 764, pt. 542.

the Supreme Court held concerning the revenue of the Judiciary vis a vis section 162(9) of the Constitution which formed the bedrock of the judgement in JUSUN's favour that;

- (a) funding of Joint Venture contracts and funding of Federal/State Judiciaries cannot by any stretch of imagination be charged on the Federation Account as the funds to the account is exclusively to be shared between the Federation, States and Local Governments.***
- (b) that the provision of Section 162(9) referred to above is both superfluous and otiose as the expenditure of the Judiciary is to be charged from the consolidated Revenue Fund of the Federation and States respectively which are created by sections 81 and 121 of the Constitution"***

4.04 It is now settled that indeed there is no fund to be shared directly with the judiciary from Federation Account contrary to the impression given under Section 162(9) of the Constitution. The views of **UWAIS C.JN** at page 960 – 1 is relevant.

"It has transpired also that other deductions are

being made from the Federation Account in respect monies paid to National Judicial Council for funding the Federal and State and for funding joint venture contracts and Nigerian National Petroleum corporation priority projects. All these deductions are carried out as front line charge on the Federation Account. All the deductions are not provided for by the 1999 Constitution notwithstanding the provisions of section 162 subsection (9), in the case of National Judicial Council so that even if any enactment has provided for them, like the Appropriation Act by National Assembly, such enactment is inconsistent with the Constitution and is therefore void to the extent of the inconsistency."

4.05 Onu JSC at page 876/7 held as follows in the same Judgement referring to provisions in section 84(1) (2) (4) and (7):

"the above provisions have been made to emphasize how it is the Consolidated Revenue Fund of the Federation established under Section 80 of the Constitution and not the Federation Account that is charged with the salaries and allowances of judicial officers as well as recurrent expenditure

of Judicial offices in the Federal. It is then to be stressed how the charge on the Federation Account is therefore unconstitutional notwithstanding the provision of sub-section 9 of section 192 (sic) which states.....” If it was intended by the above provision to give the judiciary, a share of the Federation Account such has not been made manifest. Sequel to these, all charges in the Federation Account Considered herein are inconsistent with the Constitution and are therefore invalid.

Consequently, I am in agreement with my learned Brother Ogundare, JSC to grant 10th Defendant’s Claim (F) and hereby declare that the underlisted Policies and/or practices of the Plaintiff are Unconstitutional being in conflict with the 1999

Constitution to wit:

- (i)***
- (ii)***
- (iii) Funding of the Judiciary as a first line charge on the Federation Account***
- (iv)***
- (v)***

4.06 The above pronouncements I believe settled the raging issue of direct line charge on Federation Account especially, the effect and validity of **Section 162(9), of CFRN.1999 (as amended)**.

5. THE PRACTICE, BEFORE AND AFTER THE JUSUN STRIKE

5.01 The point should be made that before the JUSUN strike of 5th January, 2015, it was a common sight to find Chief Judges of the States High Court, seeking for approval before the Governor of a States. The reason for this is two folds. The first is that in most of the States, there is always provision for Capital Budget for the Judiciary in the respective appropriation Laws of the States, and given the paucity of Funds, there is always a contest for the limited fund available especially to execute Capital Projects. The effect is that the Judiciary is compelled to struggle for what is available along with other Arms and agencies of Government.

5.02 The second reason, is that some heads of spending are drawn from votes of other Departments of government, in that they are not captured in the budget of the Judiciary as an Arm of Government. Two examples quickly come to mind; Health and Foreign travels. Funds needed for medical bills are usually drawn from the votes of

the Ministry of Health, which is the Ministry that service all the Health needs of offices and officers in government departments. The votes for foreign travels is drawn from Protocol and Foreign travels votes.

5.03 In all the States of the Federation, the funding of the judiciary like all other Arms of Government has always been based on monies accruing to the State from the Federation Account and the IGR of the State. The judiciary has its own Budget comprising Recurrent and Capital Expenditure. While certain heads in the Recurrent Expenditure like personnel cost are automatically released monthly based on the budget and the availability of funds, certain Heads like "*Special programme*" is also now released depending on the remittances from Federation Account and the I.G.R. The Capital Expenditure is dependent on the available Funds.

5.04 The agitation of JUSUN was therefore intended to make all heads of the Recurrent and Capital Expenditure automatically payable or released without any request to Government as soon as the budget is passed and assented to. This is what is loosely called "*autonomy*" or "*Financial autonomy*". Against the preconceived notion, albeit

ignorantly, that Government is at all times financially buoyant, it was somewhat difficult during the negotiations between JUSUN and the Government to convince the representatives of JUSUN to agree that since Funds available to the state fluctuate and are limited and dictated by what accrues from the Federation Account and the IGR, Government would not be able to accept or agree to wholesale enbloc release of funds to the judiciary all at once.

The negotiations in most of the States of the Federation culminated in different Memoranda of Understanding, putting an end to months of Judiciary strikes in the States.

5.05 Again in the course of our various discussions on the funding of the Judiciary and JUSUN strike, by this I mean discussions between the Attorneys General of our various States which I was privileged to coordinate on one hand, and the Honourable Chief Justice of Nigeria and our various Heads of Court on the other hand, the fear was expressed that in the process of legislation for Capital expenditure, the legislature may underfund the Judiciary. Again, in my own view, the Judiciary Arm of Government cannot interpret the law and legislate at the same time. These are different functions given to

different Arms of Government, that is why I proffer the solution that no **Arm of Government is an island in itself**. The checks and balances imposed by the Constitution also in my view imposes a complementary relationship. The fact that each Arm checks the other, underscores the principle that none can do without the other.

5.06 The Body of Attorneys General, realistically reviewed the areas of dispute between the contending parties and came up with a position. That position is to principally ensure that whatever is available to the Judiciary under the budget is released periodically, and where there is any shortfall in revenue and remittances, it will affect funds due to all organs of government especially on the capital vote. That position is contained in the letter signed by myself on behalf of all Attorneys General of the 36 States. I believe the contents of that letter is still relevant and I quote a portion of same. This is what we said:

"(1) that those constitutional provisions dealing with the funding of the Judiciary should be implemented

(2) Whereas each State of the Federation appropriate funds to its Judiciary every Financial Year, and as the States rely on revenue from Federation

Allocation and IGR in funding their budgets, each State is to ensure that funds due to State Judiciary are released to Heads of Courts on monthly or quarterly intervals.

(3) Noting however, that funds due to the States from the Federation Account and IGR fluctuates for reason beyond the control of the States, funds appropriated therefore in favour of the judiciary is to be released in any given month or quarter in proportion of any shortfall in the revenue of the State.

(4) that such available funds (where there is shortfall), should be released monthly or quarterly without subjecting the Head of Court to the bureaucratic process of making request for funds and awaiting approvals.”

5. Conclusion

6.01 The challenge of funding of the Judiciary has been with us for decades. The challenge was neither caused by the present administration, nor was it caused by the previous ones. It had remained with us for as long as I can remember. It evolved from lack of understanding of the provisions of the constitution, that the

Judiciary is an Arm of Government and as an arm of government, it deserves better if not equal attention as other arms of government regarding adequate funding.

6.02 The strike action as a means of enforcing judgement of courts is to say the least novel. While one may not entirely be in support of strike action by JUSUN or any other body as a means of enforcing a judgement in the light of the provisions of our laws especially the Trade Dispute Act and the Sheriff and Civil Process Act, the good side to this is that it had waken our collective consciousness to the daunting challenge of underfunding in the judiciary.

6.03 The damage caused by the Strike Action to the socio political life of our nation and the economic disruptions and the brutal assault on the rights of the citizens is there for all to see. Despite this the Judiciary has emerged from this I believe stronger and better, despite the negative effect on litigants especially the aggrieved and the government itself.

6.04 I round off by calling on the Executive Arm, the Leadership of the Legislature, our Heads of Courts, to sit down and address the challenges of funding in the judiciary. This is important, having

regard to the critical role, reserved for the Judicial Arm of Government, in interpreting of our statutes, and adjudication of cases.

6.05 The Executive, the Legislature and the Judiciary must understand the fine demarcations prescribed in the Constitution and live by them. Those fine demarcations referred to commonly as separation of powers confirm the need for each Arm of Government to be complementary of each other, in the interest of good governance, sustenance of our democracy and by extension the nurturing of all the institutions that are established to keep our nation, running and effective.

6.06 Thank You.