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THE DOCTRINE OF SEPARATION OF POWERS UNDER THE NIGERIAN CONSTITUTION

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Abstract

Separation of powers is a hallowed constitutional principle of the democratic government of Nigeria for the three arms of government to stay in their assigned tracks to avoid arbitrary excesses by any of the arms. The ideal is that the legislature makes the law; the executive executes the law, while the judiciary interprets the law. In recent times, the president of Nigeria churns out Executive Orders in the form of 'laws seeking to regulate the activities of the government and the people. Similarly, agencies of the federal government have been found wanting in this act. This paper thus revisits the doctrine of separation of powers in Nigeria with a view to justifying its practice and an examination of the emerging trends of Executive Order and independence of the judiciary. The paper finds that the practice of separation of powers is on course in Nigeria despite some pockets of arbitrariness and concludes that adherence to the principles of separation of powers remains a sine qua non to Nigeria's successful democratic journey.

Keywords

Constitution, Separation of Powers, Checks and balances, Executive Order and rule of law

1. Introduction

The Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN, 1999) was examined in this study to see how the idea of separation of powers is applied to the three branches of government; the Executive, the Legislature, and the Judiciary.

The Nigeria's presidential system of governance is predicated on the supremacy of the Constitution, the doctrine of separation of powers and the principle of the rule of law, which are the three constituent pillars of any democratic government. This work began with an analysis of the meaning, history and practice of the doctrine under the military regimes and under previous Constitutional enactments in Nigeria, in addition to the present including attendant checks and balance measures. Additionally, emerging issues affecting the practice of separation of powers in Nigeria like executive order by the President is still functional in Nigeria with pockets of arbitrariness by the executive arm of the government which merits our discussion.

1.2. Literature Review

The literature review will briefly examine the historical origins of the principle of separation of powers and its meaning below.

1.2.1. History

The principle of separation of powers as it is known today was the basis of this principle to dissuade men from the temptation to grasp power of making laws, to execute them, whereby they may exempt into one hand for fear of putting it to their own private advantage according to (*Locke, J, 1960*).

It follows that political liberty can only be established in an environment free of abuse of power as proposed by (*Baron Montesquieu in 1748*). Constant experience, however, demonstrates that every guy who is given authority is prone to misuse it and extend it as far as he can. In order to avoid this kind of exploitation, it is essential that one power be a check on the other. As a result, the notion of executive and legislative branches of government was acknowledged and codified in the US Constitution. The US Court in 1926 made this pronouncement according to Baron de Montesquieu that the doctrine was to preclude the exercise of arbitrary powers among the 3 departments and from anarchy.

2. Separation of Powers under Military Regimes in Nigeria

According to (*Chinwo, C, 2020*) the military is an undeniable organ in the matter of politics and the Constitution of Nigeria. The military in Nigeria first got involved in the political system with neither an invitation nor a directive of the civilian government authority, as should happen in cases of emergency under the existing Constitution. The effect of a military coup in Nigeria has always been to sack the legislature and the executive organ, replace it with a military head of state by whatever name called and other officers appointed by him from time to time at different levels.

It is in the character of each military junta, upon a successful usurpation of power of government, albeit, by unconventional means, to suspend some parts of the Constitution, irrespective of the constitutional provision for the amendment of the constitution. This attitude of the successive military administrations in Nigeria simply underscored the disdain for which the military holds the doctrine of separation of powers during their administration. With military administrations, the judiciary was also allegedly made inefficient and devoid of judicial powers under numerous constitutions, making them unable to carry out their duties. By promulgating orders pretending to eliminate the court's authority, military officers seize control of the judiciary and deny it the ability to carry out the functions and responsibilities placed on it by the CFRN, 1999 per *A-G Federation v Guardian Newspapers Ltd (1999)*.

It is also worthy to note that the judiciary, even during military regimes, was bold in the defence of its constitutional roles - the much it could in the circumstances. In the famous case of *Attorney General (Western State) & Ors v. Lakanmi (1971)* the separation of powers provided under the 1963 Constitution was relied upon by the Court when it held thus:-

We have a three-tiered system of government under our Constitution: legislative, executive, and judicial. Our constitution is based on the American Constitution in every way possible.

As stated in the 1963 Constitution, the Supreme Court unambiguously affirmed the idea of separation of powers. A military law, Decree No. 28 (Supremacy and Enforcement of Powers) Decree of 1970, effectively nullified the Supreme Court's ruling. Nevertheless, this has not made the judiciary to falter in their constitutional functions even during military regimes through decisions that challenged the military authorities to their marrow. The judiciary although often ends up in hushed voices, benumbed limbs, bruised noses or visage, is usually, at least, on paper,

left untouched by Military power when it takes over power. Quick to state here that Section 1(2) of the Constitution has in very clear terms outlawed military and other undemocratic takeovers of governance in Nigeria -the rationale being that the process of their emergence to power by military might are clear signs of disrespect for due process and the rule of law. It is expected that the perpetrators of the various military coups – both successful and unsuccessful ones - should be seen and treated a law-breakers and punished accordingly because right from independent, the Nigerian Constitutions outlawed violent takeover of government.

2.1. Separation of Powers under the 1960 and 1963 Nigerian Constitutions

There were two constitutions in force during Nigeria's first democratic transition: the 1960 Independent Constitution and the 1963 Republican Constitution, both of which had provisions for the separation of powers, but with less stark distinctions than those of succeeding times. Chapter IV of both the 1960 and 1963 constitutions created the Governor-Office General's and the President's Office, respectively. For the Parliament, both constitutions had Chapter V; for the judiciary, both had Chapter VIII. Chapter VI outlined the President's and Governors' methods for carrying out their duties as chief executive officers. Both Constitutions did not have a clearly defined division of powers. To be eligible to serve in executive posts, a person must be elected to either the federal or regional legislature, as stipulated in the 1960 or 1963 constitutions.

2.1.2. Separation of Powers under the 1979 Constitution

Sections 4, 5, and 6 of the 1979 Constitution of the Federal Republic of Nigeria, which was in effect throughout the Second Republic of her democratic experiment, allowed for a clear separation of powers. The Constitution established the legislative branch in Chapter V, the executive branch in Chapter VI, and the judicial branch in Chapter VII. In accordance with this arrangement, the executive branch of government is responsible for carrying out the laws passed by the legislature and enforcing the court's decisions; the legislature is responsible for passing laws, while the judiciary adjudicates and interprets the laws passed by the legislature. This arrangement is completely consistent with the principle of separation of powers. This notion under the Constitution of 1979 was interpreted by the courts in the 1981 case *A-G Bendel State v. A-G Federation & 22 Ors*, in which the Supreme Court ruled that when the President signs a bill, he is exercising executive powers within the legislative process.

The essence of the theory is to allow for checks and balances, hence promoting a healthy influence or control by one party over the actions of the other. As accurately stated by (Ali, Y., 2019), "the whole concept indicates that the legislative, the executive, nor the judicial would exercise the entire or a portion of the functions of another," but it does not exclude influence or control by one over the actions of another.

The politicians in power in 1979 did not fully adhere to the notion of separation of powers set out in the Constitution. The civilian administration likewise worked harder to nullify the Constitution's provisions on the separation of powers, although less obviously. The fact that the legislative branch of government was not independent of the executive branch during the Second Republic, which lasted from 1st October 1979 to 30th December 1983, was brought to light by (Nwabueze, B.O, 1985). The President and Governors in particular, he said, had the luxury of abusing their positions and influence to utilize the power of patronage to subjugate members of the Legislature. Some believe that despite clear and detailed rules for separation of powers, those who interpreted and enforced it did not completely adhere to it, probably because of a protracted military interregnum during the country's post-World War II period.

2.1.3. Separation of Powers under the 1999 Constitution

There are no changes to the separation of powers clauses in the Federal Republic of Nigeria's 1999 Constitution (as amended), which is the same as the 1979 Constitution. According to Sections 4, 5, and 6 of the Constitution, the Executive, Legislative, and Judiciary were each given a part of the Federation's authority. Section 4 of the Constitution grants the National Assembly and Houses of Assembly of the States the authority to make laws for the federal government and for each of the states. Section 5 of the Constitution grants executive authority to the government's executive branch. According to S.6 of the Constitution, the Judiciary has the ability to adjudicate and interpret the law.

So, the three branches of government have separate roles, underscoring the fact that the Constitution specifies a clear division of powers between them. Individuals who are members of one arm cannot concurrently be members of another. Thus, no one who has served as a judge in the superior courts of records can ever hope to join the other two branches of government - no matter how far up the ladder they may have been.

In a plethora of judicial authorities such as *Kayili v Yilbuk* (2015), the Courts, have held as unconstitutional actions by any of the three arms of government that tend to undermine the

doctrine of separation of powers. More interestingly, the Courts have also resisted attempts to make the Judiciary infringe on the doctrine of separation of powers in *Amoshima v State* (2011).

3. Conceptual Analysis

Separation of powers, as the name indicates, refers to the division of government authorities and responsibilities across the three branches of government, namely, the executive (executive branch), legislative (legislative branch), and judicial (judicial branch). There are three departments of government: legislative, executive, and judicial, each having specific responsibilities that the other two cannot trespass on, according to this definition (*Garner, B. A, 2014*). The argument states that the Executive, Legislative, and Judicial branches of government should focus on policies and the implementation of laws, respectively, while the Judiciary should solely be concerned with interpreting the laws. According to Nigeria's constitution, each of the country's three branches of government must adhere within its designated limits in order to ensure that government powers are not concentrated in the hands of a few persons, but rather distributed among many institutions. Dictatorship is defined by the consolidation of governmental powers in a single individual's hands, according to (*Nwabueze, B.O, 1983*), who cautioned that absolute authority is arbitrary, capricious, and tyrannical by definition. Separation of powers is defined as the execution of three different duties by the three branches of government without excessive meddling and/or needless intervention in the affairs of another to maintain desirable checks and balances in government.

As the three parts of government are necessary for the creation, enactment, and administration of laws, the separation of powers serves to minimise the likelihood of arbitrary abuses by government. Separation of powers may be defined as the concept that only one of three branches of government has authority to take action at a given time: (*Paton, G.W. 1972*).

4. Research Issue

The major issue in this research is the examination of the principle of separation of powers with particular interest in how it is practiced in everyday situation in Nigeria and whether the necessary checks and balances are applied to keep the various arms of the government in check to avoid arbitrariness.

4.1. Issues of Checks and Balances

Constitutional rules for unambiguous separation of powers among the three branches of government do not guarantee total non-interference, but rather the need for cooperation between the three branches of government for a successful country's administration. Checks and balances is a notion which stresses that different organs keep an eye on each other's actions. According to (*Onyekachi, D. 2019*) the idea of separation of powers, known as checks and balances, this may be an exception.

Under the Constitution, there are also checks and balances in place to keep the government from going over the top, even if it seems to be lawful. "The concentration of government powers in the hands of one man is the exact essence of dictatorship, and absolute authority is by its very nature arbitrary, capricious and tyrannical," wrote (*Nwabueze, B.O, 1981*) in support of this position.

The notion of checks and balances extends to situations in which the powers of the executive and legislative branches have been united under the Constitution. There shall be no legislation passed by either House or National Assembly that interferes with the judicial rights or tribunals of the courts under Section 4 (8) of the *CFRN 1999*, and no law passed by either House or National Assembly that disagrees with this provision will be implemented.

Instances of the provisions for checks and balances under the CFRN, 1999 are legion: Firstly, by the combined reading of Sections 1 (1) and (3), 4 (8) and 6 (1) and (6) (a) – (b) of the Constitution, the Courts are the guardians of the Nigerian Constitution, hence no doctrine, including that of separation of powers, will inhibit the courts from voiding any act on the ground of unconstitutionality per (*Hon, S.T. 2016*)

In *Atoshi v A-G Taraba State (2012)*, while providing justification for deviating from the doctrine of non interference – by voiding the Legislative and Executive actions of the Taraba State House of Assembly and State Governor, respectively which had dissolved the elected Local Government Councils and replaced them with Caretaker Committees, the Court of Appeal held, per Yakubu, JCA, amongst others that

the Courts have the judicial powers to consider and determine whether the law so made by the legislature is consistent with the Constitution ... and that is the beauty of our democracy.

Secondly, the Constitution, by the provisions of S. 46 (3) authorizes the Chief Justice of Nigeria to make rules (laws) with respect to the practice and procedure of a High Court in fundamental right matters. In this particular instance, the judiciary appears to be performing legislative functions. Thirdly, under Section 32 (1) of the Constitution, the President is authorized to make regulation (laws) on matters concerning citizenship and immigration matters. This is such an instance where the President has been assigned a law making responsibility or so it seems.

Fourthly, the President or the Governor, as the case may be, is entitled to pardon a criminal or to exercise his prerogative of compassion - by, for example, erasing or expunging a convict's sentence issued by the court in a particular instance (*Section 171 and 212, CFRN, 1999*). In the same way, the President or "Governor with the relevant legislature" might remove a judge for misconduct in the same manner as described above (*Section 292, CFRN 1999*). Changes to current laws may be made by the President as well (*Section 315 CFRN 1999*).

Some executive bodies that were constituted by the Constitution have the authority and responsibility under the Constitution to manage their own operations as well as confer powers and impose duties on themselves (*Section 160 and 205 CFRN, 1999*). A Minister of the Federal Government or a State Commissioner is required to appear before the National Assembly or State House of Assembly, as applicable, to explain the conduct of his ministry in accordance with Sections 67, 108, 67(2) and 108(2) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999. Impeachment procedures may be initiated by either chamber of Congress under Sections 143 or 188, respectively, and the legislature has full authority to do so. *In A-G. Federation & Ors v. Atiku Abubakar & Ors*, the Supreme Court repeated this clause (2007).

Sections 147 (2) and 192 (2) of the Constitution mandate that the Legislature must approve all executive appointments of ministers and commissioners who are members of the Executive. According to Section 80 of the Constitution, the National Assembly has the jurisdiction to control public money and to set the salaries of the executive and judiciary.

S. 88 also grants to the legislature quasi-judicial powers to issue warrants, summons, and receive evidence on oath from any person in connection with its legislative powers of I which include the ability to investigate and expose corruption, inefficiency, or waste in the execution or administration of funds appropriated by the legislature. An appeals court found that the provisions of Sections 88 and 1989 of the Constitution did not amount to a breach of legislative

and executive powers in *National Assembly & Ors v Momoh (1984)*, where the Court of Appeal concluded that this section had been amenable to judicial interpretation.

Sections 58 and 159 of the Constitution provide the President additional veto authority over legislation passed by Congress. While legislative approval is required for the appointment of judicial officers in Sections 231 and 271, certain other judicial officers are granted constitutional authority to issue rules governing the practice and procedures of their respective courts in Sections 236, 248, 259, 264, 274, 279 and 284 of the CFRN 1999. Though three branches of government each have their own distinct powers, they are all obligated to cooperate with one other for the interest of the people and the advancement of justice, freedom, or equity, no matter what their respective powers are in *Gadi v Male (2010)*.

5. Methodology

The style of writing employed in this paper is the doctrinal methods. Here consultations to statutory provisions, texts, journals and publications of learned authors are made to define the concepts in this paper for clarity.

6. Analysis of Research

Under this sub heading, we will be consideration the numerous benefits and advantages of the principle of separation of powers under the various constitutional provisions in Nigeria.

6.1. The Pros of Separation of Powers

In *Inajoju v Adeleke (2007)*, his Lordship Musdapher, JSC summed up the benefits of separation of powers by stating that the idea of division of powers under the Constitution is supposed to assure good governance and development and prevent the misuse of authority. The theory of separation of powers is intended to increase the efficacy of government by prohibiting the use of arbitrary authority by all branches of government, hence preventing conflict. According to the Court of Appeal, the rule of law "is the foundational principle of democracy, as demonstrated by the idea of separation of powers, which is anathema to authoritarianism" (1996).

6.1.2 Executive Orders of the Federal Government of Nigeria

Executive agencies or government officials to direct or instruct their actions, or to create rules that the executive branch must follow, an executive order is generally issued by the president or on his behalf (*Amadi S, 2022*).

In Nigeria, both the President of the country and the various State Governors issue and gazette executive orders. A practice became which became much rampant during the early part of year 2020 when the Corona virus pandemic was at its worst ebb. In recent times, the President of Nigeria has had cause to issue about 10 Executive Orders since 2017 till date. Some of them are as follows:

- (i) Executive Order No. 1: On the Promotion of Transparency and Efficiency in the business Environment – came into force on 18th May, 2017.
- (ii) Executive Order No. 2: Promotion of Local Content in Public Procurement by the Federal Government – came into force on 18th May, 2017.
- (iii) Executive Order No. 3: Timely submission of annual budgetary estimates by all statutory and non-statutory agencies, including Federal Government owned companies – came into force on 18th May, 2017.
- (iv) Executive Order No. 4: Voluntary Assets and Income Declaration Scheme (VAIDS) – came into force on 29th June, 2018.

Hitherto, the making of executive order has not been very popular with the government of the Federal Republic of Nigeria; however, the current administration of President Muhammad Buhari has, within a short period of time made several executive orders per *Belgore, JSC in Abia State v A-G Federation (2003)*. Irrespective of the beauty and necessity of the various executive orders being churned out by the President ostensibly under the combined authority of Sections 5 and 315 of the Constitution as part of the President's implied powers, it arguable, that the President is tacitly encroaching on the law-making powers of the Legislature although executive orders are instruments of management of the national economy and other domestic affairs by the President. It remains for the Supreme Court to pronounce on the validity of the various executive laws being issued by the current President of Nigeria – more than any other President of the country before him – if and or when such matter is presented to the court per *O. Adeyemi, (2022)*.

6.1.3 The Code of Conduct Bureau

The Code of Conduct Bureau (CCB) and the Code of Conduct Tribunal (CCT) established under the Fifth Schedule to the Constitution are statutory bodies for the discharge of the roles given to them by the Constitution. Incidentally, the recent events under review here portend the tribunal, which is not constituted by judicial officers, as seemingly functioning at the behest of the Executive arm of Government in encroaching on the duties of the judiciary. The circumstances of the trial at CCT of Senator Bukola Saraki and, later, Hon. Justice Walter Onnoghen were clearly disruptive of the activities of the other two arms of government led by the two accused persons at that point in time. In the case of the Chief Justice, the CCT granted an ex- parte order to suspend him from office and that led to his eventual removal from office.

7. Discussion of Research

7.1. Independence of the Judiciary

The system is such that the judiciary cannot be divulged from the clutches or patronage of the executive arms of government especially in the area of funding. It is no longer news that there is acute funding constraint being experienced by the judiciary in Nigeria both at the federal and the State level.

The Chief Justice of Nigeria, who spoke at the 2019 Legal Year Opening Ceremony and the Inauguration of the new Senior Advocates of Nigeria in Abuja on the full autonomy granted to the judiciary, admitted that funding remains the biggest handicap in the effective administration of justice in Nigeria, said recently that the judiciary has been given full autonomy in 2019. It is a well-known fact that most State Governors go out of their way to provide infrastructures for the judiciary within their States irrespective to whether it is the Federal courts or State Courts. What is relevant in this paper is the fact that there cannot be an effective practice of the doctrine of separation of powers if the third arm of the government is not fully autonomous and free from control by the other arms of government.

Another cause for the quest for the independence of the judiciary is the issue of intimidation of judicial officials by the security agents of the executive arm of the government. Under the present Federal Government in Nigeria, there has been spate of breaches of the securities of the judicial officers including the Honorable Justices of the Supreme Court of Nigeria. For instance, at different times in 2016, the homes of senior judicial officers in Nigeria, including justices of the Supreme Court, Judges of the High Courts in several parts of the

country were invaded by security agents at unholy hours of the night for no justification. Most recent is the raid by security operatives on the residence of Hon. Justice Mary Odili – the 2nd highest senior Justice of the Supreme Court of Nigeria – on Friday, October, 29, 2021, for no justifiable cause according to the (*Vanguard Newspaper, 2022*). Incidents, such as this underscore the fact that undue interference and or intimidation amongst the arms of the government, wittingly or unwittingly exists, and they portend danger to democracy and the rule of law, *a fortiori*, the practice of separation of powers in Nigeria.

7.2. Concluding Remarks

The taste of the pudding they say is in the eating. The beautiful notion of separation of powers notwithstanding, the citizen must have their eyes open to scrutinize the actions of the three arms of government in order to ensure that their respective actions are in line with the democratic ideals of the rule of law and separation of powers. Vigilance by the citizenry is the price to pay for good governance to be sustained

This paper, in reviewing the application of the doctrine of separation of powers has also considered some emerging issues such as the resurgence of Executive Orders by the Executive arms of the government and surmised that the making of the executive orders have not infringed on the hallowed doctrine of the Separation of Powers, rather those orders have accentuated the beauty of the Presidential system of government. However, care must be taken to ensure that these orders do not encroach into the lawmaking functions of the Legislatures. Secondly, the Code of Conduct Tribunal which tried both the former Senate President – Dr. Bukola Saraki, and the immediate past Chief Justice of Nigeria – Hon Justice Walter Onnoghen, though a tribunal set up by the Constitution to try public officers must be conscious of its actions so as not to give the impression that it is a tool in the hands of the executive used for punishing un-cooperating members of the other arms of government.

Whilst it is appropriate that the 1999 Constitution enshrined the principles of separation of powers, the same Constitution created areas where the three organs interface and there are also measures of checks and balances therein. To this end, the Constitution has taken care of the doom that could have befallen governance where there is to be strict adherence to the doctrine of separation of powers. The bottom line is that the doctrine of separation of powers is good for our polity and its perceived demerits have also been cushioned by the same Constitution in the practice of checks and balances. Therefore, the Constitution, being the grundnorm, having

enshrined the doctrine of Separation of powers under Sections 4, 5, and 6, and flowing from the legal positivist theory, it behooves on all Nigerians to work for the full realization of this intent.

The doctrine of Separation of Powers under the 1999 Constitution of the Federal Republic of Nigeria (as amended) is an essential component of the rule of law, which is a *sine qua non* for good governance in a democratic environment such as ours. Under the Constitution, the practice of separation of powers was not made watertight or mutually exclusive amongst the three arms of government. Ample provisions were made for the fusion of the functions of the three arms of government for ease of governance. The principle of checks and balances were also entrenched in the constitution to enable the three arms serve as checks on one another, in order to balance the interplay of powers amongst them. This is to forestall arbitrariness and autocracy in the system.

Furthermore, the practice of separation of powers we should encouraged by ensuring that members imbibe the culture of mutual respect for one another. Mutual respect will enable members of one arm of the government not to look down on the others, but to see one another as equal partners in the democratic process. The populace should vote in members of the three arms of government who are men of integrity and of impeccable quality. By so doing, it will be difficult for one arm of government to tend to intimidate the other such as in subjecting the leadership of that arm of government to persecution. Such a trial, while the person is still in office may not augur well in enhancing the doctrine of separation of powers.

Finally, whilst full independence of the judiciary is advocated for the judicial officers should, like Caesar wife, be and act above board. As a result of the importance of the judicial arm of government in the equation, the twin essentials of full independence and integrity must be pursued simultaneously. It will amount to suicide for a biased judiciary to be accorded full independence that they deserve if the practitioners cannot be fair and just in the performance of their functions.

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