

## Enhancing Rule of Law and Social Justice with the Principles of Separation of Power in Nigeria

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### *Abstract*

The principle of rule of law and separation of power is very essential in any sane democratic society. Without rule of law, life will be nasty and there will be anarchy in the society. The principle of separation of power maintains that the three arms of government in Nigeria must be separated from one another and their functions performed differently and independently, that is, one arm of government should not perform the function of the other. This paper is intended to state the rule of law and principles of separation of powers and checks and balances, its meaning and scope and its application by the makers of the 1999 Constitution of the Federal Republic of Nigeria, the level of compliance with the principles in our constitutional experience and the attitude of the judiciary towards ensuring that the principle is preserved and complied with strictly. The relationship between the rule of law and social justice cannot be overestimated while the paper concluded that the operation of rule of law and social justice cannot be effectively felt without separation of power.

*Keywords:* rule of law, government, Nigeria, separation of power, constitution.

### 1. The principle of separation of powers

The doctrine of separation of power which derived its origin from Aristotle, John Locke and later Montesquieu is a device against abuse of power or what he called political liberty! He posited that the functions of governments of western states are of three kinds: (1) The legislative or law-making function is carried out by the legislature; (2) The executive function is carried out by the executive and when the Legislative and executive powers are vested or United in the same person or body, there can be no liberty. Again, there can be no liberty if judicial power is not separated from legislative and executive.<sup>1</sup> Thus separation of power could be described as sharing of powers by separate institutions. But not a complete independence of organs of government. They still have to work in cooperation although the independence is to safeguard a kind of checks and balance Montesquieu was writing from his experience in Western countries where functions of government are of three types: (1) the legislative, (2) executive function which is concerned with the formulation and carrying out of policies by executive usually called government, and (3) the judicial function which consist of interpreting and applying the law by the judiciary (Judges in the courts). In Britain parliament makes laws many of which gave power

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<sup>1</sup> Barnet Hillarie Constitutional and Administrative law 5<sup>th</sup> Edition.

to the government to do certain things.<sup>2</sup> Laws are not always clear in their meanings however and it is then the function of the courts to give a decision in case of dispute.<sup>3</sup> Thus, this French philosopher opined in the 18<sup>th</sup> century that the three functions of government should be kept separate. He argued that their separation would prevent one man or group of men from exerting too much power; each organ of government could act as a check on the others.<sup>4</sup> Separation of power ensures operation of rule of law and social justice if institutionalized by the constitution.

Inherent in the doctrine of separation of powers is the principles of checks and balances. The separation of these powers to check one another and balance their operation without encroachment of one-by the other is referred to as checks and balances.

This doctrine has been embraced all over the civilized world including Nigeria.

## 2. Separation of power in Nigeria governance

### 2.1 *Legislature*

This doctrine was entrenched in the constitution of the Federal Republic of Nigeria 1999 in section. 4, 5 & 6 Section 4. It provides that the legislative power of the Federal Republic of Nigeria shall be vested in the National Assembly which consist of a Senate and House of Representatives and shall have power to make laws for e peace, order and good government of the Federation or any part thereof with respect to any matter in Executive legislative list set in out in part I of second schedule to this constitution..., while the House of Assembly of a State shall have power to make laws for peace order and good government of the State or any part thereof with respect to any matter in the con-current legislative list set out is part 11 of second schedule to the constitution. On this section the court has held in *Ekeocha Vs Civil Service Commission of Imo State & Anor.*<sup>5</sup> (Under 1979 constitution) Oputa J. (as he then was) that in all cases of interpretation, the courts should adopt such a construction which will put the federal legislative in such a position so that it can legislate for the general interest of the whole country. The decision is a protection of legislative power of the National Assembly. This was also done in *See A. G. of Bendel Vs A. G. Federation.*<sup>6</sup>

### 2.2 *Executive*

The constitution provide that the executive powers of the federation shall be vested in the president and may subject as a-fore-said and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and the ministers of the government of the federation or officers in the public service and shall extend to the execution and maintenance of this constitution, all laws made by the National Assembly and a matters with respect to which the National Assembly has for the time being power to make laws while the executive powers of state is vested in the Governor of that state who may subject to the aforesaid and to the provision of any law made by the House of Assembly of a state be exercised by him directly or through the Deputy Governor and Commissioner of the Government of that state or

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<sup>2</sup> Cavendish Press London, 1980.

<sup>3</sup> Separation of Power: An overview ncls.org.

<sup>4</sup> O'Brien David Constitutional law politics, 1991, [www.norton&company](http://www.norton&company), New York.

<sup>5</sup> 1980 suit no HC/8/80/1981 1 NCLR 154.

<sup>6</sup> 1981 1 NCLR 30.

officers in the public service of the state and shall extend to the execution and maintenance of the constitution.<sup>7</sup>

### *2.3 Judiciary*

Section 6(i) provides the judicial power of the federation shall be vested in the courts to which this section relates being court established by law subject as provided by this constitution for state. Section 6(5) of this section relates to Supreme Court, Court of Appeal, Federal High Court, State High Court, Sharia Court of Appeal, Customary Court of Appeal and any Court that may be established by law. By amendment to the constitution, the National industrial court of Nigeria has created by section 254A-D of the constitution.<sup>8</sup>

5. 6(6): the judicial powers shall extend to inherent power and sanctions of a court of law, all matters between persons, between government or authority and any person in Nigeria and to all actions and proceeding thereto for the determination of any questions of as to civil rights and obligations of that person.

These are the provisions of Sections, 4-6 of the 1999 constitution which clearly entrenched the doctrine of separation of powers.

The Courts in Nigeria had made educative and illuminating pronouncements in their attempt to ensure compliance with these elucidated principles of law in the constitution. In the case of *Unongo vs Aper Aku*.<sup>9</sup> The Supreme Court held The Constitution of the Federal Republic of Nigeria 1979, which is hereinafter referred as the constitution, is very unique compared with the previous constitution in that the executive, the legislature and the judiciary each established as a separate organ of government. There is what can be termed a cold calculated rigidity in this separation as shown in Section 4, 5 and 6 of the constitution which established the legislative and the executive and the judicature respectively.

The real connecting link among these three is that they provide checks and balances on one another. But though there are checks and balances, one cannot and must not usurp the function of the other.

This case was reaffirmed in *Attorney General of Bendel Vs Attorney General of the Federation*<sup>10</sup> where ESO JSC said now it is time that the legislature, especially in a country like ours which has accepted the doctrine of separation of powers and which got that doctrine embodied in constitution, is “a master of its household.” The exception to this sovereignty within its own household is where the powers of such legislature have been specifically restricted under the constitution.

Having tried to show the embodiment of the doctrine of separation of powers in our constitution of 1979 and 1999 both statutory and judicially it is however pertinent to mention that in a military regime which has characterized this nation since 1966, the doctrine of separation of powers wears a different look entirely.

Under the military the executive and the legislature are fused. The Head of state is the Chief executive and at the same the lawmaker, the law maker is the supreme military council, which the Head of state chaired. At the state level, the military cover nor is the law maker through promulgation of edicts the Head of state makes laws through Decrees.

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<sup>7</sup> Section 6 of the constitution of FRN 1999 as amended.

<sup>8</sup> Section 6 of Section 6 of the constitution of FRN 1999 as amended.

<sup>9</sup> 1990 4 NWLR (Pt 143) at 254.

<sup>10</sup> 1972 3 NCLR 166.

#### *2.4 Judicial check of legislative and executive*

The judiciary having been empowered by Section 6 of the constitution is at the apex of this checks and balances. The judiciary has the primary duty of inquiring into the legality of acts of executive and the legislature. Any question on whether the executive has acted *intra vires* or *ultra vires* or has complied strictly with the procedure, manner or form prescribed by law is determined the court. In order that the judiciary may be able to perform this function effectively the independence of the judiciary is a condition. This has been guaranteed in Sections 17 (2) (e) and section 230-254 A.D.

There are quite a number of cases where the judiciary had to caution the executive when the executive is acting *ultra vires* or for failure to comply with the manner and form prescribed by law in administrative or governmental action. In *Okiti pupa oil palm Company limited Vs Hon. J. E. Jegede and others*<sup>11</sup> an issue of constitutional importance was raised as to whether an injunction of any kind can be ordered by a court in Nigeria against the legislature as a body or against a member thereof for act purported, to have been or is being, or about to be committed in course of its operation, it was held, *inter alia*, that once a court is properly seized with jurisdiction it will act within its inherent and constitution power to restrain any or the said arm which in pursuit of its constitutional function tends to over step its limited jurisdiction under the constitution, and by virtue of the constitution, it is within the lot of judiciary in its supervisory capacity to ensure that all the three arms of government i.e., the legislature, the executive and the components of the judiciary itself keep within the receptive area of powers, privileges and competence under the constitution ... This is in addition to the judiciary being checked through appeals and judicial review or amendment of the law.

This position was confirmed by the Supreme Court in *Governor of Lagos State Vs Chief Odumegwu Ojokwu*<sup>12</sup> where it held that “Executive lawlessness is tantamount to a deliberate violation of the constitution, when the executive is the military government which blends both executive and the legislative power together and which permits the judiciary to coexist with it in the administration of the country, then it is more serious than imagined the essence of rule of law is that it should never operate under the rule of force or fear, to use force to effect act and while under the Marshall of that force, seek the courts equity is an attempt to infuse timidity into court and operate a sabotage of the cherished rule of law It must never be.”

Moving a step further on the supervisory role of the judiciary, over the executive the supreme court in *Garba Vs University of Maiduguri*,<sup>13</sup> – said “I would add to this admirable statement by Lord Denning that to give a blanket implementation to the decision of the executive, and without reference to the elementary rule of fairness is an abdication by the judiciary of its power to the executive especially in a country like ours where the power of each of the organs of government.” Executive, legislature and the judiciary are distinct under the constitution.

The judiciary has also exercised its checks, supervision and control over the executive by inquiring into the use of presidential power by the president through his minister; see the case of *Alhaji Abdul Darman Shugaba Vs Minister of Internal Affairs*.<sup>14</sup> The plaintiff in that case was deported by the minister of internal affairs on the order of the president made under the immigration Act on the ground that as at the time of his election to the House of Assembly of Bornu State, he was not a citizen of Nigeria by birth as provided in S 23 of 1979 (now S. 25 of 1999 constitution). The plaintiff having proved that his father, was of Chad Republic but his mother was

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<sup>11</sup> 1982 suit on How/8/80/1981.

<sup>12</sup> 1981 1 NWLR (Pt 18) 633 at 634.

<sup>13</sup> 1981 1 NCLR 218.

<sup>14</sup> 1981 1 NCLR 25.

a Nigerian of Kanuri tribe, the court held that the deportation was illegal, null and void and unconstitutional. It has also been stated that the court can examine whether the power conferred on the Governor to appoint commissioners in accordance with S. 173 (a) of the constitution has been properly used or not. This was in issue, in the case of Governor of Kaduna State Vs House of Assembly of Kaduna state<sup>15</sup> where the Governor of Kaduna State Alhaji Balarabe Musa sought an order of Mandamus from the court to compel the members of the House of Assembly to approve his list of nominees for office of Commissioners of Kaduna State. The court declined to grant this application because the House of Assembly had power to approve or reject the list or any person on the list of the governor.

Therefore, nominations must be confirmed by the House Assembly before the appointments are made. That being so, if a commissioner is sworn in without his appointment being confirmed, his appointment is invalid. This section 173 has also been interpreted to mean that a Governor has a legal duty to appoint commissioners, he does not have a choice in the matter. In *Alh Lawal Kagoma Vs Governor of Kaduna State*<sup>16</sup> it was held that since the Governor is merely a chief executive, there must be an Executive council. The constitution in S. 162 (2) describes the governor as the Chief Executive and not Sole Executive and thereby implies that there are other executives.

Another important way by which the judiciary checks the executive is by way of judicial review of administrative action. Where an administrative body or tribunal refused to follow the due process of law or the rule of natural justice, the court has inherent power under S. 6 (6) (a) (b) to review any administrative action or decision that failed to comply with the rule of natural justice such as *Audi Alteram par tem* (hear the other side), otherwise known as fair hearing in S. 33 of 1979 and (S. 36 of 1999 constitution) and *Nemo judex in causa sua* (you cannot be a judge in your own cause). That means an impartial umpire must adjudicate or arbitrate dispute, prosecution and determination of rights and obligations imposed by law.

This list of occasions where the judiciary had demonstrated its willingness and ability to check and did check the executive is in-exhaustive.

### *2.5 Judicial check of legislature*

Under this topic we shall approach the issue in two ways because Nigeria is a federation comprising of states, we shall succinctly examine the judicial control of the legislature both at the federal and state level.

The National Assembly in its bid to exercise its power to conduct investigation of the executive in executing and/or administering laws, and disbursement or administering moneys appropriated or to be appropriated by the National Assembly under S. 82 summoned a journalist to come to the floor of the House to come and disclose the source of his information on the report and Editorial he Wrote in the Daily Times Newspaper. The court held that the right to freedom of expression protects a journalist's right not to disclose his source of information and therefore senate cannot demand for his source of information because it would amount to an infringement of his fundamental human right.<sup>17</sup>

The National Assembly in exercising the power conferred on it by S. 55 of 1979 & now (S. 59 of 1999) the constitution in respect of Appropriation Bill or Supplementary Appropriation Bill or any Bill, the payment or issue or withdrawal from the consolidated Revenue Fund or any

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<sup>15</sup> 1982 3 NCLR (Vol 3) 229.

<sup>16</sup> 1982 3 NCLR Vol 3 420 or 1982 LPELR Sc 64.

<sup>17</sup> 1982 NCLR 340.

other public fund of the federation, the bill is to be passed by both Houses of National Assembly but when there is conflict between the two Houses, the President of Senate shall within 14 days call for a meeting of joint finance committee of the house and where the joint finance committee fails to resolve the issue then the Bill will be represented at a joint session of the National Assembly, if the Bill is passed, it is then presented to the president for assent. Where the president withholds his assent after 30 days of the presentation of the bill to him, the Bill will again be presented at a joint meeting of National Assembly and the Bill will be passed by 2/3 majority, the bill shall become law without the assent of the President.

The question whether the National Assembly had complied with this provision in passing the Allocation of Revenue (Federation Account etc.) Act No. 1 1981 was in issue in the case of Attorney General of Bendel State Vs Attorney General of the federation.<sup>18</sup> In the case Bendel state Challenged the constitutionality of the Act on the ground that it had not been passed by the National Assembly in the manner and form prescribed or required by the constitution. In the case the two Houses had been unable to agree on the Bill as a result of which it was referred under S. 55(2) to a joint finance committee of National Assembly. The committee apparently resolved the conflict but without any subsequent reference to either House, the decision of the joint finance committee was sent to the president for Assent. The Bill was signed by the president. The Supreme Court rightly held that the Act was invalid.

### *2.6 Check of state legislature*

At the state level the constitutionality of a law or an Edict can also be decided by the judiciary. See military Governor of Ondo State Vs Adewumi.<sup>19</sup> The essence of that decision is, that a state law or Edict must not be inconsistent with the constitution as amended or a Decree. That constitutes a check on the state legislature by the judiciary against unguided legislation that is capable of causing confusion or chaos in the body polity.

In spite of the consolidation of this judicial control of legislation by judicial activism the courts have warned that it will not allow itself to be seized with frivolity in exercise of judicial power to check the legislature. The case of Hon. Edwin-Ume Ezeoke Vs Alhaji isa Aliyu Makafi<sup>20</sup> where the plaintiff was a member of the House of Representatives and the defendant, the speaker of the House. The plaintiff went to court as a result of an announcement made by the speaker in the House on Wednesday 28th day of May 1980 to the effect that he had received a letter from the leader of the plaintiff's party that he has been suspended from party's membership. The said announcement tended to indicate that the defendant was empowered to suspend the plaintiff from all standing committees of the House, the plaintiff sued the speaker for a declaration that the action of the speaker was unconstitutional he sought an injunction restraining the speaker from taking any step with reference to membership of the plaintiff in the House.

The defendant raises preliminary objection to the effect that since the cause of action was an internal matter of the House, the court has no jurisdiction to interfere. This objection was overruled but the court held that except there is a specific provision in the constitution as to any particular procedure the legislature must comply with, the court will not interfere with the internal proceedings of the legislature.

It is clear from the above case that the court is not a rubber stamp for executive action, nor will it allow the legislature to be subjected to ridicule by frivolous applications.

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<sup>18</sup> 982 3 NCLR 166.

<sup>19</sup> 1988 JELR 479B(SC).

<sup>20</sup> 1982 3 NCLR 166.

### 3. Legislative control of executive action

#### 3.1 *Approval of appointment*

S. 133 of 1979 & (now S. 147 1999) constitution gives the president the power to determine the number of ministers and to appoint ministers by sending the list of his nominees to the senate to approve or reject all or any of the nominees of the president failure by the president to get the approval of the senate will make his appointment invalid. The president can remove any appointed minister and substitute it with another one, but the substitution still has to pass through the normal approval procedure. S. 192 applies to appointment of commissioners by the state governor who shall submit the list of his nominees to the state House of Assembly for approval.

The State House of Assembly can approve or reject all or any part of the list of nominees of the Governor. S. 154 empower the president to appoint chairmen and members of parastatal subject to approval of senate. There are other Acts of National Assembly that subject appointment of executive to approval of senate i.e., EFCC Act ICPC Act etc.

#### 3.2 *Check through appropriation bill*

S. 133 of 1979 & now S. 147 of 1999 constitution the National Assembly has to approve an appropriation Bill or supplementary Bill including any other payment, issue or withdrawal from the consolidated Revenue Fund or any other public fund of the federation and a Bill for the imposition or increase in any tax, or fee or any reduction, withdrawal or cancellation thereof. This approval must conform with the procedure laid down by the section see Attorney General of Bendel State Vs Attorney General of the federation & other<sup>21</sup> see constitution in respect of state House of Assembly of a state.

#### 3.3 *Impeachment procedure*

S. 132 now 5. 143 of 1999 provides that where a notice signed by 1/3 of member of National Assembly is presented to the president of Senate stating that the holder of the office of president or vice president is guilty of gross misconduct in the performance of the functions of his office detailed particulars of which shall be specified.

The President of Senate shall serve the notice on the president or vice president and members of the National Assembly within 7 days of receipt of the notice and within 14 days the president or vice president shall reply in writing stating his defense to the allegation and the National Assembly, shall resolve whether or not to investigate the allegation by 2/3 majority votes of members. A committee of 7 shall carry out the investigation within 3 months and their report will be presented to the House and if this report is adopted, the president or vice president shall stand removed from the office. This proceeding for removal from office of the president is not questionable in the court of law, see S. 170 (10) of 1979 now s. 188 (10) of 1999 constitution for removal of Governor from office and Governor of Kaduna State Vs House of Assembly of Kaduna State.<sup>22</sup> The provision is plausible because the president cannot be prosecuted for a criminal offence while in office as per section 308, therefore the only way by which he can be censured would be under impeachment process. On the jurisdiction of the court to inquire into the propriety of impeachment proceeding in S. 143 (10) it is suggested that this- subsection should be expunged from the constitution because it is capable of making the legislature to exercise the power maliciously or absolutely. In the United States the impeachment panel of inquiry is headed by the

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<sup>21</sup> Sections 112 of 1979 and 120 of 1999 Constitution of FRN as amended.

<sup>22</sup> 1981 1 NCLR 414.

Chief justice, so same procedure is recommended for Nigeria. See also S. 144 of removal of chairmen and members of federal parastatal, Boards and Commissions. Section 188(10) has been given a liberal interpretation that once a legislative House refuse to follow the procedure in section 188 (1) +(9) meticulously such impeachment procedure would be declared void by the court. See cases of Ladoja, Peter Obi and Dariye. These cases changed the trend in *Balarabe musa v Kaduna State House of Assembly*.<sup>23</sup>

#### 4. Auditing of account and appointment of auditor

Now, sections 85 and 86 of 1999 provides for auditing of account by both Federal and State government and the Audit report to be submitted to the National Assembly in case of Federal government and to state House of Assembly in case of state government. The Auditor is vested with independence so that he can discharge his function honestly. The Federal Civil Service Commission recommends this appointment which will be confirmed by the Senate. He is also to set standards for state owned enterprises and compile list of auditors for them under the new constitution, this is to ensure probity in public enterprises.

#### 5. Power to conduct investigation on spending of the executive

Each House of National Assembly is empowered to conduct investigation on any matter with respect to which it is empowered to make law and the conduct of affairs of any person, authority, ministry or government department charged with the responsibility of executing or administering laws enacted by the National Assembly and disbursing or administering money appropriated by National Assembly. In addition to its legislative power each of National Assembly enjoys the power of conducting, investigation in order to gather information needed to legislate, to propose constitutional amendments or to perform other constitutional actions. Under this power each house of National Assembly can conduct investigations to correct any defects in the existing laws. The House can expose corruption, inefficiency, or waste in spending of public funds. But the limit of this power had been decided in the case of *Tony Momoh Vs Senate*<sup>24</sup> supra (see section 88 and 128 of 1999 constitution). It is under this section that the legislature in Nigeria conducts public hearing on Bills.

#### 6. Declaration of war

Section 5 (3) (a) and (b) of the constitution provides:

(a) “the president shall not declare a state of war between

The federation and another country except with the sanction of a resolution of both Houses of the National Assembly sitting in a joint session;” and

(b) “except with the prior approval of the senate, no member of the Armed forces of the Federation shall be deployed on combat duty outside Nigeria.”

The above quoted section actually limits the exercise of executive powers of the president. The president cannot declare war without the prior sanction of the legislature. The Armed Forces cannot be deployed for any combat duty outside Nigeria without the prior approval

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<sup>23</sup> Hon Mute Balonwu & others v Hor peter obi (2007) lawcarenigeria.com inakoju v Adeleke 2007 NCSC 30, 2007 4 NWLR (Pt 1025) 427 Hon Micheal Dapialing V Cheef (Dr) Joshua Dunye 2007 NGSC 148.

<sup>24</sup> *Ibid*.



of the Senate. And when the armed forces are deployed to any place before approval of Senate, the president must request for approval within 30 days of the deployment.

#### 7. Legislative control of the judiciary

This is exercised by the legislature under section 9 of the constitution; this section empowers the legislature to amend any part of the constitution following the manner and form prescribed by the constitution.

#### 8. Conclusion

It has been shown both statutorily and by judicial precedent that the constitution of the federal Republic of Nigeria 1999 made adequate provision for the operation of the principles of separation of powers and checks and balances in order to ensure a stable democratic culture in Nigeria. The provisions are far-reaching and are many steps ahead of the 1963 republican constitution that operated parliamentary democracy allowing for fusion of legislative and executive powers and this culminated into the public disorder that led to the military takeover of 1966. It must also be stressed that integration of the principle of separation of power in constitution is the foundation for democracy and good governance if the operators of the constitution can keep to it. The operation of the spirit and the letters of the provisions on the doctrine of separation of power in Nigeria will enhance the rule of law and social justice if the different organs of government perform its role without encroachment on the roles of the other organs of government. There will be a harmonious relationship among the organs of government, and this will ensure good governance. Rule of law and social justice is not restricted to those in governmental authorities alone, but it is the duty of every individual who is dealing with any other person to ensure that he complies with the rule of law.

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