

THORNY ISSUES IN SEPARATION OF POWERS IN NIGERIA: IMPLICATIONS FOR DEMOCRATIC CONSOLIDATION

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Abstract

It is no doubt that modern democratic systems are built on the doctrine of separation of powers, which is complemented by the theory of checks and balances but the problem has always been its practicability especially in Nigeria. This paper therefore in its main thrust examines the thorny issues in separation of powers in Nigeria and the implications for democratic consolidation. The theoretical foundation was based on balance theory propounded Fritz Heider in 1946 which is relevant to this subject matter as it suggests that balance of power will make dominance in politics among various arms of government impossible. Content Analytical Approach was used in methodology as data was generated through secondary sources. The data presentation and analysis on the subject matter reveals among others that there are some sections of the 1999 workability of separation of powers in Nigeria difficult especially in the vexed Executive-Legislature relations where the chief executives performs some legislative functions and on the other hand of organ of government permitted by the constitution to appoint judges. The implication would be the resolving of adherence political party loyalty in tacking national issues. Though there are merits and demerits of separation of power as highlighted here, it was recommended among others for a review of the 1999 constitution to strike a balance between the three organs of government to help caution the intimidations from the executive to other arms of government.

Keywords: *Separation of Powers, Democratic Consolidation, Checks and Balances, Executives, Legislature and Judiciary.*

Introduction

Separation of powers is a fundamental feature of most democratic systems of government. By the operation of this doctrine, different arms of government, that is, the legislature, executive and the judiciary perform their administrative duties and responsibility without undue infringement from any of its segments. However, in Nigeria despite the tripartite arms of government, what is quite evident is that this doctrine has become seemly impracticable. The 1999 Constitution of the Federal Republic of Nigeria made the theory of separation of powers a fundamental principle of governance. The 1999 Constitution in different sections vested the powers of government in separate organs of government as follows: Section 4 deals with the legislative powers; Section 5 deals with the executive powers while section 6 is concerned with judicial powers.

After three decades of nearly continuous military rule, democratic government was restored in Nigeria in 1999 and Nigeria once again adopted the American style of presidential system of government albeit with a nominal federal constitution. Despite the over 50 years of independence in which the British bequeathed a democratic system of government and also had our own very first democratic experience (1979) and now from 1999 to the present dispensation, our democracy is still largely fledging and imperfect with heavy consequences on human right which is improper for our democratic consolidation.

Despite the constitutional provision, there have been criticisms that the principle of separation of powers in Nigeria is more of a myth than a reality. This is because there have been instances where the executive arm of government has interfered with the work of the judiciary and the legislature. For example there have been instances where the executive has disobeyed court orders and there have also been instances where the legislature has been accused of being a rubber-stamp for the executive. It is also

a problem that the executive arm of government has too much power particularly in terms of controlling the country's finances. The constitution gives the president significant control over the country's finances especially the budget and there is concerns that this can be used to influence the actions of the legislature and judiciary.

Another is that the judiciary is not always independent and impartial. There have been instances of judges being influenced or coerced by the executive and there have also been concerns about the appointment and promotion of judges being influenced by political considerations.

The specific objectives of the study were to: (i). determine the constitutional roles of the executive, legislature and judiciary in Nigeria; (ii). describe the thorny issues in separation of powers in Nigeria; (iii). identify the merits of separation of powers to Nigeria's democratic consolidation and (iv). identify the demerits of separation of powers to Nigerians democratic consolidation.

The study employed the Content Analytical Approach because of the qualitative nature of the research and data was derived through secondary sources.

Conceptual Issues

Separation of Powers

Separation of powers, according to Ezeadi and Asiegbu (1990), is a doctrine whereby the three arms of government, the legislature the three arms of government, the legislature the executive and the judiciary are separated in functions and personnel's. It implies that the separation is very important in order to avoid tyranny, oppression and dictatorship. Also that no one organ of the government should be allowed to perform the functions of the other organs but the organs should be separate and work co-operatively for smooth running of the government.

Democratic Consolidation

Democratic consolidation simply means the institutionalization of democratic norm and value of political institution of which the electoral process is a critical part of. Indeed, there is an inextricable link between 'elections and the enthronement of a democratic order. Elections are no doubt a "critical part of the democratic process" (Wail, 1978), and all other variables of democracy do not just "revolve around elections' (Strom & Dalton, 2004), but on the quality of the electoral process. An examination of some major democratic theories reveals the high premium attached to the quality of the electoral process for the qualification of a regime as democratic.

To Linz (1999), a consolidated democracy is one in which “none of the major political actors, parties, or organized interests, forces or institutions consider(s) that there is any alternative to the democratic process to gain power and that no political institutions or groups has a claim to veto the action of democratically elected decision makers. According to Diamond (2013), democratic consolidation means the quality, depth, and authenticity of democracy in its various dimensions has been improved: “political competition becomes fairer, freer, more vigorous and executive; participation and representation broader, more autonomous, and inclusive; civil liberties more comprehensively and rigorously protected; accountability more systematic and transparent. Democratic consolidation implies a democracy that can last for the test of time. This can be assured if those values that made democracy worthwhile are fully institutionalized.

Legislature

According to Mbah (2007), the legislature is one of the three organs or arms of government it is made up of the representatives of the people. The main task of the legislature is to make laws that guide or

govern the country or unit where it exercises authority. The legislature is perhaps the earliest and most durable political institution. It maximizes access to the decision making process that impact on entire societies.

Executive

It is the organ of government charged with the execution of policy. Anifowose and Enemu (1999) defined the executive as “those who apply the authoritative rules and policies of a society. The executive also is that branch of government which gives effect to the will of the state by carrying out or executing the laws of the land. In the same vein, Olisa (1990), defined the executive as “one of the three arms of government whose principal duty is to carry out the general administration of the country that in this process of administering the country, it enforces laws, introduces bills into legislations and organizes the bureaucracy with a view to making it function efficiently.

Judiciary

This is the organ of government which has as its main function the interpretation of the law of the state. It is made up of the body of judges in the country, the laws and the court system.

Checks and Balances

A system that allows each branch of a government to amend, override or veto acts of another branch from exerting too much power or power beyond its authority. They are the legislature, judiciary and executive branches. Each branch has a certain job and the other branches have special powers to watch over it. These make the branches equal so that one doesn't become too powerful.

Theoretical Framework

The Balance theory developed by social psychologist- Fritz Heider in 1946 was adopted as the theoretical framework of this study. The theory was originally developed to explain patterns of interpersonal and political relations. Heider explained that a balance must exist between political and interpersonal relationship or for something specific between two or more organs so that psychological harmony can be achieved. The key notion of balance theory is that certain structures are balanced whereas others are imbalanced. Balanced structures are usually preferred over imbalanced ones. Mbah (2007), contributes thus that in the main Balance of Power is defined in the following ways:

- A state of affairs in politics where no party or organ holds a majority, another group may have enough votes to decide the issue and thus hold the balance of power.
- The distribution of power in a system such that no one group or organ may overwhelm others.
- An equilibrium of power between groups or organs

This theory is relevant to this subject matter because balance of power or equilibrium will make dominance in politics among various arms of government impossible. The essence of equilibrium becomes to deter attack. Equilibrium is balanced power and balanced power is neutralized power. Any attempt by any organ to expand its power or attain dominance or hegemony which would allow it to impose its will upon other organs, will be resisted.

Data Presentation Based on research Question 1: What are the constitutional roles of the executive, legislature and judiciary in Nigeria?

The Executive

The exercise of power and definitions of the functions of the executive is clearly stated by the provisions

of the 1999 constitution of the Federal Republic of Nigeria. This is established by section 153, subsection 1.

Mbah (207: 175-276) highlighting on those key roles, states that:

- i. The most significant function performed by the political chief executive is that of providing policy making leadership to government. this executive policy leadership goes beyond the domestic environment to include the external environment (area of foreign policy), this is a result of the need for speed and secrecy of action needed in this issue area.

The executive also performs some legislative function like

- ii. Recommendation and initiation of bills for legislative consideration;
- iii. The making of administrative laws, originating from the parent Acts. This is to enable the state cope with emergencies and minor subjects that might require urgent attention and those that have local bearing.
- iv. The executive signs a bill into law. When the executive organ assents to a bill the law is said to be perfected. (See section 58 (1) of the 1999 constitution of Nigeria).

Ezeadi and Asiegbu (1990:73-74) also itemized in continuation the roles of executives as follows:

- v. The appointment of ministers and advisers subject to approval by legislature
- vi. The appointment of judges but cannot dismiss them unless they misbehave and their removal is approved by the Judicial Service Commission in Nigeria.
- vii. The appointment of Ambassadors and assigning them to countries of choice
- viii. The preparing and presenting of annual budget to legislature for approval.
- ix. Declaring of war and state of emergency subject to the approval by legislature.

The legislature

Section 47 of the 1999 constitution states that there shall be a National Assembly for the Federation which shall consist of a senate and a House of Representatives. Kalu and Obi (2018:75-79) highlighted their following functions:

- i. Law making activities:** The primary responsibility of the legislature is to enact laws for the good governance of society. The activity decides the legal rules that govern our society, state or nation. The laws when enacted, regulates the activities of government.
- ii. Service to constituents:** As representatives of their constituents, owe them quality representation and translating their views, opinions or demands into possible realities.
- iii. Representation of Diverse Interest:** They represent the diverse interest of the society which could be expressed in the case of federal laws denoting diversity and conflicting views of the regional, economic, social, racial, region and other interest that could be expressed in a federation. For example, “during former late President Yaradua's ailing moments, saw the transmission of certain powers to his then former vice president Goodluck Jonathan. A legislative act that saved Nigeria from “political vacuum” and instability.
- iv. Oversight and investigative function:** This is the function of checks and Balances which is achieved through summon and to any form of misappropriation. It has remained a guard to modern democracy.
- v. Authorization, Fiscal Approval of Expenditure and Appropriation:** Public income and expenditure are usually expected to pass through the scrutiny and approval of the National Assembly who enjoys a constitutional backing. This is to ensure proper allocation of resources based on need and expectation of the masses.

- vi. **Consensus Building:** The National Assembly as representatives, remain a forum of ventilation to all sheds of opinion and to give room for consensus and reconciliation since the common interest of all members is to ensure peaceful co-existence among diverse elements in a federation.
- vii. **Public clarification:** Contending issues of urgent national importance are made much more easy for public consumption through intense debates discussions and motions by the National Assembly. Here burning issues that do not have corollary to the constitution which might be injurious to national cohesion and unity are systematically thrown out as lacking in merit and therefore declared null and void to the extent the constitution permits.
- viii. **Resolving Conflicts in Society:** The National Assembly engages in series of fence mending across the length and breadth of the country. They can cause the intervention of the executive branch of government to immediately deploy the national instrument of coercion. (Army, Navy, Airforce, Police, DSS) etc to troubled spot and seek intervention through relief materials and opening of displacement campus. Such intervention had been extended to the conflict between various labour unions and the government in many times.
- ix. Policy formulation and implementation Ezeani (2006:304) well noted that the legislature remains a policy making organ directly or indirectly. Through bills, motions public hearing, they have significantly contributed to policy issues of development of their constituencies and the nation at large.
- x. **Confirmation of appointments:** The National Assembly reserves the right to scrutinize certain political appointment made by the executive Arm of government. this function ensures that those appointed to occupy public positions are men and women of integrity whose nomination satisfy demand of efficiency, transparency and the federal character principle

The judiciary

Section 232 (1) and (2) of the 1999 constitution of Nigeria gives the primary function of the judiciary which comprises.

- i. **Constitutional interpretation:** Whenever there is confusion or conflict over the import of a constitutional provision, it is usually referred to the apex court (Supreme court) which has the original jurisdiction and interpretation over constitutional matters.
- ii. **Judicial review:** This falls within two categories, review of legislation and review of executive actions. Here, acts of both legislature and executive could be declared null and void.
- iii. **Law interpretation:** As their main function, they do this when they try cases that come before the courts and judgements relating to these cases are made both in the civil and criminal cases, thus appropriate sanctions or acquittal are made.
- iv. **Protection of individual civil rights:** The courts in several occasions play this role of defender of civil rights and liberties especially making sure that the executive organ of government adheres to the rules laid down by the constitution. Examples of these kinds of executive arbitrary actions are detention without trial, torture in detention and abuses on human dignity.
- v. **Miscellaneous functions:** There are other supplementary functions of the judiciary in the political system that include:
 - Ruling on disputed elections and electoral boundaries

- Advising the executive on the assumptions of emerging powers.
- They possess powers of issuing injunctions orders, that is the power of asking parties or party concerned in a dispute not to take further action in their affairs till the matters in dispute are adjudicated upon by the court.

Data presentation based on Research Question 2: What are the thorny issues in separation of powers in Nigeria?.

There are controversies being raised from different quarters and scholars on both the viability and practicability of the principle of separation of powers in Nigeria as it has consequences for Nigeria's democratic consolidation towards sustainable national development. They are highlighted under the sub topic below:

The Vexed Issue of Executive Legislative Relations and Executive-Judiciary Relations

There is a perceived level of bias by the 1999 constitution of Nigeria that apportioned greater influence to the executive over the legislative and judicial organs of government. Mbah (2007) pointed out that the chief executive also performs some legislative functions like: recommendation and initiation of bills into law- which implies that when the executive organ assents to a bill, the law is said to be perfected; the executive influences legislation positively or negatively through the use of veto power, threat of veto, messages and the power to convene special sessions of the Assembly. On the other hand, the executive have this influencing role over the judiciary as the chief political executive grants pardon and amnesty to citizens who committed various criminal offences against the state. He can also after consultations with other relevant bodies, may reduce a sentence or delay its execution (Section 175 (1), (2) and (3) of the 1999 constitution).

Further, the executive's judicial function relates to the way in which it is constitutionally backed to appoint the leadership of the federal courts and courts in the federal capital territory, Abuja according to Otoghagua (2007:309) is a major defect (of the constitution). He argued that in truly democratic society where the rule of law prevails and are to be interpreted without fear or favour, the judiciary needs to be independent. To him, justice cannot be derived from judiciary if the appointment of judges is carried out by a political office holder. In Nigeria as he maintained, "There is the culture of reward syndrome. Everybody wants" a thank you" either by means or return for every official work done. In such a society, oppression, injustice and anarchy would prevail as no judge would want to bite the finger that fed him. The 2023 presidential election is widely reported to be marked by irregularities and the opposition parties of Labour Party and Peoples Democratic Party challenged Action Progressive Alliance Party victory at the Election Petition Tribunal Court. Many Nigerians pointed accusing fingers on the President on the rationale for appointing Lateef Fagbemi one of the lead counsels of him President Bola Tinubu's, legal team to the political position of the Minister of Justice and Attorney General of the Federation. It was thought to be a calculated attempt to influence the outcome of the 2023 presidential election petition tribunal judgment. However, all the petitions of the opposition parties were struck out for lack of merit as the matter were contested all the way at the Apex court of Nigeria. The delay in the delivery of judgment does not show clear separation of powers between the executive and the judiciary arms of government.

Data presentation based on research question 3: What are the merits of the principle of separation of powers to Nigerians democratic consolidation?.

Mbah, (2007: 191-192) noted the following merits

- I The theory of separation of powers when applied to practical governance prevents tyranny, oppression and arbitrariness of the organs of government. This is because it is an obvious fact that if power is allowed to go unchecked, sooner or later it becomes a danger to the liberty of the individual.

The theory therefore is a device to avoid concentration of power, and where it becomes inevitable, adequate checks and safeguards should be put in place to prevent abuse of power.

- ii. Separation of power doctrine brings about division of labour, which in turn leads to specialisation, efficiency and increased productivity in the conduct of government business.
- iii. Separation of powers safeguards the liberty and freedom of the citizens.
- iv. The theory strives to separate the legislative and executive functions of government. This is to avoid the enacting of arbitrary laws and then subsequent enforcement in a harsh manner.
- v. Also, it is necessary to separate the judicial powers from the executive. Otherwise, the same person or body of persons will become the prosecutor, the judge as well as the jailor.
- vi. It avoids the concentration of powers in one person or institution. This is because the executive and the judicial functions require persons of different temperament and quality. A judge ought to be cool-headed, cautious and impartial. On the other hand, an executive officer ought to be able to make up his or her mind quickly and should be firm and active in taking decisions and in implementing them. A legislator on the other hand, should be able to feel the impulse of his or her constituency accurately and pass on their desires as well as ill-feelings for proper redress to the appropriate authority. That is to say, that a legislator should be a good political communicator and a master of political rhetoric.

In the same vein, justice brandeis in *Jay and Albert* (1978) had noted on the merits and of separation of powers that:

“The founder purpose of creating the constitutional branches was not simply to facilitate efficiency, coordination, and a smooth functioning of government. The purpose was also to create a system that would give each branch a motive and a means for preventing abuses or misguided action by another. This would prevent the accumulation of all powers, legislative executive and judiciary in the same hands....”.

Data presentation based on research question 4: What are the demerits of the principle of separation of powers to Nigeria's democratic consolidation?

Mbah (2007: 192-193), pointed out the following demerits

- I A rigid separation of powers is not good because it makes it difficult for the legislature and the executive to cooperate; and without the cooperation of the two organs of government, government business will come to a halt and the larger society will be worse off for it.
- ii. Separation of powers can lead to duplication of functions, which can make the running of government to be too expensive.
- iii. The concept of checks and balances inherent in the theory of separation of powers can prevent government functionaries from taking quick decisions
- iv. The traditional triad of powers is not very okay as of today. This is because the legislature does not always concern itself with the making of laws. It, in some cases, delegates to the executive powers to make rules within the broad framework of the law. Furthermore, administrative unit" are given judicial powers by statute. There is the practice whereby judges, through their interpretation of the laws, make new laws. This is known as judge made laws and the process is known as judicial review.
- v. Montesquieu version of the theory of separation of powers is too mechanical. This is because there is no animating mechanism. This would seem a motionless balance. As a human affair there should be a lubricating force to powers, a sort of biological mechanism.
- vi. Complete separation of power is an impossibility. Critics of this theory argue that it is not possible to define the area of each of these three organs of government in such a manner that each remains independent and supreme in its allotted territory. Absolutely complete separation of powers of government would require separate electors and independent tenure of office for each of the three

organs. That even at that, the separation would not be complete.

Justice Brandeis in *Jay and Albert 1978* supports this notion as they opined that “separation of powers would also create a tendency toward inaction. Not only would each branch check the others, but a system of checks and balances would also serve as a check on popular political passions”

Conclusion and Recommendations

Conclusively, the effectiveness of the separation of powers in Nigeria will depend on the commitment of the different arms of government respecting each other's roles and responsibilities. This will require a culture of accountability, transparency, and respect for the rule of law.

This paper have highlighted the specific functions of the executive, legislature and judiciary organs as provided by the Nigerian 1999 constitution as amended. The merits and demerits of the principle of separation of were noted. On the place of thorny issues on the separation of powers in Nigeria, the paper posits that the practice cannot become meaningful if checks and balances are not applied. Where there is fuse in functions that makes checks and balances not possible, then there is the need for the review of the 1999 constitution of Nigeria aiming to checkmate the abuse of power by more worriedly the executive arm of government in Nigeria. The constant abuse of power and neglect of the rule of law by the executive organ of government is a serious threat to Nigeria's democratic consolidation.

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