

THE IMPERATIVES OF SUSTAINING SEPARATION OF POWERS AND CHECKS AND BALANCES UNDER PRESIDENTIAL SYSTEM OF GOVERNMENT IN NIGERIA

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ABSTRACT

Separation of powers is one of the crucial features of a presidential system of government as it is practiced today in Nigeria. No man or group of people is too good to be vested with absolute powers of government viz: legislative, executive and judiciary because of the fear of being abused by suppressing the rights of the people. This is because power corrupts, absolute power corrupts absolutely. It is against this backdrop that the doctrine of separation of powers as provided by Montesquieu is not absolute due to the checks and balances that goes along with it. In view of selfish interest, people like arrogating powers to themselves to the extent that they become tyrant. The paper relied heavily on the use of secondary sources such as textbooks, journals, newspapers, internet and reports to collect data. Content analysis was also used in the analysis. The paper in the course of analyses found out that the doctrine of separation of powers and checks and balances are imperative in view of the fact that they have allowed each organ to confine itself to its constitutional role with the doctrine of checks and balances strengthening it. However, the doctrine of separation of powers has resulted to usurpation of powers and crisis between the legislature, the executive and judiciary even with the checks and balances. The separation of powers has made them to be competing enemies which does not create room for the dividend of democracy to trickle down.

Key Words: Separation of powers, checks and balances, presidential system of government and Nigeria

1.1 Introduction

In most democratic countries in the world particularly in presidential system of government, separation of powers is a crucial doctrine and practice in countries such as United States of America and Nigeria to mention just a few. The existence of democratic governance therefore depend largely on the separation of powers as provided by Montesquieu in his book *The Spirit of laws* in (1748)¹. The essence of the theory of separation of powers is to guarantee liberty and freedom to people when legislative

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¹ Appadorai, A (1968) *The Substance of Politics*, New Delhi: Oxford University, press. Pg. 516

executive and judicial powers are separated from one another. Thus, Nigeria cannot be talking about democracy when the liberty of individuals are not guaranteed which is based largely on separation of powers. No man or group of people is too good to be vested with all these powers and they would not be abused. We have to know that power corrupts, absolute power corrupts absolutely. It is the separation of these organs that determines liberty or freedom of the people: Appodarai also asserted that:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.²

When there is separation of powers, it creates a clear division of powers where the three organs of government are assigned different responsibilities or duties.

It is against this background in Nigeria that Askia (Jnr.)³ observed that the 1999 Constitution of the Federal Republic of Nigeria has separated the three organs of government namely legislature, executive and judiciary as provided by Sections 4, 5 and 6 respectively. However, the doctrine of separation of powers is accompanied with the principle of checks and balances that is common to presidential systems of government such as it is in Nigeria and United States whose role cannot be overemphasized. The separation of powers has made a democratic system of government to be a reality and a hope for the common man. With the separation of powers, the three organs of government are separated to consolidate on their constitutional role without interference from the other organs.⁴ A member of the legislature can indirectly be involved in functions of the executive and judiciary and the reverse is the case. Albeit there are checks and balances, they are meant to keep the organs on their toes. That is, the checks and balances are meant to checkmate the likely emergence of any abuse of power by any of the organs. It is on this note the doctrine of checks and balances is equally imperative.

The objectives of this paper are to examine the concept of separation of powers and checks and balances, and the imperatives of separation of powers and checks and balances in a presidential system of government in Nigeria.

1.2 Clarification of Concepts

There are three basic concepts that need to be clarified here in an attempt to comprehend the subject matter. Such concepts are; separation of powers, checks and balances and presidential system of government.

² Ibid pg. 516

³ Askia, S. (Jr), (2013) *Constitutional Principle of Separation of Powers Vanguard on Live Retrieved From: Community Vanguardngr.com/.../blog Pus...pg* NP 27th November, 2016

⁴ Okoli, E.F (2003) *Foundations of Government and Politics Onisha: Africana First Publishers Ltd.* pg

i. Separation of Powers

Separation of powers means that the three functions of government viz: legislative, executive and judiciary should be performed by different bodies of person; each department should be limited to its own sphere of action or area of control or jurisdiction.⁵ Thus separation of powers refers to a process where different persons or group of persons control each of the organs of government so as to guide against abuse of powers. That is, different person or group of persons is to make the law, different person or group of persons to execute the law, different person or group of persons to interpret the law. According to Montesquieu, this is the only way the liberty or the freedom of the people would be guaranteed.⁶

According to Danladi, separation of powers is: division of powers into three organs or government namely executive, legislative and judiciary. The legislative power is the process of formulating a general rule of conduct, without reference to particular case, and usually operating in future, while executive power is the power of performing particular acts, or issuing particular orders or making decision through the application of general rules to particular case, and judicial power is power of interpreting the law enacted by the legislature.⁷

These two definitions clearly shows that separation of powers is a process where the organs of government, viz; legislature, executive and judiciary are separated and controlled by different persons or group of persons and are assigned different function(s) in order to protect the rights or the liberty of the people. This separation of powers is very obvious in USA and Nigeria where presidential system of government is in full practice.

ii. Checks and Balances

This refers to, "constitutional provisions designed to ensure that political power is not concentrated in the hands of one person or a group of individuals... and the placing of checks on each of these organs of government."⁸

It is obvious from the definition that the principle of checks and balances is geared towards using power to check power. That is, a provision is made for the three organs of government to monitor themselves so as not to abuse their own powers. If the organs are allowed free hands to operate without any mechanism in place to check themselves, there is a tendency for them to become corrupt. It is therefore meant to control some of the excesses of the organs if they are left alone.

Okoli also sees checks and balances, as a process where the legislature is charged with the responsibility for law making, the executive for law execution, and the judiciary for law-interpretation which is also accompanied with the power of each organ to check the

⁵ Chturvedi, A.K. (2006) *Dictionary of Political Science*. Nigeria: EPP Books Services Nig. Ltd pg. 282

⁶ Appadorai, A (1968) *Op.cit* pg. 516

⁷ Danladi, K.M. (2013) *Outline of Administrative Law and Practice in Nigeria Zaria: Ahmadu Bello University Press Ltd. Pg. 48*

⁸ Chturvedi, A.K. (2006) *Op.cit* pg. 42

other organs so as to prevent them from either abusing or usurping too much power or arrogating too much power to themselves.⁹ Any separation of powers that is not accompanied with checks and balances is subjected to abuse. Therefore, there is a need to use power to check power in order to prevent abuse of powers by the organs, because power corrupts if it remains unchecked.

iii. Presidential system of government:

According to Ujo, presidential system of government is a government that started in the United States of America where the president or the leader combines the powers of the Head of State and the Head of Government.¹⁰ Here, the Executive President exercises both the functions of the Head of State that are ceremonial and the functions of the government. Such ceremonial functions are: receiving the visiting head of states, ambassadors, award of national honors, while the functions of government are day to day administration of the state.

Okoli on the other hand sees presidential system of government as a government where the president is dominant. He combines in his person the important roles of (a) Head of Government or Chief Executive, ceremonial chief of state and very symbol of his people, and the leader of the political party in the state.¹¹

Presidential system of government where separation of powers exist is simply the type of government where the president combines both the powers of the head of state that are usually ceremonial and the powers of government which are day to day running of the affairs of the government. Thus Nigeria and United States of America are good examples of presidential system of government as provided by the 1999 constitution that makes the president to be the executive president.

1.3 Separation of powers and the system of checks and balances in Nigeria.

Separation of powers and the system of checks and balances in Nigeria are very obvious. This is based on the fact that the 1999 Constitution of the Federal Republic of Nigeria has made in Sections 4,5 and 6 very clear the separation of the organs of government.¹² These organs viz: legislature, executive and the judiciary in Nigeria's presidential system of government are clearly separated. For instance, if a member of the legislature is to be a member of the executive, such a member has to resign his membership of the legislature and vice versa.

- a. **The Legislature:** the legislature in Nigeria based on 1999 constitution as amended is made up of the National Assembly as it is at the national level composed of the senate and the House of Representatives with 109 and 360 members respectively. At the Federal level, it is a bicameral legislature while at the state level, it is a

⁹ Okoli, E.F (2003) Op.cit pg. 117

¹⁰ Ujo, A.A. (2004) *Understanding Democracy and Political: A Guide for Students, Politicians and Election Managers*, Kaduna; Anyaotu Enterprise and Publishers Nigeria Ltd pg. 29-30

¹¹ Okoli, E.F (2003) op.cit pg. 69

¹² 1999 Constitution of the Federal Republic of Nigeria, Lagos: Federal Government.

unicameral legislature having only House of Assembly. The primary function of the legislature at both levels is, to make laws. Therefore, law making is the main function of the National Assembly.¹³ Other functions of the National Assembly are: constitution making and amendment, power of removal of the chief executive, budget approval, approval of treaties, ratification of international treaties, approval of appointments made by the executive among others.¹⁴ These functions are independently performed by the National Assembly without interference from the other organs albeit there are checks and balances. While at the state level, the functions are carried out by the House of Assembly.

The Executive: This is also another important organ of the government that is also separated from the other organs as postulated by Montesquieu to create liberty among the subjects. The executive at the Federal level based on the 1999 Constitution is composed of the President, Vice President and the Ministers. That is, it is composed of President Muhammadu Buhari and his Ministers. The main responsibility of the executive organ of government is to enforce laws. Other functions of the executive as it is in Nigeria are: appoints and removes cabinet members; prepares the budget of the country, controls the armed forces, initiates and submits bills to the National Assembly, gives assent to bills before they can become law, maintain foreign relation and sign treaties with foreign nations, formulate policies, grant staff pardon to people convicted of criminal offences among other functions.¹⁵ Just as separation of powers is with the legislature, that is how it is also with the executive. The executive perform the administrative functions along without any interference from the other organs. As for the state level, the functions are carried out by the State Governor, Deputy Governor and his Commissioners.¹⁶ These roles are also performed by the State executives although not all functions without undue inference from the other organs of the government.

Judiciary: This organ is equally important and it is made up of the courts and the Judges at both federal and state levels. The main activity or function of the judiciary is to interpret the law. Other assigned functions of the judiciary at the federal level are: settle disputes between parties, ensures that the laws are obeyed, protect the rights of individuals and groups, advice on matters concerning constitutional preparation and amendment, interprets the constitution, judicial reviews among other functions.¹⁷ The judiciary as it is applied to other two organs of the government is separated in Nigeria.

Jjo, A.A, (2004) op.cit pg. 36

Oyenaye, I. Etal (2001) Roundup Government: A Complete Guide. Ikeja: Longman Nigeria Plc pg. 43
bid, pg. 47

Danladi, K.M. (2013) op.cit pg. 57

Oyenaye, I. Etal (2001) op.cit pg. 49

However, "state judicial powers are vested in the courts established for the state. This is regulated by section 6(2) of the 1999 constitution".¹⁸ It is pertinent to note that, "both federal and state judicial powers operate on the same hierarchical structures to the extent a case that was handled by state courts can reach federal court when appealed against"¹⁹. The judiciary is expected to be more independent than other organs of government because of the functions of an arbiter. so that it would be able to carry these functions without any fear or favour. This can be guaranteed through recruitment, salary and benefits.

Albeit, there is separation of powers among the organs, there is a need for the organs to work in unison because all the organs work for the same goals or objectives to better the life of the people. Anything less than this is trouble.

1.4 Checks and Balances

The principle of checks and balances according to Ujo started with the American Constitution where it was discovered that the doctrine of separation of powers should be accompanied with checks and balances. The wisdom behind this was to ensure that the organs were not left unchecked to the extent that they would misuse powers. Thus, executive is balanced against the legislature and judiciary, legislature is balanced against executive and judiciary and judiciary is balanced against legislature and judiciary.²⁰

It is against this background that the founding fathers of the United States believed in limited government, government should be designed so that it would not become a threat to the liberty or property of the people, since the founding fathers believed that power was a corrupting influence and that the concentration of power was dangerous, they believed in dividing governmental power into separate bodies capable of checking each other, in the event that any one branch should pose a threat to the liberty or property.²¹

This is what is guiding separation of powers today in Nigeria. So many instances can be cited to buttress this issue of separation of powers and checks and balances as it is in practice today in Nigeria. The first instance is that, the legislature (National Assembly) has the power to make laws but such laws would not see the light of the day without the President (executive) or Governor assenting to it.²² Again, any law made by the legislature that is contrary to the provision of the Constitution of the Federal Republic of Nigeria, the judiciary has the power to declare such a law null and void.²³ Hence, the bills that have been passed to law by the National Assembly or House of Assembly have been assented to by the president or governor as the case may be and have been found worthy to be laws and have not contradicted any section or sub-sections of the constitution.

In addition, it is noted by Danladi that:

¹⁸ Danladi, K.M. op.cit pg. 61

¹⁹ Ibid, pg. 59

²⁰ Ujo, A.A. (2004) op.cit pg. 42

²¹ Ibid pg. 41-42

²² Danladi, K.M. op.cit pg. 53

²³ Ibid, pg. 66

the 1999 constitution maintains a system of checks and balances by making some exercise of power by the executive subject to some limited interference by the legislature. For example, the function of appointing members of his cabinet, judges of federal, superior courts, ambassadors/high commissioners, chairmen and members of some commissions of federal government establishment must be confirmed by the legislature before such appointments can be effective.²⁴

This obviously shows that it is the National Assembly or House of Assembly that gives approval to key appointments made by the President or the Governor as the case may be. It is meant to guide against the President or the Governor appointing people that are probably not qualified or not having widespread federal character. The appointment of Ministers by President Muhammadu Buhari in 2015 is a case in point where all the Ministers were screened by the senate. The recent lists of career ambassadors and non career ambassadors 47 and 46 respectively approved and rejected by the National Assembly is also a means of checks and balances where the legislature serves as a clearing house.²⁵ The scrutiny of the National Budget and other financial matters by the National Assembly or State House of Assembly are also instances to show the level of checks and balances in a presidential system of government as it is today in Nigeria. For instance, the National Assembly (the senate) rejected Buhari's \$29.9bn loan because of the absence of the detail of the borrowing plan that was not included.²⁶ The need to know how the loan is to be used is imperative not only to the National Assembly but to also all Nigerians because, it is a huge amount of money.

The essence of checks and balances in democratic system of government therefore cannot be overemphasized. This is based on the fact that it makes each organ to be on its toes and on the right track because power corrupts if it is not put under control.

1.4.1 Imperatives of Separation of Powers

Danladi has clearly adumbrated the importance of separation of powers, particularly in a democratic system of government like Nigeria.²⁷

Decentralization of Powers: Separation of Powers is crucial because it helps in arrogating powers to three organs of government in order to avoid misuse of power when power is concentrated. It is against this backdrop that there are three organs of government viz: legislature, executive and the judiciary each with its area of jurisdiction or control. Decentralization of power therefore helps in strengthening democratic system of government in Nigeria.

²⁴ Ibid, pg. 57

²⁵ Daily trust (2016) Senate Rejects Buhari's 46 Ambassador Nominees. 16th Nov, pg. 1

²⁶ Daily trust (2016) Why Senate Rejected Buhari's \$30bn Loan 2nd Nov. pg. 5

²⁷ Danladi, K.M. op.cit pg. 62-65

Prevention of Arbitrary use of Powers: It is obvious that the practice of separation of powers in Nigeria has helped a lot in the prevention of arbitrary use of power particularly when many powers or absolute powers are vested on one person or body of persons. Man, by nature, is very selfish and he likes arrogating powers to himself. Such behaviour threatens the weak ones in the state.

Creating Harmonious Working Relationship: Separation of powers leads to consciousness of the fact that the organs of government are separated; but they all work for the same purpose. This no doubt creates a kind of harmonious working relationship and mutual respect among the people engaged by the organs. Harmony is a key to better performance of these organs.

Protection of Judicial Independence: It is only through separation of powers that the independence of the judiciary can be guaranteed and maintained. Independence of the judiciary would create a very conducive atmosphere for the judges to carry out their assignment without any fear or favour of either the executive or the legislature. It is judicial independence that gives law a sense of direction, fair play and justice.

Protection of Liberty: Montesquieu observed that it is 'only when there is separation of powers that the liberty or the rights of the people would be guaranteed. Therefore, anything less than that is tyranny, oppression and anarchy.'²⁸ This goes to say that liberty of the people in a democratic system of government like Nigeria can only be in place where there is separation of powers as it is also in USA where Nigeria copied the system.

Enhancement of Effective Governance: It is obvious that effective or good governance cannot be in place where there is no separation of powers. Thus, separation of powers is what makes or leads to good governance in any democratic system of government. It is separation of powers that makes government to be responsive and responsible with regards to meeting the yearnings and the aspirations of the people that are governed.

1.5 Challenges of Separation of Powers and Checks and Balances in Nigeria

The challenges of separation of powers and checks and balances are enormous.

The separation of the executive and the legislative organs of government often than not leads to governmental crisis or conflicts – when there is disagreement with each other especially on such issue like budget. The 2016 budget is still fresh in our memories. According to the Guardian.

the controversy surrounding the 2016 budget continues to linger even as the first quarter of the year has ended. Right from the onset, the budget proposal was traded with the allegations of padding, missing, subterranean withdrawal attempt, re-jigging by the executive and others, a development that nearly puts the executive and the legislature on the collision path.²⁹

²⁸ Appadorai, A. (1968) op.cit pg. 517

²⁹ The Guardian Newspaper, (2016) 2016 Budget Controversy. 16th April

The alleged removal of N60 billion Lagos-Calabar coastal rail project and secret inclusion of Novel Project worth billions of Naira. Albeit the National Assembly denied the allegations of such removal worth billion of naira. This was a development that threatened the peaceful co-existence of the two organs legislature and the executive.

Another disregard of separation of powers in Nigeria is the issue of usurpation of powers of the legislature through fuel tax. According to Oraegbanan, the unilateral imposition of fuel tax by the Chief Executive of the Federation, an act that violates the provisions of section 59 of 1999 Constitution, is another case in direct collision with the separation of powers theory. The section provides for the mode of exercising federal legislative powers on money bills. Subsection 2 thereof requires that such bills, including "impossible of or increase in any tax" (at section 59 (1)(b) must be passed by both houses of the National Assembly plus the presidential assent before they become laws.³⁰

Contrary to the above, the bill emerged from the chief executive and was passed at the same time by the executive without passing through the legislature. This is a violation of separation of powers and checks and balances because alone, the executive played the role of initiating a bill and passing it into law without the legislature involved. This is a clear case of usurpation of powers meant for the legislature. However, the intervention of the Abuja high court through Justice Salami as a result of anti fuel tax protest by the NLC, the matter was put to rest.

Dictatorial attitude of the executive in the Nigerian polity says much about non-adherence to the doctrine of separation of powers in Nigeria. Declaration of state of emergency in Plateau State by the Federal Government in 18th May, 2004 was another action that threatened the doctrine of separation of powers. The Constitution of the Federal Republic of Nigeria of 1999 in Section 305 vests on the President to declare a state of emergency, but such declaration depends largely on meeting certain conditions albeit such declaration is always a last resort.³¹ President Obasanjo went ahead to proclaim a state of emergency in Plateau with consequential action of suspensions of the elected arms of government who were replaced by a sole administrator accountable only to the President whose situation was not a threat to Section 305(3) of the 1999 Constitution. Meanwhile, there were situations that were not as bad as Plateau such as Kaduna, Lagos, Kano, Niger Delta to mention but a few but such states did not in any way experience state of emergency. These conditions in section 305(3) of the 1999 constitution were not met.³² This situation has been considered to be mere self arrogation of powers to the executive and usurpation of powers of government of Plateau State contrary to the vertical principle of separation of powers. This is also a violation of separation of powers because the organs have refused to confine themselves to their constitutional powers.

Another example where the executive undermined the power of the National Assembly in Nigeria was,

³⁰ Oraegbanan I., (2005) *Separation of Powers and Nigeria*: 19th January. Vanguard News Paper pg. 1

³¹ Ibid pg.2

³² Federal Constitution (1999) op.cit pg. 113

the incident that took place at the National Assembly Abuja on 20th November, 2014 where the Nigerian police took over the premises of the complex in a bid to prevent the speaker of the House of Representatives Hon. Aminu Waziri Tambuwal from gaining entrance to the chambers for their plenary session summoned the extension of emergency rule in parts of the North East was anything but recklessness on the part of the Executive arm of government. The barricade of the gates and free use of tear gas by the men of the police force against the members were akin to unprovoked war.³³

This encounter was as a result of defection of the speaker which the 1999 Constitution has been silent on carpet crossing and no genuine attempts have been made by the National Assembly to amend the said Section of the Constitution that has been causing unhealthy development between the executive and the National Assembly. The executive wanted to use force with the aid of the policemen to force him out of office instead of amending the constitution on what need to be done when a member of legislature defect to another political party.³⁴

1.6 Conclusion and Recommendations

Separation of powers and checks and balances have helped the organs of government be on their toes. It's imperative to know that governmental powers cannot exist without checking their excesses because of the abuses such powers may find itself. It is against this backdrop that the Constitution of the Federal Republic of Nigeria has clearly defined the powers of the organs – legislature, executive and judiciary so as to establish a peaceful atmosphere as they carry out their respective duties. Absolute separation of powers would only create a room for abuse of such powers by the individual organs. Therefore, the doctrine of checks and balances has helped in creating a balance relationship between them. Using power to check power in order to avoid abuse. However, this is not to say that there are no challenges as noticed above or earlier.

It is for this reason the paper is making the following recommendations:

- i. There should be strict enforcement of the provisions of the 1999 Constitution no matter the vested interest of the legislature or the executive or judiciary. A law is a law and it should not look at human face to determine the direction of justice.
- ii. Each organ should stick to her powers as provided by the 1999 Constitution, however the doctrine of checks and balances should be allowed to co-exist in an attempt to avoid abuse of powers by the respective organs because power corrupts.

³³ Uhwo, J. (2014) Separation of Powers and Executive Recklessness in National Assembly: Retrieved from: 247 un-reports. Com/separation-of -pows-and executive. Pg.1

³⁴ Ibid

- iii. The relationship between the legislature and the executive should be closely monitored by the public because any crisis by these organs always have enormous consequences on the masses such as delay in signing the budget as it happened during the 2016 budget.
- iv. There should be mutual respect among the organs as all are working for the same purpose and goal. This will make them to see themselves as partners in progress.
- v. Any erring organ or body should be sanctioned so as to serve as a deterrent to others. Thus any section of the constitution violated should be punished according to established laws.