

Analysis of Some Grey Areas in the Operation of Separation of Powers in Nigeria

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Abstract. Interesting as democratic government might be, its success depends on the observance of the doctrine of separation of powers by the respective organs. While separation has been well practised in advanced democracies, as United States of America and Great Britain, the experience in emerging democracies, Nigeria inclusive, has been unrewarding, particularly because several grey areas have remained unresolved. The major objective of this paper therefore, is to examine the sources and nature of the unresolved areas which have inexorably produced rancorous relationships among governmental arms in Nigeria. In the qualitative research design which adopted expository analytical approach, the study found, among others, that it was not constitutional, legal or institutional deficits or lacunae, but human factor that had constituted the major obstacle to the successful practice of separation in Nigeria. To change the paradigm therefore, it was recommended among others, that regular training and retraining, with practical case studies from the experience of advanced democracies, should be conducted, to educate the leaderships of governmental arms, given that expertise or experience in governance is not a prerequisite for political leadership in Nigeria.

Keywords: Democracy, Separation of Powers, Checks and Balances, Grey Areas, Relationship.

1. Introduction

After a few years of practice of parliamentary government, specifically during the First Republic, Nigeria opted for the presidential system from the Second Republic. The presidential system adopted is a semblance of the United States of America (USA)'s

democracy widely practised by most countries of the West.

As a political concept, democracy has been variously defined. The assumption here is that elementary understanding of the definition of democracy is given; and may therefore not detain the proceeding of this paper at this stage. However, a “consensual” definition of democracy, one provided by Abraham Lincoln, is that democracy is “government of the people, by the people and for the people” (Habu, 2019, 71).

Siaroff (2013) examined Lincon's definition critically and noted that a proper understanding of democracy may be problematic, particularly with respect to the misleading notion that in a democratic government, the people are the actual decision makers, given the limitation in the extent of the people's participation. In the light of the deficit inherent in a straight jacketed definition, scholars (Laski, 2008; Appadorai, 2004; Habu, 2018) are of the opinion that democracy is easier identified by basic features or characteristics which include, but are not limited to, existence of legislature; possibility of change of government, multiparty system, tolerance of opposition or divergent opinions, popular participation and competitive free and fair elections.

In liberal democracies, additional features include respect for individual rights and separation of powers as exemplified by the brand practised by USA and Great Britain. Of the myriad of features, the focus of this paper is separation of powers. Separation is a mechanism for safeguarding the imperative of the exercise of constitutionally legitimate powers by each organ of government within the limit or confine of the respective organs. Thus, the Executive,

Legislature and Judiciary are enjoined by separation to conduct their respective affairs within their legitimate bounds, without encroaching, straying or veering into the domain of the other(s), notwithstanding the need for inter-organ cooperation in the conduct of governmental responsibilities.

In Nigeria, the practice of separation is weak form, resulting in instances of inter-organ encroachment and possible “intimidation” both of which are antithetic to the fundamental objective and goal of the principle. Whether in the press, or in academic literature, the polemic in inter-organ feud in Nigeria has remained unresolved. The major source of the ever raging feud is understandable: the totalitarian political culture shaped by long military rule. This commentary is inspired by the desire to examine the grey-areas in the practice of preparation in Nigeria under democratic dispensation.

The salient questions which were asked in this study included: whether the inappropriate practice of separation in Nigeria is attributable to constitutional, legal or institutional lacunae; or, whether the distortion is ascribable to the personality of the political leadership.

Flowing from the questions, the objective of this paper is three-fold: to examine the deficits or lacunae, if any, in the legal and institutional arrangements, that had often given rise to the observed weakness in the operation of separation; to examine whether or not the observed weakness is inherent in the operators of the system; and to proffer antidotes for improvement in the practice of separation in Nigeria.

Methodologically, the study adopted expository analytical approach, based on a critical examination of past scenarios; and the attitude of the leadership of the organs of government, in relation to the conduct of separation principle. It is anticipated that this study would contribute significantly to the strategic imperative of improving the existing poor relationships among governmental organs in Nigeria, ascribable to improper practice of separation principle.

2. Review of Literature and Theoretical Framework

2.1 Conceptual Clarifications

For elucidation, the review is preceded with a clarification of the salient concepts adopted. Among the related concepts are separation of powers, checks and balances, and rule of law.

2.1.1 Separation of Powers

In modern democratic practice, the powers of government are separated to three major parts, namely executive, legislative and judicial. While the executive power is vested in the Executive arm, the legislative power is vested in the Legislature. Similarly, the judicial power is entrusted in the Judiciary. In Nigeria, as in USA, the Executive is the President; while the Legislature is the bi-cameral National Assembly (NASS), comprising the Senate and House of Representatives. The Judiciary is composed of the hierarchy of Courts (Nwankwo, 1990).

With regard to functional responsibilities, the Legislature is charged with rule-making; while the Executive is responsible for rule implementation. The Judiciary is saddled with rule adjudicating function. A combination of the three functions provides the governmental machinery for orderly management or administration of the State.

The thesis of the doctrine of separation offers discussion on what the proper relationships among the various organs of government should be, in the exercise of the respective functions (Gaub, 2003). Accordingly, separation doctrine enjoins that the three powers of government should be entrusted to different organs; and that no organ should exert influence on the other (Itodo, 2014).

Espoused by Charles Montesquieu (1689-1755), the doctrine has gained wide application in USA and Great British. In Nigeria however, separation is still practised as a caricature of the ideal model; and as an inchoate microcozym of the superior American typology.

2.1.2 Checks and Balances

The real essence of separation of powers among governmental organs is the imperative for each branch to serve as a check over the other (Allan & Guy, 2000). Thus, while Congress in USA can constitutionally impeach the President, and can also decline to approve appropriations for the Executive and the agencies. Similarly, the Supreme Court, the apex court of USA, can declare an Act of Congress null and void, if it is established that such Act is ultra-vires the constitutional powers of Congress. On the part, the President can veto a bill of Congress, if in the opinion of the President, such bill is unconstitutional. The arrangement is similar in Nigeria where NASS checks the President through the exercise of the power of impeachment or veto.

The President can equally veto a bill of NASS if it is against the Constitution. The same holds for the Judiciary, which has powers to declare any action of NASS or Executive null and void, if such action is at variance with constitutional provisions. Of note, each branch of government checks the other with every sense of responsibility, understanding, cooperation and equanimity.

2.1.3 Rule of Law

Although no precise definition has been placed on the concept of rule of law, the variant provided by A.V. Dicey is now widely adopted. By the definition, rule of law is the supremacy of the law, as distinct from any other mode, which is arbitrary; and which seeks to deprive the individual of the liberty in the State.

In a more concise explanation, Poat (2015) referred to rule of law as meaning that it is the law that rules and nothing else, and “governance is based on law and not the dictates or wishes and feelings of individuals”. Of the myriad of the implications of rule of law, the canon which enjoins that official actions should be consistent with the established or declared rule is aptly relevant in governmental inter-organ relationship. More concretely, organs of government must operate within the dictates of declared law, Katuka (2013). To be sure, a breach of the rule is a harbinger of tyranny, as is typical of military dictatorship.

3. Review of Previous Studies

Akinsanya, Mahmud, Abdullahi, Mohammed and Itodo (2018) in a study titled “Executive-Legislative Relations, June 2013-May 2015, noted that Parliamentary Executive system which permits a fusion of legislative and executive powers facilitates efficiency in administration and stability in government, in contradistinction to the Presidential system that allows for inefficiency in administration and government immobilism. By the nature of Presidentialism, which Nigeria operates, the three arms of government are separate, with respect to functions and personnel. The separation vests each arm with adequate powers of checks, in order to properly balance the other arm (Oyelele, 2003), as explicated in the review under “check and balances”.

Against the backdrops of the separation principle, Akinsanya, et al., (2018) examined the operation in the relationship between the administration of Dr. Goodluck Jonathan’s Executive branch and the 8th Assembly or Legislature, during the period June 2013 – May 2015. The study reviewed the *modus operandi*

of separation between the arms, with specific experience drawn from various conducts relating to management of public finances, law making, policy formulation, representation, investigation, fixing of remuneration of political appointees and public officers, appointment to key positions, removal of chief executives and other top government functionaries, and oversights, among others.

The study reported obvious instances of attempted or actual encroachments by the arms, particularly the Executive and Legislature. As an instance, the Executive, either due to ignorance or inadequate understanding of constitutional provision, or latching on to the extant culture, “insisted” on playing the leading or sole role in budget appropriation, notwithstanding that the 1999 Constitution of Nigeria (as amended) vested the power of appropriation in National Assembly. Similarly, NASS dabbled into Executive’s function by insisting on executing constituency projects. Across the various functions of the respective arms, instances of encroachment were reported.

Of particular note was the preponderance of Executive’s overbearing influence on other arms. In this regard, the “culture” of Executive’s attempt to “instruct” the Legislature or Judiciary had been deeply cultivated over the long period of military rule. Thus, it was common-place expectation for the Executive to “direct” NASS to either approve (or rubber stamp) a bill or proposal; or “mandate” the Judiciary to do the “needful” (Akinsanya, 2015).

It was however a paradigm shift in the Executive-Legislative relationship during the 8th Assembly (2015-2019) when NASS stood a firm ground to be and remain independent, in line with the constitutional guarantee. This “insubordination” of NASS was resented by the Executive, resulting in a frosty relationship throughout the tenure of the administration. The “rebellion” of NASS leadership was not without Executive’s sanction”, either using political party machinery, or legal maneuvers (Akinsanya, et.al, 2018).

A study by Mahmud, Itodo and Abdullahi (2019) examined the sources of the inexorable feud between the Executive and Legislature in Nigeria, particularly during the 8th Assembly. Employing expository analysis, the study found that while Executive’s actions were driven by personality, the Legislature stood firmly on constitutionality. In this regard, Executive’s actions such as the appointment of military Service Chiefs and Inspector-General of Police, hitherto taken without recourse to the Legislature for approval as required by the

Constitution, became objectionable to the Senate. Consequently, such appointments were made in acting capacity until they were confirmed by the Senate. Without doubt, it is likely that “reversing” a presidential decision by anybody, or governmental organ, constituted ‘disrespect’ and degradation to the personality of the “all-powerful” Executive, irrespective of the equality of all arms as envisaged by the Constitution of Nigeria.

In a paper presented by Ajala (2017) titled “the Legislature and Presidentialism, the author provided an explicatory review of the relationships in several African democracies and noted the incessant conflicts between the Executive and Legislature. The study democracies were mainly countries which had experienced long periods of military rule. The paper reported that, particularly where the President transmuted from military dictatorship, separation of powers was virtually impracticable. In effect, such President remained a military “Head of State” in civilian garbs, with resistance to the fundamental tenets of democratic rule. To be sure, such “democracies” were at best totalitarian, as noted by the paper.

4. Theoretical Framework

From the foregoing, this study is underpinned by the Theory of Separation of Powers. Further elaboration of the theory might be superfluous here, given the earlier explication of the concept. What needed to be emphasized however is the observed tendency for gross abuse or violation of the tenets of separation in the Executive-Legislative discordant relationship in Nigeria, as reported by Akinsanya, et al., (2018) and Mahmud, et al., (2019) in the various studies.

Of particular note in the relationship is the existence of “unconstitutional dependence” of other arms on the Executive. The dependency may be explained by the custodial responsibility and vantage position of public revenue by the Executive. The exercise of the function had given rise to misconception and misapplication, leading to Executive’s arrogation of financial resources and management, through budgetary monopoly.

It is therefore trite knowledge that Dependency Theory, as espoused in Frank (1972)’s typology, posits that what is critical in the dependence relations among nations, and by extension in all relationships, is “resource control”. Thus, where one institution is placed in a “superior” position in the control of commonly owned resources over another, there arises the natural tendency to dominate and depend in the

relationship. The inter-play of separation and dependency theories facilitates a clearer understanding of the relationship expectations in an ideal democracy, in contradistinction to the practice of the inchoate brand in many emerging countries, Nigeria inclusive. Accordingly, the facilitation of an ideal inter-organ relationship underscores the utility of the theories, and the relevance to this study.

5. Separation of Powers in Nigeria: Analysis of Some Grey Areas

Separation of powers is one of the fundamental requirements of a modern and successful democracy, no doubt. The importance of the doctrine and practice was emphasized in the observation by Charles Montesquieu (1530-1596), the famous French jurist who noted, during a visit to England in the 18th century, that in Britain, the three governmental powers were separated from one another. Montesquieu concluded that “such arrangement was the secret of the liberty enjoyed by the British people” (Habu, 2018, 76).

Without doubt, it is surmised that water-tight separation is neither possible nor practicable, not even in USA or Britain. In inchoate democracies as Nigeria and Ghana, it is expected therefore, that several unresolved issues “rightly” challenge the smooth operation of separation. This section analyses several of the grey areas in the operation of separation of power in Nigeria

5.1 Financial Autonomy

Sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (“the Constitution”) allocate public powers to the three organs of government. Nothing in the sections alludes to subordination or superiority of any organ to the other. Except for the necessity of cooperation and collaboration, the import of the conferment of governmental powers by the constitution is that each organ is autonomous, in all material particular.

In Sections 162, 163, 164 and 165 of the Constitution, the administration of public revenue is prescribed. Again, nothing in the sections places any of the organs in a subordinated position to the other. In effect, the financial autonomy of the respective organs derives and is implied, from the original autonomy granted by Sections 4,5 and 6.

Unfortunately however, experience in practice has suggested that the Executive, merely capitalising on the advantaged position as collector and custodian of

public revenues, had extended the unconstitutional arrogance of revenue appropriation to other organs. Consequently, sister organs have assumed the position of a beggar when the need arises during annual budgeting or for funds utilization. In effect, only projects or expenditure “approved” by the Executive might be captured in budgets. Even when projects are budgeted and approved, accessing the funds by the Legislative and Judicial organs might be Herculean. This experience is alleged to have been pervasive across the various tiers of government.

In order to mitigate the unconstitutional relationship, several calls by analysts and activists had gone to the Executive. In 2020, President Muhammadu Buhari issued Executive Order, directing the proper operationalization of the subsisting constitutional provision for financial autonomy of other branches of government. Thus, state governments which replaced the old official vehicles of High Court Judges and Legislators or who constructed official residential quarters for the routine accommodation of Judges and Legislators have often been highly appreciated by the beneficiaries, and indeed the public, as “performing” and “magnanimous”. No one, not even the constitutional “owners” or “allottees” of the funds but whose priorities the Executive must determine, have had the “privilege” to raise questions about the propriety or otherwise of Executive’s action. In this light, the favour” or “magnanimity” extended by Rivers State Executive by providing quarters for High Court Judges, and in replacing the old official vehicles, must be viewed more appropriately as a breach of financial autonomy than service. To be sure, only when a service is basically constitutional will it not be an anathema. Notwithstanding, the more but needless clarification provided through the Executive Order, the implementation of the “directive”, particularly at state and local government tiers remains suspect. In effect, financial autonomy of all organs remains clearly unresolved.

5.2 Financial and Budgetary Appropriation

A major “grey” area in the operation of separation in Nigeria relates to authority over financial appropriation, usually presented in annual budget rituals. Section 80(1) of the 1999 Constitution (as amended) provides for the establishment of the Consolidated Revenue Fund (CRF). The Section also provides for the authorization of expenditure from CRF by the Federal Government. Similar provisions are made in Sections 120 and 121 of the Constitution with respect to CRF and authorization of expenditure therefrom by State Government.

Notwithstanding the clarity of expression in the provisions, the question as to which organ, Executive or Legislature, should exercise the authorization function had remained controversial, resulting in serious feud between the arms (Mahmud, et al., 2019). In 2016 and 2017, the controversy and feud became so serious that budget implementation was virtually marred. Central in the feud was the alteration effected in the budgetary estimates from the President by NASS.

Objectionable to the “daring insubordination” of NASS, the Executive refused to assent to or commence implementation of the budget as amended. The “insubordination” came to the fore because the then independently minded NASS was on a “test-run” of its autonomy. The resultant effect of the disagreement was denial of good governance to the citizenry.

The “prodigal leadership” of the 8th NASS however paid for the “insubordination” by failing to secure re-election into the Legislature. To stem the “unwanted behaviour” of the 8th Assembly leadership, a new and “better-understanding leadership” was installed for the 9th Assembly. Public commentators are worried that the 9th Assembly may become dirigible, if the stance is sustained.

The new leadership with the mantra, “to be on the same page with the Executive”, is perceived as returning the relationship to status quo ante. Consequently, the era of disagreements and feud has been put in abeyance. Irrespective of the situation, if the Constitution remains the grundnorm, financial appropriation belongs to the realm of the Legislature, as rightly put and insisted upon by the 8th Assembly.

5.3 “Constituency Projects”

A grey area in the operation and management of separation is the novel “constituency projects”. The concept and practice is an advent of NASS, which seeks to allocate a portion of annual budgetary appropriation to members of NASS, for execution of projects in the respective constituencies. The argument is that projects so executed will discharge members of campaign promises to the electorates, and thereby position them strategically victory at subsequent polls.

The key question is whether NASS, and indeed members, are constitutionally charged with project execution responsibilities or obligations. If the answer is in the negative, a subsequent question is why candidates should promise to deliver services outside the purview of the office into which they seek

election? To be sure, it smacks of ignorance of the electorate not to understand that the Legislature has no constitutional mandate to deliver physical projects to constituencies. This limitation is however not extended to members' obligation to attract projects through convincing arguments during debates at appropriate sessions. Notwithstanding the unconstitutionality of the demand, the Executive may have acquiesced to the arm-twisting tactics of the Legislature, in order to "cooperate" or collaborate, and to "remain on the same page", a cliché fondly used in the 9th Assembly. Public policy analysts have criticized the "collaboration" as an importation of antigens into public budgeting and appropriation in Nigeria. Without doubt, the challenge of constituency project remains unresolved.

5.4 "Legislative Amendment" by the Executive

It is trite knowledge that law-making function, including amendments, is the preserve of the Legislature, or NASS in Nigeria. Nevertheless, on several instances, the Executive attempted to "amend" extant laws, without recourse to the Legislature. In this regard, the action of President Olusegun Obasanjo when the President directed deletion of the word "Force" from the name, "Nigeria Police Force" was ill-advised; because the action required constitutional amendment. Accordingly, the action failed. A similar attempt by the Executive to effect a change in the name, "University of Lagos", to "Moshood Abiola University", also failed because the contemplation was done by mere "Executive fiat", although amendment in the University Establishment Act was basically required.

5.5 "Statute of Limitation" in Relating with the Judiciary

The Judiciary is the last defence of the otherwise politically, economically and socially vulnerable members of the polity. To respect the sanctity of this peculiar arm of government, the tradition of neutrality accorded to and enjoyed by the institution is sacrosanct. In this regard, the appointment, management and termination of Judicial Officers must be conducted in the best manner of the established tradition.

The process of appointment and discipline of members of this "special" part of society must also remain apolitical and duly followed. However, experience of the Executive's procedure in the cases of His Lordship, Walter Onoghen, JSC and Justice Nasiru Ajanah, Chief Judge of Kogi State, were far from expectation, as was widely perceived. While

Justice Omoghen was "removed" without recourse to the National Judicial Council and Senate, as required by the Constitution, Justice Ajanah's escape from "sanction" by the Executive was by divine intervention.

The sum total of the action or inaction of the Executive in taking arbitrary decisions that smacked of totalitarianism can only find expression in weak form democratic education, leading to authoritarian tendencies. In USA and UK, the President and Prime Minister are perceived as being "powerless", or at best as powerful as the constitutionality of the action. In emerging democracies, the culture has remained crude and advanced. In such situation, raw power, not constitutional authority, remains the source of action. Nigeria's experience typifies this absurdity.

It is for this reason that Nwaneogbo, Tsuwa and Omadachi (2013) concluded that "governance breeds development when it controls or manages, in accordance with democratic principles of authority, the rule of law, legitimacy, choice and accountability". More seriously, Omenka, Iba and Asongo (2013) noted that although the Legislative, Executive and Judiciary constitute governance:

in Nigeria, the executive tend, in fact, to be the major and sometimes sole actors in the political system due to the fact that they have potentially large shares of the available political resources and find it rather easy to bend the governmental process that would have served the state better and provide for the common good of the common people. The reality is that most executives in Nigeria have been dictatorial and have used the political resources to over-awe the other two branches of government and the entire society (p.55)

6. Conclusion and Policy Recommendations

For democracy to operate smoothly and effectively, the cardinal fundamentals of separation of powers and checks and balance must be truly observed and respected. Thus, each arm must discharge the assigned function in accordance with the dictates of the Constitution, and all the extent laws, in line with rule of law.

The prevalence of the unresolved or grey areas in Nigeria portends a threat to a harmonious relationship among the organs of government. Although the areas of conflict had been adequately addressed in the Constitution, and extent laws in Nigeria, inadequate understanding of the *modus operandi* of constitutional democracy by the chief operators of the

system has remained the bane of a smooth operation of separation.

A critical appreciation of the situation, as noted by Akinsanya (2015), suggested that the long military rule, which had bedeviled much of the Third World, bequeathed a culture of militarism and the attendant autocracy in governance. From the foregoing therefore, it is important to understand the place of leadership in democratic governance and development. To be sure, Nigeria political culture is characterized by lack of agreed set of rules and procedure capable of regulating political and power interactions, resulting in the use of unconstitutional means to achieve goals (Omenka & Akaan, 2013). To overcome the undemocratic political culture, a shift in paradigm in the practice of separation in Nigeria is required, as proffered in the subsequent recommendations.

Based on the analysis and conclusion, the following policy recommendations are made:

- Government should institutionalize regular and frequent training and retraining of all political office holders, and the top echelon of the bureaucracy, in the tenets of democracy and democratic governance. Training should focus on demilitarization of the ego and psyche of the political ruling class, as well as rule of law, in order to subordinate the ego to the supremacy of constitutional provisions, irrespective of how much it may hurt or bruise the ego. Case studies in practical scenarios from the advanced democracies should form a significant part of the curriculum and instructional materials, as against undue emphasis on theoretical exposition. This position is informed by the finding that the existence of the grey areas is not attributable to constitutional or legal lacunae, but to human factor, ascribable to operators of the system. In this wise, the National Institute for Legislative and Democratic Studies should be adequately equipped to play the role.
- It has been tritely suggested by public and political analysts that the latent motive behind all political discords is “political interest and consideration” (Anyia, 2018). In this respect, where the Executive attempts to circumvent the established procedure for succession to a vacant judicial office, or where the Executive insists on usurping the revenue appropriation function of the Legislature, the clear motive is to gain

undue political advantage. The same holds where the Legislature “hustles” to assume Executive’s function of budget execution, clothed in “constituency project”.

- It is therefore recommended that effective legal and institutional mechanisms should be emplaced, to check the unwholesome personal or political desires or motives of political leaders who often stray into domains outside of the purview of the assigned responsibilities. In this regard, clear institutional sanctions for a deviant-organ should be entrenched in the Constitution; while enforcement of such provisions should be sacrosanct.
- Without necessarily promoting a culture of undue litigation, any arm of government convinced that an encroachment had been perpetrated by another should boldly test the legality or otherwise of the breach, by approaching the courts for remedy. A “defeated” arm so “disgraced” and degraded would be less audacious in future thoughtless actions, to avoid total loss of credibility and respect.
- Very important also, the operation of financial autonomy should be redefined, through a constitutional amendment, to remove all ambiguities under which the Executive has hidden to exercise undue control over sister arms. The amendment should emphasize the custodial or banker-customer nature of the relationship. It should also emphasize the nature of the autonomy: from financial appropriation, through funds management to project implementation, subject to extant provisions of the allocative power of the Legislature. Thus, the Executive should be restrained to play the role of the Post Office only. The redefinition of financial autonomy is critical because of the centrality of funding in public management and administration; and the potency to generate feud among governmental organs, when violated.

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