



The Efficacy of the Doctrine of Checks and Balances in Contemporary Nigeria

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ABSTRACT

The philosophy of Montesquieu, that political power should be divided so that no one authority would have absolute powers, (otherwise known as Separation of Powers) is the bedrock upon which the doctrine of checks and balances stands. According to Montesquieu's philosophy, governmental powers are now divided among the Executive, Legislature and Judicial arms. To ensure the different arms do not perform their duties perfunctorily or outside the scope of their powers the doctrine of checks and balance, has evolved. Most democracies, Nigeria inclusive, practice this system of checks and balances where in each arm acts as a check on the other arms. In Nigeria, this practice is in vogue, albeit with questionable objectives. It appears the doctrine is riddled with corruption, different from what it should be. A situation where a Senate President, without qualms, announces to the whole world that any issue that emanates from the President, must be approved by the Senate, stands the doctrine of checks and balances on its head. This paper appraises the operation of this doctrine in Nigeria since 1999 with some recommendation for improvement.

Keywords: Checks And Balances, Separation Of Powers, Executive, Legislature, Judiciary

1.00 INTRODUCTION

A fundamental principle undergirding the design of modern governments is that of the separation of powers, which prescribes the parceling out of the various powers and functions of government to separate and relatively independent levels and branches of the Federal and State governments in order to prevent their all being controlled at the same time by any potentially tyrannical political faction. But to the way of thinking of the framers of modern-day Constitutions, the long-term survival of free popular government would require more than simply a purely formalistic separation of governmental functions and powers into completely independent organizational jurisdictions. Ambitious and unscrupulous office holders in one or another of the various branches and levels of government could be expected to encroach upon the powers and authority of the other branches and levels from time to time, and this would gradually bring about a usurpation of powers unless the leaders in the other parts of the government could be given the necessary constitutional means and personal motives to resist the encroachments of the others. Like Madison famously wrote, **“ambition must be made to counteract ambition”**.

Checks and balances which, like separation of powers, generally credited to Montesquieu is a government structure that gives each branch some control of the actions of the others and requires cooperation among the branches. A system of checks and balances minimizes the risk that one branch might completely take over the government or stray too far politically from the other branches. The principle has been a key factor in a

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constitution's survival, assuring evolution in government rather than revolution. Due to a system of checks and balances therefore, was that no one branch of government should be able to get too far out of control without being put in check by the others. Thus, if a President starts acting like a despotic king he can be impeached by the National Assembly. If the National Assembly starts trying to pass a series of laws that are blatantly unconstitutional, those laws can be overturned by the Courts and so on. The most important result is that getting anything done within any democratic system of government typically requires the cooperation (or at least the acquiescence) of more than one branch of government. We shall be considering checks and balances among Nigeria three arms of government contemporarily.

2.00 LEGISLATIVE CHECKS ON THE EXECUTIVE

2.01 Removal

The power to remove an elected executive officer is an ultimate weapon the principle of checks and balances gives to the legislature. This power is granted to the legislature to check the abuse of the enormous executive powers exercised and exercisable by them. This is important since they are shielded from prosecution from criminal or civil charges (in their personal capacities) while in office¹. Thus, as a check on the executive, the legislature may remove the President or Vice-President², a Governor or his Deputy³ where one or more of them is found guilty of gross misconduct in the performance of the functions of their office. Several instances abound in Nigeria of removals albeit in blatant disregard of constitutional provisions. Some examples are the removal of Governors Rasheed Ladoja of Oyo State, Joshua Dariye of Plateau State and Ayo Fayose of Ekiti State.

2.02 Law making Function

The primary function of the legislature is to make laws for the society for the good of the people⁴. Thus, there the executive intends a policy to become law, it does not have the power to make it law except it is ascertained and approved by the National Assembly. Under the Nigerian constitution, proposals for law come before the National Assembly or a State House of Assembly in the form of Bills. These Bills are either private, public or money, but majority of the public Bills coming before the National Assembly or a State House of Assembly, the Assembly scrutinizes such a Bill before it becomes Law. This is important as it will enable the legislature to ascertain whether or not the Bill will be beneficial to the people when it eventually becomes Law, thereby checking and balancing proposed laws from the Executive.

2.03 Appropriation Function

Appropriation is the responsibility of the executive in Nigeria. The constitution therefore gives powers to the President or the Governor as the case may be, to submit an Appropriation Bill, which shall be the heads of estimate for the various sectors of government to the legislature for approval⁵. During the appropriation process, ministries, agencies and other departments of government are called upon by the legislature to defend their respective budgetary proposals. The relevance of the legislature in this process is assessed in the constructive perspective in the following words:

The power to pass or reject an Appropriation Bill affords the legislature the opportunity for a thorough sanitary criticism of the proposals contained therein. The debate involved before its passage has its impact on government indeed it is the critical quality and effectiveness of such debate that determines the character of a legislative body⁶.

2. Section 308 CFRN, 1999

3. Section 143 CFRN, 1999

4. Section 188 CFRN, 1999

5. Section 4 CFRN 1999

6. Section 81 CFRN, 1999

This suggests that a legislative body which is worth its salt must take debate on the Appropriation Bill seriously and use the opportunity to convey its views and positions across to the executive which will in turn put the executive on its toes and make it most responsible. It is however sad that this opportunity is often left unutilized in many legislative houses (both National and States) as, instead of taking the time to make an impact on the executive arm, the legislators get themselves embroiled in a duel for party supremacy or seize the opportunity to demand for settlement from the embroiled in a duel for party supremacy or seize the opportunity to demand for settlement from the executive with the attendant suffering inflicted on the people.

2.04 Confirmation Function

The Presidential system in Nigeria as in the United States of America allows the President or Governor of a state to perform the functions of his office either directly or indirectly through the Vice-President, the Ministers or subordinate official⁷. Flowing from this, the President is empowered to appoint Ministers who form members of his cabinet subject to confirmation by the Senate⁸. The President thus in practice only nominates ministers who are to form part of this cabinet; no nominee becomes a minister unless and until the nomination is confirmed by the Senate. This is to ensure that the President does not bring into government incompetent people who do not have an idea of how government is being run.

Furthermore, appointment certain judicial officers is subject to confirmation by the Senate⁹. The President appoints the category of judicial officers on the recommendation of the National Judicial Council. The role of the Senate in the appointment though confirmatory, is mandatory and no such appointment is valid without a confirmation. The members of the National Judicial Council themselves are not appointed unilaterally by the President; they must be confirmed by the Senate before their appointment can be valid¹⁰. By a similar token, the Chief Judge of a State though appointed by the Governor on the recommendation of the National Judicial Council is subject to confirmation by the House of Assembly of the State¹¹. The Senate rejected Buhari's nomination of Ibrahim Magu twice for the office of Chairman of EFCC.

2.05 Oversight Function

The Legislature is mandated by the people through the constitution to carry out necessary investigation with the view to exposing corruption, inefficiency or waste in the administration of the laws made by the appropriate assembly. This puts the Executive on its toes at times to reduce corruption in the administration of its activities to the barest minimum lest it be found wanting.

Finally, the President does not have the unilateral power to give a treaty entered into between Federation and any other country the force of law as the National Assembly shall be the one to enact such a treaty into law¹². The essence of this is to prevent the President from entering into a treaty with another country that is tyrannical in nature or purports to surrender the sovereignty of the Federal Republic of Nigeria to the other country.

3.00 EXECUTIVE CHECK ON THE LEGISLATURE

3.01 Legislative Check

No bill passed by House of Assembly or National Assembly becomes law unless the President or Governor as the case may be gives his assent to it (although they may veto the President's/Governor's assent after 30 days of the refusal to grant assent to the Bill). Where a Bill is sent to the President or Governor and he refuses to assent to the Bill, he must within 30 days communicate to the National Assembly or the State House of Assembly of his refusal to assent to the Bill¹³ with reasons.

7. Sections 5(1) and (2) CFRN, 1999

9. Section 147(2) CFRN, 1999

10. Sections 231(1) & (2), 238(1) & (2), 250 (1), 256(1) and 261(1)

11. Section 154(1) CFRN 1999

12. Section 231

13. Section 12(1) CFRN, 1999

The beauty of this process and of the principles of checks and balances came to the fore in 2015 when the National Assembly sought to among other things separate the office of the Attorney-General of the Federation for his assent. The President relying on section 9(3) of the constitution refused to give his assent to the amendments of some sections of the constitution in the document sent to him by the National Assembly. Section 9(3) of the constitution provides thus:

An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.

The President explained his position on the amendment and why he declined to sign the document into law.

In view of the foregoing and absence of the evidence that the constitution of the Federal Public of Nigeria (Fourth Alteration) Act 2015 satisfied the strict requirements of section 9(3) of the 1999 Constitution, it will be unconstitutional for me to assent to it, the President said.

I therefore withhold my assent and accordingly remit constitution of the Federal Republic of Nigeria (fourth alternation) Act 2015 to the Senate/House of Representatives of the Federal Republic of Nigeria.

However, the National Assembly threatened to veto the President after 30 days and he (the President) approached the Supreme Court through a former Attorney-General of the Federation, Bayo Ojo, on behalf of the incumbent Attorney-General of the Federation at the time, Mohammed Adoke for determination of two questions and other nullifying and setting aside the sections he thought contravened section 9(3) of the constitution.

4.00 EXECUTIVE CHECK ON THE JUDICIARY

The Judiciary has the constitutional power to, among other things, adjudicate on matters between the Executive and Legislature and to also interpret laws made by the Legislature. This does not exclude the Judiciary from being checked by the Executive as it has power to appoint certain judicial officers who serve in the Court in the first place on the recommendation of the National Judicial Council. Similarly, the President may recommend to the Senate the removal of judicial officer who has been found guilty of judicial misconduct. The President or Governor as the case may be, also has the power to grant prerogative of mercy to a person sentenced by the Court¹⁴ after consultation with the Council of State.

5.00 JUDICIAL CHECK

5.01 Judicial Review

The actions or inactions of the other organs of government are subject to the judiciary's power of review. Judicial Review is defined as a Court's power to review the actions of other branches or levels of government¹⁵. Constitutional experience in Nigeria where elected state officials and their unelected party officials often engage in abuse of office, corruption, lawlessness and lack of respect for the rule of law gives credence to the need to check and balance the Legislature and Executive through judicial review.

The Supreme Court in **A.G. LAGOS STATE V. A.G. FEDERATION** in exercise of its power of judicial review, declared the withholding of money due to Lagos State by the President from the Federation Account as unconstitutional, null and void. The contemporary situation in Nigeria shows that

¹⁴.Section 58(4) CFRN 1999

¹⁵.Section 175 and 212 CFRN, 1999

rather than being anti-democratic, judicial review is most appropriately the bedrock of democracy and without it, not only the lives and liberty of the people would be in jeopardy, the democratic rights and competencies of one branch of government may with recklessness, be put in jeopardy or render ineffectual by another branch. The politics of removal of States Chief Executives in the country between 2003 and 2007 points to this fact. The judiciary however by its power to review the activities of the legislature stepped in to declare most of the removals carried out during that period as unconstitutional. Similarly, the judiciary will act as a check on the legislature to declare as null and void a law passed by the legislature that does not follow the due process of law or does not favour the people.

To protect the powers of the judiciary to check on the activities of the legislature, the Constitution provides that legislature does not have the power to preclude the judiciary from determining whether or not it has acted *ultra vires* of its powers¹⁶.

6.00 CHALLENGES

The constitution of the Federal Republic of Nigeria although does not provide in express terms that the doctrine of separation of powers should apply in Nigeria. Provisions contained therein as discussed earlier recognizes the need to confer governmental powers in different persons and organs of government. As lofty as the doctrine seems, in practice it has suffered several setbacks which officers of the executive, legislative and judicial arms of government are responsible for. More often than not, the challenges faced by the doctrine arise when the various organs of government carry out their constitutional function of checks and balances on each other. In appraising these challenges, this work is restricted to the challenges faced by the doctrine since the return of representative democracy in 1999.

6.01 LEGISLATIVE OVERSIGHT

To promote accountability in governance, the constitution empowers the Legislature to constantly carry out oversight functions on the executive. Legislative oversight encourages checks and balances, enthrones fiscal discipline, good governance and transparency in public offices. Legislative oversight takes place when the National Assembly or a State House of Assembly continually review the effectiveness of the executive arm in carrying out the constitutional mandates through supervision, watchfulness of the executive actions and activities. This legislative process affords the electorates the opportunity to see what public office holders are actually doing, whether they are really serving their collective interest or not. In spite of the importance of legislative oversight in contemporary democratic governance, it has been controversial in all ramifications in Nigeria's political scene as it has often led to the legislature encroaching on the powers of other organs of government and has remained the major source of executive and legislative conflict in Nigeria.

On March 14 2012, a public hearing was conducted by the House of Representatives Committee on Capital Market and Institutions during which specific charges of corruption were made by the Director General of the Security and Exchange Commission (SEC), Ms. Aruma Oteh against the Chairman of the Committee Mr. Hermand Hembe. In the course of the hearing, the Chairman took Ms. Aruma Oteh by surprise by accusing her of "spending money as if it is going out of fashion since assuming office one year ago" and went on to list particulars of how she spent the money. Taken by surprise, Ms. Oteh who could not put up a defence on the spot managed to say that the Chairman was guilty of corrupt practices and did not give her fair hearing.

While bribery and corruption could seriously undermine any system of government they are not as fundamental in the damage they can do as a system of government as the breach of the principle of separation of powers. The fundamental issue here is that Mr. Hembe's¹⁷ Committee of the legislature

16. Section 6(6) CFRN 1999

17. Justice O.O., Aguda National Assembly's Oversight Foundations and Fair Hearing [newjurist.com /national-assemblys-oversight-functions-and-fair-hearing. Html#. VyTgoTw2AO](http://newjurist.com/national-assemblys-oversight-functions-and-fair-hearing.html#_VyTgoTw2AO). Accessed on 26feb2020.

breached the doctrine of separation of powers by conducting judicial proceedings which are clearly within the powers of the Court. In so doing, the Committee violated the principle of fair hearing by obtaining information from the SEC without giving that body or Ms. Oteh the opportunity of commenting on it before using it to arrive at his judgment. He did not let Ms. Oteh know in advance the charge or charges she was coming to meet during his committee's investigation thereby making Mr. Hembe the Accuser, the Prosecutor and the Judge during the probe. The obviously flawed approach adopted by the House of Representatives' Committee in its conduct of the quasi-judicial proceedings made it clear why, under the doctrine of separation of powers, judicial functions are assigned to the judiciary under the constitution¹⁸.

Another area where the legislature tries to encroach on the powers of the executive is the issue of budget. The controversy that surrounded the 2016 budget is instructive on this. The controversy took another turn with the National Assembly returning to the President a budget with omission of certain projects and inclusion of others not proposed by the Executive for assent. Having in mind the provisions of section 81(1) of the 1999 constitution, this was an usurpation of the executive powers to prepare and lay before the National Assembly estimates of the revenue and expenditure of the Federation for a new financial year. The role of the National Assembly as can be inferred from the provisions of section 81(1) is limited to the passing of Appropriation Bill on the basis of estimates duly prepared and laid before it by the President. The legislature ought not to presume and proceed to estimates and allocate monies the President does not ask for but to vet and approve estimates if Ministries, Departments and Agencies as presented by the Executive. Where the National Assembly thinks there is a need to add a project to the budget, the expectation is that it should lobby the Executive to make such an addition and not to unilaterally make such inclusion without putting the Executive on notice.

It seems therefore that the legislature was attempting to take over the responsibility of the Executive arm of government by making omissions and additions to the budget sent to it by the executive. This is made obvious in the fact that it did not immediately provide details of the omission and additions it made to the budget until the Executive beckoned on it to provide the details. This attempt to usurp the power of the executive is fraught with grave dangers for the realization of democracy and good governance anchored on accountability and service delivery. For instance, if the President as the head of the executive arm has no prior information as to what the legislature allocates for a ministry as an executive agency, he may not be able to properly direct and coordinate programme implementation. Secondly, if the legislature could find it difficult to hold the President to account for performance, while the electorates who voted on the basis of the President's manifesto are shortchanged.

These and many other examples are why Justice Oluwadare Aguda (Rtd.) once argued that oversight functions (and the principles of checks and balances) as is carried out by the legislature is often unconstitutional and violates the doctrine of separation of powers which is basic to democratic government. He observed that the legislature in Nigeria is systematically usurping the functions of both the executive and the judiciary, warning that this could hamper political stability and socio-economic development.

6.02 EXECUTIVE LAWLESSNESS

One important element of the doctrine of separation of powers is that one organ of government should not control or interfere with the exercise of functions of another organ. The recognition of this is tantamount to rule of law while the violation of same is tantamount to an abuse of the rule of law. The Executive organ is traditionally vested with the responsibility of carrying out or implementing the laws made by the legislature, the policies made by quasi-judicial legislative bodies or the decisions, judgment or orders rolled out by the judiciary. Hence, it is an established fact that going out of its constitutional powers to encroach on the powers of one or more organs of government will amount to lawlessness and a negation

18. Section 6(1) CFRN 1999

of the doctrine of separation of powers. Since the return of representative democracy in 1999, there have been instances where the Executive arm has violated the doctrine of separation of powers duly acknowledged and entrenched in the constitution in the performance of its duties and responsibilities thereby exceeding the limits and extent of the provisions of such powers. In 2002, it was alleged that former President Olusegun Obasanjo smuggled into the Electoral Bill 2001, passed by the National Assembly and sent to him for his assent, provisions which were not in the Bill when the National Assembly passed it and he (Obasanjo) proceeded to sign it into law¹⁹. Meanwhile, the provisions smuggled into the Bill and signed by the President became the law even though it was not passed by the authority of the National Assembly which is vested with the constitutional power to pass such a law. This act constituted a blatant subversion of the substantive and procedural provisions of the constitution regulating how laws should be made and an encroachment on the powers of the legislature. Sometime in 2006 also, former President Obasanjo declared the office of the Vice-President vacant. This was done because the occupier of the office at that time, Atiku Abubakar had defected from the People's Democratic Party to Action Congress of Nigeria (ACN). This was tantamount to executive lawlessness to the extent that the constitution²⁰ did not expressly and/or explicitly confer such power on the President so to exercise. The legislature often raises alarm where the Executive is attempting to or has encroached on its powers. In a speech to mark the end of the third session of the 7th House in 2014, the speaker of the House of Representatives Aminu Tambuwal accused the Executive of encroaching into the legislature's area of jurisdiction. Citing the suit by the Minister of Petroleum Resources Mrs. Deziani Alison – Madueke seeking an order to stop the House Committee on Public Accounts from going ahead with its planned probe of her alleged spending of N10 billion for the chartering of private jets, Tambuwal said it was unheard of that an official of an arm of government would try to use the court to stop another arm from carrying out its constitutional assignment.

The usual democratic practice is that the powers of the Courts are activated to challenge laws enacted by the legislature. This is the proper manner in which the judiciary is enabled to perform its constitutional function as the interpreter of both the constitution and duly enacted laws he said.

He noted further that:

It is neither usual nor appropriate for the judiciary to be used pre-emptively to stop the legislature from acting in the first place. This is an encroachment on the powers of the legislature and a slap in the face of the principle of separation of powers.

Another example is the Onnoghen's case, where the President removed the Chief Justice of Nigeria, without the recommendation of the National Judicial Council because he failed to declare all his asset as a public officer. Thus, performing the duties of the judicial arm of the government.

According to section 292 sub 1 paragraph 21(b) of the third schedule of the 1999 constitutional which expressly provides that a judicial officer shall not be removed from his office or appointment before his age retirement except in the following circumstances.

- (a) In the case of Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal High Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja and President, Customary Court of Appeal of the Federal Capital Territory Abuja by the President acting on an address supported by two-third majority of the house of senate.
- (b) In any case other than those to which paragraph (a) of this subsection applies by the President acting on the recommendation of the **NATIONAL JUDICIAL COUNCIL** that the judicial officer be so removed for his inability to discharge the function of his officer or appointment (whether arising from infirmity of mind or body) or for misconduct or contravention of the code of conduct.

19. Mohammed Haruna. Punch Newspaper, A President and his credibility problem October 13, 2012

20. Section 146(3) CFRN 1999

From the above constitutional provision, we have clearly seen that before a Chief Justice would be removed from his post, only the (NJC) has constitutional power to exercise disciplinary control over the Chief Justice of Nigeria. These committee has to seat and deliberate on the matter and if such CJN is guilty, such person would be removed from office.

In the Onoghen's case, this wasn't the situation as the President without receiving recommendation from the National Judicial Council, removed Chief Justice Onnoghen and appointed another on the issue of the former CJN not declaring all his asset. This is the very definition of dictatorship. The President that is under the executive arm of government encroached on the powers and responsibilities of the judicial arm of government.

In **KILBURN V. THOMPSON**, it was held by the court that for separation of powers to work, those entrusted with power in one branch of government should be allowed to encroach on the powers and duties of the other branch of Government.

Also, in commissioner for Local Government, Anambra State V. Ezemoke, it was stated by the court under the 1979 constitution, a state executive has its constitutional duties just as the judiciary has its own duties. The Judiciary ought not to interfere with the right of the executive to perform his duties and vice versa. However, this is all in theory. Just like in the Onoghen's case where the Executive arm of Government interfered with the duties and responsibilities of the judicial arm.

6.03 INTERFERENCE WITH THE LEADERSHIP OF THE LEGISLATURE

The doctrine of separation of powers requires that one organ of Government should not exercise the functions of another. With this in mind, it makes constitutional and political sense that members of the Legislature only should determine who should lead them. During the days of former President Obasanjo, there was several attempts to muzzle the legislature via constant interference with the leadership of the various legislative houses. This was evident in the removal of three (3) Senate Presidents in three (3) years. In the circumstances that led to the removal of Senators Evan Enwerem, Chuba Okadigbo and Adolphus Wabara as Senate Presidents, the connivance, collusion involvement of the Executive was always alleged.

The consequence of this was the instability that characterized the National Assembly (particularly the Senate) during Obasanjo's administration. Most Senate Presidents were either appointed (indirectly) by the President on the basis of their willingness to be subservient, or alternatively deposed as a result of their tendencies to asset their independence against the wishes of the President. Although the President was resisted by the House of Representatives where attempts to unseat former Speaker Ghali Umar Na'Abba was aborted, the overturning of the leadership of any Senate President or House Speaker that refused to bend over to the dictates of the Executive was the situation that pervaded the Hallowed Chambers of the National Assembly in the eight years that Obasanjo held sway. The Legislature's attempt to assert its independence from the Executive by performing its constitutional duties has equally caused the loss of a number of Speakers at the State level. In 2015, the Speaker of the Enugu State House of Assembly was removed by eight (8) lawmakers. The removed Speaker pointed accusing fingers at the Governor, Sullivan Chime as being the mastermind behind his removal after the Speaker along with fourteen (14) other members of the State House of Assembly attempted to remove the Governor for among other things, manipulating the 2014 Appropriation Bill. In his words:

I am really shocked that the Governor, who is a lawyer, could champion eight people sitting down to remove a Speaker when he knows that it requires two-third. It is a shame to democracy and I am equally ashamed, as I am speaking this.

Closely related with the above is the appointing of Hon. Mulikat Adeola Akande by the PDP to succeed Oladimeji Bankole as Speaker of the House of Representatives. The members of the House resisted this imposition by voting Hon. Aminu Tambuwal as Speaker. Similarly, the Senate resisted attempts by the All-Progressives Congress (APC) to impose on it Senator Ahmed Lawan as Senate President by rather electing

Senator Bukola Saraki. It should be noted that in Nigeria, the President is the leader of this party and any decision or action taken by his/her party is taken with acquiescence of the President.

6.04 UNCONSTITUTIONAL REMOVAL OF ELECTED OFFICERS

The constitution provides that the above-named Officers may only be removed from office where they have been found guilty of gross misconduct in the performance of the functions of their office. Since 1999 however, accusing fingers have been pointed at the Executive at the Federal level of being responsible for the removal of some Governors which negates the principle of 'vertical' separation of powers. This is relatable to the biblical Voice of Jacob and Hand of Esau since the President propels the members of the State House of Assembly to remove their Governor while such members under the guise of 'gross misconduct' do the removing. The eventual result is that the legislators rush to remove their Governors thereby tainting the removal process with constitutional irregularities. This was the case in Anambra State where President Obasanjo was accused of being responsible for the removal of Governor Peter Obi who was elected on the platform of All Progressive Grand Alliance (APGA). In his usual jocular manner, it was said that the former President had told Obi to forget re-election in 2007 if he did not join the PDP because he (Obasanjo) would not support a non-PDP member. True to Obasanjo's postulations, Mr. Obi, was removed on November 2, 2006 after seven (7) months in office in a controversial manner. Similarly, Obasanjo was alleged to be responsible for the removal of Governor Fayose in his first term after he (Fayose) who was a former ally of Obasanjo fell out with the latter²¹. It was also the practice during Obasanjo's tenure to use Federal might to hound members of any State House of Assembly where he wanted the Governor removed if they tried to assert their independence. This the Executive did by deploying the Police and the EFCC to go after such members until they did the bidding of the Executive. The Federal Government allegedly used the EFCC and the House of Assembly of Bayelsa State to remove the Governor of Bayelsa State for alleged money laundering. The Speaker of the House who had earlier indicated that the House was not interested in removing the Governor was later intimidated and hounded by the EFCC into removing the Governor

6.05 LACK OF JUDICIAL INDEPENDENCE

An independent, impartial and informed judiciary holds a central place in the apprehension of a good, transparent and accountable government. This is necessarily made possible by the provisions that charge the judiciary with the function and responsibility to determine all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating to the determination of any questions as to the civil rights and obligations of any person. As important as the judiciary is to the sustenance of the rule of law and democracy, it is the most vulnerable of the three arms of government as it always depends on the other arms to perform its functions. Likewise, its powers are deliberately encroached upon by the executive and legislature.

Judicial independence can be defined as the total freedom from the other two arms (Executive and Legislature) of Government. The purpose of this is to ensure the entrenchment of democracy²². Independence protects the judicial institution from the Executive and from the Legislature. As such, it lies at the very heart of separation of powers. It is well accepted among advocates of judicial independence that the following are the key indicators of an Independent Judiciary; appointment and removal process of judicial officers, how the judiciary is funded, extent of individual and institutional freedom from unwarranted interference with the judicial process by the Executive and Legislative arms of Government. It is on the basis of the above that the challenges facing judicial independence in Nigeria will be discussed. For the judiciary to be seen as independent, persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law.

21. Uchenna Awom *Impeachment as Weapon against Opposition*, leadership.ng/news/politics/378378/impeachment-weapon-opposition. Accessed on 26 Feb., 2019

22. Oladotun Gbolaagunte. *An Independent Judicial System in Nigeria: The Challenges*

Thus, the way in which judges are appointed and subsequently promoted are crucial to their independence. They must not be seen as political appointees, but solely rather for their competence and political neutrality. The appointment of top judicial officers in Nigeria is made by the President on the recommendation of the National Judicial Council (NJC) subject to the confirmation of the Senate at the Federal level. At the State level, the appointment of top judicial officers is made by the Governor of the State on the recommendation of the National Judicial Council. It is submitted that this process is not healthy for the doctrine of separation of powers. This is so because as politicians, the President and members of the National Assembly or Governor and members of the State House of Assembly may be swayed to make such appointments on political connections, religious leanings, “federal character” without any regard for merit and competence. Where this is done, the consequence is the proverbial “he who pays the piper dictates the tune”. Amongst the various challenges of judicial independence, the process of funding, for the judiciary is the most experienced challenge. It is indeed instructive that it was in the bid to insulate the judiciary from Executive control and influence that the constitution provided that:

Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the Courts established for the Federation and the State under Section 6 of this Constitution.

Even where the letter and spirit of the above quoted provisions of the Constitution are not ambiguous, with a political class that has penchant for impunity and reluctance on the part of the Executive to recognize and respect the financial independence of the judiciary, the Legislature and Executive between them always vote what they want for themselves while the judiciary, the ‘third arm’ is allocated what the other two deem fit. It leaves the judiciary in a position of going on bended knees to request its needs. If anything at all, the situation discussed above does not make for the independence of the judiciary.

The Judiciary in Nigeria has been constantly battered by the lack of individual and institutional freedom from unwarranted interference with the judicial process by the executive and legislative arms of Government. The Executive has often been accused of interfering in the functions of the judiciary. Notable among them is the role the Executive played in the removal of former President of the Court of Appeal, Justice Ayo Salami. The Judiciary itself cannot be absolved of blame as most times, it is discovered that it aides the other arms of government in interfering with its activities. It is on the premise of this that Justice Ayo Salami (Rtd.) at a lecture in 2015 said:

What I am driving at here is that Hon. Justice Dahiru Musdapher and Aloma Mukhtar did not resist the Presidency from undermining the independence of the judiciary. They allowed the erosion of the separation of powers. Even after I was declared innocent, they failed to muster the courage of recall me. Rather, the two of them jointly and severally fiddled while the time for my retirement was ticking; notwithstanding Hon. Justice Uwais’ statement to the effect that the National Judicial Council and not the President was vested with the authority to recall me²³

As outlined earlier, the legislature is also guilty of constant encroachment on the powers of the judiciary. This is done while carrying out their constitutional oversight functions. Most times, the Legislature also to cut down on what it deems as the excesses of the Judges by removing them from office without regard for constitutional provisions.

23. I.A., Salami, Eradicating Corruption in the Judiciary, being a paper delivered by the Hon. Justice Isa Ayo Salami, OFR President Court of Appeal (Rtd) at the 8th Annual Forum of the Laureates of the Nigerian National Order.

By and large, maintaining the independence of the Judiciary ought to be a collaborative effort between the three organs of Government. However, members of the Executive and Legislature are by their very nature politicians and would not waste time to muzzle the Judiciary where it tends to be against laws and policies made by them.

7.00 RECOMMENDATIONS

1. The judiciary should be granted the much needed independence and in addition to this, it should be granted financial autonomy as contained in the 1999 Constitution of the Federal Republic of Nigeria by the executive. It is by doing this that the judiciary can effectively and satisfactorily keep tab on the activities of the executive and legislature so as to checkmate likely lawlessness and highhandedness especially in the performance of their constitutional functions.
2. There is a need for the Executive to grant more autonomy to the Legislature in the running of its activities. The Legislature on its part should not be out to victimize or vilify the Executive by unnecessarily withholding approval where one is required. Similarly, where disagreements between both arms of Government, recourse should be made to the courts which have the Constitutional power to interpret and clarify ambiguous provisions of the law rather than going into an all-or-nothing showdown.
3. It is recommended that the process of appointment of judicial officers like the Chief Justice of Nigeria, Justice of the Supreme Court, President of the Court of Appeal etc should end at the National Judicial Council who should be responsible for the screening of qualified candidates. Alternatively, advisements should be made where there are vacancies for the position of Judges. Furthermore, qualified candidates should be made to write examination by the National Judicial Council which will be the basis for appointing successful candidates.
4. Since all members of the Executive and Legislative arms of Government belong to a political party, it is recommended that they should be subject to discipline and guidance of the political parties where they seem to be going outside of their constitutionally assigned roles.

8.00 CONCLUSION

A fundamental principle undergirding the design of modern governments in that of the separation of powers. However, this work has stated that the doctrine of separation of powers can only function properly where there is an interplay of checks and balances. By this interplay, the fiction is that, each arm shall be autonomous within its own sphere. This is a fiction properly so called because the three arms of government are by the Constitutional framework expected to operate an overlapping system of administration. Each must carry on in a manner that is complimentary to and not subversive of the other two towards peace and good Government. This practice however is fraught with challenges in Nigeria. This work has addressed these challenges. In the course of this study also, we have established the roles each arm of Government play in checking the activities of the others. Equally, we have posited that members of the executive and legislative organs of Government pledge their loyalties to their respective parties and not the electorates to detriment of the citizens. It is in light of this that we submit that, in spite of structural deficits and some other problems, constitutionalism still holds a better prospect for political stability in Nigeria, if the factors that promote these challenges can be attenuated.