

**THE LIMITS OF THE DOCTRINE OF SEPARATION OF POWERS IN THE  
CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999**

**BY**

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**INTRODUCTION**

There is no gainsaying the fact that the famous doctrine or principle of separation of powers is as old as man, what we are saying in essence is that, separation of powers has been in existence since man came to the society. It is apposite to state that the doctrine of separation of powers was in existence and strictly observed in this country before the advent of the British. This foregoing position can be demonstrated when a recourse is made to the old Oyo empire, where there were in existence the Alafin, Oyo Mesi, the Ogboni among other traditional title holders who took charge of the administration of the said empire. There was a manifest and undoubted separation of powers between the Alafin who was the head and the Oyo Mesi, and the Ogboni, this brought about the necessary checks and balances, so

that power is not concentrated in the hands of the Alafin, which is capable of being misused or abused.

The doctrine of separation of powers as practiced by the then Oyo - empire was premised on the YORUBA adage which says that:

- (i) Agbajowo Lafi nsoya, ajeje owo kan ko gberu dori.
- (ii) Akii je meji Laba Alade - eni to jesu koni mumi.
- (iii) Enikan kii je awade, Igi kan kole da igbo se.

Meaning that, no man is an island to himself and cannot be all in all.

The point we are trying to derive home is that, the principle of separation of powers is not strange to the African society and therefore, the principle can not be said to be imbibed or imported from the white man but in its formalized theoretical notion it is an imported value into our body politic.

## **HISTORICAL DEVELOPMENT OF MODERN THEORY OF SEPARATION OF POWERS**

You will agree with me that any system of government that is hinged on the Rule of law and Democracy and especially the presidential system of government as practiced in Nigeria must consist of the three great arms of government, namely, the Executive, the Legislature and the Judiciary. As rightly pointed out by Aiche in his book<sup>1</sup> that such a division of labour is a condition precedent to the supremacy of the Rule of Law in any society.

The principle of separation of power as it is known today was propounded by **Montesquieu** who derived his inspiration from **Locke's** writings and the study of the eighteenth century English constitution. The basis of the principle of separation of powers was given by Locke in his second **Treatise of Civil Government** as follows:

"It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the

power of making laws; to have also in their hand the power to execute them, whereby they may exempt themselves from obedience to the laws they made and suit the law, both in its making and execution, to their own private advantage."<sup>2</sup>

In the same vein Montesquieu said that:

*"Political Liberty is to be found only when there is no abuse of power. But constant experience shows every man invested with power is liable to abuse it, and carry his authority as far as it will go. To prevent this abuse; it is necessary from the nature of things that one power should be a check on another.. When the Legislative and Executive powers are united in the same person or body there can be no liberty.... Again there is no liberty if the judicial power is not separated from the legislative and executive. There would be an end of everything if the same person or body, whether of the nobles or the people, were to exercise all the three powers."*<sup>3</sup>

It is worthy of note that the principle of separation of powers was not in operation in his country France at that time, even up till today the executive and legislative functions are concentrated in the hands of the same group of people in France.

However, the American constitution practicalised the theory of separation of powers. In other words, it was fully adopted in the United States of America. This is in contradistinction with the British constitution where there is no such clear cut separation of powers.

A Nigerian renowned constitutional lawyer Professor Nwabueze while emphasizing the importance of the principle of separation of powers says:

*"Concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute power is by its very nature arbitrary, capricious and despotic.*

*...Limited government demands therefore that the organization of government should be based on some concept of structure, whereby the functions of law-makings, execution and adjudication are vested in separate agencies, operating with separate personnel and procedure. We are not prepared, write Vile, 'to accept that government can become, on the ground of "efficiency", or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships... By separating the function of execution from that of the law-making, by insisting that every executive action must, in so far at any rate as it affects an individual, have the authority of some law, and by prescribing a different procedure for law making the arbitrariness of executive action can be effectively checked.<sup>4</sup>*

Therefore, in the light of the above, separation of powers can be succinctly put to mean, the exercise of three distinct functions of government by three arms of same without undue meddlesomeness and/or unnecessary interference in the affairs of another ensuring the desired checks and balances in government.

#### **SEPARATION OF POWERS UNDER THE PREVIOUS NIGERIAN CONSTITUTIONS**

It is our opinion that a review of the separation of powers under the 1999 constitution cannot be effectively carried out without recourse to the previous constitutions, like the 1960 Independent constitution, the Republican constitution of 1963 and the 1979 constitution.

The foregoing becomes necessary in view of the fact that, we need to go down the memory lane, at least to take a cursory look into the past in a bid to understand the present and the future. And as the great Cicero rightly says "to be ignorant of the past is to forever remain a child". Therefore, to do justice to this

discourse, an attempt will be made to examine the principle of separation of powers as entrenched in those constitutions aforementioned viz-a-viz its effectiveness at that point in time. To achieve this, we shall examine the topic under the two headings viz: the period of military Regimes and Civilian Regimes.

#### **MILITARY REGIMES (1966- 1998)**

It is common place that, the first assignment usually undertaken by military dictators immediately they usurp power by that unconventional means, was to put some parts of the constitution in abeyance, regardless of the ways or procedures laid down in the constitution for its amendment. This attitude is only to demonstrate that the successive military regimes in Nigeria considered the principle of separation of powers as an aberration during their tenure of office, prima facie, the military regimes combine both legislative and executive powers in themselves.

It is noteworthy also that, the military not only combined both the Executive and legislative powers but also frustrated the judiciary and apparently rendered same ineffective whenever in power, despite the judicial powers vested on them under the various constitutions. The military constantly and arrogantly took a swipe at the judiciary by the promulgating of Decrees purporting to oust the jurisdiction of the Courts and in effect prevent the Courts from exercising the powers and/or duties conferred on them by the grundnorm that is the constitution.

The position enunciated above, was graphically demonstrated by Professor Nwabueze he stated thus:

*"The absolute power is, expectedly being exercised autocratically. In the first era of Military rule, 15 January, 1966 to 30 September, there were 50 Decrees and 14 between 1 January, 1984 and 15 May, 1985 which explicitly made the constitutional guarantee of fundamental*

*rights inapplicable in relation to any matter arising under those Decrees, and no Court is to enquire into the question whether a guaranteed right has been or is being or will be contravened by any thing done or purported to be done thereunder. Thus, under individual Decrees of the Military government thousands of people have been detained without trial, political parties, tribal unions and some other similar associations were dissolved or banned, many trade unions proscribed, the publication or circulation of some newspapers or magazines, prohibited criticism of government and political discussion generally severally restricted, public assemblies and processions proscribed, and property or assets of some people expropriated or encroached upon.*

*From January 1966 to September, 1979, there have also been 39 adhominem Decrees (Edicts of State Governments excluded) of the 627 Decrees enacted between 16 January,*

1966 and 28<sup>th</sup> September, 1979, 295 or nearly 50 per cent had retrospective effect with 52 creating criminal offences. 27 of the 49 or 55 per cent of the Decrees enacted between January 1, 1984 and May, 15 1985 had retrospective effects, with 11 or 22.5 per cent creating criminal offences."<sup>5</sup>

From the above quotation, it can be deciphered vividly that, the issue of observance of the principle of separation of powers was almost a mirage during the military regimes, in spite of the constitutional provisions for same. In other words, what was apparent was the usurpation of the legislative powers by the military that also purportedly exercised executive powers and at the same time flagrantly promulgated decrees which rendered the judiciary a toothless bull dog that cannot bite.

On the manner in which the military striped off the judicial powers of the judiciary, our renowned Professor Nwabueze had

this to say:

"In the executive field, which the military have tried to maintain the semblance of the rule of law by first going through the motion of enacting laws as a basis for its executive actions, the principle that an executive act of government must keep strictly within the four corners of its enabling law or else be open to challenge in a Court of law has all but been jettisoned. This principle is indeed cardinal and central to the Rule of Law, and, as we have seen, it was maintained in the face of all the oppression under colonial absolutism. Between January 1966 and September, 1979 and January, 1984 and May, 1985, there had been some 64 Decrees which conferred unquestionability on executive acts done or purported to be done under their provision. A variety of forms and combination of forms were used to achieve this, the aim being to ensure that all loopholes for the Court's intervention are effectively plugged."<sup>6</sup>

Disobedience of Court orders and wanton disregard of the rule of law became very pronounced during the dark days of later dictator, Gen. Sanni Abacha. Like his predecessors, he ran foul of the provisions of the constitution by constantly and illegally hindering the judiciary from performing its role guaranteed by the 1979 constitution and also found of trampling upon the fundamental Human Rights of the citizenry. Since the support of this paper is not to examine the infringement of fundamental Human Rights, we need not go beyond this point. However it should be noted that the disregard of the principle of separation of powers by the military was predicated on the desire of the military dictators to shield themselves from incurring the wrath of the law, sequel upon their misdeeds which in general forms were outrageous and inhuman. Chief Gani Fawehinmi while commenting on the observance of the principle of separation of powers viz-a-viz the military regimes in a lecture delivered in Ibadan at the instance of the N.B.A.,

declared that:

*"There is no substitute for the rule of law where each department of government is allowed to function without a fundamental interference by any of the 3 in the performance of the others' fundamental duties and functions. In most instances, the whole concept of ouster in Nigeria is to protect the illegalities, the mis-governance, the corruption; the general misdeeds including immoralities of those who hold political powers particularly in a military dictatorship."*<sup>7</sup>

Be that as it may, the judiciary in a bold defence of its constitutional role to adjudicate, challenged the ousting of its jurisdiction by various, Decrees in the famous and historic case of **The Attorney General (Western State) & Ors vs. E.O. Lakanmi and Ors**<sup>8</sup>. The separation of powers provided for under the 1963 constitution, though not as sharp as that of the 1979 constitution was relied upon by the court in this popular case, which was considered as the

**primus inter** pares of the cases against ouster of court's jurisdiction and executive usurpation of judicial power.

In that case, the Supreme Court had the opportunity of having a clear interpretation of the provisions of the 1963 constitution and made adequate pronouncement on the principle of separation of powers contained therein, when it held thus:

*"We must here revert once again to the separation of powers, which, the learned Attorney General himself did not dispute, still represents the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our constitution is based on the separation of powers, the Legislature, the Executive and the Judiciary, our constitution clearly follows the model of the American constitution. In the distribution of powers the Courts are vested with the exclusive right to determine justifiable controversies between citizens and between*

*citizens and the state. See **Attorney-General for Australia vs. the Queen (1975), A.C. 288, on pg. 311, etc"***.

In **Lovell vs. United States (1946), 66 Supreme Court reports 1073, on pg. 1079**, Mr. Justice Black said as follows:

*"Those who wrote our constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislative thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts"*.

And even the Courts, to which this important function was entrusted, were commanded to stay their hands until and unless tested safeguards were observed. When our constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trails and punishments were too



dangerous to liberty to exist in the nation of free men they envisioned. And so, they proscribed Bills of Attainder". These principles are absolutely fundamental and must be recognized. It is to define the powers of the legislature that constitutions are written and the purpose is that powers are left with the legislature be limited, and that the remainder be vested in the courts" <sup>9</sup>.

The Court went further and states thus:

"At the passing of **Decree No. 37 of 1968**, the present case was pending in the Western State Court of Appeal. Although the Decree repealed Edict No. 5 of 1967 and purported to withdraw the constitutional rights to challenge by way of action and prerogative writ in any Court of law provided for in chapter III of the constitution, dealing with fundamental Human Rights, it would appear that more thought was given to this enactment, and the Decree NO.

34 of 1968 followed. But Decree No. 45 of 1968 is the core of the matter. It validated everything that was wrong or wrongly done, referred specifically to the names of the appellants in the schedule and without defining a new "public officer", validated orders made against the second appellant who, according to section 13 (1) of the Decree No. 37 of 1968, could not by any stretch of imagination be considered a public officer. In an attempt to crown the efficiency of the Decree, it purported to abate all actions and appeals pending before any Court. In short, it stopped the pending appeal of appellants in the Western State Court of Appeal. We have come to the conclusion that this Decree is nothing short of legislative judgement, an exercise of judicial power. It is in our view **ultra vires** and invalid. We are in no doubt that the object of the federal military government, when it engaged in this exercise, was to clean up corrupt practices, those

vampires in the society whose occupation was to amass wealth at the expense of the country. But if, in this pursuit, the government, however well-meaning, falls into the error of passing a legislation which specifically in effect, passes judgement and inflicts punishment or in other words erodes the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the Court must intervene<sup>10</sup>”.

The Supreme Court in this case unequivocally rested the principle of separation of powers as contained in the 1963 Constitution. However, to the chagrin of the citizens, the decision of the Supreme Court was rendered nugatory by overruling it vide a legislation, **Decree No. 28 (Supremacy and Enforcement of Powers) Decree of 1970**. The attitude of the then military dictator lend credence to the point that military regimes successfully combine both legislative and executive powers and cap it all by persistently

aspiring to edge out the judiciary through the promulgation of Decrees ousting the court's jurisdiction.

In the same vein, the Supreme Court had another opportunity to condemn in its entirety the flagrant flouting of court orders by the Government of Lagos State and reaffirmed the doctrine of separation of powers contained in the 1979 constitution as amended, in the celebrated case of **Gov. of Lagos State vs.. Ojukwu** where the Supreme Court held inter-alia that:

*“It is more serious when the act of flouting the order of the court, the contempt of the court, is by the executive. Under the constitution of the Federal Republic of Nigeria, 1979, the executive, the legislative while (it lasts) and the judiciary are equal partners in the running of a successful government. The powers granted by the constitution to these organs by S.4 (legislative powers) S. 4 (executive powers) and S. 6 (judicial powers) are classified under an Omnibus*

*Umbrella known under part II to the constitution as "powers of the Federal Republic of Nigeria". The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed there will be no federal government. I think, for one organ, and more especially the executive, which holds all the physical powers, to out itself in sabotage or deliberate contempt of others is to stage an executive subversion of the constitution it is to uphold. When the executive is the military government which blends both the executive and the legislative together and which permit the judiciary to co-exist with it in the administration of the country, then it is more serious than imagined<sup>11</sup>".*

The court while showing its displeasure at the manner in which Chief Ojukwu was forcibly ejected by the then Military Governor of Lagos State, when the case was pending in the High Court, and more so when the Court

of Appeal had earlier on granted an interim injunction to stop ejection of Chief Ojukwu, pending the determination of substantive motion on notice had this to say:

*"In the area where rule of law operates, the rule of self-help by force is abandoned. Nigeria being one of the countries in the World which proclaim loudly to follow the rule of law, there is no room for the rule of self-help by force to operate. Once a dispute has risen between a person and the government or authority and the dispute has been brought before the Court, thereby invoking the judicial powers of the state, it is the duty of government to allow the law to take its course or allow the legal and judicial process to run its full course. The action the Lagos State Government took can have no other interpretation than the show of the intention to pre-empt the decision of the court. The courts expect the utmost respect of the law from the government itself which rule by the utmost respect of the law from the government*

itself which rule by the law. The Nigerian constitution is founded on the rule of law the primary meaning of which is that everything must be done according to law.

It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power which **Coke** colourful spoke as 'golden and straight metwand of law as opposed to the uncertain and crooked cord of discretion' (see 4 Inst. 41). More relevant to the case in hand, the rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive see **Wade on Administrative Law 5<sup>th</sup> Edition P. 22 - 27.** That is the position in this country where the judiciary has been made independent of the executive by the constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 1 of 1984 and No. 17 of 1985. The judiciary cannot shirk its sacred responsibility to the

nation to maintain the rule of law. It is both in the interest of the government and all persons in Nigeria. The law should be even handed between the government and citizens<sup>12</sup>".

Honourable Justice Oputa JSC (as he then was) while acting to the attitude of the Lagos State Government stated that:

I can safely say that here in Nigeria even under a military government, the law is no respecter of persons, principalities, governments or powers and that the court stand between the citizens and the Government alert to see that the state or Government is bound by the law and respect the law<sup>13</sup>".

One can notwithstanding the good fight put up by the judiciary to defend its judicial powers in line with the principle of separation of powers, say that, under the military regimes there had been no clear separation of powers. Apart from fusion of both the executive and legislative powers by the

military, the judiciary had no free hands to perform its duties according to the constitution, as the courts were encumbered by various obnoxious ouster clauses.

The period of November, 1993 to July, 1998 was indeed a watershed in the annals of tyranny, dictatorship, arbitrariness and corruption of the military in Nigeria.

#### **UNDER CIVILIAN REGIMES 1960 AND 1963 CONSTITUTIONS**

Under constitutions that were in place during the 1<sup>st</sup> Republic were the independent constitution of 1960 and the 1963 Republic Constitution. These constitutions provided for an obvious separation of powers though not as sharp as that of the 1979 constitution. For instance, the office of the Governor-General and the President under the 1960 and 1963 constitutions respectively was established pursuant to Chapter IV of both constitutions. Chapter V of the aforementioned constitutions provided for the parliament, while Chapter VIII hosts the judicature. It should

be mentioned that manner of exercising of the executive authority of the president and the executive authority of the Governors were contained in Chapter VI.

There was no sharp and/or elaborate separation of powers under those two constitutions as mentioned above. The reason for this is not far fetched, it is axiomatic that, the independence constitution was promulgated vide and **Order in Council** made by the colonial masters for the colony of Nigeria. While the 1963 constitution merely effected a change from monarchy to republicanism. This made a wide difference between the 1979 constitution which was fashioned in line with the American constitution and both the independence and republican constitution of the first republic. The two constitutions were based on the British model of parliamentary system of government.

It should be noted also that in the operation of the 1963 constitution the civilian

government also displayed its disdain for the principle of separation of powers when the federal parliament, passed, **The Constitution of Western Nigeria (Amendment Law)** reversing by legislation a Privy Council judgement which found that **Chief Akintola** had been validly removed as the Premier of Western Nigeria. This singular act suffices to justify our position that the disregard of the principle is not peculiar to military regimes alone.

Under the 1960 and 1963 Constitutions members of the executive arm of government must be elected into the respective houses either at the Federal or regional level before qualifying to hold executive positions.

This was a clear departure from the position in the 1979 Constitution where provisions were made that made an elected legislator that accepted an executive post to relinquish his elective position.

#### **1979 CONSTITUTION**

The 1979 constitution which was

in operation during the second republic provided for a clear separation of powers. This is contained in **SS. 4, 5 and 6 of Chapter V** of the said constitution which established the national assembly, the composition of the senate, the House of Representatives; president of the senate and so on. While chapter VI provides for the executive arm of government and chapter VII contained the aspect relation to the judicature.

This constitution as earlier mentioned provided for distinct and specific functions for each organ of government, unlike the previous constitutions. It can be seen that the executive under the 1979 constitutions is to execute the law made by the legislature and should not venture into law making. The legislature is to make laws while the judiciary is to adjudicate and interpret the laws made by the legislature. None of the arms of government should dabble into the arena outside its purview of function.

The separation of powers as enshrined in the 1979 constitution was also given a judicial interpretation in the case of **Attorney General of Bendel vs. Attorney General of the Federation and 22 Ors** where the Supreme Court held:

*"In my view legislative powers commence when a Bill is introduced in either House of National Assembly and end when the Bill is submitted to the president for his assent. I hold the view that what the president does, in assenting to a bill, is performing executive powers within legislative process.*

*If, in the process of the exercise of the legislative power by the National Assembly, there is such a constitutional defect, as to lead to an interpretation to the effect that a Bill was not passed according to law, that is, it does not follow the procedure laid down under the constitution for the passing of a Bill, then the Bill which has passed through such exercise is null and what the*

*president assents to, in exercise of executive powers within the legislative process is a nullity. The Supreme Court in exercise of its jurisdiction under section 212, when there is a dispute under the section, could adjudicate on the issue. And this constitutes the limitation on the sovereignty of the legislative<sup>14</sup>".*

The whole essence of the doctrine is to give room for checks and balances and by so doing, encourage healthy influence or control by one over the activities of another is expected. As rightly put by Aihie and Oluyede in their book<sup>15</sup> that:

*"What the whole idea means is that neither the legislature, the executive nor the judiciary should exercise the whole or part of another's powers, but it does not exclude influence or control by one over acts of another".*

The doctrine of separation of powers under the 1979 constitution was not strictly followed by the politicians in

power as well, like their military counterparts though not so pronounced. The civilian regime also strived hard to render nugatory the provision, of the constitution as rightly pointed out by professor Nwabueze in his book<sup>16</sup> where he declared that, the legislative arm of government was not independent of the executive arm during the second republic, that is, October 1979 to December 1983. This according to him was sequel to the dominance of the party in power, particularly the President and Governors, who by their position and influence, were in a position to use the power of patronage to subdue members of the legislature. This took the form of award of contracts, distributorship of scarce commodities, provision of social amenities, like roads, schools, hospitals, pipe borne water in the member constituencies and so on.

Therefore, the 1979 constitution no doubt made an explicit and elaborate provision for separation of powers like its United States counterpart which

was its model. However, those that operate the constitution as indicated above contributed to its ineffectiveness at that point in time.

#### **SEPARATION OF POWERS UNDER THE 1999 CONSTITUTION**

Consequent upon the controversies surrounding the making of the 1999 constitution, unlike the 1979 constitution which gained overwhelming acceptance of the vast majority of Nigerians, an attempt will be made to trace the root of the 1999 constitution in order to garner the purport of the peoples' outcry and condemnation of the said constitution. Thereafter, we shall take a look at the 1979 constitution vis-à-vis the 1999 constitution in a bid to see if there are any remarkable differences or innovations, especially as regards the provisions of those constitutions that deal with separation of powers. In the same vein, we will examine briefly those provisions under the 1999 constitution and make necessary comment on them.



Under this heading too, we shall succinctly appraise the workability and the effectiveness of the principle of separation of powers as entrenched in 1999 constitution under this political dispensation. We shall then conclude the discourse by making some recommendations we consider germane to fostering enduring democracy in our great country, Nigeria.

#### **THE MAKING OF THE 1999 CONSTITUTION AND THE ATTENDANT CONDEMNATION**

It is not in dispute that the 1999 Constitution of the Federal Republic of Nigeria came into force on 29<sup>th</sup> May, 1999 vide: ***The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999***, following General Sani Abacha's transition to civil rule programme which produced a draft 1995 constitution after the deliberation by a few selected persons imposed on the citizens by the then military junta that purportedly collected and collated some Nigerians views about the constitution and came out with a report. The published

edition out of the various versions available was referred to the ***Constitutional Debate Co-ordinating Committee*** constituted by General Abdul Salami Abubakar for review.

However, the ***Constitutional Debate Co-ordinating Committee*** having regard to the condemnation and the genesis of the draft constitution recommended that a recourse should be made to the 1979 constitution subject to some amendments.

The legal giant Chief F.R.A. Williams SAN while vehemently condemning the making of the 1999 constitution when delivering a keynote address at a workshop organized by N.B.A. Ikeja branch<sup>17</sup> lamented that:

"... The last speaker asked me to name the author of the 1999 constitution. Every day, from my early days as a student, I have been taught to classify a document which tells a lie about itself as forged document. When I searched for the author, I found that the introduction to the 1999 constitution, the preamble says "We the people of the Federal Republic of Nigeria"

do hereby make, enact and give to ourselves the following constitution. That is what the document says about itself. I will classify it as I have always been taught to classify a document that tells a lie about itself you all know it's a lie."

What Chief F.R.A. Williams who was the Chairman of the Constitution Drafting Committee of the 1979 constitution was saying is that, the 1999 constitution is not a document that emanated from the people as purportedly claimed in the preamble and by implication such document is not fit to be regarded as the constitution of the Federal Republic of Nigeria.

Professor I.E. Sagay, SAN in a paper titled: **The 1999 Constitution and the Nigeria's Federalism**<sup>18</sup> also voiced out his displeasure on the manner in which the 1999 constitution came into being, he stated that:

*The 1999 constitution has been dogged by problems and controversies right from the moment of its release in May 1999. It tells a lie about*

*itself when it proclaims as follows:-*

*"WE THE PEOPLE of the Federal Republic of Nigeria ... DO HEREBY MAKE ENACT AND GIVE TO OURSELVES the following constitution.*

*As probably every enlightened Nigerian knows, we the people of the Federal Republic of Nigeria did not make, enact or give ourselves the 1999 constitution. A few persons selected by the military junta collected some views, collated them and wrote a report. The military government thereafter, made, enacted and gave to their Nigerian "subjects", the constitution. The document was infact hidden away from Nigerians, until a few days before the hand-over date of 29<sup>th</sup> May 1999.*

*Thus the present group of political rulers did not know what their functions and powers were to be, long after they were elected to perform those duties and to exercise those powers.*

*This applied not only to the executive and legislative arms of government, but also to the*

*judiciary, third arm of government. Just as the elected legislators were unaware of the legislative lists and the comparative powers of the state and the centre, so too were the courts ignorant of their comparative jurisdictions, bases of appeals, or even the types of courts that were to be established by the constitution. The whole transition programme was for the politicians, judges and the civil populace, a sheet leap in the dark."*

We quite agree with the learned Chief F.R.A. Williams and Prof Sagay and we pitch out tent with their submissions, hence to say the least, the 1999 constitution is nothing short of a Decree imposed on Nigerians as their constitution as it was midwived by the military, more so, when one of the features of the constitution is general acceptance by the people, which usually form the basis of the preamble. But in the case of the 1999 constitution, this basic element of acceptability is

lacking.

Having said that, it is worthy of note that the 1999 constitution is a replica of the 1979 constitution with the introduction of few new provisions noticeable therein, such as environmental objectives, duties of the citizen, dual citizenship, right to acquire and own immovable property anywhere in Nigeria<sup>19</sup>. Also there are provisions for additional qualification for membership of parliament both at the federal and state levels, recall and remuneration and an elaborate provision on political parties<sup>20</sup>. In the aspect of the judiciary, there is the creation of the National Judicial Council<sup>21</sup> which see to the appointment and removal of judicial officers among other responsibilities.

Apart from the few new provisions and innovations contained in the 1999 constitution, one can state without mincing words that the 1999 constitution is a verbatim reproduction of the 1979 constitution. In view of the foregoing, the provisions of the

1999 constitution that relate to the principle of separation of powers remain unchanged as we have them under the 1979 constitution. For the avoidance of doubt we shall endeavour to reproduce some of the relevant sections of the 1999 constitution that deal with powers of the Federal Republic of Nigeria and the aspects that treated the three arms of government that is the legislature, executive and the judicature.

#### **LEGISLATIVE POWERS**

The Constitution provides as follows:

*"The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the federation which shall consist of a Senate and a House of Representatives.*

*The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part 1 of the second schedule to this*

*constitution."*<sup>22</sup>

*"The legislative powers of a state of the federation shall be vested in the House of Assembly of the state.*

*The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say.*

(a) Any matter not included in the exclusive legislative list set out in part 1 of the second schedule to this constitution;

(b) Any matter included in the concurrent legislative list set out in the first column of part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto; and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.<sup>23</sup>

From the above provisions of the

1999 constitution, it is unequivocally stated that, the functions or powers of law making are vested in the National Assembly and Houses of Assembly of the states for the federation and states respectively. However the constitution also provides for a clear demarcation between the areas which can be legislated upon by the National Assembly and the states Houses of Assembly. These are contained in the exclusive and concurrent legislative lists<sup>24</sup>. The National Assembly has exclusive power of law making with respect to any matter included in the exclusive legislative list, to the exclusion of the Houses of Assembly of the states, while both the National Assembly and the Houses of Assembly shall exercise their legislative powers on those matters contained in the concurrent legislative list.

A closer look at the legislative especially the exclusive legislative list reveals that the federal government enjoy overwhelming power to legislate virtually on every subject. This is a clear indication that the

federation is dominating at the expense of the states, this is against the principle of federalism.

Those items listed in the exclusive legislative list of the 1999 constitution are now 68 compare to the 1979 constitution with 66 items and in contra distinction with the 1960/1963 constitutions with just 45 items. The argument at this juncture is that, some of the matters in the exclusive legislative list ought to be within the competence of the states alone.

It is also observed that some items contained in the exclusive legislative list should ordinarily be placed in the concurrent legislative list. It is argued in some quarters that the issues involving borrowing of money by a state, local government, company or any other entity should be placed in the concurrent legislative list, so that both the federal and state governments can legislate on those matters.

It is also our contention that

issues like Evidence used in court contained in item 23, Labour, Trade unions, industrial relation in item 34 and the local government election ought to be in the concurrent legislative list, instead of the exclusive list. The idea is that why should the federal government become an Alpha and Omega which must have a way on every aspect of life of this country? It is our view there should be a forum where our co-existence as a Nation should be reviewed so as to pave the way for proper and true federalism.

#### **EXECUTIVE POWERS**

The 1999 Constitution provides **inter alia** as follows:

*"Subject to the provisions of this constitution, the executive powers of the federation shall be vested in the president and ay, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the vice - president and ministers of the government of the federation or officers in the public*

*service of the federation; and Shall extend to the execution and maintenance of this constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws."*

*Subject to the provisions of this constitution, the executive powers of a state:*

*Shall be vested in the governor of that state and may, subject as aforesaid and to the provisions of any law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that state or officers in the public service of the state; and*

*Shall extend to the execution and maintenance of this constitution, all laws made by the House of Assembly of the state and to all matters with respect to which the House of Assembly has for the time being power to make laws."*<sup>25</sup>

In the light of the above constitutional provisions, one

can rightly posit that, the powers of the executive neither encompasses law making, nor adjudication but strictly limited or restricted to execution and maintenance of the constitution and the laws made by the legislature. The executive powers of the federation is conferred on the president and according to the constitution, can be delegated to the vice president, ministers or officers in the public service of the federation. While the State Governors shall exercise the executive powers of a state either by himself or through the Deputy Governor, Commissioners or officers in the public service of the state.

Therefore, under the 1999 constitution like the 1979 constitution there are unambiguous provisions for separation of powers among the three arms of government viz: the legislature, the executive and the judiciary their distinct functions are explicitly spelt out in the constitution and on no account should one carry out the function of another save as

permitted by the constitution itself.

### **JUDICIAL POWERS**

The Constitution makes extensive provisions for the judiciary as follows:

*"The judicial powers of the federation shall be vested in the courts to which this section relates being courts established for the federation.*

*The judicial powers of a state shall be vested in the courts to which this section, being courts established, subject as provide by this constitution, for a state.*

*The judicial powers vested in accordance with the foregoing provisions of this section.*

*Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;*

*Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question*

*as to the civil rights and obligations of that person.”*<sup>26</sup>

The judiciary as the third arm of government exercise is powers of adjudication and interpretation of the constitution and law made by the legislature through the courts created by the constitution and other courts as may be established by the National Assembly or any House of Assembly. Therefore the judiciary and courts may be used interchangeably as they imply the same thing. As an addendum to our position that, the functions of the three arms of government are distinct, one cannot find in this aspect of the constitution related to judicial powers anything connected with the functions of the other two branches of government. This is an indication that, the constitution as it is today though not generally acceptable to the populace, still made ample provisions for a clear separation of powers among the legislature, the executive and the judiciary. And unless reviewed, as the mechanism for that is being set in motion by the constitution of

some committees by the president and the National Assembly to look into it, the said 1999 constitution will remain in operation as our grundnorm in this country despite whatever anomalies that is surrounding its existence.

### **CONCLUSION**

At this juncture, it is pertinent to state that, despite the clear separation of powers provided for under the 199 constitution, which distinctly made provisions for the respective functions of the three arms of government, interdependence among the aforementioned arms of government is desirable in order to ensure checks and balances. As rightly pointed out that, no man is an island to himself, the legislature, the executive and the judiciary must relate and cross path in the discharge of their functions, toward ensuring smooth governance in the interest of the populace that voted them into power and which must reap the dividends of democracy.

In the light of the above there is the need for interaction and



control of one arm by another. The constitution sanctioned the National Assembly and the Houses of Assembly not to make laws to oust the jurisdiction of courts. The legislature is also stopped from making any Law relating to criminal offences which have a retrospective effect. In other words, the exercise of their legislative powers is made subject to the jurisdictions of the courts of Law." <sup>27</sup>

It was pursuant to the foregoing provisions of the constitution that, the Supreme Court condemned the promulgation of the Decree purporting to oust the jurisdiction of the court during the military regime in the case of **Attorney General of Western State vs. Lakanmi ors.** <sup>28</sup> amongst other authorities to that effect. Definitely such an attitude would be vehemently condemned during the civilian dispensation.

Even though the three arms have separate powers but there is no water tight compartment in between them. There are areas of the constitution which make interaction between the three

arms inevitable for the successful execution of the provisions of the constitution.

This is why the president, though the commander-in-chief of the Armed forces of the federation cannot declare war without the prior approval of the legislature, at the same time the legislature, even the judiciary must request for any security agents for their protection from the President. Another area of interest is the Money bill which can only emanate from the Executive. But if the president within thirty days after the presentation of the bill to him, fails to put his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting and if passed by two-third majority of the members of both of Houses at the joint meeting, the bill shall become law and the assent of the president shall not be required. In the same vein, the executive both at the federal and state levels must not unilaterally withdraw moneys from the consolidated revenue fund of the

federation and states without being authorised by the National Assembly and the State Houses of Assembly respectively<sup>29</sup>. The constitution also provides for succour when it stipulated that, the President and Governors may authorize expenditure in default of appropriation that is if the appropriation bill in respect of any financial year has not been passed into law by the beginning of the financial year.

Another area of interest is the power given to the legislature to conduct investigation into the activities of the executive charged with the responsibility of disbursing or administering moneys appropriated or to be appropriated by the legislature.

Also the amount standing to the credit of the states and the local governments from the federation account can only be distributed in such a manner as may be prescribed by an Act of the National Assembly, while the amount standing to the credit of local government councils of a state shall be distributed in such terms and manner as

prescribed by a law of the House of Assembly of the state.<sup>30</sup>

In order to give effect to the principle of separation of powers and checks and balances, the constitution stipulates that once a member of the National Assembly or State House of Assembly is appointed a minister or commissioner respectively, such a member must resign his appointment as a member of the parliament before taking the appointment as a member of the parliament before taking the appointment as a minister or commissioner as the case may be. It should be noted that the approval of the Senate is also required for the appointment of a minister to take effect; while accordingly, the House of Assembly must also approve the appointment of commissioners.

However, failure to approve the nomination or refusal to make return within twenty-one working days will be tantamount to deeming the appointment to be validly made.<sup>31</sup>

This power extends to some other

executive office appointments like some of the bodies created by the constitution where the nominees must be screened by the Senate or State House of Assembly before the appointment will become effective.

The purport of the elucidation of the manner and how the three arms of government relate with one another, is to draw the necessary inference that, albeit, the three arms perform distinct functions but which are interrelated, and for effective governance, one must exercise control over the other. This position as discussed earlier on depicts that, neither the legislature, the executive nor the judiciary should exercise the whole or an integral-part of another's powers as conferred upon them by section 4, 5 and 6 of 1999 constitution. Be that as it may, this does not exclude influence or control by one over the acts of another and ensure the desired checks and balances.

Finally, we must not close our eyes to the incessant rancour or dispute between the executive and

the legislature, which we consider dangerous and inimical to the success of our nascent democracy now at its infancy. Such a simmering disagreement is not good for our image as a nation and also capable of constituting a stumbling block to the desired development we have been lounging for in this nation that is already bastardise by prolonged military rule. What we advocate are principled disagreements that are articulated with decorum and enlightenment.

In the light of the above, we urge the executive and the legislature at federal and state levels to close ranks and work as a team, in a bid to meet the aspirations and yearning of the masses. It is by so doing that they will justify the confidence reposed in them by the electorates that voted them into power.

There must be mutual respect between the executive and legislature since honour begets honour, one must not make an unwarranted incursion into the

functions of another but to work together as partners in progress.

## **RECOMMENDATIONS**

In drawing the contain on our discussion, one cannot but venture to make some recommendations to assist all the operators of the three arms of government to come to terms with the onerous duties and obligations cast upon them by the Constitution. The recommendations are by no means exhaustive but if implemented will go a long way in promoting the ideals of separation of powers as entrenched in the 1999 Constitution.

1. There should be extensive education for the practitioners of the constitution with their limitation and powers, this will to a great extent reduce the simmering rancour among the three arms of government.
2. Provisions should be made for a residual legislative list, this we believe, will eliminate the conflict between the federal and state governments on the areas of their legislative competence.

3. Some of the items contained in the exclusive legislative list referred to in this paper, which ought to be in the concurrent list should be looked into and put in the concurrent list.
4. Independence of the judiciary should be guaranteed at all times, this can be achieved by ensuring security of tenure for the judges and they should be adequately remunerated. Also the judiciary must be properly funded. The Judiciary should attain hundred percent financial autonomy for all its activities.
5. More power should devolve to the states and local governments as against the position now.
6. In order to practice true federalism, like what is obtainable in the first republic, states should have their constitutions but to be made subject to the National constitution.
7. The Revenue allocation should be reviewed in favour of the states and the local governments, this is because

they are closer to the people and understands their yearnings and aspirations better. This will reduce the cut throat contest by all the ethnic nationalities for positions at the centre due to the belief that the federal government has limitless resources that can be plundered.

8. Derivation should form the largest percentage of revenue allocation given the peculiar circumstances of our federation and the current agitation for resource control.

#### **END NOTES**

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21. See Third Schedule part 1 of the 1999 Constitution.

22. S. 4(1) and (2) of the 1999 Constitution.

23. See part I and II second schedule, 1999 Constitution.

24. See part I and II second schedule, 1999 Constitution.

25. See S. 5 (1) and (2) 1999 Constitution.

26. See S.6(1)-(6) 1999 Constitution.

27. See S. 4(8) and (9) 1999 Constitution.

28. Supra.

29. See SS. 80 and 121 of the 1999 Constitution.

30. See S. 162 of the 1999 Constitution.

See SS. 147 and 192, 1999 Constitution.