

Modeling Separation For Constitutionalism: The Nigerian Approach

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Abstract

Separation of power has become an important device against autocratic and arbitrary exercise of governmental power, be it by the executive, the legislature or the judiciary. This paper is a critical evaluation of the concept of separation and its contributory role in ensuring constitutionalism. The paper, adopting doctrinal and juristic analysis, further employs a comparative appraisal of Nigeria's and America's models and contends that separation and constitutionalism are complimentary and inseparable. It demonstrates the implication of the model of power sharing arguing that the Nigerian model of separation does not allow for absolutism in government as does in the United States of America. It is also shown that judicial review is an integral part of separation in Nigeria, but that the present constitutional arrangement does not allow for proper independence of the judiciary.

Keywords: Separation of Powers, Constitutionalism, Judicial Review, Independence of Judiciary.

1. Introduction

Judiciary as an important and specialized arm of the government has become the strongest of all the agents of the people in most democracies of the world since after the World War II (Lisa Hiblink: 2010). In the more recent time, many democracies (1979 Nigerian Constitution: Sections 6(6b); 257) have adopted American model of judicial review with a slight difference from Nigerian model. It is therefore necessary that for there to be checks and balances any country adopting a written Constitution based on separation of power is most likely to have a system of judicial review as a necessary weapon against executive and legislative excesses and abuses.

Nigeria's approach to separation of power with judicial review started with the 1979 Constitution. Being a federation, the President is the Chief Executive for the Federation while the Governors are the Chief Executives (Governors) of their respective States. There is the National Assembly, i.e. the national parliament at the center and State Houses of Assembly (State Legislatures) as there is in US the Congress and the State Legislatures, to make laws for the entire nation and for the States, respectively. Besides, the authorities of each of the Executives and of the Legislatures are clearly defined to ensure that all actions have legitimacy and limitations. The constitution, as the contractual instrument between the organs and the people, clearly expresses the desire and will of the people as to the powers granted the organs. The people however expect that the organs would most likely abuse their limits. This is a legitimate anxiety and apprehension emanating from the fact that human beings and their institutions cannot be entirely trusted with power without the risk of abuses. This calls for constitutionalism as against absolute separation as the foundation and bedrock of the democratic aspirations and ideals of the society.

This notwithstanding, judicial review as a constitutional theory and the bedrock of separation of powers, remains an object of persistent and rigorous attack (Andrew, 2001: 511; Bradley, 2002: 22; Naomi, 2008: 13; House of Commons, 2006: 1-54; McDowell, 193: 420; Shehu 2010: 217-236). Truly, judges of Constitutional or Supreme Courts are in most jurisdictions appointed by the executive subject to confirmation by the legislature, particularly the Senate Dermot, 2008: 39-45). It therefore raises question as to the rational for giving such supreme power to the appointee of the two other organs of government. But It must however be asked whether the grantors of the power; the "people themselves", intended a government with limited or unlimited powers under the doctrine of

separation. Apparently, the people, for security of their liberty, intend a limited government in which the power of one organ is circumscribed by the other.

One other basis of resistance to judicial review is that it violates the principles of separation of powers (Ian, 2002: 265), as if separation without the necessary control mechanism can accomplish its task of stabilizing governance; it is also to others undemocratic and counter-constitutional (Miguel, 2010; Peter and Allison, 1997: 76-79; Alon, 2003: 254-261). This paper would, however, not be much concerned with the controversies that are most apparently theoretical. Rather, it would in part two examine, in what is referred to as modeling separation, the constitutional relationship between the three departments of government using Nigeria and America as models for analytical purposes. It would be urged that the basis of separation of power in each jurisdiction differs and that that dictates variation in modeling. Part three deals with the competences of the Legislature under the Constitution and argued that the legislature does not make laws alone, it performs both executive and judicial functions; that the constitution does not allow for tight or absolute separation. Part four, examines the functions allocated to the executive arm and concludes that in spite of the principle of separation, the executive yet performs both legislative and judicial functions as an indication of limited separation and government. Before the conclusion and recommendations, the paper in part five looks at the functions of the judiciary arguing that it is the most important arm that ensures the stability of the polity, democratic principles and the rule of law through the power of judicial review.

2. Modeling Separation of Powers

The constitutional arrangement, particularly in presidential system, is based on the principle of separation of powers. The doctrine opines that the three main department of government, not only be separated into three distinct functional departments, but must also be each managed by different and distinct personnel (Theodore, Benjamin and Kenneth, 2008: 31; Frederic, 1951: 28-29; Oluyede, 2001: 75). A close examination of the constitutional arrangement in Nigeria and the United States of America seems to agree with the argument that never could there be absolute separation in modern system of government, particularly in a constitutional democracy. In line with the traditional formulation, the constitutions in Nigeria and the United States of America vest in the Legislature the law making power, in the Executive the execution and maintenance of the constitution and other laws made by the legislature (Nigerian Constitutions, 1979, 1999: Section 5), and the judiciary is vested with the power of interpretative adjudication (Nigerian Constitutions, 1979, 1999: 6). In sharp departure from the orthodoxy, the Nigerian Constitution and indeed the US's make some overlaps in the allocation of departmental competences of lawmaking, executive functions and judicial competence. The main reason for this overlap is to ensure that there is some balancing in the system. This is more so when separation is not to ensure, in its traditional sphere, efficiency and effectiveness. This is however contentious because oversight function would in the end enhance efficiency and effectiveness, whether under simple or tight separation (*A. G. Abia State & 35 others v A.G. Fed.*, 2003: 398).

One of the very essences of separation is balancing of power and ensuring compliances with limitations. Apart, it assures liberty of the people, absence of tyranny and abuse of power. It is also capable of, as does legislative oversight of administration, ensuring that targets set by each arm of the government are attained, and this is all about efficiency and effectiveness. A good example of this is the appropriation matter which is the expression of the targets set for itself by the executive to accomplish within the budget year. It must therefore be urged that where, all things being equal, the principle of separation is allowed its proper place in the scheme there would be a high propensity for efficiency and effectiveness which would often translate into good governance; the essence of democracy.

In Nigeria, as with US Constitution, the powers of government are divided among the organs (1999 Nigerian Constitution, Sections: 4,5,6), but the judiciary is granted extra power, not of monitoring and not being suo motu as a consequence of interpretative competence in disputes of constitutional dimension to engage in constitutional review of actions of both the Legislature and the Executive. It must however be noted that any model of separation has its unique peculiarities. For example, as a matter of constitutional policy demand Nigerian President is empowered by Section 315 of the Constitution to "modify" an existing law, while in the United States of America the Vice-President though elected as a member of the executive, he is at the same time the President of the Senate, though without voting right, unless there is tie.

Oosterhagen (1993: 74) is thus right when he observes that all systems of separation “employ the same devices; the designation of several actors, each of them being authorized to exercise a part of the power of the state, in order to prevent any actor from exercising the total of governmental power alone.” This observation admits that there may be different forms of separation depending on which form catches the fancy of a nation. Apparently, many factors would dictate the form of separation a country would adopt; the political arrangement and history of a country are some of the factors that are most likely to dictate the approach as in the case of Nigeria with parliamentary system at independence, but with presidential system since 1979.

The parliamentary system that had been the darling of all and sundry in England and only adopted in Nigeria at independence in 1960 was rubbished and bastardized by Nigerians and their political leadership certainly not because of any inherent or structural inadequacies or deficiencies, but consequent upon their lust for absolute power. The prime minister, being the chief executive, was conscious of the powers vested in him by the constitution. The President, being ceremonial, lacked executive power and could only advise the prime minister. That was the constitutionally helpless situation in which the President, Dr. Nnamdi Azikiwe (Nigeria’s President, 1960) found himself leading to acrimonious situation in which he and the Prime Minister (Ademoyega, 1981: 71-80; Muffet, 1982: 25-42; Madiebo, 1980: 15-22) entangled between 1961 and 1965. Thus frustrated, Dr Nnamadi Azikiwe in 1961 called for Nigeria a presidential system (Ojo 2003 : 299), and it was considered at the all parties’ conference in July 1963, preparatory to the 1963 Republican Constitution (Osadebay, 1978: 135-142). It never saw light of the day until 1979 when the military that had taken over power in the country since January 1966 handed-over power to a constitutional government in 1979.

The idea of ceremonial presidency, particularly in Africa, generated brilliant discussion. According to Ojo, no African head of state would be content with a merely “titular head” and where it happens it would engender crisis between the President and the Prime Minister. This is because, according to him, African rulers were used to wielding enormous power. Mbeya (Nnamani, 1986: 6-9), like Ojo, contributing during parliamentary debate of the Kenya National Assembly argued strenuously that the idea of ceremonial head of state was alien to Africa. John Day added that authoritarianism was necessary “in order to carry out vast economic programmes.” Also, Nnamani, citing I. Schepera (Nnamani, 1986: 7), pointed out that the Chief “occupied a place of unique privilege and authority,” and indeed, he is an “absolute monarch.”

It is difficult to agree with Ojo, Mbeya and Day on their perspective of African conception of power and political institutions. It is also difficult to understand Day’s need for authoritarianism to facilitate vast economic programmes. It should be noted that there was never a time in history when the whole of African continent had either a unified or uniform system of government. It is equally on good note that the position of the Chief, the King or Emir was different from one community to the other. Therefore, the idea of African Traditional System of Government is grossly misleading. It is also better to discuss the different systems of indigenous government as were prevalent then than discussing them as if they were unified or uniform. Even in Nigeria alone there were different systems as there were many kingdoms, chiefdoms, emirate or the caliphate. In the Northerner part was Islamic system of government (Hiskett, 1978: 131-146, Maududi, 1980: 148-152) and the Yorubas (Asiwaju, 2001: 132-133), for example, had their own system.

Also, it is unthinkable that developmental reasons could be adduced to reject Westminster system in favor of executive presidential system. The British system remains Westminster, Japan practices prime-ministership (Japan Constitution, Art: 6) and so did Germany (Germany Constitution, Art: 62) up till today and perhaps without any dream for presidential system, and yet they are all economic powers. What actually accelerates the rate of development is not the form of government. Rather, it is among others, the macro-economic policies of the government and the political stability of the state. Also, with positive and purposive political leadership would emerge necessary vision and focus for policy formulation and the necessary courage to implement such policies given stable political environment that is most essential for growth and development.

Nigeria’s adoption of separation of power was influenced by political and historical experience; the acrimonious relationship between the Prime-Minister and the President the American experience could be said to be philosophical for Montesquieu theory of separation of powers found adherence in the America than among the French politicians (Maurice and Donald, 1964: 114-115), and of no influence at all in Britain where he (Montesquieu) had developed the impetus for the theory.

3. Legislature's Competences

The primary function of the parliament is to make laws for the society for the good of the people. Under the Nigerian constitution, proposals for law come before the National Assembly in the form of bills. These bills are either private or public, but majority of the public bills coming before the National Assembly are usually executive. An examination of the relevant provisions in the constitution legitimating the system do not make proposal for legislation exclusive to members of the parliament. All the Constitution requires is that such a proposal must come before either of the two Houses of the National Assembly (Nigerian Constitution, 1999: s. 58(1)) and when passed into law by that House where the proposal is initiated it shall be forwarded to the other House (Nigerian Constitution, 1999: s. 58(2)) and if again passed into law by that House it shall become an Act of the National Assembly and it shall be presented to the President for his assent (Nigerian Constitution, 1999: 58(3)). Besides, the Legislature performed other functions that are not purely lawmaking:

3.1 Appropriation Function

Appropriation is all about budgeting for the state and this is apparently the responsibility of the executive arm Nigerian Constitution, 1999: s. 81). The executive is in charge of revenue collection and by that it is the only department of government that has the knowledge of what comes into the treasury from all forms of government sources of revenues. Also, the Executive arm is in charge of the various ministries and other agencies and departments of government. Thus the executive is in practice the custodian of public purse with all the information appertaining thereto. Ironically, in appropriation procedure, the legislature plays key policy role as if policy formulation other than legitimating for implementation is part of lawmaking. During the appropriation process, ministries, agencies and other departments of government are called upon by the Legislature to defend their respective budgetary proposals. This Legislature's power over appropriation is not peculiar to Nigeria; it is almost all over the World, and indeed one of the earliest and oldest functions of the parliament (Rod and Martin, 2004: 257; Valentine, et. al., 1976: 895-908).

3.2 Confirmatory Function

Presidential system in Nigeria as in the United States of America allows the president to perform the functions of his office either directly or indirectly through the Vice-President, the ministers or such or other subordinate officials (Nigerian Constitution, 1999: ss. 5(1), 147). In other words, the President is empowered to appoint Ministers who form members of his Cabinet (Nigerian Constitution, 1999: s. 130), subject to confirmation by the Senate. The President thus in practice only nominates members of the cabinet; no nominee becomes a minister unless and until the nomination is confirmed by the Senate. This is to ensure that the President complies with constitutional provisions relating to appointment of Ministers and to make the ministers responsible not only to the President, but also to the people. Ministerial appointment is administrative and does not involve lawmaking, yet the constitution requires confirmation by the Senate of Nigeria. This is thus a norm of constitutionalism in Nigeria; that there is no absolute government.

Further, appointment of certain judicial officers by the executive is subject to confirmation by the Senate (Nigerian Constitution, 1999: ss. 231; 238; 250(1); 256; 261(1)). The president appoints the category of judicial officers on the recommendation of the National Judicial Council (Nigerian Constitution, 1999: 153(1)) subject to confirmation by the Senate. The role of the Senate in the appointment though confirmatory, it is mandatory and no such appointment is valid without the Senate confirmation. However, if the recommendation of the National Judicial Council can be regarded as judicial, can the roles of the President and that of the Senate be so regarded? The answer is certainly in the negative. Lawmaking has nothing to do with appointment of judicial officers as adjudicatory and interpretative competences are certainly not administrative. It is however to make members of the judiciary be accountable to the representatives of the people and ensure that the President complies with the constitution in making the appointments.

3.3 Oversight Function

The oversight of the Administration by the legislature is beyond lawmaking. Constitutionally, the legislature has the mandate of the people to carry out necessary investigation (Nigerian Constitution, 1999: 88)48 with the view to enabling the parliament make necessary laws "...with respects to any matter within its legislative competence and correct any defects in existing laws Nigerian Constitution, 1999: 88(2a))." It may also conduct or direct to be conducted any such investigation for the purpose of exposing corruption, inefficiency or waste in the execution

or administration of the laws made by the parliament (s. 58(2)), or for exposing corruption, inefficiency in the disbursement or administration of funds appropriated by it (Nigerian Constitution, 1999: s. 89). Interestingly, investigation in this sense entails a quasi-judicial proceeding; what the legislature does is engaging in investigation of the executive and not lawmaking, though such exercise is for the purpose of making new laws, correcting defect in or repealing an existing law. Certainly, investigation is an executive function (EFCC Act, ICPC Act), yet the legislature is constitutionally competent to embark on it for the purposes provided by the constitution. This is also the case with the general legislative oversight of the Executive as in impeachment matter that is judicial in nature (Nigerian Constitution, 1999: s. 143).

4. Executive Competences

The Nigerian President, in line with the principle of separation of powers, is the Chief Executive of the government of the Federation (Nigerian Constitution, 1999: s. 130). He is at the sometime the Head of State and Commander-in-Chief of the Armed Forces of the Federation (s. 130(2)). The president is vested with the executive powers of the Federation (s. 5(1)), which extend to the execution and maintenance of the constitution. The powers extend to all laws made by the National Assembly and also to all matters over which the National Assembly has power to make Laws (s. 5(1b)). However, the constitution fails to define the phrase “the executive powers of the Federation” (Shehu, 2009: 124-134). The constitution grants the President competency to perform certain functions that are not executive in nature.

4.1 Legislative Function

The National Assembly makes laws for the Federation, but no bill passed by the National Assembly becomes law unless the President gives his assent to it (Nigerian Constitution, 1999: s. 58(1)), except where the bill is vetoed by the President (s. 58(4) and the National Assembly overrides the veto (Nigerian Constitution, 1999: s. 58(5)). The framers of the constitution were perhaps conscious of the President’s legislative leadership and do not insist that all bills coming before the National Assembly must be private members bills alone. Technically, the constitution provides that a “bill may originate in either the Senate or the House of Representatives...” (Nigerian Constitution, 1999: s. 58(2)). To “originate” is different from initiate; “originate”, in the sense in which it is used in the constitution could only mean that a bill may not necessarily be initiated in any of the Houses, it may be initiated by any person or group of persons, but it must come through or originate from either of the Houses. Thus, the President initiates most of the bills and sends them to the Legislature for consideration and possibly passes them into Laws. Essentially, the role played by the executive in legislative process is fundamental such that it makes the executive an integral part of the lawmaking process.

Besides, the president exclusively shall issue proclamation for the holding of the first session of the National Assembly immediately he is sworn-in after the election, and also for its dissolution at the expiration of its four-year tenure (Nigerian Constitution, 1999: s. 64(3)). The National Assembly can neither commence sitting nor dissolve at the expiration of its tenure without the proclamation.

4.2 Judicial Function

Further, as if he is head of the judiciary, the president appoints certain judicial officers on the recommendation of the National Judicial Council, subject to confirmation by the Senate (Nigerian Constitution, 1999: s. 231(1, 2)). Also, such judicial officers can only be removed by the President “acting on an address supported by two-thirds majority of the Senate” (ibid: s. 292). The role of the President in the appointment and removal of judicial officers can not be regarded as executive, it is judicial. This is so because judicial function starts from the moment a person is appointed a judge having been so recommended by the appropriate authority, or so elected.

Even, assuming his role is executive in nature, it thus presupposes that the “executive powers” of the president include some judicial or quasi-judicial functions. This is again a clear case of limited separation of powers. Otherwise, the National Judicial Council could make recommendation for appointment, removal, discipline and all that to the Chief Justice of Nigeria as head of the judiciary of the federation for approval, without the involvement of either the Executive or the Legislature.

5. Judicial Competences

The judicial powers of the government are vested in the judiciary (Nigerian Constitution, 1999: s. 6(21)). These include the power to adjudicate between individuals and between persons and the government (ibid: s. 6(6)). It

also extends to interpretation of the constitution (ibid: s. 231(1)). In all, the decision of the court, especially the Supreme Court is final and binding on all authorities and persons in the federation except in electoral matters where the decisions of the court of Appeal are final and binding on all (Nigerian Constitution, 1999: ss. 239, 287), The main focus here is the supreme power of the court; judicial review as it affects the actions of the executive and the legislature to ensure constitutionalism. Although the status of the judiciary, in practice, is as if it is made an appendage of both the executive and the legislature, the effect of the decisions of the court makes it the supreme organ of government.

5.1 Judicial Review

The actions or inactions of the other organs are subject to judiciary's power of review. Constitutional experience in Nigeria where the elected state officials and their unelected party officials often engage in abuse of office, corruption, lawlessness and lack of respect for the rule law gives support to judicial review of executive and legislative actions. Politics in Nigeria has been largely characterized by lack of respect for fundamentals of democracy such that there is a need for balancing of power. Federalism also requires a court system that would police the activities of member states to ensure compliance with the federating charter (Miguel, 2008: 264-266). All these have been amply demonstrated in Nigeria where the constitution distributes powers among the federal government and the federating units, as can be seen below.

5.2 Review of Executive Action

For example, in *A.G. Lagos State v A.G. Federation* (Nigerian Supreme Court Quarterly Report, 2004(20): 99), it was alleged that the President withheld the statutory allocation that was due to Lagos State from the Federation Account on the grounds that the state created local government councils without compliance with the relevant provisions of the constitution. The State, among other reliefs, sought a declaration that the President lacked power to withhold the money due to the State from the Federation Account. The Supreme Court, in exercise of its power of constitutional/judicial review, declared the presidential act as unconstitutional, null and void (ibid: 147-148). Unfortunately, the President did not, in spite of the Court's ruling, release the funds. Miguel is therefore correct that judicial review was "designed to knit the nation together by counterbalancing the pressure exerted by federalism" (Miguel, 2008: 264). He however stresses the issue of federalism too far when he opined that it is (federalism) "an important condition for judicial review to flourish" (ibid: 264).⁷⁵ This is an undue generalization of theory; without federalism, judicial review would flourish. What it requires for its sustenance is a strong independent and incorruptible judiciary and people's confidence in the institution. Ghana is a unitary system, yet it has power of judicial review (Ghana Constitution: Arts. 33(1), 230(1)).

More interesting is the approach to judicial review under the Constitution of the Islamic Republic of Iran. Although not in the Western orientation, Iran has a Council whose constitutional function is to ensure compliance of executive and legislative acts with the Shariah (Iran Constitution: Arts. 9, 94). This is a counterbalancing power, which in the western sense, a form of judicial review. The council may not be strictly judicial; it composes of eminent clerics with vast knowledge of the Shariah. Freeman accurately captures the implication when he points out that it does not matter whoever exercises the final authority of interpreting the law. The most important is that whoever exercises the power acts must preserve the constitution (Samuel, 1990-1991(9): 356-363). The people, in their wisdom may create a body by whatever name and vest that body with the final interpretative authority. However, the people would not be unmindful of the caliber of membership of such body whose exclusive job would be to interpret the ordinary laws of the legislature or an executive action and put the interpretation side by side with their interpretation of the enabling constitutional empowerment to see if there is any conflict or derogation. This calls for legal minds, those who are specifically trained in the science of law. This may not be necessarily judges, since not only judges are trained in the science of law; many trained, but not at the bench.

5.3 Review of Legislative Action

The contemporary situation in Nigeria shows that rather than being anti-democracy, 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 be, with recklessness, put in jeopardy or rendered ineffectual by another branch. The politics of impeachment of some states chief executives (Ologbenla, 2007: 78-96) in the country between 2003 and 2007 points to this fact. The 1999 Constitution (s.

143) empowers the Legislature to impeach the Chief Executive on the grand of “gross misconduct.” This power of removal is vested in the legislature by the people to ensure that Chief Executives are conscious of their democratic responsibilities to the electorate and to insure that the officeholder does not engage in any act unbecoming of the status of that office. Rather than exercise the power of removal for the end of democracy, the Legislatures saw the power as an instrument of political vendetta such that the infant democracy was almost truncated. The Supreme Court’s intervention through judicial review, in *Inakoju v Adeleke* (Nigerian Supreme Court Quarterly Report ((Nigerian Supreme Court Quarterly Report, 2007(29): 958), saved the situation, particularly in the case of the unconstitutional impeachment of Governor Rahidi Ladoja by a splinter of the State House of Assembly.

There was political bickering and animosity between the Governor and his one time godfather, Alhaji Lamidi Adedibu. The sour relationship engendered political and constitutional crises between the Governor and the State House of Assembly and the House was polarized against itself. Consequently, a section of the legislature aligned with the Governor and the other section supported the Deputy Governor. Eventually, the pro-deputy governor group sat at a Hotel in the capital city of that State, Ibadan on the 13th December, 2005 and purportedly issued a notice of allegation of gross misconduct against the Governor. On the 22nd December, 2005 the group unconstitutionally passed a motion for the investigation of the allegation against the Governor. The Governor was eventually removed from office, though unconstitutionally. The removal was consequently challenged before the State High Court, which declined jurisdiction; the matter went before the Court of Appeal. The Court of Appeal gave judgment against the manner in which the purported impeachment of the Governor was carried-out. Dissatisfied with the judgment of the Court of Appeal, the splinter legislature brought an appeal before the Supreme Court. It was a clear case of judicial review; the court was to determine the constitutionality of the procedure adopted by the splinter legislature. Supreme Court, per Justice Niki Tobi, JSC, declared the impeachment as unconstitutional (Nigerian Supreme Court Quarterly Report, 2007(29): 1116-1118).

The decision of the Supreme Court in that case has thus saved the infant democracy in the country from being truncated. This essentially points to the fact that separation in Nigeria with the power of judicial review is to achieve the ends of constitutionalism that is an anchor for democracy.

6. Conclusion and Recommendations

This paper examines the system of separation of power in Nigeria and in the process dealt with, though in passing, the model in the United States of America providing an opportunity for inter-jurisdictional comparison of both models. The paper demonstrated the implication of the model of power sharing arguing that the Nigerian model of separation does not allow for absolutism in government as does in the United States of America. It is also shown that judicial review is an integral part of separation in Nigeria, but the present arrangement does not allow for proper independence of the judiciary. The paper however makes the following recommendations:

First, to ensure constitutionalism, there is a strong need for a properly independent and courageous judiciary to make separation and judicial review veritable and potent weapons against executive and legislative arrogance, abuse and recklessness. It is absurd that while members of the Legislature and the Chief Executive are directly elected by the people, members of the judiciary are appointed by the Chief Executive subject to confirmation by the Legislature (Nigerian Constitution, 1999: ss. 231(1, 2), 238(1, 2), 250(1, 2), 256(1, 2)). Appointment of judges of superior courts is made by the President upon the recommendation of the National Judicial Council (NJC). The Council recommends to the president from among the list of judges submitted to it by the Federal Judicial Service Commission (ibid: s.153). The Commission also advises the Council on removal of certain judicial officers.

The Council comprises of Chief Justice of the Federation as the Chairman, the next most senior Justice of the Supreme Court as the Deputy Chairman, President of the Court Appeal and other specified members of the higher bench and five members of the Nigerian Bar Association and other two persons not being legal practitioners appointed by the Chairman as members (Nigerian Constitution, 1999: 20 Part 1, Third Schedule). Neither the legislature nor the executive constitutionally has input in the composition of the Council.

In contrast, the Commission comprises of Chief Justice of the Federation as Chairman, President of the Court of Appeal, Attorney General of the Federation and Chief Judge of the Federal High Court. Others include two members of the Nigerian Bar Association and two persons not being legal practitioners appointed by the President. In short, the Commission comprises of eight members out of which the President appoints three. This

is a breach of independence of judiciary; composition of membership of the commission should be purely judicial affairs without any input from either the executive or the judiciary.

Second, the Constitution pretends to recognize the age-long necessity for independence of the judiciary: a judicial officer, once appointed, has security of tenure, and remuneration and salaries of judicial officers are charged upon the Consolidated Revenue Fund of the Federation (Nigerian Constitution, 1999: s. 84(1)), and their conditions of service cannot be altered to their disadvantage. The remuneration and salaries are determined either by the Legislature or Revenue Mobilization Allocation and Fiscal Commission (ibid: s. 153). This shows that funding of the Judiciary is within executive or legislative function. The proper approach should be that the Judicial Council should determine remuneration and salaries of members of the judiciary; it may however be subject to legislative approval. This is simply because the control of the purse is a traditional function of the Legislature.

Third, the much talked-about independence of the judiciary would remain cosmetics if head of the judiciary is not directly elected by the people or through an Electoral College. This would not only make the judiciary responsible to the people, it would also ensure proper independence. It is interesting that nearly two-third of the States in America use an elective system to choose judges (Baum, 1994: 118); the system is either partisan or non-partisan based (ibid: 115-118).

A nonpartisan elective system may be proper to insulate the judiciary from political influence from political parties or the other branches of government. This also would make the judiciary people oriented. With this, the fear of the proponents of separation of powers would be properly allayed. The experience in Nigeria now has called for a change in the system of selecting judges of the Superior Courts. A situation where the Chief Executive could commit contempt of judgment of the apex Court as in the Lagos fund seizure's case is dangerous for liberty.

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