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The Separation of Powers and Constitutionalism in Africa: The Case of Nigeria

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Abstract: This study briefly traces the origins, evolution and purposes of the doctrine of separation of powers as well as its main modern manifestations. The study argues that the doctrine can now be regarded as a general constitutional principle that was never conceived, nor intended, to operate as a rigid rule or dogma. Mindful of this significant fact, the study analyzes the structure of government in Nigeria and examines the extent to which the doctrine operates within the executive, legislative and judicial branches. What emerges from the analysis is that there is no total separation of power in Nigeria, the constitution through the various provisions, allows any of the three organs to perform the function of one or the other arms of government in certain circumstances.

Key words: Doctrine, separation, manifestation, constitution, mindful, Nigeria

INTRODUCTION

The doctrine of the separation of powers is a kind of principle which is used in achieving or maintaining equilibrium in power distribution. The essence of separation of powers is to make sure that power is reasonably apportioned among the incident groups in government. Because the only way to prevent absolutism and high-handedness in rulership is to make sure that absolute powers do not reside in only one of the organs of government. Separation of powers is an influential concept in modern democracies and African regimes have tried to display their nascent democratic credentials by introducing new constitutions that apparently provide for a separation of powers (Fombad, 2003). Even the French considered this doctrine so important that Article 16 of their Declaration of the Rights of Man and of the Citizen of 1789 (Anonymous, 1789) stated that any society in which the separation of powers is not observed has no constitution (Art.16 French). Aihe and Oluyede (2000) claimed that separation of powers stemmed from Locke's observation of the condition prevalent in 17th century England. Locke thought that it was convenient to confer legislative and executive powers on different organs of government as the legislature can act quickly and at intervals while the executive must constantly be at work. He argued that it was foolhardly to give to law-makers the power of executing law because in the process they might exempt themselves from obedience and suit the law (Both in making and executing it) to their individual interest. However, the modern idea of the doctrine of separation of power was explored more profoundly in the spirit of the law (1748), a study by French political writer, Baron de Montesquieu. He based his exposition on the British constitution of the first part of 18th century as he understood it because the claim is now regarded as flowed since, the 18th century English constitution did not observe the separation of powers in the form that he propounded it. Barendt (1995) whichever way, he was the first to categorize governmental functions as legislative, the executive and the judicial and the first to analyze the relationship between the separation of powers and the balance of powers in terms of checks and balances (De Montesque, 1991) if the executive and the legislature are the same persons there must be a danger of the legislature enacting oppressive laws which the executive will administer to attain its own ends. It is quite clear from his theory of checks and balances that he was not advocating a rigid separation in which the different organs work in isolation from each other but rather a system in which they were working in concert with each other. Thus separation of powers as currently understood implies that none of the legislative, executive and judicial powers is able to control or interfere with the others. The judges should be independent of the executive and the legislature or that the same individuals should not hold posts in more than one of the three branches. The ministers should not be members of the legislature or vice versa or that one branch of government should not exercise the function of another that is the executive should not make laws.

SEPARATION OF POWERS UNDER THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

Nigeria from independence till date has seen it all, Parliamentary, Military dictatorship and the Presidential system of government. From 1999 till date Nigeria is practicing the presidential system of government, taking

after United State. United State constitution was established for better for worst on an idea new to the world in 18th century and uncommon in 20th century. The most distinctive contribution to the art of government by the United State is the doctrine of separation of powers. Today in Nigeria, it has to be admitted that the structure of the constitution is based on the doctrine separation of powers i.e., the Legislature, the Executive and the Judiciary. Thus respect must be accorded to separation of power as enshrined in Nigeria constitution. No arm of a democratic government should take or usurp the functions of the other arms of government. Apart from mutual respect due to each arm, it is unwise to disregard the constitution more so when disregard may lead to a social disorder.

Separation of powers is a fundamental constitutional principle in 1999 Nigeria constitution. The basic powers of each of the government were placed in separate section by the constitution. For example, Section 4 and 5 of the constitution deal with the legislative and the executive powers while Section 6 deal with the judiciary. There is also a vertical separation of powers between the Federal Government and the State Government and horizontally.

However, despite the constitutional separation of power in Nigeria, the three branches are not completely sealed off from each other, there is no complete and total separation of powers. The question that follow include: what is the real status of the doctrine of separation of power in Nigeria? Do the separation of power in Nigeria is in accordance with the letter and spirit of the law? If not what is the real situation? That is what we set to find out in this research.

The executive is easily the most important of the three branches of government, functioning chiefly to execute or carry out state functions and maintenance of the constitution and law made by the legislature. Executive as the engine of the political system in Africa has been known to be usurping the duties of the legislature and the judiciary and one of the major reasons for Africa dismal record on constitutionalism is the ease with which African leaders have managed to adopt imperial tendencies, enabling them to rule largely without legislative or judicial interference (Fombad, 2003) and even taken over the job of the legislature and judiciary. For example in the case of any break down of public order and public safety in the federation or any part there of to such extent as to required extra ordinary measures to restore peace and security, the president has right under Section 265 (3) of the constitution of federal republic of Nigeria to issue a proclamation of a state of emergency. These give the president the power to make law to be ratified by the national assembly. More so, the president or the governor shares the law making power of the legislature by virtue of the constitutional provision for presidential or governor's assent to bills before they become laws Section 58 (1) and 100 (1). Where they withhold their assent, the respective legislature can override the said refusal with 2/3 majority vote at fulfillment of relevant conditions. This gave the executive the opportunity to participate in the law making procedure which is not part of its function. In addition the executive arms of government also perform legislative function through delegated legislation. There are some statutory laws that make provision that gives power to the minister or commissioner, director general to make rules and regulation, bye laws for the conduct of the affairs of their ministries, department and organizations.

The presidential power to give executive orders in some areas is another major exception to the doctrine of separation of powers. The president and governor have power to grant prerogative of mercy or grant pardon as contained in Section 175 of the 1999 constitution and that of the state governor is contained in Section 211 (Supra). The power to set aside the decision of the court after a due process of adjudication is another way by which the executive interferer in the work of the judiciary. More so in Section 160 (1) and 191 (1) of 1999 constitution vested power on the Attorney General in the constitution to institute and undertake, take over and continue or to discontinue at any stage before judgment is delivered on any criminal proceeding. The power given to the Attorney General is a blanket one because he need not to give any reason for his action but according to Section 160 (3) and 191 (3), he must have regard to the public interest, the interest of justice and the need to prevent abuse of legal process. The executive arms of government also perform judicial function by setting up administrative tribunals and commissions of enquiries. Both bodies function like courts but the members may not be a trained law person and in some instances two or three lawyers may be included.

The legislature according to Section 4 (2) and 6 (2) of 1999 constitution is saddled with the responsibility of making laws for peace, order and good government of the country or any part of it. Considering the role of legislature, the researchers discovered that they do participate in the executive function for example, the legislature has to approve any treaty negotiated by the president before it becomes effective. There are other provisions in the constitution for example Sections 211 (1 and 2), 218 (5), 157 (4) and 135 (2) give the legislature the power of approving the president's nominees into any key offices such as those of the chief justice of the Supreme Court, President of the Court of Apple, Ministers and Ambassadors.

Furthermore, the legislator in both state and Nation are given according to Sections 56 and 95, the right to regulate their own proceedings as well as the way and manner to control the conduct of members. Such member may be tried summarily and punished. In the exercise of this judicial power, there is no right of appeal to the law courts. A non legislative member may also be tried in the same manner for contempt and punished without the right of appeal to law courts. Another way by which the legislative arms of the government perform judicial functions is by way of initiating proceedings for the removal of the chief justice of the federation as well as the chief judge of the state High Court. They are removing on an address to that effect which is supported by two third majorities of the members of the senate. These exercises of judicial powers extend to the impeachment of the chief executive and their deputies. The senate initiates the proceeding in respect of the president and his vice while the house of assembly does so in respect of the governor and his deputy.

Judicial arm of the government perform the function of adjudicating between government and citizen and between and among citizen. We discovered that judicial arm of the government also perform legislative and executive functions. For example the chief justice of the federation is responsible for making Supreme Court rules while the president of the Court of Appeal makes that of the Court of Appeal and the Chief Judge of a state makes that of area and customary courts. The courts also make laws through their judgments. This is because whenever a case is brought before a judge it is the duty of the judge to interpret and apply the relevant law to the case. His interpretation of the law may be at variance with the real intention of the makers of the law but all the same it is the interpretation given to the law by the judge that is taken to be what the legislature intended to be the law. Whichever way such interpretation become precedent to be followed in subsequent cases by other judges when deciding cases that are on all fours with the one decided by judge. In addition, judicial arms of government do perform executive function in the administrative performance of their offices. For example, the chief justices of the federation, the president of the court of Appeal, the Chief Judge of a State High Court are the one responsible for the general administration of their courts.

From the discussion so far, we have seen that there is no total separation of powers in Nigeria. This is because even though the constitution provide for the existence of and functions of the three arms of government but at the same time allow through the various provisions which we have seen each of three arms of government to perform the functions of one or all of the other arms of government in their performance of their duties.

In general opinion the problem with Nigeria is not that of separation of powers among the three arms of government but the lopsided allocation of powers between the centre and the states. In Nigeria constitution, the centre is too strong and the states are weak. In fiscal matters, the domination of the centre is total. Even in legislative matter the power are so allocated that the constitution is centripetal and not centrifugal. To make the matter worst, only one constitution governs both the state and the centre in a true federal system each of the state in the federation should have their own constitution. The situation in Nigeria where only one constitution govern 36 states and the centre only present Nigeria as a unitary system of government masquerading as a federal.

CONCLUSION

The study shows that the doctrine of the separation of power is a very impressive concept. Yet it is often difficult to practice in reality. This is because even though the constitution provide for the existence of and functions of the three arms of government, it at the same time allowed through the various provisions, allow any of the three organs to perform the function of one or the other arms of government in certain circumstances. But this does not means that we should despair because the doctrine of the separation of powers is purely democratic ploy which serves the democratic aim of checking authority and protecting liberty. It challenges every political theorist as well as everyone involved in the political game to accept the rules of the game and play fair.

REFERENCES

Aihe, D.O. and P.A. Oluyede, 2000. Cases and Materials on Constitutional Law in Nigeria. 2nd Edn., University Press, Ibadan, Nigeria, ISBN-13: 9780195755190, Pages: 832.

Anonymous, 1789. Declaration of the rights of man and of the citizen. National Assembly of France, August 26, 1789. http://www.hrcr.org/docs/frenchdec.html.

Barendt, E., 1995. Separation of powers and constitutional government. Public Law, UK., pp: 599-600.

De Montesque, B., 1991. The Spirit of the Laws. Book 11, (Thomas Nugent Translated by Prichard, J.V. Ed.). Fred B. Rothman and Co., USA., pp: 160-196.

Fombad, C.M., 2003. Cameroon: Constitutional Law (In Blanpain, International Encyclopaedia of Laws-Constitutional Law). Kluwer Law International, The Hague.