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Judiciary and the Doctrine of Separation of Powers in Nigeria's Fourth Republic

Hakeem Olatunji TIJANI

Political and Governance Policy Department
Nigerian Institute of Social and Economic Research (NISER)
Oyo Road, Ojoo,
Ibadan
tunjitijani2000@yahoo.com

and

Nwachukwu, Lambert Chidi

Department of Industrial Relations and Personnel Management
Faculty of management Sciences
Michael Okpara University of Agriculture, Umudike
Abia State
Mobile: nwagodchidi@yahoo.com

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Abstract: As a branch of the government, the judiciary plays a crucial role in guaranteeing that, in a democracy, the principle of separation of powers is rigorously upheld. Like other democratic governments worldwide, Nigeria's 1999 Constitution upholds the principle of separation of powers, which greatly influences how well a nation is run. Once again, the judicial branch is a crucial political institution because of its many functions, which are rooted in the rule of law, and safeguard a democratic government to remain viable. However, the judiciary's numerous transgressions, which range from open corruption to inadequate case management, have rendered it weak. This paper examines the judiciary's role as a branch of government in upholding Nigeria's theory of separation of powers using secondary data. It determines that the rigorous adherence to the theory has not been upheld by the judiciary. It, therefore recommends that, among others, the implementation of the

1999 Constitution's Section 121(3) that ensures the heads of the courts receive payment from the Consolidated Revenue Fund of the State for any sum standing to the credit of the judiciary, members of the Executive and Legislative branches who violate the 1999 Constitution's provision on the financial autonomy of the Judiciary as reflected in Section 121 (3) be subject to jail time as a criminal penalty. Also, the states should not be involved in the financing of capital projects at state high courts and their subsidiaries to break the governors' control over these entities.

Keywords: Constitutionalism, Democratic government, Judiciary, Nigeria, Separation of powers

Introduction

All over the world, a democratic government is piloted on the pivotal triad of the three arms of government – the executive, the legislature, and the judiciary. The effectiveness of these triadic arms in heralding democratic dividends is hinged on the strict adherence to the doctrine of Separation of powers. This is because each arm of government has a distinct role to play in the overall uprightness of the government in discharging its responsibilities to the people. Each arm works within defined areas of responsibility so that each keeps a check on the actions of the others (Tijani, 2016). This does not just happen,

the essence of the principle is to ensure that a democratic government discharges its responsibility of providing for the welfare of the people in a way that makes citizens exercise their fundamental rights, freedom of speech and freedom of association. What guarantees effective governance is the rule of law that is solely guided by the Judiciary. According to Tijani (2022), it is the responsibility of the Judiciary to protect very vehemently the rights of the people against such infringement from the government. Again, it is also incumbent on the Judiciary to prevent the government very unreservedly from infringing on the rights of the people. The role of the Judiciary in democracy includes the

review of the acts of the legislative and executive arms of the government, judicial interpretation, and guarantee of strict adherence to the doctrine of Separation of powers among the three arms of government.

In Nigeria, the doctrine of Separation of powers is enshrined in the 1999 Constitution as in other democratic governments of the world, these roles have significant impact on the quality of governance that a country has. Again, all these roles are embedded in the rule of law, a bastion for sustainable a democratic government, and therefore make the judicial arm an important political institution. It can then be argued that in Nigeria, the absence of adherence to the doctrine of Separation of powers, with the Judiciary at the receiving end of the spectrum, accounts for a decline in the rule of law, lack of judicial independence, and poor human rights enforcement. Nwabueze (1981:32) opines that “concentration of government 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”.

Fundamentally, what is significant in the separation of powers is that it makes a proper understanding of democratic government feasible and challenging. The feasibility and challengeable nature of the separation of powers makes the democratic government robust. It is not even the Constitution! It follows therefore that it is not right to base the effect of the doctrine of separation of powers on the premise of achieving democratic government by making the arms of government adhere to the constitution, which is fundamental to the rule of law. Yet again, it is not equally wrong to say that democratic government is embedded in constitutionalism and that it is guaranteed when each arm of government keeps to its powers and performs its functions. What is consequential about the Constitution is that it is made to protect the rights of the people. In other words, neither constitutionalism nor the ability of a government to make good policies and effective programmes may even guarantee a democratic government. The paper uses secondary data to analyze lack of Separation of powers in Nigeria and how the Judiciary has been at the receiving end of the spectrum.

A Historical and Comparative Discourse on the Separation of Powers

Separation of powers was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th-century French social and political philosopher. His *Spirit of the Laws* inspired the Declaration of the Rights of Man and the Constitution of the United States and by extension, the principle behind all democratic governments of the world. Montesquieu propounded those political institutions to be established, which he termed the Executive, the Legislature, and the Judiciary, and that political powers be divided among these three arms of the government in the polity with each having particular responsibility. Thus, we have the following:

- The legislative arm with the responsibility of enacting laws and appropriating the funds to run the government.
- The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.
- The judicial branch is responsible for interpreting the constitution and laws and

applying their interpretations to disagreements brought before it.

The philosophy of Montesquieu behind this creation and division of powers is to promote liberty. To him, each of these arms of government must be separate and act independently. The purpose of this principle is to discourage the abuse of power that can occur when powers are concentrated in one arm. Again, it is to provide for checks and balances. In other words, the Separation of powers is not absolute. It is not an end in itself, but a means to achieve a particular goal of guaranteeing freedom for the people. Hence, the doctrine of checks and balances is provided to complement the principle of Separation of powers, which is to promote freedom, a key ingredient of the rule of law. The judicial arm is charged with the responsibility of providing the needed freedom in the polity. Gicheru (2007), the Chief Justice of Kenya, states that the three arms of government - Legislature, Executive, and Judiciary - should uphold the principle of Separation of powers to guarantee the rule of law. He adds that there should be mutual respect among these institutions and where the administration of the law

(that is under the jurisdiction of the Judiciary) is threatened by disrespect from any of the other two arms – Legislature and Executive – the contempt must be sternly frowned at and punishment must be meted out in the public interest. This is to show the supremacy of the rule of law and to uphold the authority of the Judiciary as the custodian of the rule of law (Gicheru, 2007:16).

Separation of powers can be analytically discussed from the entry point of Reeve's (2003:62) analytical proposition of *unique aptitude doctrine*, whose central crux is on specialization. The doctrine forecloses the interference of man into the natural aptitude of another man. It understands that every person is endowed with a natural aptitude for a unique craft or type of work, or unique way of life, or a social role. In other words, a physician is naturally endowed with the craft of medicine, while another person is not. A pure scientist has a natural aptitude for pure sciences; a social scientist does not, but he is blessed with a natural aptitude for studying human beings and their environment. On this premise, according to Reeve (2003:62), Plato accepts that

“each member of the *kallipolis* must practice exclusively throughout life the unique craft for which he has a natural aptitude.” Reeve perceives this doctrine as the *principle of specialization*:

Thus, it can be argued that it is not the Separation of powers when another arm handles the responsibility of which it is not specialized. It is therefore not in congruence with the spirit of Separation of powers when another arm different from the Judiciary performs the selection, discipline, and career promotion of the judicial officers. What the doctrine tries to safeguard is the independence of each arm of the government. The substance of the Separation of powers must be understood religiously that it is meant to emphasize the specialization of each arm of government. Then, it follows that judicial selection, discipline, and career promotion be handled solely by the judicial arm itself. It is this that will promote specialization that the Separation of powers preaches. It is a fundamental flaw to put these judicial processes in another arm. The wrong notion often witnessed about the Separation of powers is that the activities

of one arm of the government should be monitored by the other arms.

The origin of the Separation of powers among the arms of government could be traced to John Locke who thought that the powers of the Executive be separated from the Legislature's and that there should be a hierarchy in the control of these powers with the Legislature having overriding powers over the Executive. According to Baradat (1979:64), Locke believed that the Legislature should decide on the policy of the government and that the Executive should dutifully carry out the mandates of parliament. This limitation of Separation of powers in which powers should be separated between the Executive and the Legislature is evident in his exclusion of judicial powers. Locke's Separation of powers is not a watertight theory of Separation of powers, the kind of separation that can bring effective governance. This is because Locke's Separation of powers ignores the judicial power hence, checks and balances cannot be maintained, this deficiency is noticed by Saley (1998:274).

Montesquieu improved on the doctrine by propounding that political liberty be

achieved for the masses. For Montesquieu, political liberty is achievable when there is no abuse of power. Montesquieu therefore, sensing the natural tendency of man to crave power and coupled with the experience that every man is likely to abuse it, propounded that power must not be concentrated in the hands of one man. This is to achieve political liberty. As a result, to achieve political liberty and to prevent its abuse, Montesquieu professed those powers be separated among the three arms of government - the Executive, the Legislature, and the Judiciary with each having powers to check one another. It is in this regard that the power of the arms of government is equated with the practice of federalism. Cameron and Falleti (2004) equate federalism with the doctrine of Separation of powers, for this reason, they proffer a strategy to analyze whether a country's constitution is federal or the constitution upholds the Separation of powers. According to them, a systematic way of assessing the effectiveness or otherwise of federalism and the doctrine of Separation of powers is to look at the adherence to the limits of the central power to the sub-national powers. They put it succinctly that:

When assessing whether a constitution is federal, we should direct our attention to the existence of legislative and judicial institutions at the sub-national level; when assessing whether a constitution upholds the doctrine of the Separation of powers, we should direct our attention to whether the institutions of self-government are in operation at the sub-national level as well the national level (Cameron and Falleti, 2004:29).

Essentially, the Separation of powers is about the division of powers among the actors in governance, among the three arms of government. Presidentialism as a system has its intrinsic value of Separation of powers, which can be attributed to the United States of America's presidential system of government. Hence, it is expected that in Nigeria's presidential, the salient feature of this doctrine, which is to check and balance the power among the three arms of government should also be present. Although the Separation of powers features so prominently in presidentialism, its origin can be traced to the United Kingdom with the system of baronial powers of life and death of the kings over those who were under them. This was revolutionized into the Crown in Parliament, which made the sovereignty of the Parliament assured while the basic Constitutional Rights in England were not entrenched in the

Parliament. They were secured by a line of instruments of the Magna Carta of 1215, the Petition of Rights of 1628, and the Bill of Rights of 1687 to check and balance the powers of the Parliament (Eso, 2003:64).

Characteristically, the parliamentary system as practiced in the United Kingdom does not properly fit into Nigeria's separation of powers within the contextual system of government the country is practicing. This is because of the fused powers in the arms of governments as against separate powers in the arms of government in presidential. The Separation of powers in the United Kingdom especially regarding the Judiciary as being weak. Even though UK courts are unquestionably some of the most independent in the world, the Law Lords, who decided cases in the UK, also sat in the House of Lords, the legislature's upper house. However, this arrangement ended in 2009 when the Supreme Court of the United Kingdom was established. Moreover, since Parliamentary sovereignty exists, a system like the UK's is better characterized as a "fusion of powers," even though the theory of

separation of powers may be studied there.

In Nigeria, public policies suffer as such policies are viewed by the policymakers through the myopic lens of what may benefit the few powerful people in the country to the detriment of the larger public. Another typical example of this aberrational practice was demonstrated by the late former President Umaru Musa Yar'Adua. The late President refused to implement the judicial reform that should have provided a bulwark for the Separation of powers and guaranteed the independence of the Judiciary. It was hoped that if the Judiciary were given the responsibility of choosing the composition of the Independent National Election Commission (INEC), the Nigerians would have had the opportunity to elect their leaders without the political leaders rigging themselves into power, the doctrine of Separation of powers and the sanctity of independence of the Judiciary would have been at play. On 16 January 2008, while holding a consultative meeting with the state governors and other stakeholders on the Electoral Reforms Committee headed by the former Chief Justice of the

Federation, Muhammed Uwais, the late President himself attested to the fact that political leaders do rig election to get political power (Adeniyi, 2011).

Constitutionalism, Democratic government, and Separation of powers

Constitutionalism is commonly understood as a set of rules and guidelines supporting the notion that the state's power originates from and is constrained by an essential corpus of law. Significantly, it also suggests that adherence to these same norms is a prerequisite for the legitimacy of government (International IDEA, 2022). The beauty of a democratic government is not located in the ability to make good policies and effective programme, but opportunities it gives people to protect their rights. Harel (2014:38) states that *robust constitutionalism* is achieved when constitutionalism is desirable independently of whether it results in desirable decisions (such as bringing out good policies and effective programmes). Still, it is directed to protect individual rights. This is because, in Nigeria, politicians in the two other arms - executive and legislative - who have access to the state resources have

continually abused their office by engaging in high-level corruption with dire consequences for the country despite the constitutional provision of the separation of powers. Such a phenomenon of high-level state corruption has tagged Nigeria a 'resource curse'.

Brooks (2013) states that the resource curse cannot be overcome without incorporating the doctrine of Separation of powers as a feasible solution to the problem. He argues that a component absent from resource curse studies is the need for constitutional modifications, not only better governance, for the impacted states. It is important to stress the significance of the Separation of powers here. The natural resource curse mostly affects Algeria, Nigeria, Sudan, and numerous other states, all of which have overly strong executives. The United States and other states endowed with abundant natural resources, such as oil, are immune to the resource curse for a variety of reasons. What democracy provides is the ability of the system to manage interactions or, in more refined academic parlance, inter-governmental relations in a way that would make the

citizens benefit from the system without infringement on the power relations in the union. What, therefore, distinguishes a democratic government from a non-democratic one is the smooth interplay of the arms of government to guarantee civil peace in the state and discourage authoritarianism. In other words, all arms of the government would be so sufficiently powerful as to challenge the decisions of the other. This is the salient feature of the Separation of powers and provides an alibi for the doctrine to be a very vital instrument in protecting democracy as a system that guarantees the power of the people. According to Brooks (2013), a state that lacks a separation of powers is more likely to be subjected to corrupt authoritarianism.

Separation of Powers in a Democratic Setting

A democratic government signifies a country that has chosen democracy as its system of government. It is only in the system that the practice of Separation of powers is feasible. It is best practiced where presidentialism is chosen and practiced as a form of government. Separation of powers in this form of government is associated with the rule of

law. Thus, the term Rule of law becomes imperative for our understanding of what democracy is. It is a term that serves as a determinant for equality in a polity. It is a measure of protection of all individuals in a country. An eminent Nigerian jurist, Eso concurs with this position when he defines democracy within the specificity of the rule of law. According to Eso (2003:23), democracy is defined as “the rule of law and human rights”. The Rule of law is a connective term that collectively emphasizes the importance of all the individuals in a polity. It is a term that neither discriminates nor segregates.

Thus, in a polity where the rule of law reigns supreme, which makes the government a democratic one, all the individuals can be aggregated as the people but not all the people can be disaggregated as individuals in a non-democratic government, this is because some individuals tend to be above the rule of law. This is because in democracy according to Tully (2008:), the constituent power that should belong to the people has been surrendered to some individuals in the name of the state (the police and the military) with the aim of

monopolizing (the monopoly use of force by the state) it for the benefit of the people in a constitutional or representative democracy.

Separation of powers in a democratic government is the distribution of political authority within a government, it provides an arrangement of checks and balances that ensures that no single branch of the arms of government becomes too powerful or infringes on the rights of the citizens. Separation of powers occurs when powers and functions are shared among the three independent and separate arms of government - the Legislature, the Executive, and the Judiciary. This is for the arms to act as a check and balance on one another and thwart the excesses and abuse of powers. Separation of powers is aimed at protecting the liberty of the ruled, which is best observed when the rulers are prevented from dictatorial rule. This is done by avoiding the concentration of all the powers of government in one hand, or more than one. Separation of power can be horizontal or vertical. It is horizontal when powers and functions of government are distributed among the

arms of government – Executive, Legislature, and Judiciary. The doctrine becomes vertical when, within the context of a federally structured country like Nigeria, powers and functions of government are shared out to other tiers of government - states and local governments. Separation of powers is discussed horizontally and analysis is woven around the central government.

At the state level, the governor controls the judicial branch of government. The state's judicial branch sometimes makes constitutional requests that are personalized by the governors and viewed as a way to appease the judiciary. This practice leads to compromise from the judiciary because the constitutional request becomes a way for the judiciary to be gratified in the hopes that the judiciary will reciprocate the gesture. Funds intended for the judicial arm should be directed directly into the judiciary's vote, which should originate from the NJC, to eradicate this immoral mindset and reestablish the independence of the judicial arm. This is owing to the Constitution's directive that the Chief Justice of the State, who is the Head of the Court, receive the money owed to the

Judiciary. The arm's independence is in danger because to the existing trend of placing capital projects under state control. As a result, the NJC should manage both the capital and recurring votes. Although the court is intended to be financially and politically independent under the Constitution, this is not the reality in practice; rather, it is only independent in theory. The state's executive governor signs the budget after the legislature does, but the judiciary will remain at the mercy of the executive since the constitutionally mandated sum for the judiciary will not be given to the head of the court. The Executive has not upheld or adhered to Section 121(3) of the 1999 Constitution, which guarantees judicial independence.

Referring to the judiciary's independence, the constitution tends to shield this branch of government from the legislative branch's meddling because it is so sacred. This is accomplished by preventing the Legislature from passing legislation that could jeopardize the Judiciary's statutory functions. The judiciary is protected against the enslavement of other branches of government, especially the legislative

branch, under the 1999 Constitution. It thus stops the Legislature from passing legislation that could compromise the Judiciary's statutory functions. According to Musdapher (2011), Section 4(8) of the Nigerian Constitution prohibits the Legislature from passing any legislation that would remove or appear to remove the authority of a court of law or judicial tribunal created by law, demonstrating the significance the Constitution places on the role of the judiciary.

The Judiciary and the Control of Powers

For the judiciary to play its statutory responsibility of reviewing the acts of the government, the Judiciary should not have its powers usurped by any of the other two arms of government - the executive and the legislature. In other words, the Judiciary should have the power to control the excesses of the other two arms. This can occur when there is strict adherence to the doctrine of Separation of powers. This is because the salient feature of the doctrine of Separation of powers is to maintain checks and balances among the three arms of government. This is imperative for the sustenance of any democratic

government, Nigeria inclusive. Essentially, the existence of and access to efficacious grievance procedures remains the hallmark of a democratic government. Given the role of the Judiciary in playing the role of stabilizing a country by constitutionally resolving conflicts, and electoral petitions, protecting citizens' rights, and ultimately preventing the government from infringing on the rights of the citizens, the judiciary must exercise its power to stop the excesses of the other two arms of the government. Again, in a pluralistic and heterogeneous country like Nigeria with diverse ethnic groups and multi-minority groups, the role of the Judiciary becomes consequential in protecting the rights of the minorities and gives every citizen a sense of nationhood.

Separation of powers is synonymous with federalism whereby the federating units are structurally independent with each governing structure – the Executive and the Legislature deriving their powers from the citizens in the units. All over the world, the doctrine of Separation of powers is more pronounced in a democracy that runs a presidential system of government. Although the Separation of powers is also present in a

parliamentary system of government, such fusion of responsibilities between the Legislature and the Executive signifies a pseudo-separation of powers (Tijani, 2016). Still, it is a democracy, a liberal democracy for that matter! Notwithstanding the congruity surrounding the Separation of powers in a parliamentary system and its synonymy with a unitary system of government, powers are still distributed between the Judiciary and the other arms. Such countries with a not-too-good practice of Separation of powers include Britain, France, and Morocco's monarchy in Africa. Such mongrelization of powers as evident in a parliamentary system of government has implications for developing countries whose institutions are not fully strengthened.

Typically, the judicial arm of government is acutely affected as the judicial powers of the judicial arm are infringed upon. At the sub-national level, the scenario is played out; powers that are distributed horizontally are also inherent at the sub-national level. The 1999 Constitution of the Federal Republic of Nigeria that distributes powers among arms of the government also does the same at other

tiers of government as it outlines powers of each of the arm of government in the three branches at the sub-national levels except in the local government where the tier is subsumed by the state. At the national level, the legislative branch is a two-house Congress, also known as a bicameral legislature, comprising the Senate and the House of Representatives. It has the power to make federal laws that apply to the entire country. It also has the power to appropriate money to carry out laws, establish all lower federal courts, override a presidential veto, and impeach the president. The executive branch has the power to carry out and enforce federal laws using federal departments and agencies, a cabinet, and regulations. The president is the chief executive of this branch, which also oversees the military. The powers of the executive branch also include veto power over all bills (before they become laws), the ability to appoint judges and other officials, the ability to make treaties, and the power to issue pardons (Tijani, 2016).

The judicial branch comprises federal courts and has the power to interpret federal laws by hearing arguments about the meaning of laws and how they are

carried out. The Supreme Court also has the power of judicial review, which is the ability to determine if a law or executive act is in agreement with the Constitution or not (Egemonu, 2022). State governments are also organized similarly to the central government. Each has a constitution that provides for the separation of powers among the legislative, judicial, and executive branches. The chief executive of a state is the governor.

Conjecturing the Judiciary and Separation of power in a democratic setting

The 1960s saw the development of the New Institutionalism theory, which examines how institutions influence social and political results. The theory is a collection of institutional theory variations, each focusing on unique social and political issues, rather than a single body of theory. Therefore, there are three categories into which New Institutionalism can be divided: Sociological Institutionalism, Historical Institutionalism, and Rational Choice Institutionalism. According to Hall and

Taylor (1996), the fourth variation of the theory, known as New Institutionalism in economics, can be categorized under Rational Choice theory because the two overlap and differ in their areas of emphasis. While New Institutionalism in economics focuses on property rights, rents, and competitive selection mechanisms (Eggertson, 1990), Rational Choice Institutionalism focuses on strategic interaction (Hall and Taylor, 1996). In essence, the process of free exchange between independent actors is the focus of the New Rational Choice Theory. The idea recognizes that human beings are Hobbesian and self-interested. The idea aims to investigate how self-interested individuals can solve challenges related to collective action.

In the course of their interactions, it also seeks to examine how people might overcome the risks that come with their Hobbesian nature. The rational choice theory's most unique focus is on how cooperation might be used to solve these issues. The core of the idea, according to Moe (2005:216), is how opportunistic and self-interested individuals can overcome their collective action issues to work together for mutual benefit. To achieve the benefits of a democratic

government, the doctrine of separation of powers emphasizes collaboration between the three branches of government. A democratic government is harmed by vertical theft of power from other levels of government and horizontal rivalry among the three branches. However, North (1990:12) asserts that human selfishness frequently makes cooperation challenging. He claims that when the game is not replayed, there is a dearth of player information, and there are many players, collaboration is hard to maintain.

In other words, for cooperation to be sustained, interactions should be a frequent occurrence. This brings out governance because interactions would lead to participation, which is considered a key variable in the process of decision-making. Therefore, cooperation is essential; it is a key ingredient in governance. Since repeated interactions among human individuals are difficult, there is usually a lack of information between the rulers and the ruled in the polity and there are large numbers of players like the case of Nigeria with different cleavages such as religious cleavages, ethnic cleavages, social cleavages, etc., the panacea is for the

players to devise a strategy for their mutual existence and benefit. They therefore need the basic strategies for the conduct of their affairs, these strategies are the institutions, and this will regulate their interactions.

The synopsis of the theory is that institutions are a sort of internal mechanism to regulate the conduct of human behaviors and where there is disobedience to these rules, practices, laws, and norms, external enforcement such as courts are needed. To effectively regulate the conduct of human behaviours, especially in a democratic system like Nigeria, where capitalism - the liberalization of the economy - has meant the full involvement of the society in economic activities, the law is needed to regulate the system. Law as a formal institution of regulating human behaviours needs to be formulated because of the complexity brought about by the interactions of the state and the society in the economy of a democratic, capitalist-inclined country like Nigeria.

Judiciary and Nigeria's Problem

In Nigeria, the Judiciary which adjudicates and ensures the

implementation of the rule of law has been ineffective in maintaining the rule of law including checking the abuse of the executive powers. Rather, the Judiciary is corrupt.¹, this has made it difficult to exercise its statutory function of maintaining the rule of law. This is because, without the rule of law, it is very complicated to enforce laws and rules intended to control corruption. A Senior Advocate of Nigeria and former President of the Nigerian Bar Association (NBA), Joseph Daudu accused some senior lawyers and retired justices of corruption. They were accused of parading themselves as consultants in election petition cases for incredible sums of money to obstruct election petitions. According to him, the senior lawyers and retired justices act as conduit pipes between their clients and the election court (Tijani, 2019).

The allegation was made before the justices of the Supreme Court (Daily Trust, Saturday 18 February 19, 2012 P.1). Again, the former Chief Justice of Nigeria (CJN), Justice Aloysius Katsina-Alu was accused of influencing a case in 2011 Sokoto State governorship election petition before the Sokoto State election petition tribunal. Correspondingly, in a survey jointly conducted by the United Nations Office on Drug and Crimes (UNODC) and the National Bureau of Statistics, (NBS), the country's judiciary is found to be the second most corrupt public system in Nigeria.². Consequently, judicial corruption, therefore, makes the judicial arm susceptible to intricacies of power relations among the other two arms. Such intricacies of power relations include the inertia pulse.³ The syndrome of fluctuation of powers in which power to checkmate excesses of the other two arms becomes slippery, especially when

¹ Judicial corruption has become endemic with judges (across all levels, from Magistrate to the Supreme Court) being accused and found to be corrupt. The National Judicial Council has found some judges guilty of corruption. Judicial corruption is anecdotal to the principle of Separation of powers because it compromises the judicial arm in checkmating the excesses of the two other arms.

² See Rotimi Fasan "The NBS/UNODC

2017 Corruption Perception Report and the Police" *Vanguard*, 30 August 2017.

³ The inertia pulse in the Judiciary denotes the inactivity of the Judiciary in which the arm becomes a lame duck and is ineffective. Its power of oversight on the other two arms of government is curtailed and is, therefore, unable to check the excesses of the executive and the legislature, which is the hallmark of the doctrine of Separation of powers.

the said arms have been accused of corruption.

The failure of the Judiciary to check the powers of the legislature and the executive in Nigeria reflects the brand of politics that has characterized Nigeria's democratic system, the *prebendal* politics. Straightforwardly, politics in Nigeria is patrimonial *prebendalistic* because the executive and the legislature, since the beginning of the Fourth Republic, have seen political office as an instrument for harnessing public resources with the Judiciary becoming an arm to be harnessed too. Dishearteningly, justice, a very important commodity in the democratic system has become another precedential prebend that politicians consider as a tradeoff. This has continually brought bad governance as evident in the Judiciary becoming subservient to the other two arms of government. Such subservience is often witnessed in the political class subverting the rule of law, using the judiciary to serve their egotistical interest, and making the judges rule in favour of the political elites. Such judicial misdemeanors have accounted for poor governance indices that Nigeria has

recorded over time. The political class in both the executive and the legislature use their powers to subvert the judiciary's statutory role of guardian of the rule of law with dire consequences for the judiciary such as its dismal performance.

The consequence of the dismal performance of the Judiciary and consideration of justice as a trade-off is experienced in the abuse of the rights of the citizens. Rulers (in the executive and the legislature) have considered the ruled (citizens) as part of the asset in the office to be acquired. This is done by subjugating their rights and lowering their political voice. Ironically, an arm of government, the Judiciary, that is statutorily empowered to challenge occupants of the two other arms, checkmate their abuse of powers, and protect the citizens from bad governance, through its statutory role of reviewing the act of government, has not lived up to expectation. For example, a Federal Capital Territory High Court, Abuja sentenced a director of the Police Pension Office, Mr. John Yusuf, to a two-year jail term for conniving with others to defraud the office and pensioners of N27.2bn. Yusuf admitted to stealing N2bn of the

money. Alas, he would not spend the two years in jail as Nigeria's Judiciary gave him an option of a fine in the sum of N750,000 for the three offenses he pleaded guilty to (The Punch, 29 January 2013).

Okechukwu (2009) sarcastically posits that the character of the judges is witnessed in judges succumbing to the control of the executive and the legislature. This ultimately leads to judicial corruption and is the major problem confronting the country. This has implications for the governance and development of Nigeria. Vitvitsky (2012) likens the rule of law that is weak to a bent, deformed, and stunted human skeletal structure which ultimately produces a deformed body, adding that so it is with a society's economic and political structures. In the same vein, the custodians of the rule of law must be aboveboard people. This is important for society to benefit from the rule of law as the bonds that connect people in the society, irrespective of their social, economic, and political status, are traced to the existence and adherence to the rule of law. If the custodians of the rule of law, herein, the judges, are wanton in

character, then it follows that the society would become nastier and more brutish. Oyetibo, a Senior Advocate of Nigeria (Premium Times, 26 September 2012), describes a wanton judge aptly when he laments that a corrupt judge is more harmful to society.

Conclusion

The Judiciary serves as a repository for safeguarding the liberty and freedom of individuals. It does this by checkmating the excesses of either the legislative arm or the executive. Again, this is done by vitiating repressive laws and giving freedom to the citizens. Unfortunately, the situation in Nigeria has meant that the Judiciary is not seen as the depository for the rule of law but as an arm that is to be manipulated for the selfish interest of the other two arms of government especially the executive.

In light of the aforementioned, the paper recommends the implementation of the 1999 Constitution's Section 121(3) requirement. The clause permits the heads of the relevant courts to receive payment immediately from the Consolidated Revenue Fund of the State for any sum standing to the credit of the

judiciary. This is accomplished by professional organizations such as the Nigeria Bar Association and the Academic Staff Union of Universities (ASUU) or civil society organizations filing a lawsuit in the Federal High Court against the Federal Ministry of Finance for granting the state's executive branch the capital vote of the judiciary.

Additionally, it is suggested that members of the Executive and Legislative branches who violate the 1999 Constitution's provision on the financial autonomy of the Judiciary be subject to jail time as a criminal penalty for violating Section 121(3). This is accomplished by the Civil Society submitting a bill to the National Assembly, which then passes the bill and makes it law. Again, the state should not be involved in the financing of capital projects at state high courts and their subsidiaries to break the governors' control over these entities. This can be done by the Federal Ministry of Finance directly releasing both capital and recurring votes to the National Judicial Council, which will then forward them to the state's various heads of courts accordingly.

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