

Articles

The Rule of Law: The Roles of the Executive, the Legislature and the Judiciary in a Democracy

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Introduction

That great scholar, Professor Ben Nwabueze, writing in 1981, in examining the picture in our own continent, where, as he rightly posited, presidential tyranny had acquired a frightful reality which had earned for the system a rather pejorative appellation ‘African presidentialism’, defined checks and balances as:

A concept in the relationship between the executive and the legislature whereby the political organs with a view to the balancing of powers are able to check one another in the exercise of their respective functions.

Since the time of the definition given by that scholar, until only recently, the picture which has been presented by the Executive, especially in Nigeria had only gone worse. Militarism, which entered into our body politic in 1966, only gave the country a respite in 1979, the year of the first presidential constitution. It came back with unabated fury only four years later. Introduced into the system was such unprecedented ruthless despotism, which turned the country into the private estate of the despot both in the Federal and State governments. The despot behaved worse than the Roman subjugator did. He harvested at will even what and where he never sowed. The common man was turned into a serf. He became what the Romans would refer to as “adscriptus glebae” or a mere dediticus. The despot killed or maimed at will, all those or whom he had suspected of being disloyal to his nefarious cause. Institutions like the Bar Association were disgraced and put under. Various methods were employed at the discard of these institutions. Some hardy ones were sent down by sheer force arms, while others were won over and led into destruction with the aid of common bribery.

With all these antecedents, the doctrine of separation of powers, of checks and balances must present an interesting study. That nothing should be too much to prevent the exercise of arbitrary power would be seen in the

surmise of Brandeis J. who took the view, that the aim of the doctrine of separation of powers adopted by the convention of 1787 was —

not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of inevitable friction incident to the distribution of governmental powers among three different departments, to save the people from autocracy. ¹

Historical Background to the Doctrine of Separation of Powers

Now, what is the history of the evolution of the doctrine of separation of powers, or as it is usually referred to, checks and balances? The basic norm is Power, which is often wrongly associated with greatness. But democracy has realised, as the immortal Bard of Stratford-On-Avon had done, centuries ago, that power is usually abused, and when so abused, it is done to the chagrin of the common man. Shakespeare had said that:

The abuse of greatness is when it disjoins remorse from power.

The despot rules sans remorse. But then, he is sans conscience (and that is why he is a despot). And so, the concentration of power in his hands could, as would be expected, only be to the chagrin of the subject. Tyranny is of ancient breed. Let us give two distant but ancient examples. There was the Athenian Draco, who lived in Greece in the 7th Century. Draco was an Intelligentsia with power. He was requested to codify the Athenian laws, which were, up till that time, unwritten and administered by the Eupatrides, that is, the Executive, in an arbitrary manner. Draco codified the laws and he could have earned himself positive immortality, which the people of Greece wrongly believed he did. It was however later discovered that what the Athenian did was to make the penalty for every offence to be the same and that penalty was death! Draco earned his immortality by negatively contributing a word to the English Thesaurus, in respect of harsh and unconscionable legislation — ‘draconian’.

Aristotle

In his Politics, the Philosopher Aristotle had recognised the price of good government. In the philosopher's opinion, good government would exist, only when the powers of government are divided. He believed that logic, governmental operations would be more thorough. It is to be noted that the view of Brandeis J., which we had earlier given, was that such

thoroughness was not the aim of the American convention in 1787 but a concern for the circumscription of the exercise of arbitrariness in the exercise of powers. Aristotle was thus the origo of the constitutional philosophy — Separation of Powers. His thesis being that we would thus have a separation of the main powers of governmental bodies, which are now referred to as the executive, the legislature and the judiciary.

John Locke

John Locke, a thinker on the philosophy of separation of powers, wrote, in his observation of the seventeenth-century England. With respect, he was right when he said:

‘It may be too great a temptation to human frailty ... apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made and suit the law, both in its making and execution, to their own private advantage.’

Montesque

In Book XI of his *L'Esprit des Loix*, the celebrated philosopher, Montesquieu, one of the greatest thinkers on the Separation of Powers, based his doctrine on a study of Locke's writing. He was concerned with the preservation of political liberty.

He said:

Political liberty is to be found only when there is no abuse of power.

He then joined the idea of separation of powers to the notion of a mixed constitution of checks and balances. The philosopher brought Aristotle's earlier discovery of good government to the service of the rising libertarianism of the eighteenth century. Montesquieu's contention was that ‘men entrusted with power seem to abuse it.’

That has been proved correct. If any support were needed for this theory of Montesquieu, one would have a legion in the military governance of this country. One of those in power, boasted of having captured prisoners of war, without any evidence that though a soldier, he was one who had fired a catapult even once in his military-career.

But back to Montesquieu. He argued the desirability:

Firstly, to divide the powers of Government so as to keep to a minimum, the powers which are lodged in a single organ of government; and Secondly to be able to oppose one organ with one or the other of the other organs.

Indeed, this second move is very clever, and it has proved successful in several cases in history.

And now to come nearer home. Let us look at the views of some of our academics on the subject.

Nwabueze

Probably the leading academic voice on constitutional law in the country, Professor Ben Nwabueze has written so many books on the Law and the Constitution. The learned Professor after giving the definition of checks and balances as already afore-written gave the three forms of checks by the national assembly over the President's exercise of powers. He regarded the presidency as a consultative one. They are:

- (i) Approval for presidential action;
- (ii) Inquisition into the President's administration;
- (iii) Impeachment of the President and the Vice-President.

Nevertheless, Professor Sagay whose view we would consider next believed that Nwabueze's view was rather narrow.

Itse Sagay

One of the greatest constitutional brains in this country, is Professor Itse Sagay. In his paper, titled: Separation of Powers and the Rule of Law in Democratic Governance, delivered under the auspices of the African Centre for Democracy and Human Rights Centre, in Banjul, The Gambia in 1998, the learned Professor rightly posited that there could never be an effective functioning of democracy without checks and balances. In that lecture, Sagay gave credit to Nwabueze's position on the issue of checks and balances, but was of the view that Nwabueze's definition was very narrow.

Sagay's own view, was that checks and balances exist at every level of a free and democratic society, formally and informally. We agree with Sagay that they should. Sagay believed that Nwabueze's thesis was limited to the legislature's check on executive powers and vice versa, also the judicial check on both the executive and the legislature. But for Sagay, there should be more than what he regarded as a narrow compass. Apart from the three organs constituting checks and balances on one another,

there is the check of the Press, which holds tenaciously to the fourth estate of the realm or of the Republic as the case may be. And true to the prediction of the learned Professor, and as would be shown anon, this fourth estate of the realm has been more than hyperactive very recently in the present dispensation. But, more of this anon. Sagay has also included, and again he is right, in his thesis, that checks and balances against abuse of power, by persons and organs exercising state authority include political parties, the public complaints office, Trade unions, Professional Associations, like the Bar Association, and indeed, the international community. We could add more. The fear of the electorate and the action thereof in the constituencies in future elections. Recent events in our very young adventure into freshly re-enacted democracy, are enough to bear testimony to the foresight of the learned Professor. But again, more anon.

Lessons from other jurisdictions

Before we come to concrete issues in our jurisdiction, we may learn from what goes on in other jurisdictions. We choose two democracies, one with a Parliamentary democracy, like the one we had before the Republic and the other a Presidential system of government, the United States of America, operating a similar constitution like the one we now have. The Parliamentary Constitution we operated was one with a written constitution while the one we intend to discuss now is the United Kingdom, without a written constitution. The point here, which we would like to bring out, is that even in a non-written constitution, it is possible to have separation of powers fully at work.

The United Kingdom

In the United Kingdom, the Sovereign reigns but does not rule. A system of ‘the King can do no wrong’ and the baronial powers of life and death over those who were under their jurisdiction were gradually revolutionalised into the Crown in Parliament. The sovereignty of the Parliament was assured, but the basic constitutional rights in England were not entrenched in parliament. They were secured by a line of instruments which became declaratory of the rights. They are the Magna Carter, 1215, the Petition of Right, 1628, the Bill of Right 1687. This situation, however, was not achieved overnight. It was achieved after a long drawn ‘battle’ between the Crown and the commons. There were also the Habeas Corpus Acts. These were of course as a result of parliamentary actions.

The effectuation of Separation of Powers of the arms of government started in the United Kingdom with that feudal reactionary document known as the Magna Carter. The Magna Carter has turned to be the most important instrument of English Constitutional history. The Charter was very reluctantly signed on the meadows of Runnymede, which is a place

now in Surrey, by a tyrant King John of England and a committee of feudal barons who before the exercise of signing had their baronial powers spread all over Great Britain. In Runnymede, the King promised to administer a fair legal system and end corruption, which was very rife, and like it is in Nigeria of today, the order of the day. The Magna Carter, apart from its place in English history, has also become one of the most important and practical instruments which, doubt, has exercised enormous influence on mankind. Just as recently as in 1921, a United States Chief Justice paid adequate complement to the Charter. He admitted that due process, had its origin in the Magna Carter. He went on and said that:

It (due process) overlaps, to an extent that protection in the sense that due process gives a required minimum of protection for everyone's right to life, liberty and property.²

The Magna Carter was probably the first instance of the British formalised and justiciable Human Rights Charter. This proceeds, in any event, the European Human Rights Convention. But this is by the way. Though the Magna Carter followed on the pattern of the XII Tables in ancient Rome, there is no evidence that it was copied therefrom. At the best the Tables might have influenced the revolution which preceded the coming into operation of the Charter. The Charter declared:

No freeman may be imprisoned or disseised of his freehold or liberties, or free customs or be outlawed or exiled or, in any way molested or judged or condemned except by lawful judgement or in accordance with the law of the land, nor may justice be sold or denied or delayed to any subject. And the crown or its Ministers may not imprison or coerce the subjects in any arbitrary manner.³

And thus was commenced by a revolution the separation of the powers of the Judiciary from the Crown and Parliament. This is not the place to go into the antecedents of the sufferings of the common man of the time, in detail, but the provisions of the Magna Carter are sufficiently indicative of the humiliations and injustice, which the common man suffered before the coming into force of the Charter.

Four hundred years later, in 1627, the Petition of Rights and Bill of Rights came into force. They provide inter alia:

(a) no person owing allegiance to the crown may be committed to prison or detained by special command of the Sovereign without any cause shown

- (b) excessive bail or fines ought not to be required or imposed nor cruel and unusual punishment inflicted
- (c) the Crown may not suspend laws or the execution of laws without the consent of Parliament, nor may it dispense with laws or with their execution. (Petition of Rights 1627 ss. 5 and 8)

All these provisions were justiciable, but more importantly, for the purpose of our thesis, they constitute a separation of the powers of the legislature from the Crown and the Judiciary from both.

Then in 1688, there was a revolution. It was usually referred to as the Glorious Revolution. It was bloodless. By an Act of Parliament, signed by William of Orange, Parliament was authorised to protect the rights of the individual.

In 1701, still under the reign of William of Orange, judges were given security of tenure and by this, they were able, finally, to establish their independence from the government. And thus was finalised the movement from 'the King can do no wrong' to a real separation of powers of the Crown, the Parliament (that is the Legislature) and the judiciary.

What is really interesting with this phenomenon is that all these movements happened under an unwritten constitution. There had been criticisms against an unwritten constitution. Thomas Paine simply vilified such governments. Paine believed that the laws of governments without a written constitution are irrational and tyrannical. His opinion of the British Constitution was that it was:

one of the vilest things that can be set up

Paine went on with his castigation:

Government without a constitution is power without a right. For the want of a constitution in England to restrain and to regulate the wild impulse of power, many of the laws are irrational and tyrannical, and the administration of them vague and problematic.

These are interesting submissions by a philosopher on the Rights of Man. Only a bit of the man would however feature here for lack of time and space.

The United States of America

To establish the Constitution of the United States of America was not a secret move nor was it done by a clique for the people. It was not a constitution falsely claimed to have been fashioned for the people by non-

representatives of the people. What emerged was more akin to our 1979 Constitution than the present orchestrated constitution. Firstly, eighty-five Federalist Papers were invited on the subject by founding fathers and these provided for studies towards finding the way to building a good government. Alexander Hamilton, who wrote the first of these eighty-five papers wrote:

It has been frequently remarked that it seems to have been reserved to the people of this country (the USA) by their conduct and example, to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice or whether they are ever destined to depend for their political constitutions on accident and force.

The people decided to act by conduct and example and not by accident and force. They arrived at separation of powers, summed up as follows:

Firstly, there are three intrinsically distinct functions of government — the executive, the legislative and the judicial;
Secondly, the three distinct functions ought to be exercised respectively by three separately manned departments of government;
Thirdly, the three should be constitutionally equal and mutually independent. And finally;
Fourthly, the philosopher John Locke stated a corollary doctrine — and this, (it was not originally Montesquieu's idea) that the legislative organ may not delegate its powers.

While the British crown reigns, but does not rule, the American President rules, he does not reign. Lord Bryce presented an interesting picture of the American President. Nwabueze has copiously quoted this in his book. ⁴ Bryce said⁵:

The President is simply the first citizen of a free nation, depending for his dignity on no title, no official dress, and no insignia of a state. ... To a European observer, weary of the slavish obsequiousness and lip-deep adulation, with which the members of the reigning families are treated on the eastern side of the Atlantic, fawned on in public and carped at in private, the social

relations of an American President to his people are eminently refreshing. There is great respect for the office, and a corresponding respect for the man as the holder of the office, if he has done nothing to degrade it. There is no servility, no fictitious self-abasement on the part of the citizens but a simple and hearty deference to one who represents the majesty of the nation. ... He is followed about and feted and in every way treated as the first man in the company; but the spirit of equality which rules the country has sunk too deep into every whispering reverence. He has no military guard, no chamberlains of grooms-in-waiting; his everyday life is simple; ... he is surrounded by no such pomp and enforces no such etiquette as that which belongs to the governors even of second class English colonies, not to speak of the Viceroy of India and Ireland.

Professor Nwabueze spoke the obvious when he said that the picture of the social relations of an American President to his people does not exactly fit the presidency in the context of Nigeria as a developing African country. We even doubt if it fits a present American President.

And so to recap, separation of powers occurs for separateness of each organ and each to perform the functions set out for it to perform under the Constitution. But for one not to usurp the functions of the others, and so, the Executive executes:

- (i) exercising only the powers specifically granted to him under the Constitution;
- (ii) the laws made by the national assembly, and maintains the Constitution.

The legislature exists to make laws. It

- (i) considers Bills sent to it by the president;
- (ii) initiates its own bills; and
- (iii) takes, considers and passes private member's Bills.

While it is for the judiciary to adjudicate over the disputes that might arise in the polity. Aihie and Oluyede put the position thus:

What the whole idea means is that neither the legislature, the executive nor the judiciary should exercise the whole or part of another's powers, but

it does not exclude influence or control by one over the acts of another.⁶

We shall see how this works in practice when we examine the factual position as the concept is practised in this country later. For it is easier to pontificate than to act.

The Factual Position in Nigeria

We are now in the third Republic and it is necessary to go through the three Republics to examine the experience of the country so far.

Constitutions of the First Republic

The first Republic was ushered in on October 1, 1960 and it lasted until 15th January 1966, when the soldiers struck into our body politic and sacked the government. The First Republic was governed by Parliamentary democracy starting with a monarchical democracy — the Queen, represented by the Governor-General, set up by the Independence Constitution.⁷ Three years later, that is, on 1st October 1963, it yielded to a presidential democracy set up by the Constitution of the Federation.⁸ But it was a presidential system with a difference for the important change was from monarch who was a non-ruling executive to the President still a non-ruling executive. The two Constitutions provided a clear separation of powers. Chapter IV of both Constitutions established the office of the Governor-General and the President, as the case may be, Chapter V of both the Parliament and Chapter VIII the Judicature. Chapter VI deals with the exercise of the executive authority of the President and the executive authority of the Governors.

The separateness of the organs soon came under judicial test and in the case of *The Attorney-General (Western State) & Others v. E. O. Lakanmi and Ors.*⁹ the Supreme Court had the opportunity to make a pronouncement on the doctrine of Separation of Powers as contained in the 1962 Constitution.

The Assets Tribunal set up by the Western Nigeria Government made an order and an application for certiorari was brought to the High Court to quash the order. The high court dismissed the application. The applicant lodged an appeal to the Western State Court of Appeal, but before the appeal was heard the Federal Government had passed some decrees in aid of the Western State Government. The order which the subject matter of the application had been validated by decrees and the decrees also ousted the jurisdiction of the court.

The Supreme Court after taking argument, held:

We must here revert again to the separation of powers, which the learned Attorney General himself did not dispute is still the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our constitution is based on the separation of powers — the legislature, the executive and the judiciary. Our constitution clearly follows the model of the American constitution. In the distribution of powers the Courts are vested with the exclusive right to determine justiciable controversies between citizens and the State. ... In *Lovett v. the United States*, (1946) 66 Supreme Court Reports 1079 Mr. Justice Black said as follows:

Those who wrote our Constitution well knew the danger inherent in special legislative acts, which take away the life, liberty or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. And even the courts, to which this important function was entrusted, were commanded to stay their hands until and unless tested safeguards were observed. When our constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so, they proscribed Bills of Attainder.

They went on later in the judgement:

We are in no doubt that the object of the Federal Military government, when it engaged in this exercise, is to clean up a section of the society which had engaged itself in corrupt practices — those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if in the pursuit, the government, however well meaning, fell into the error of

passing legislation which specifically in effect, passed judgement and inflicted punishment or in other words eroded to the jurisdiction of the courts, in a way, the courts must intervene.

This was a clear case of the Supreme Court recognising in the Constitution separation of powers and telling the organs that they had to mind their own fields. But the Government believed that they must have the last say, for, the decision of the Supreme Court was overruled by a legislation, Decree No. 28 (Supremacy and Enforcement of Powers) Decree 1970.

The decision was given during the military rule and the overruling of the decision by Decree done during the military. In a democracy, as we have now, the act of nullification is unconstitutional.

Because the matter came during the military era, it might be pertinent to say one or two things that were particularly military and not democratic. The legislature and the executive were merged into one. That was the essence of military rule and the judiciary was only permitted to co-exist with the combined force. Without doubt, it was for the permitted judiciary to adjudicate in the circumstance. And it did adjudicate. But as the Supreme Court perceived, it was also for the executive cum the legislature to make laws, and in the process the position presented was like a scale in contrary motion. And so, there was a clash of giants. It was after the decision by the judiciary that the legislature cum the executive passed the law to disestablish the decision of the Supreme Court. Here, we had a movement of scales in contrary motion!

The Second Republic

The Second Republic was governed by the 1979 Constitution. This was a Constitution, which was given by Nigerians to Nigerians. The Independence Constitution was an Order in Council made by the colonial masters for the colony — Nigeria. The 1962 Constitution was an amendment to the Independence Constitution to effect a change from monarchy to republicanism. With the 1979 Constitution, there was a real planning. There was a Constitution Drafting Committee and a Constituent Assembly. As a result of the deliberation, the 1979 Constitution emerged.

Chapter V of the Constitution provides for the Legislature — establishes the National Assembly, the composition of the Senate, the House of Representatives, President of the Senate, the Speaker of the House of Representatives and the staff of the National Assembly.

Chapter VI provides for the Executive, establishes the office of the Executive, the qualification, the election, tenure, qualification, office of the Vice-President and the removal of President from office.

Chapter VII deals with the Judicature. It establishes the Supreme Court, the Court of Appeal, the Federal High Court and State Courts.

The important thing with this Constitution is that each organ of the Government, has been given separate but specific functions under the Constitution. The Legislature to make laws and neither to execute the laws nor interpret them, the Executive to execute the laws of the nation and if it has any laws to present should send a Bill to the National Assembly. The Judiciary to adjudicate. However, there were frictions as would be expected. Indeed if no such frictions are to be expected, there would be no need for the elaborate provisions and definitive demarcations of functions. What were these frictions?

In a Federation like ours, where in the Constitution, the powers of such organ, that is, of the Executive, Legislature and Judiciary have been so expressly stated recourse could only be made to preserve the Federation by an observance of the provisions of the Constitution.

Firstly, the Legislators believed they could also interpret the laws, which they had made. A Flurry example could be provided in the utterance of a Senator of the Republic.

‘The judgements of the Supreme Court are *non-cacutus*.’¹⁰

So said an unbridled Senator during a television debate in the Second Republic. The solace was that the Supreme Court, against which the statement was directed treated both the statement and the Senator, who made it with utter disdain, especially as there is no such phrase as *non-cacutus* in the ancient but romantic Latin language.

We would now examine some of the pronouncements of the Supreme Court in an illustration of the views of that Court on the stand of each organ on the subject of separation of powers. But firstly what is the Court's view on the nature of federalism? The Court in *Ogun State v. Aberuagba* expressed this.¹¹ There the Supreme Court made a distinguishing feature between the American federation and the Nigerian Federation the Court said:

The Nigerian federation itself never started like the American federation of strong small units coming under an umbrella as if the original purpose was confederation graduating to federation and with each strong small unit yielding some means of its power structure to the federation. The Nigerian federation started the

other way round first as one whole (unitary government) then with provinces and finally regions. But then, very powerful regions, each almost independent of the other. It is the federation of powerful regions that has yielded some of its powers to the state units created therefrom.

This point is often forgotten, while dealing with problems of the Nigerian federation, but it should not, for, it is a point that surfaces throughout in its idea of federalism and, a fortiori, separation of powers and checks and balances.

On the distinct functions of each organ the case of *A.G. Bendel State v. A.G. Federation* comes in above others to specify the function of each of the organs, the Supreme Court held: ¹²

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

The Supreme Court had an answer. It said: ¹³

If, in the process of the exercise of the legislative power by the National Assembly, there is such a constitutional defect as to lead to an interpretation to the effect that a Bill was not passed according to law, that is, it does not follow the procedure laid down under the Constitution for the passing of a Bill, then the Bill which was passed through such exercise is null and what the President assents to, in exercise of his executive powers with the legislative process is a nullity. The Supreme Court in exercise of its jurisdiction under Section 212, when there is a dispute under the Section could adjudicate on the issue. And this constitutes the limitation on the sovereignty of the Legislature.

On a Bill becoming law, the Bill becomes law only after the President had signed the Bill. The Bill would only be due for signature only after it had been so passed in accordance with the procedure laid down under the constitution. See *Field v. Clark* ¹⁴

There is close similarity between the idea of separation of powers of the United States and this country. The reason for the adoption of such similarity might not be clear to the Supreme Court. The Court however said:

It seems that in so far as our Constitution is concerned, observance of the doctrine is meant to promote both efficiency and preclude exercise of arbitrary power. Actually, whether one or both of these aims succeed depends on the three arms of government but more ... on the judiciary bringing it home to all the functionaries concerned at every opportunity.

The Supreme Court's view on the issue of the judiciary was that the legislature could not pass any law that would oust the jurisdiction of the court.¹⁵

The Third Republic

The Third Republic is predicated upon a Constitution, which was purported to have been made by the people of Nigeria for Nigerians. We know it is not so. Nevertheless, for the purpose of this talk, we would have to rely upon that Constitution. Like the 1979 Constitution, Chapter V sets up the Legislature, the National Assembly and the State Houses of Assembly. Chapter VI establishes the Executive. In regard to the President of the Federation it is pertinent to examine the provisions on the Ministers,¹⁶ and their executive responsibilities. We intend to refer to these later. Under sections 147 and 148 of the Constitution, it is the President who would determine the offices of the Minister of the Government and appoint persons thereto, subject to confirmation by the Senate, and it is the President that assigns executive responsibility to the Ministers.

Chapter VII of the Constitution deals with the Judicature and establishes the Federal Courts and the State Courts. Each organ is expected to perform as has already been stated, but how have they performed? It is probably too early to give an objective assessment. However all we would do is to present facts of their performance and leave the judgement to the floor to give a verdict upon their performance.

The Presidency

The President, since the inauguration of the Republic has already presented three Bills to the National Assembly. They are:

- (i) The Appropriation Bill;
- (ii) The Anti-Corruption Bill; and
- (iii) The Niger Delta Bill.

We have already earlier in this talk stated that the best the President could in the real of initiating legislation is to forward his proposal as Bills to the National Assembly. This he has done. The National Assembly is still to fully consider any of the Bills.

The President has also set up certain probes to investigate certain measures of human rights, property deals, contractual obligations and also given an intention to set up a probe on cult and cultism in all tertiary institutions in the country.

Further the President has moved to abolish the PTF established by the military predecessors and ordered the transfer of certain Ministries from one place to the other. These Ministries are all under the portfolio of the President and it is left for him for the purpose of efficiency to post them to wherever he believes they will best be efficient following assignment of executive duties to them.

The President took an action, which disestablished the PTF. The legislature did not seem happy. But how could the PTF be funded outside the Federation Account should have been the magic to be displayed by the Legislature. Rather than provide the answer, the Legislature passed a motion against the action. The motion was constitutionally futile. Section 162 of the Constitution defines Federation account as follows:

The Federation shall maintain a special account to be called 'the Federation Account' into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

It is the President's constitutional responsibility to table before the National Assembly proposals for revenue allocation from the Federation Account. It is after the presidential constitutional action that the National Assembly will determine the formula. It could have been completely unconstitutional to maintain the PTF account and the only way out was to forget the programme. That was what the President proposed.

The second example lies in the President relocating the Ministries which, under section 147 of the Constitution, he alone has the constitutional right to establish, and also the sole constitutional right to appoint into.¹⁷ It stands to common sense that he, who establishes offices and appoints personnel thereto, should know best where to have the offices relocated. It was not so with the Legislature. They filed and passed the usual motion censuring that constitutional action.

We will now consider whether or not all he had done so far were within the province of his constitutional powers. For the purpose of checks and balances both the legislature and the judiciary, the latter if the matter is brought before it, by any person having locus, has power to see that the President has not exceeded his constitutional powers or mandate.

The Legislature

The Legislature has been seised of the Bills, which have been presented by the President but has not yet completed debates on them. The President is unhappy about this. The Legislature believes they are doing their best. What would appear to be going on has no precedent either in the Second Republic nor in another Presidential democracy. Already, there seems to be a dispute, which appears to be simmering between the executive and the legislature. In the Second Republic the dispute was between the Federal Government and the State Governance. The Legislature would appear to set itself in opposition in this Republic to the executive. Motions, which are tabled, are mainly critical of the actions of the executive. What is important is to find out whether or not they are justified, as the check of the Legislature on the executive is limited to preventing the executive from acting outside the Constitution.

Let us look at two examples. The PTF in the old dispensation was, in all effect, a parallel government with its own funds outside the Federation Account. The justification for spending outside this account, could, at the time, be anchored on the Decree which set up the PTF and which provided it with its own source of funds. With the coming of democratic government where any legislation which does not in conformity with the Constitution is null, there is no way by which any funds could be allocated to the PTF in the manner it existed before the 29th May.

The Constitution does not provide for the type of **Opposition** which the Legislature is creating. It is an unusual phenomenon. It is necessary to outlive it quickly! But as if that is not even sufficient. The President gave out the intention of appointing a Panel to find ways and means of eradicating cult and cultism in Nigeria. He further gave out a list of those whom he intends would man the Panel. That Panel is yet to be set up! There is already a move by one legislator to bring a motion in the Legislative House to stop the appointment of the Chairman and another member. One of the reasons given by the Newspaper over captioned report for the possible bias of the prospective Chairman was that his son was a cultist! A most damaging statement if found false. And it is false! Whereas the truth, which it could have cost the legislator only a telephone call to find out from the prospective Chairman or his children is that Justice Eso's only two children (one son, one daughter) **never attended**, repeat **never attended**, any tertiary institution in Nigeria; and the question of either or

both of them being tainted by the abominable cultism did not, could never, and does not arise. And neither Justice Eso nor the children has ever suffered such ignominious accusation in their respective lives. The lie was given the widest possible coverage by the Press. This has stopped to be checks and balances but recklessness. And the legislature might still spend Nigeria's money investigating this wicked fiction.

But so be it. This is a democracy, and it would appear we are all in the process of learning or relearning what we had learnt once. We do hereby recommend that the Bar Association should re-enact seminars on Checks and Balances to which the Executive, the Legislature and Judiciary should be invited to participate. We will make it!

NOTES

1. *Myers v. United States* 272 U.S. 52, 293.
2. *Truax v. Corrigan* 257, U.S. 312, 332 (1921) as per Taft C.J.
3. *Magna Carter* 1215 Arts 39, 40.
4. Nwabueze: *The Presidential Constitution of Nigeria*.
5. Bryce: *The American Commonwealth* ed. Hacker Vol. 1 (1959) 25–26.
6. Aibe and Oluyede: *Cases and Materials on Constitutional Law in Nigeria* p. 20.
7. *The Nigeria (Constitution) Order in Council 1960 Statutory Instrument 1960 No. 1652*.
8. 1962 No. 20.
9. (1971) 1 U.I.L.R. 201.
10. Senator Uba Ahmed while giving a television interview on the judgement of the Supreme Court in *Unonqo v. Aka* (1983) 2 SCNLR 332 at 361–362.
11. (1985) 1 NWLR 395 at 438–439. As per Eso JSC.
12. *Bendel State A.G. v. A.G. Federation* 10 S.C. 1 at 179–180.
13. *Ibid.*
14. 143 U.S. 649 at p. 672.
15. See *Unongo v. Aku* (1983) 2 SCNLR 332 at 361–362.
16. *The Constitution of the Federal Republic* sections 147 and 148.
17. S. 147 (2).