

African Research Review

An International Multidisciplinary Journal, Ethiopia

Vol. 6 (3), Serial No. 26, July, 2012

ISSN 1994-9057 (Print)

ISSN 2070--0083 (Online)

DOI: <http://dx.doi.org/10.4314/afrrrev.v6i3.9>

The Theory of Separation of Powers in Nigeria: An Assessment

(Pp. 127-134)

Ogoloma, Fineface - Institute of Foundation Studies, Rivers State University of Science and Technology P. M. B. 5080, Port Harcourt, Rivers State, Nigeria
E-mail: ogoloma_iroka@yahoo.com.

Abstract

The Theory of Separation of Powers means that, a different body of persons is to administer each of the three departments of government. That no one of them is to have a controlling power over either of the others. For the purpose of preserving the liberty of the individual and for avoiding tyranny separation of powers is necessary. In Nigeria, how has this theory been effective either during the military rules or the civilian administrations? This study is going to examine the working of separation of powers in Nigeria.

Introduction

The guarantee of liberty in any given government to the people is the practice of the theory of separation of powers. This theory according to Gettel, implies that, the three functions of the government “should be performed by different bodies of persons; each department (the legislature, the executive and judiciary) limited to its own sphere of action, and within that sphere should be independent and supreme (Chaturvedi; 2006:282).

The theory of separation of powers is predicated on the premise that, if a single group holds all the three powers of the government, they are bound to have unlimited powers. They could prescribe any law arresting say, criminals. Because, they exercise unlimited powers could pronounce the

criminals guilty without recourse to fair trial. It is through the separation of powers that any given group cannot at the same time prescribe, execute and adjudicate in any case. Otherwise, there will be no justice. That is why, it is only through the combination of all these departments that a government can use force especially in a military rule.

The theory of separation of powers means that, a different body of persons is to administer each of the three departments of government (The legislative, executive and judiciary). And that, no one of them is to have a controlling power over either of the others. Such separation is necessary for the purpose of preserving the liberty of the individual and for avoiding tyranny.

The term “Separation of powers” originated with Baron de Montesquieu, a French enlightenment writer. Nevertheless, the actual separation of powers amongst different branches of government can be traced to ancient Greece. The framers of the American constitution decided to base the governmental system on this theory of separation of powers whereby the legislature, executive and judiciary branches will be separate from each other. This gave rise to the idea of checks and balances on each other\$. As a result, no one branch can gain absolute power or abuse the power given to them like in despotic military regimes.

The model of separation of powers was first developed in ancient Greece and gained recognition by the Roman Republic as part of the unmodified constitution of the Roman Republic. In this model, the state is divided into branches, each with separate and independent powers and areas of responsibility in such a way that no branch has more powers than the other branches. This also, forms the concept of separation of church and state as is the practice in many countries of the world depending on the applicable legal structures and the prevailing views towards the exact roles of religion in the given society.

Meaning and origins of the concept

It must be noted that, the doctrine of separation of powers has been developed over the centuries. The evolution of the concept of separation of powers can be traced to the British Parliament’s gradual assertion of power and resistance to the royal decrees during the 14th century. James Harrington, an English scholar was one of the first modern philosophers to analysis the doctrine of separation of powers. Harrington in his essay, “Common Wealth of Oceana” (1656), built upon the works of earlier philosophers like Plato, Aristotle and Machiavelli, described a utopian political system that included

a separation of powers. In his second *Treatise on Government* (1690), John Locke an English Political theorist, gave the concept of separation of powers more refined treatment. John Locke argued that legislative and executive powers were conceptually different. But that it was necessary to separate them in government institutions. However, in Locke's conception, judicial power played no significant role.

The modern idea of the doctrine of separation of powers was vigorously explored in the "*Spirit of Laws* (1748)" by Baron de Montesquieu a French Political writer in his work. He based his exposition on the British constitution of the first part of the 18th century the way he understood it. As a doctrine, it has been interpreted as, "Where an individual occupies the position of both the executive and the legislature, there is the danger of the legislature enacting oppressive laws which the executive will administer to attain its own ends". Montesquieu in the process outlined a three-way division of powers in England amongst the parliament, the king and the courts, even though such a division were not in existence at that time. Montesquieu apparently believed that the stability of the English government was due to this practice of separation of powers despite the fact that he did not use the word "separation".

It must be realized that Plato, Aristotle, Harrington, Locke, Montesquieu and other commentators saw the concept of separation of powers as a way to eliminate the arbitrary powers to check dictatorial tendencies.

One condition of liberty is the separation of the legislature from the executive, and the existence of an independent and impartial judiciary. It is also as a result of this that, Montesquieu regarded "the separation of powers as an essential safeguard of liberty. According to him, there is no liberty if the judiciary power be not separated from the legislative and executive". That is why according to Gettel, this doctrine implies that the three functions of the government "should be performed by different bodies of persons; each department limited to its own sphere of action, and within that sphere should be independent and supreme" (Chaturevedi, 2006:282).

Hence, separation of powers is presently understood to mean that, none of the legislative, executive and judicial powers is able to interfere with the others. For example, the Judges should be independent of the executive and legislature in theory. Or that the same persons should not hold posts in more than one of the three branches. For example, that one branch of government

should not exercise the functions of another. That is, the executive should not make laws which fall within the purview of the legislature.

That be as it may, closely related to this theory is the “doctrine of checks and balances”. This doctrine states that, governmental power should be controlled by overlapping authority within the government and by giving citizens the right to criticize state actions and remove officials from office.

But the big question is, what happens in despotic military regimes and, dictatorial civilian regimes or in parliamentary’ systems where the cabinet minister must be a member of either houses of parliament as we have seen in Mymmar (Burma), Nigeria, before 1966 Coup, Thailand, Chile, China, Union of Soviet Socialist Republics (USSR) before it crumbled in 1989 with the introduction of glassnote and prestorica by Govbachev or how about where there is one party dominance in a political system? The whole argument in favour of separation of powers will be meaningless as well as hopeless in the above situation or circumstances.

Nevertheless, it must be stated that, like in Italy and in most democracies, separation of governmental powers in their constitutions has a separate constitutional courts to review cases that raise constitutional issues. Such democratic countries create such mechanisms to ensure judicial independence from legislative and executive officials. However, some scholars were of the opinion that, creating an extreme separation of powers can make government less effective because, it increases the possibility of “governmental paralysis”. Where the leaders in different branches of the government disagree about fundamental objectives, the country’s official business will come to a standstill.

Is separation of powers feasible?

It must be noted that, separation of powers is almost impossible to carry out in actual practice. “However, in a modified form the theory has been adopted in America, Nigeria France and other countries. The President and the legislature in U.S.A. and Nigeria for example, are both elected by the people and are responsible to them. While the judges once appointed hold office during good behaviour”. But in both U.S.A. and Nigeria for example, the President has the legislative power of vetoing to bills and the Senate has the executive duties of sanctioning appointments and treaties, while, the Supreme Court has the power to determine the constitutionality of the laws.

In India and France for example, where there is parliamentary form of government in place, the executive is responsible to the legislature because, the cabinet members are members of the legislature and therefore performs both executive and legislative functions. In England with parliamentary system in place, there is no separation of powers because, the House of Lords performs judicial functions and the judiciary has jurisdiction over the executive officers. The cabinet performs legislative functions and its members are also the members of the parliament (Sachdeva and Gupta; 1980:221).

Separation of powers in Nigeria in theory and practice

It is interesting to note that, the 1999 constitution of the Federal Republic of Nigeria, separation of powers is a fundamental constitutional principle which spells the roles and duties of the three arms of the government. These principles are enunciated in the constitution as follows:

Part I Section 231(1), states that, “the appointment of a person to the office of Chief Justice of Nigeria shall be made by the president on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate”.

Part I Section 231(2), states that, “the appointment of a person to the office of a Justice of the Supreme Court shall be made by the president on the recommendation of the National Judicial Council subject to confirmation of the appointment by the Senate”.

Section 232 (2) states that, in addition to the Jurisdiction conferred upon it by sub-section(1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly.

Part II Section 4(8) states that, save as otherwise provided by this constitution, exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of Judicial tribunals established by law and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Chapter V (The Legislature) Section 5 8(1) States that, “The Power of the National Assembly to make laws shall be exercised except as otherwise provided by this section and sub-section (5) of this section, assented to by the President.

Section 58(3) says, “Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it.

Section 58(4) states that, “Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.

Chapter V Part II (House of Assembly of A State) Section 100(1) states that, “The Power of a House of Assembly to make laws shall be exercised by bills passed by the House of Assembly and, except as otherwise provided by this section, assented to in accordance with the provisions of this section.

Section 100(2) states that, “a bill shall not become Law unless it has been duly passed and, subject to sub-section (1) of this section, assented to in accordance with the provision of this section.

Section 100(3) states that, “Where a bill has been passed by the House of Assembly, it shall be presented to the Governor for assent.

From the foregoing, it is obvious that the essence of the doctrine of separation of powers is to protect the arbitrariness of rules. It by bills passed by both the Senate and House of Representative and, prevents the danger that is most likely to emanate by the conferment of two much powers any single person or body and check of one power by another (The Tide; 2010:23). The power of the executive to convene the legislature and to veto its enactments affirms of defence while the legislative power to impeach is necessary and sufficient to hold the executive accountable to examination without holding him hostage.

The people also look forward to the judiciary for the dispensation of justice and that of judge must carefully but firmly set out to administer according to law which is established by the legislature or by the binding authority of president, which itself is substantially founded on the laws passed by the legislature (The Tide: 20 10:23).

Despite the grammatical niceties with which the constitution is coated with in practice, any rigid separation of the state departments as stated above is obviously going to paralyse the governmental activities of the state. In theory separation of powers seems to imply that, the powers of government consist

mainly in making, executing and applying laws to cases through the rule of law.

Conclusion/suggestion

In conclusion, separation of powers appears not to operate any legal restriction on power but, it provides the basis for important principles which the law protects such as independence of the judiciary.

It provides a basis for the adoption of structure processes and control which protects liberty now and in the future. It guards against broad spectrum of the ills like absurd judgement avaricious and ambitious self-serving behaviour and inefficient performances of functions. As our system of government evolves new conventions, political practices and events at times need legal rules will need to be devised to protect the liberty of the. people and our nascent democracy” (2010). The doctrine of separation of powers therefore provides the justification for these measures and helps to determine their nature and scope. Apparently, there is the need to monitor our political system, be vigilant about our liberty and advocate new measures when the liberty is threatened.

It is suggested therefore that, the state should adhere to the theory of separation of powers as is the practice in other democratic states of the world taken account of our historical past and the urgent need to modernize where necessary. Any dictatorial tendency should be nibbed on the bud.

Secondly, it will help to dispense with executive usurpation of powers, check corruption of elected officials and manipulation of electoral processes.

References

- Appadorai, A. (2003). *The Substance of politics*. New Delhi: Oxford University Press.
- Basic Concepts: Nation: Sovereignty, Authority Sources of Authority, Legitimacy, Influence Power, Game theory, Political Obligation.
- Blackstone (1765). *Commentaries on the Laws of England*, Vol. 1 pp. 146 & 269.
- Chaturvedi, A. K. (2006). *Dictionary of Political Science*. New Delhi: Academic Publishers.
- Federalist (1788). Essay XLVII

- FRN (1999). The 1999 Nigerian Constitution. Lagos: Federal Government Press.
- Hamilton, J. Jay and J. Madison (n.d.) *The Federalist*, 'Everyman Library', Dent.
- Ivor, Jennings: *The Law and the Constitution*; P.28
- Jaja, Jones M. & Aba-Erondu, Nnamdi (2000). *Fundamentals of Government and Political Science*. Owerri: Springfield Publishers Ltd.
- Kumokou, I. (2003). *Nigeria, the making of a Nation. Anthropological Brief* Port Harcourt: Ideal Publishers.
- Montesquieu, C. L. (1949). *The Spirit of Laws*, 2nd ed. Hafher.
- Montesquieu, *Espirit Des Lois*, Book XI, Chapter what is the Practice in today's World? Or The Theory of Separation of Powers: A Critique. VI: (no. ed.: 1749: VOL. I, P. 219.
- Osai, O. Jason (2007). *Introduction to Political Science, A Nigerian Perspective*. Port Harcourt: Osai Int'l Publishers Ltd.
- Sabine, G. H. *A History of Political Theory*, P. 559.
- Sachdeva & Gupta (1980). *A Simple Study of Political Science Theory*. Delhi; Ajanta Prakashan: 1980).
- The Tide Newspaper* (Wed. Dec. 8, 2010). Vol. 12 No. 200.
- Willoughby, W. F. (1936). *The Government of Modern States*, Appleton Century.