JUDEX AND THE THEORY OF SCAPEGOATISM IN NIGERIA: DECONSTRUCTING AND RENEGOTIATING THE DOCTRINE OF SEPARATION OF POWERS

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Abstract

The concept of Separation of Powers as an age long doctrine recognizes the need for each arm of government to have specialized functions and a working symbiotic relationship with themselves in the delivery of good governance to the citizenry. This doctrine recognizes the imperativeness of the impossibility of a water tight governmental arrangement and thus expects harmonious working regime of partners and equals.

The control of the purse has however created a senior/junior partner relationship over a long period of time and the holding of sway by the military in the Nigerian contemporary history further compounded this clear dichotomy where the command structure determines who gets what and who does what in the realm of governance. The recent experience in Nigeria with regards to the mantra of anti-corruption regime pitched the Judiciary against the Executive on one hand and the Legislature against the Executive on the other hand. Decisions by the courts which are against the position of the Executive is seen as a way that the Judiciary demonstrates its unwillingness to fight corruption and possibility of its complicit in enthroning a corrupt regime and consequently derail the anti-corruption drive of the present Nigerian government.

This paper seeks to properly contextualize the doctrine of separation of powers within the existing Constitutional framework in Nigeria and demonstrate from the empirical perspective the decisions of courts as based on the cold facts presented before the courts and the inevitability of the Judiciary to do otherwise in the light of the justice system that is presently in place in Nigeria and that the Judiciary is only being isolated as a scapegoat for the failure and inadequacies

of the Executive to present a better argument in its fight against corruption. Legislative interventionist imperative will be proffered as the panacea for the present state of affairs as well as the need for introspection on the part of the Executive in re-engineering its avowed anti-corruption war instead of scapegoating the Judiciary which can only determine cases presented before it even if it is aware of facts contrary to the ones presented.

INTRODUCTION

In most democratic systems the world over, the governance arrangement is generally shared into a tripod of Legislature, Executive and the Judiciary on the basis of the doctrine of separation of powers. The three arms of government as usually addressed are assigned specific powers in a way that power is not concentrated because as argued, power corrupts absolute power corrupts absolutely.[1] The legislative arm is given the role of law making, the executive is expected to implement the laws and the judicial arm is to interpret the laws. There cannot be a watertight separation because it is a human community where relationships are expected to occur and to that extent there are overlaps in terms of power relations and for an arm of government to be a check on another. The power relations is such that the arm that controls the purse especially in Nigeria is regarded as the main arm of government while the other arms are treated with impunity and reckless abandon. The judiciary is generally thus regarded as the most junior and relatively an insignificant arm.

It must be emphasised from the onset that this classification is a perception issue as all arms of government are constitutionally created and are equal partners in terms of constitutional power matrix. This position is informed by the fact that the ultimate decider of the fate of the hopeful and the hopeless is the judiciary.[2] This paper is to interrogate the power relations of the three arms of government, identify the position of the Judiciary and call attention to the current trend in Nigeria where the judiciary is made to take the blame for every perceivable wrong in the system. In fact, the Judiciary is seen as the bane of the

[1] Tobi N., "Law, Judiciary and Democracy", Ayua L. A., (ed.), *Law Justice and the Nigerian Society*, (NAILS, Lagos, 1995), pp 122-139 where his lordship argued for the need for balancing in the sharing of governmental powers.

[2] Egbewole, W. "Judex: Hope for the Hopeful and the Hopeless" 139th Inaugural Lecture delivered at the University of Ilorin on 28th November, 2013.

Nigerian state because of the corruption perception and the slow pace of the administration of justice in Nigeria. This perception even if wrong it can however be seen as wrongly created by the judiciary itself in its challenge of integrity, lack of transparency and palpable corruption of some of the judicial officers.[3]

CONCEPTUALISATION OF SEPARATION OF POWERS

The idea of separation of powers was developed in relation to the growth of liberal democracies and the emergence of self government across nations. It was argued that there is need for a more expansive devolution of powers instead of concentration. James Harrington who, in working out a constitution for Great Britain, prescribed rotation in office, free choice of electors and a separation of powers the three arms of government as they are known today as the basis "an equal commonwealth" and that the government at all times must respect the will of the people.[4] Indeed John Locke[5] classification of governmental powers into these three compartments[6] was central to the liberal democratic creed and boosted the idea, even when doubts still existed in some quarters.[7] This idea as we have it today is however popularised by Montesquieu.[8]

According to Montesquieu,

> *Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man*

[3] Recently, the Economic and Financial Crimes Commission arrested some judges on charges of corruption and some of them tried and some are still standing criminal trials in various courts in Nigeria. See https://www.dailytrust.com.ng/news/law accessed 22/7/17

[4] Harrington, James. Oceana, London, 1656. S.B. Liljegren ed., Heidelberg, 1924.p. 33.See also: George H. Sabine and Thomas L. Thorson. A History of Political Theory. 4th ed. Hinsdale, Il.: Dryden Press, 1973p. 467

[5] John Simmons describes Locke as "one of the first great liberal political philosophers". See Simmons' "Introduction", in Steven M. Cahn. (ed.) Classics of Political and Moral Philosophy. NY: Oxford University Press, 2002. p. 457

[6] Chapter XII, par. 143 of "Second Treatise of Government", Locke: Two Treaties of Government. ed. by Peter Laslett. Cambridge: Cambridge University Press, 1988. p. 364

[7] See: Sabine, op.cit. p. 497

[8] ibid. p. 515

> *invested with power is liable to abuse it, and to carry his authority as far as it will go….To prevent this abuse, it is necessary from the nature of things that one power should be a check on another….When the legislative and executive powers are united in the same person or body…there can be no liberty…. Again, there is no liberty if the judicial power is not separated from the legislature and executive….There would be an end to everything if the same person or body, whether of the nobles or of the people, were to exercise all these powers.*[9]

He argued essentially for what can be regarded as a clear level of operation where each arm of government will not in any way have anything to do with the other arm. This is what Anise described as the "pure theory of separation of powers"[10] and means, according to Calvert, "distributing ultimate authority among different entities, none of which is subject to control by the others within its sphere"[11] all for the ultimate sake of freedom.

The Founding Fathers of the American federation devoted a considerable portion of their writings (Federalist Papers Nos. 47, 48 and 51) to articulation of the doctrine, insisting that power concentration "is precisely the definition of despotic government",[12] The doctrine has receive3d a considerable number of opposition or criticisms from Jeremy Bentham and later by Hegel and their

[9] Montesquieu, Baron de. *L'espirit des Lois*, Book XI, Chapter VI

[10] Anise, Ladun. "The Theory of Separation of Powers and the 1979 Nigerian Constitution", Ife Social Sciences Review, Vol. 3 No. 1, March 1980. p. 15

[11] Calvert, Peter. Devolution. Professional Books Ltd., 1975 p.6

[12] Jefferson, Thomas. "Views on Constitutional Government", in Peter Woll, Peter Woll. American Government: Readings and Cases. 6th ed. Boston: Little, Brown and Co., 1978. p. 47

argument is that watertight compartmentalisation is not practicable and generally unrealistic.[13]

As argued by Alabi, separation of powers is a principle against arbitrary exercise of powers. Because power tends to corrupt and absolute power tends to corrupt absolutely, modern constitutional theorists tend to emphasis that powers of government be separated among the three organs of government. In this way, absolutist tendencies and reckless abuse of political powers could be avoided. Thus, as a necessary corollary to the principle of separation of powers, there is the idea of checks and balances. By checks and balances is meant that the arms of government should check and balance their respective powers against each other.[14] Thus, the legislature had by the seventeenth century began to acquire enormous power of control over the executive. Royal absolutism was thereafter sought to be curbed, in the eighteenth and the nineteenth century, by granting parliament the power to control the prerogative of the Crown. The powers of the legislature known as the Parliament grew in leaps and bounds in Britain and almost uncontrollable.[15]

The powers of the judicial arm also developed in relation to the two other arms of government. In developed democracies the judiciary especially in the United States of America as well as Nigeria where political power arrangement was fashioned in the same manner. The emphasis is on constitutional supremacy as against Parliamentary supremacy. This arrangement gives the Judiciary a prime of place in power balancing.

[13] For a summary of the utilitarian critique of separation of powers, see: Sabine, p. 629-630. For Hegel's critique, see: Sabine, p. 601-602

[14] Alabi, MOA "The Legislature and Intra-Governmental Relations in Nigeria" In Alabi, M & Egbewole, W. (ed) Perspectives on the Legislature in Government of Nigeria (Morocco: CAFRAD 2010) p.100

[15] Roskin, Michael G. Countries and Concepts: Politics, Geography, Culture. Upper Saddle River, NJ: Prentice-Hall, 2001.p. 28

The principle of separation of powers is not intended to promote the goal of efficiency in government. Although the Founding Fathers of the American Federation identified the need for an efficient government as the basis for separating the executive from the "fragmented and episodic" Congress,[16] the prevention of tyranny was the most prominently articulated rationale for separation of powers.[17] As Nwabueze posits that the doctrine of separation of powers curbs arbitrariness and autocratic inclinations[18] and the tendency towards arbitrariness and despotism is reduced where the executive does not fully control the legislative process. The two goals of efficiency and devolution of powers to prevent abuse and arbitrary use are seemingly conflicting and scholars are lined in the two positions. On constant basis, attempts are being made at the intellectual level to ensure reduction of the diverse positions.[19]

Thus, even theoretically speaking, the principle of separation of powers does not import a water-tight compartmentalisation of governmental powers. The idea that one branch of government should be a check on the other necessarily obviates complete separation of powers. Thus, the question remains whether the theory of separation of powers is really in tune with practical realities. The idea of a tripartite arrangement of governmental powers and functions has been particularly attacked by some scholars who put forward new schemes of classification of government powers and functions. The contention

[16] Madison, James "Federalist 47", in Peter Woll, op. cit. p. 39-40.

[17] Egbewole, W. Jurisprudence of Election Petitions by the Nigerian Court of Appeal (Germany: LAP Lambert academic Publishing, 2011) pp10-16

[18] Nwabueze, Ben O. "A Constitutional Democracy and a Democratic Constitution", in Yemi Osinbajo and Awa Kalu (eds.). Democracy and the Law. Papers Presented at the Second Conference of the Body of Attorney General in the Federation, Held in Abuja, 9th-12th September, 1991. Lagos: Federal Ministry of Justice, 1991. p.73

[19] David P. Currie. "The Distribution of Powers after Bowsher", (1986) Supreme Court Review, 19 – 36. cf. Peter L. "The Place of Agencies in Government: Separation of Powers and the Fourth Branch", (1984) 84 Colum. Law Review

has largely been between those who favour separation of powers and others who believe that the reality of governance supports fusion (or concentration), rather than separation, of governmental powers.[20] From the latter perspective, it is argued that complete separation of powers is impossible. Even within its own sphere of authority and competence, no one arm of government can exercise absolute powers. To ensure harmonious workings of government, powers are shared and overlap of a sort is allowed. As will be argued anon, judicial powers accommodates a level of law making, executive powers provides for delegated legislation by way of law making. A form of adjudication is performed by the executive in the discharge of executive functions.

This overlap is more glaring in parliamentary regimes where Ministers which belong to the executive branch are appointed from the legislative arm. In a presidential system of government the theoretical application of the doctrine appears more feasible. All said, the doctrine has been a veritable source of counterforce in power dynamics such that an arm of government cannot lord it over another arm. The operation of the doctrine in Nigeria is however more complex in the sense that contest and contestations for power continues to be a recurring decimal between the various arms especially between the executive and legislature.[21] One area where this disagreement is more pronounced in Nigeria recently is on budgeting.[22] The two arms always also disagree on the confirmation of the nominees of the President for executive offices as we

[20] S.N. Ray, Modern Comparative Politics: Approaches, Methods and Issues. New Delhi: Prentice-Hall of India, 2003. p. 144 – 149 where attempt was provided to reconcile the views as represented by differing scholars

[21] Okebukola, E.O. "Executive Orders in Nigeria as valid Legislative Instrument" available at https://www.ajol.info/index.php/naujilj/article/viewFile/136320/125810 accessed on 21/7/2017. see also sundiatpost.com/2017/.../executive-legislature-face-off-okogie-slams-nigerian-leaders accessed 21/7/2017

[22] There is still an unresolved disagreement between the Minister of Power, Works and Housing, Raji Fashola SAN and the National assembly on the budget allocation to the Ministry. See www.premiumtimesng.com/.../234881-fashola-slams-national-assembly-for-lagos-ibadan accessed on 21/7/17

witnessed on the nomination of Ibrahim Magu as the Chairman of Economic and Financial Crimes Commission.[23]

Except for the ridiculous extent of the disagreement in terms of political manipulations and issues that does not advance democracy and development, disagreement between the two arms portend a form of stabilising factor to the polity.

In the same vein, the power arithmetic in Nigeria appears more to be donated by the control of the revenue of the Federation without recourse to the constitutional power devolution strategy. It appears the equation is generally designed to favour the arm that has control of the purse.[24] The need for harmonious working relationship cannot be over emphasised as no arm of government can effectively discharge the duties associated with governance and the Constitution of Nigeria clearly recognises this by creating the three power centres. What then is the place of Judiciary in this power equation in Nigeria?

JUDEX IN THE NIGERIAN GOVERNANCE MATRIX

The judiciary is the basis upon which democracy grows and on which rule of law and development is founded. This is the only organ of government that is created to deal with the administration and dispensation of justice in any democratic nation particularly respect for rule of law in governance and

[23] In fact, the Presidency has approached the Supreme Court on whether there is need for confirmation of such position in the light of Section 171 of the 1999 Constitution. See www.vanguard.com accessed on 21/7/2017

[24] By Section 80 of the 1999 Constitution, 1999 (as altered) the Executive arm of government is given power to control the fund of the Federation notwithstanding the fact that the spending can only be done by presenting budget estimates to the legislature which will then pass the Appropriation Bill into law as provided in Section 81 of the Constitution, 1999. The disagreement today is whether or not the National Assembly can add to, subtract or do anything to the allocation of funds in the estimate submitted by the Executive.

protection of fundamental rights of citizens.[25] In recognizing the role of the judiciary the Malawian Constitution provides:

> *"The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law."*[26]

As the bastion of hope for the hopeful and the hopeless, the judiciary has a creative function as they are not expected to just act mechanically in following the rules prescribed by the Congress but must do this by relating them with human consciousness and reconstruction of human relationship.[27]

To achieve development in human society, it has been argued that those who are vested with the power to dispense justice must be guided by the principle of fairness, equity, morality and justice. The major phenomenon in all human societies' is conflict. The judiciary settles disputes and interprets laws that are made by the legislative branch or those that are made on the authority of the legislature.[28] This role is becoming more expansive as it is now being used to accommodate a form of law making. As we argued elsewhere, this role fits the judiciary well because they are not expected to be robots in the discharge of their judicial duties.[29] This position was criticized by Aguda,[30] Aderemi,[31] and

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[25] Egbewole, W.O., "Nigeria Judiciary, Globalisation and the Development of Democracy", Taiwo Kupolati, (ed.) *Current Issues in Nigerian Jurisprudence*, (Renaissance Law Publishers, Ltd, 2007), p. 278

[26] Section 9 Malawi Constitution 2002

[27] Bhagwati, P.N. "The Judiciary and Constitutionalism in a Democratic Society" *The Judiciary in a Globalised World CJIL Year Book January 1999*

[28] Emmanuel O. O., "The Military and Democratic Transition in Nigeria: An Indebt Analysis of General Babangida Transition Programme" (1985-1993), (2000) 28(1) JPMS, pp. 1-20

[29] Egbewole, W. 'Judex: Hope for the Hopeful and the Hopeless" 139th *Inaugural Lecture*, University of Ilorin delivered on 28th November, 2017 p.6

[30] Aguda, T.A. *The Judiciary in the Government of Nigeria* (New Horn Press Ltd, Ibadan:1983) pp16 and 61

[31] Obi V. INEC (2009) 18 NWLR (Pt.1172) 215

Thomas[32] but one has no reason to change the position in the light of recent developments around the world. It must be emphasised that when decisions are taken and new legal frontiers are espoused in judgments especially by the Supreme Court, the legislature are usually left with no choice but to amend the laws in line with such decisions.[33]

Appointment into the Judiciary is constitutionally guaranteed[34] with respect to the superior courts and the crucial role of the National Judicial Council (NJC) under the leadership of the Chief Justice of Nigeria.[35] The judiciary plays fundamental role in the governance of Nigeria and this has been so acknowledged by scholars. Oyebode posited that:

> *"It is almost axiomatic that the judiciary plays a pre-eminent role in any democratic dispensation. Indeed a political system can be considered as democratic on the basis of the extent to which the judicial arm is permitted to hold the scales of justice over and above the other arms of government. The source of authority of the judiciary for exercising this critical function is, of course, the Constitution which in fact, captures, in a rather poignant fashion, the interplay of the judiciary, constitutionalism and democracy. For, if good governance has become a modern day desideratum, human ingenuity is yet to devise a better means of preventing arbitrariness and ensuring social well-being than that of separation of powers, due process of law and independence of the judiciary which, taken together, constitute the hall-marks of a well-functioning democratic setting."*[36]

[32] Thomas C. Speech to Eagle Forum, 9 November, 1996 and reproduced in Foskett, K. *Judging Thomas: Life and Times of Clarence Thomas* Harper Collins Publishers, New York:2004 p.279

[33] Amaechi V. INEC (2007) 18 NWLR (Pt.1065) 79, 91, 170 and 504 which was the basis for the provision of Section 89(7) of the Electoral Act, 2010 (as amended)

[34] See generally Chapter VII of the 1999 Constitution

[35] Section 153 (1) and Part I Third Schedule of the Constitution 1999 clearly provides for the membership of the NJC

[36] Paper presented at the National Conference on Changes to Democracy in the New Era, held under the auspices of the Institute of Human Rights and Humanitarian Law, Port-Harcourt, August 27-28, 1999.

It must be emphasised that in the trajectory of the Nigerian State and in all its developmental stages during colonial, military and democratic dispensation, the judiciary has demonstrated its unique qualities of forthrightness, consiastency and reliability.[37] Under the colonial regime, the Nigerian judiciary determined the case of **ESHUGBAYI ELEKO V. GOVERNMENT OF NIGERIA**[38] and extreme courage was demonstrated and displayed as a fearless institution. Under military regime, the institution also decided the celebrated case of **LAKANMI V. A.G. (WEST)**[39] and it was established that the judiciary does not fear the gun but will decide cases as it sees it. The position of the Nigerian judiciary and its role as an arm of government was underscored by Honourable Justice Thompson in **OYEBISI V. C.O.P. WESTERN STATE** when his lordship held:

> *Its the duty of the judiciary as an organ or agent of the state to act as the pillar of equilibrium between the traditional tyrannies of the legislature and the traditional excesses of the executive; but where as in this the legislature and the executive become united in the same body of person the task of the judiciary as the defender of the rights of the citizen becomes more important and requires of the courts not only the ability to read, understand and interpret legislations but also the courage and sincerity to tell the executive where to stop.*[40]

[37] Egbewole, W. Jurisprudence of Election Petitions by the Nigerian Court of Appeal (Germany: LAP Lambert Academic Publishing 2011) pp. 38-78

[38] (1931) AC 670; (1931) ALL ER (REPRINT) 44

[39] (1971) U.I.L.R. 201. See also ADEGBENRO V. AKINTOLA (1962) ALL NLR (PTII) 462

[40] Unreported Case No. M/34/74 delivered on 25 November, 1974

In the Second Republic the judiciary continued this stride of courage in the determination of the case of AWOLOWO V. SHAGARI.[41] This judgment was widely criticized but the judiciary interpreted the law the way it saw it and in spite of the seemingly unpopular position especially with the media, it stood its ground.[42]

The advent of the amputated Third Republic and the emergence of Fourth Republic in Nigeria depicted an entirely different picture of the judiciary as it is today in Nigeria. It is now regarded as an institution that is perceived as corrupt, unreliable and generally lazy. It must be stressed that these characterizations are a function of a number of factors. The situation was likened to the race between flies and the cobweb[43] Olatoke opined that:

> *"The great flies herein are the ones who circumvent the law and manipulate the judicial system to escape Justice. It is more pathetic when the judiciary described as the last hope of the common man in the protection of the rights of the common man assume unfamiliar role of deriding same in the discharge of its duties in the name of all that is injudicial and injudicious.We are in an age where the members of the Judiciary do not act rightly; committing acts despicable of their oaths of office. What excuse would a judge*

[41] (1979) 6-9 (REPRINT)SC 37

[42] See also the decision of the Supreme Court in AG BENDEL V. AG FEDERATION (1983) 3 NCLR 1

[43] Francis Bacon, Baron Verulam of Verulam and Viscount of St Albans, 1561-1626, in the *Apothegms,* Book of Quotations, Geddes & Grosset, 2009 cited in Olatoke, K. "Judicial Sector Reforms in Nigeria: Constraints and Prospects" delivered at the National Conference on Law and Socio-Economic Change in Nigeria: Issues, Contexts and Perspectives held at the Faculty of Law, Obafemi Awolowo University, Ile-Ife 18-21 July, 2017

who is found with huge sums of money above his income in 10 years, have?"[44]

It is our view that in spite of the fact that this perception may not be a total reflection of the judiciary, it must be emphasized that the characterization is pervasive and the judiciary is not helping matters. As at today a number of judicial officers are standing trial for corruption charges before various courts in Nigeria.[45] The challenge faced by the Judiciary in Nigeria today is essentially a development over a period of time. The first major factor responsible in our view is the skewed appointment process as against the hirtherto position of seeking out people who possesses the qualities of a good judge, such will people will be approached and attracted to the bench. The situation today is that of who you know and not what you know. As we argued elsewhere[46] "It is imperative to emphasise that the legitimacy of the judicial function rests on judgments and decisions rendered thus, ensuring integrity requires appointing persons who are of right professional character and competence as judges." Judicial integrity thus requires persons of integrity, who will do all they reasonably can to achieve wholeness of principles drawn from their role and judicial actions consistent with those principles.[47]

[44] Olatoke, K. ibid at p.5

[45] See www.pulse.ng/local/judges-arrest-inside-the-very-corrupt-world-of-Nigeria's –Judiciary accessed 22/7/17 ; https://politics.naij.com/402850 accessed 22/7/17

[46] Egbewole, W. "Judicial Integrity and Administration of Justice in Nigeria" in file with the author.

[47] Jonathan S., "Is Judicial Integrity a Norm? An inquiry into the concept of judicial integrity in England and the Netherlands", (2007) 3 *Utrecht Law Review*

Constitutionally, any legal practitioner who has been so qualified for at least ten years[48] are appointed to the superior courts. It has been discovered that lawyers working in banks, oil and gas industry, communication sector or such other institutions are appointed on the attainment of the magical ten years. Whilst it is not our argument that anybody working outside of private legal practice or in the Ministry of justice or in the judiciary are the only ones entitled to be appointed, it is important that requisite experience may be an imperative to the discharge of the onerous duties of a Judge. The appointing authority which is the National Judicial Council[49] also needs to be overhauled in terms of how they get to the Council. It is our view that the body be restructured by way of downsizing the body as a policy making organ and the powers of the Chief Justice of Nigeria in constituting the membership of the Council need to be revisited.[50]

Equally important is the training that the Judges undergo. As at today, the training given to the Judges are essentially on how to become a legal practitioner as no part of the curriculum is devoted to any form of preparation on the art of judging. It may be argued that the nature of training for judicial officers has not changed from what it was when the Judiciary was performing very well but it must be understood that the people appointed then are specially identified and not as presently approached by way of lobby and family ties. In order to improve the service delivery of the Judiciary in Nigeria, it may be apposite to introduce technology to the operations of the bench. The present situation in which determination of cases are delayed unduly is not in the interest of the democratic advancement of Nigeria and the ultimate losers are

[48] See Sections 250, 256, 261 and 266 of the 1999 Constitution of Nigeria (as altered)

[49] Section 153 of the 1999 Constitution creates the National Judicial Council

[50] Egbewole, W. "Hope for the Hopeful and the Hopeless op cit. p.56

the Nigerian citizens. A scenario was painted on the delay in determination of cases by Adegboruwa that:

> *"I just got a judgment in the Supreme Court on Friday, 23rd of June; the case started in the high court in 1984, that's 33 years ago; by the time the judgment was delivered it was 33 years, all the litigants had died. Fred Agbaje did everything possible to have the appeal heard before he died, but we were told every time we filed an application for accelerated hearing that they were only treating 2003 appeals. And do (sic), it got to our turn this time because they were now treating 2006 appeals. So, by next year, they will be treating 2007."*[51]

There has been various tales told by different people on the effect of delays in cases. In an earlier study, this is the conclusion that was reached that "the result of our study as shown in Table 1 and Figures 1-7 above, there is a palpable concern for delay in determination of cases by our courts."[52] This matter of delay has acquired a lot of scholarly attention[53] but it appears there is no end in sight as a number of cases were examined by Udombana[54] apart from the statistics provided in the table and figures earlier referred to and it is obvious the Judiciary must take concerted steps to address this albatross. The challenge is further elucidated upon by the Nigerian Institute of Advanced Legal Studies in

[51] The Punch Newspaper, Thursday July 6, 2017 page 37

[52] Egbewole, W. " Judex: Hope for the Hopeful and the Hopeless" op cit. pp.30-31

[53] Abdullahi, S. I & Abdulqadri, I.A. "Curbing Delaying Justice on the Ground of Jurisdiction in the Nigerian Courts: Lessons from the Islamic Law" in Abdulqadri, I.A. & Abdullahi, S. I. (eds) ***Nigerian Judiciary: Contemporary Issues in Administration*** p.124; Peters, D. "Minimizing Delay in the Administration of Civil Justice in Nigeria" in Yusuf, F.A.O. (ed) ***Issues in Justice Administration in Nigeria-Essays in Honour of Ho. Justice S.M.A. Belgore*** (VDG International Limited, Lagos:2008) p.p.449-461; Chijioke, J. "The Role of the Judiciary in the Crusade against Corrupt and Unethical Practices in the Public Service in Yusuf F.A.O. ibid p.324

[54] Udombana, N.J. "Speedy Administration of Justice in Nigeria: Which Way Forward?" in Abdulqadri, I.A. & Abdullahi, S.I. (eds) ***Nigerian Judiciary: Contemporary Issues in Administration of Justice*** pp.79-107

the research carried out in the various states of the Federation which depicts a very gloomy picture and calls for urgent attention.[55]

SCAPEGOATING THE JUDICIARY IN NIGERIA

The major challenge faced by the Judiciary in Nigeria today is that of corruption and this is put at the doorstep of this institution especially on the issue of delay in administration of criminal justice especially as it affects the politically exposed persons, double standard in terms of decisions taken, inconsistency and uncertainty in terms of judicial precedents, issues of socio-economic rights and incompetence to mention a few, The Nigerian citizens usually heap the blame of the discharge and acquittal of accused persons on the judiciary especially where the said accused is a political office holder or a former political office holder. Reference is made to the acquittal of the Senate President, Dr. Bukola Saraki by the Code of Conduct Tribunal which the Presidency appealed against.[56] Mention is also made of the trial and acquittal of the former Governor of Delta State, James Ibori who was then jailed 13 years by a court in United Kingdom.[57] Reference is also made to the acquittal of Honourable Justice Ademola accused of corruptly enriching himself on cases assigned to him. His lordship was charged with his wife and a Senior Advocate of Nigeria but were all discharged and acquitted.[58]

The conviction or acquittal of any accused person is not determined by the court as there are critical stakeholders or key players in the criminal justice sector. The prosecution of any case is a function of the prosecution, the defence and the

[55] ***Nigerian's Judicial Performance Evaluation 2008-2011*** in www.nials-nigeria.org/text/estore.aspx assessed 26th October, 2013

[56] See www.premiumtimesng.com/topnews accessed on 22/7/17

[57] See www.premiumtimesng.com/news/468 accessed 22/7/17

[58] See https://www.dailytrust.com.ng/news/law accessed 22/7/17. His lordship was set free on 5th April, 2017.

court. It is therefore our submission that where the prosecution failed to discharge its obligations appropriately either by not filing a proper charge, not calling appropriate credible witness, or where the accused is able to dislodge the case against him or her, the court will be left with no option than to discharge an accused person. What we have come to realise is that in most occasions, the prosecution are found wanting but because the resultant effect of the incompetence or haphazard prosecution is pronounced by the court, it is the court that is scapegoated. It is indeed a function of negative profiling. This position is not to exonerate the judiciary from any blame but it is indeed the theory of a white sheet with a black dot in the middle. What is generally seen is the black dot in spite of the dominance of the white sheet.

Our position was espoused recently that:

"It must thus be emphasized that before cases are filed in court, proper and due investigation must be conducted. It must be appreciated that no crime is committed without traces. All that the prosecution needs to do is to identify those traces and ensure that a near perfect case is presented. We must not be understood to be arguing that investigations are not done. Far from it, our position is that instead of rushing to court with haphazard investigated cases, they need to be more thorough, to be more painstaking and to be more organized in the presentation of cases. The more we avoid media at the point of investigation the better. In other jurisdictions, investigations may be on for three or five years and nobody will know of it until the prosecution is ready to move

against the defendant.[59] It is not that cases will not be lost, it is not that defendants will not be acquitted but all the stakeholders will be fully satisfied that the best has been done in the circumstances of each case. The present disposition of EFCC of quickly rushing to the media at every point of the case leaves so much to be desired."[60]

Cases are generally lost not because the courts are corrupt but because the prosecution is usually take improperly investigated to courts and engage more in media trials instead of a thorough investigation of the cases before proceeding to court. It must be stressed that what happens in advanced democracies is that a considerable time, energy and resources are devoted to the preventive and investigative aspect of crime such that by the time cases are presented in court, it will be obvious to the accused person. A case in point was that of James Ibori[61] and Mrs Allison-Madueke.[62] While the Nigerian cases and the culprits were already convicted by the Nigerian media and the agencies responsible for prosecution, the United Kingdom and United States of American counterpart said nothing and took their time to conduct a thorough investigation which now led to a case that will be difficult for the accused persons to surmount. The lessons in our view is that there is need for a concerted effort on

[59] It took UK security agents a reasonable length of time to garner evidence against James Ibori money laundering case, and eventually he was convicted.

[60] See generally, Egbewole, W. "Administration of Criminal Justice in Nigeria: What is Right and What is Wrong" delivered at the 55th Anniversary National Conference of the Faculty of Law, Obafemi Awolowo University, Ile-Ife 18-21 July, 2017.

[61] The Nigerian court already discharged James Ibori for more than six months before the court in United Kingdom launched its own case virtually "cast in iron" and Ibori ended up with a 13 year jail term

[62] The former Petroleum Minister, Mrs Diezani Allison-Madueke left office in May, 2015, it was not until July, 2017 that the Houston, Texas District Court was approached for the first time when it was obvious that the former Minister is already in the net. The details of her confession and deals were reproduced in www.premiumtimesng.com/news accessed 22/7/17

the part of investigative agencies and the prosecution to be more pragmatic and realistic in respect of their preparations before cases are rushed to court and then end up making the court the scapegoat of their negligence, recklessness and total lack of preparation.

It may also be argued by the two critical stakeholders that they do not have the required capacity, resources and infrastructure that are available to the agencies in advanced democracies. This may well be so but the fact is that how judiciously have they utilized the available resources? There is also the challenge of corruption on the part of these two critical key actors in the administration of criminal justice architecture. Allegations are rife that the officials in charge of investigation and prosecution are also complicit in ensuring that the prosecution and investigative officials are compromised on some occasions. This allegation is at the doorstep of the executive and if the judiciary is seen as the problem, how will the executive be free of blame?

There is also another arm of the government that is equally culpable. The laws being interpreted by the judiciary are made by the Legislature and there is therefore the need to tinker with the laws. We have argued elsewhere that law is actually not our problem in the administration of justice sector as we have more than enough laws to take care of our concerns and that the challenge is purely attitudinal as it is in all sectors in Nigeria.[63] In spite this established position there is however the need to for a fundamental surgical operation to our legal regime especially where corruption or economic related crimes are concerned. The philosophy of presumption of innocence as prescribed in the constitution need to be reviewed, re-assessed and re-crafted in a way to provide exception in respect of these offences. Where it is established that the person concerned is a civil or public servant all his adult working life with calculable salary for the

[63] Egbewole, W. "Administration of Criminal Justice in Nigeria: What is Right and What is Wrong" op. cit.

period and properties or money worth more than the salary is traceable to him/her, it should be his/her burden to explain how such property or money is acquired.[64] There is however a great challenge in attaining this feat and that is the crop of people that are now in the National Assembly who are themselves alleged to be complicit in corruption related cases and economic crimes. The bulk however stops with the citizens of Nigeria to ensure that only credible, reliable, transparent and honest individuals are elected into offices.

So far in this paper, it is clear that our separation of powers operations is skewed in favour of the executive in Nigeria and the Nigerian citizen rightly or wrongly believed it is only the executive that is desirous of exterminating corruption from the body polity and that the legislative and judicial arms are actually fuelling corruption especially under the present dispensation of President Buhari. While the two arms have not done enough to disabuse the minds of Nigerians in demonstrating otherwise, it must be emphasised that corruption is indeed a creation of all the arms of government and all the arms of government are actually sustaining the corruption challenge to Nigeria.

It is therefore imperative that all the arms of government must create a synergy with which the canckerworm can be exterminated instead of the present blame game, profiling of the judiciary and making the judiciary the scapegoat for all the atrocities in Nigeria.

WAY FORWARD

The Nigerian project is too big to fail and therefore there is need for all the arms of government and the citizens to come together with a single voice to make the project work. The way out of the present state of underdevelopment,

[64] See Egbewole, W. ibid and Olatoke, K. op cit.

extermination of corruption and sustainability of the Nigerian State in our view are:

a. Stop the present blame game and all arms of government to work in synergy to ensure that good governance is delivered to the Nigerian citizens;

b. The scapegoatism of the Judiciary has gone for too long especially in respect of criminal prosecution and thus all the critical stakeholders in the justice sector must discharge their obligations as constitutionally assigned and blames to be shared appropriately in order to identify which segment of the sector is not doing well;

c. In order to improve the criminal justice system in Nigeria and ensure that the Judiciary is not presented as the scapegoat of all the woes in that sector, there must be thorough investigation of criminal cases, the prosecution must be more up and doing while the court must bend over backwards to ensure speedy dispensation of justice in spite of the enormous challenges that it is facing;

d. Corruption in the judiciary must be tackled more frontally as it is responsible for the present wrong profiling and scapegoatism of the judiciary in the power matrix in Nigeria;

e. Appointment of judicial officers need to be critically reviewed by going back to the old regime of identifying capable and willing hands to be attracted to the Judiciary. Individuals seeking judicial offices need be more scrutinized to ensure that they possess the requisite qualities for the exalted office in terms of comportment, competence and above all integrity. It is high time the idea of family ties, filial relationship or political patronage is jettisoned in appointing people to judicial office;

f. Training and re-training modalities be put in place for the judicial officers. While it acknowledged that the National Judicial Institute (NJI) is doing a yeoman's job within its mandate, there is need to fundamentally restructure and review the present curriculum of law training in Nigeria in a way to accommodate training for future judicial officers instead of the "crash programme" that NJI is made to provide for the newly appointed judicial officers. A reasonable number of newly appointed judicial officers are having contact with the art of judging on their appointment. This need be changed so that a re-orientation is established paving way for an entirely brand new orientation in the emergence of new crop of judicial officers in Nigeria;

g. There is need for the deployment of technology in the discharge of the duties of judicial office. In the present 21st Century it is obvious that a 19th Century equipment is inadequate. All the courts must be equipped with modern technology on which both the judicial officers and the supporting staff must be properly trained to use effectively;

h. In order to ensure a renewed, re-engineered and service driven judiciary, true independence of the judicial arm must be allowed to flourish in terms of absolute financial autonomy, a non-teleguided appointment process, independence of decision making and availability of such other facilities that will make the judiciary a distinct arm of government that will give credence to the doctrine of separation of powers instead of the present 'fusion' of powers operated as separation of powers in Nigeria.

CONCLUDING REMARKS

The relationship between the three arms of government in Nigeria is theoretically guided by the avowed doctrine of separation of powers as espoused and popularised by Montesquieu but in practical and operational terms it is not a game of three equals but that of junior and senior partners with the judiciary seen as the most junior partner. The necessary wherewithal that will make the arm truly independent and function on the same pedestal are not made available for it.

The paper sought to deconstruct this state of affairs by calling attention to this skewed regime of power separation and power relations as well as the need to jettison the present negative profiling and scapegoatism of the judiciary. While it is recognised that there are a few bad eggs in the judicial arm of government as in other arms of government, this is not enough for the present rather hasty generalisation of the judiciary as a corrupt institution. It is better to identify the few bad individual judicial officers and deal with them appropriately in the same way the other arms must be treated. The judiciary must take the bull by the horn by way of self introspection to identify these bad few and deal with them decisively instead of the present perceived kid gloves treatment of "go and sin no more" which unwittingly create the impression and perception of a cult system that seek to protect its own. The present regime in Nigeria of all animals are equal but some are more equal than others must give way to operationalisation of a true separation of powers as adroitly espoused by its proponents.