ALTERATION OF THE 1999 CONSTITUTION FOR THE "AUTONOMY OF THE LEGISLATURE": FULFILMENT OR NEGATION OF THE DOCTRINE OF SEPARATION OF POWERS?

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ABSTRACT

This work critically examined the amendments to sections 81 and 121 of the 1999 Constitution which have been interpreted as giving the National Assembly and State Houses of Assembly "financial autonomy". The amendments, as interpreted and implemented by the National Assembly, undermines the checks and balances provided for in the original constitution and thereby violates the basic structure of the constitution. Furthermore, they will weaken the national integrity system thereby increasing the chances of corruption and lead to governmental inefficiency. They will result in the legislature exercising oversight over itself contrary to the letters and spirit of the original constitution. The amendments will serve only the personal interests of the legislators and not the interest of the Nigerian people. However, a community reading of sections 81 and 121 as amended and sections 4, 5, and 6 of the 1999 Constitution will show that the amendments do not give the legislators power to execute capital projects, since they partake of executive power. It is recommended that the amendments relating to the so-called "financial autonomy" of the legislature should be deleted through another constitutional amendment.

KEYWORDS: Constitution, alteration, separation of powers, checks and balances, autonomy of the legislature

A. INTRODUCTION

The 1979 constitution of Nigeria is based on the presidential system of government with separation of powers as a key feature, modeled after the American system.[1] The constitution complemented the separation of powers with checks and balances where one power is made to check the other powers.[2]Nwabueze,[3] in his characteristic lucid and flowery language explained how the concept of separation of powers can shield the people from tyranny. According to him, in the absence of separation of powers, not only that the repository of the combined powers can pass oppressive laws and then execute them oppressively; he can also oppress individuals by executive acts not authorized by law and then proceed to legalise his action by retrospective legislation. Separation of powers is aimed at ensuring that every executive act affecting the rights and obligations of the people has a foundation in law enacted by a body different and separated from the executive. Moreover, according to him, when the legislature has no control over the

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[1] Section 4 of the constitution vests legislative powers on the legislature; section 5 vests executive powers on the executive while section 6 vests judicial powers on the judiciary.

[2] For a discussion on how the different powers act as a check on one another see Ogbu, O. N. "The Doctrine of Separation of Powers and Nigerian Nascent Democracy: Theory and Practice in Focus"

[3] "The Separation of Powers in a Presidential System: Its Merits, Demerits, Limits, Consequences and Efficiency" paper presented at the Second Justice Augustine Nnamani Memorial Lecture, held at the Enugu Campus of the Nigerian Law School, Agbani, on 18 December 2000, pp. 7-10.

execution of its laws and cannot therefore prevent them from being enforced against its members, it may deter it from passing oppressive laws knowing that the executive may enforce such oppressive laws equally against the legislators themselves in the same manner as against other citizens. Separation of powers thus contributes in maintaining the equality of all before the law by ensuring that the law-makers, by not enforcing the laws they make against themselves, will not become a special group distinct from the rest of the community, a group that cannot be reached or touched by the law.

The objectives of separation of powers cannot be achieved unless it is coupled with the twin concept of checks and balances which ensures that one power constitutes a check over the others.

It is here intended to examine the alteration of the 1999 Constitution through the Constitution (First Alteration) Act to achieve what has been called "autonomy of the legislature" to see whether it is in fulfilment or negation of the concept of separation of powers and checks and balances.

B. ALTERATION OF THE CONSTITUTION FOR THE "AUTONOMY OF THE LEGISLATURE".

The National Assembly has been so obsessed with the "financial autonomy of the legislature" that they set out to achieve it through constitution alteration. In pursuit of this objective, section 81 of the 1999 Constitution was altered by substituting for the existing subsection (3) a new subsection "(3)" which reads as follows:

(3) The amount standing to the credit of the –

> (a) Independent National Electoral Commission
> (b)National Assembly, and
> (c)Judiciary,
> in the Consolidated Revenue Fund of the Federation shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid to the National Judicial Council for disbursement to the heads of the courts established for the Federation and States under section 6 of this Constitution.

A proposal for similar amendment to section 121(3)(a) & (b) of the 1999 constitution for the "financial autonomy of State Houses of Assembly" failed as a result of failure to obtain the support of the requisite number of State Houses of Assembly for the proposal.[4] In apparent justification of the *status quo ante*, the then Speaker of the Akwa Ibom State House of Assembly, Samuel Ikon, explained that it was possible for the National Assembly to implement financial autonomy because they know that they will get it from the Federal Government. According to him, since State Governments rely mostly on allocation from the Federal Government it was not possible to peg the percentage of the Assembly budget on the estimated cash inflow. "The autonomy would have been possible if the percentage of money due to the State Assemblies were predicated on the actual amount available for the State rather than on some impracticable provisions", he argued. To him, if the amendment has been passed, there would have been constitutional crisis in many States to the extent that governors would have been impeached

[4] For the State Houses of Assembly that supported the proposal see The Source Magazine Vol. 27 No. 15 of August 2, 2010 p. 15.

or would have faced impeachment threat for violating the constitutional provisions.[5]

However, the State Houses of Assembly subsequently started agitating for constitutional amendment that will guarantee their autonomy. The then Chairman of the Conference of Speakers of State Houses of Assembly, Hon. Garba Inuwa, urged the National Assembly to consider an amendment that will enable State Assemblies to receive their money directly as a first charge on the state allocation. He contended that the measure will go a long way in helping the State Assemblies to realise their full autonomy and free them from undue interference from any quarters.[6]

Amendment similar to the amendment of section 81 of the 1999 constitution in favour of State Houses of Assembly was achieved through the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 4) Act, 2017 Act No.7 which amended section 121 of the 1999 in the same fashion as the foregoing amendment of section 81.

The Alteration seeks to provide for the funding of the Houses of Assembly of States directly from the Consolidated Revenue Fund of the States by substituting for subsection (3) of Section 121 of the principal Act which read: "Any amount standing to the credit of the judiciary in the consolidated Revenue Fund of

[5]Macauley, Aniefiok "We Rejected the Autonomy to avert Constitutional Crisis, says A'Ibom Assembly Speaker" Daily Independent 24th August, 2012 p. 8.

[6] See Ezigbo, O. "Governors, State Assemblies Disagree over Autonomy" Thisday, 26th May 2012 p. 1.

the State shall be paid directly to the heads of the courts concerned" a new subsection (3) reads:

> Any amount standing to the credit of the – (a) House of Assembly of the State; and (b) Judiciary; in the Consolidated Revenue Fund of the State shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of the courts concerned.

A former Deputy Senate President and the then Chairman of the Constitution Review Committee of the National Assembly, Senator Ike Ekweremadu, described the alteration of section 81 of the 1999 Constitution as amendment for "financial autonomy for the National Assembly". In eulogising the amendment, he said:

> A milestone was also scored by securing the financial independence of the National Assembly from the Executive arm. Given the vital role of the National Assembly which I highlighted earlier, it was indeed a misnomer to have an arm of government which is the direct representative of the people and which is supposed to oversight the executive and help to check excesses in line with the principle of checks and balance to be dependent on the same executive arm for funding.[7]

This pronouncement will be interrogated in due course.

[7]Ekweremadu, I. "The Politics of Constitution Review in a Multi-Ethnic Society" Annual Lecture of the Law Faculty, Nnamdi Azikiwe University, Awka delivered at the University Auditorium on 19 October 2015 p. 9.

C. ISSUES ARISING FROM THE AMENDMENT

The following questions have become pertinent in respect of the purported amendment for the 'financial autonomy' of the legislature. Is autonomy of the legislature consistent with the doctrine of separation of powers and the twin principle of checks and balances? Being part of the basic structure of the constitution can parliament alone alter the separation of powers and checks and balances entrenched in the constitution? Does the amended section or indeed any other section of the constitution actually guarantee the financial autonomy for the legislature? What is the effects of "financial autonomy of the legislature" on the national integrity system? Who will exercise legislative oversight over the projects being executed by the members of the legislature? These questions will now be addressed.

(a) Whether Autonomy of the Legislature is Consistent with The Concepts of Separation of Powers and Checks and Balances

The doctrine of separation of powers is inchoate in the absence of the twin principle of checks and balances. A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no overlapping or co-ordination will be contrary to the objectives of separation of powers. What the doctrine seeks to achieve is the prevention of tyranny by not conferring too much power on anyone person or body, and the check of one power by another.[8]

[8] Philips, O. H. et. al. O. Hood Philips': Constitutional and Administrative Law 6th ed. (London: Sweet & Maxwell, 1978) p.14

In essence, the concept of separation of powers is incomplete without the concept of checks and balances. The latter supplements the former, and both concepts constitute a dual principle. Any system of government based on the principle of separation of powers that fails to incorporate some elements of the twin principle of checks and balances will lack co-ordination of the three branches of government and risk the possibility of partial tyranny in the form of isolated legislative, executive or judicial abuse. In the words of James Madison,

> Unless these departments of government be so far connected and blended as to give each a constitutional control over others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be maintained.[9]

Similarly, M.J.C. Viles[10] maintained that "the need for separating governmental powers by constitutional fiat comes from an assumption that if unrestrained by external checks, any given individual or groups of individuals would tyrannize over others." Montesquieu himself was not oblivious of this fact. He asserted that to prevent abuse of power, it is necessary that, by the nature of things, one power should check another. He is quite right. It is difficult if not impracticable for an individual, no matter how rich, powerful or influential, to constitute a check on a power of government. One power should rather be a counterpoise to other powers. In other words, the theory of

[9] The Federalist No 48 p.321

[10]Viles, M.J.C. Constitutionalism and the Separation of Powers (London: Oxford University press, 1967) p.

separation of powers never envisaged three autonomous governments or three autonomous branches of one government. What is envisaged is one government with three branches. The Constitution specifically assigned powers, duties and functions to each branch generally but also constitute each branch a check on the other branches.11Consequently, legislative autonomy for whatever purpose is antithetical to the concept of separation of powers and checks and balances. In the Nigerian context, autonomy of the legislature is a synonym for vesting of legislative and executive powers on the legislature with the consequent abuses.

(b) **Whether Alterations relating to Separation of Powers and Checks and Balances are not Repugnant to the Basic Structure Doctrine**

Nigeria borrowed the basic structure doctrine from Indian. In the Indian case of *Kesavananda v State of Kerala*[12] a majority of the Indian Supreme Court held that the basic structure of the constitution cannot be altered through the process of constitutional amendment. The Nigerian Supreme Court has identified the principle of separation of power as part of the basic structure of the constitution which cannot be altered through the procedure for constitutional amendment or alteration. Ejembi Eko, J.S.C., speaking for the Nigerian

[11]Aminu, Murtala "Judicial Power and its Independence" in Gidado, M.M. et. al. (ed) Constitutional Essays in Honour of Bola Ige – Nigeria Beyond 1999: Stabilizing the Polity through Constitutional Re-Engineering (Enugu: Chenglo Limited, 2004) p. 111 at 114.
[12] A. 1973 S.C. 1461

Supreme Court adumbrated the basic structure doctrine in *Cocacola (Nig.) Ltd. V. Akinsanya*[13]. According to his Lordship, the "basic structure" doctrine in constitutional law postulates that parliament is subject to inherent limitations, and that parliament cannot use its amending powers to damage, emasculate, destroy abrogate change or alter the basic structure or framework of the Constitution which includes: supremacy of the constitution; republican and democratic form of government; secular character of the constitution; separation of powers between the legislature, the executive and the judiciary; federal character of the constitution (which includes devolution of powers); sovereignty. In the circumstance, the National Assembly acted *ultra vires* in purporting to have amended the constitution for the autonomy of the legislature, thereby altering the basic structure of the 1999 Constitution.

(c) **Increasing the Opportunities for Corruption through Weakening of the National Integrity System**

Integrity and corruption are conceptually linked terms – with one the obverse of the other. In fact corruption has been defined as acquired integrity deficiency syndrome (A.I.D.S.). Integrity in the context of the national integrity system is the use of public power for officially endorsed and publicly justified purposes.[14] On the other hand, corruption in relation to the public sector is the use (or abuse) of public power, position or office for private purpose.

[13] (2017) 17 NWLR (pt. 1593) 74 at 118.

[14] Pope, J. Confronting Corruption: The Elements of a National Integrity System (Berlin, Transparency International, 2000) p. 33.

The national integrity system consists of key institutions, laws and practices that contribute to integrity, transparency and accountability in a society. The pillars of the national integrity system includes the executive, the legislature and the judiciary. The pillars will be effective when one constitutes a check on the others.[15]The elements of the national integrity system are similar to the preventive measures under the United Nations Convention against Corruption 2000 (UNCAC). When it functions properly, the national integrity system combats corruption as part of the larger struggle against abuse of power. The converse is equally true. The national integrity system approach provides a benchmark for assessing the adequacy and effectiveness of national anti-corruption efforts or measures.

"An integrity system seeks a move away from a hierarchical structure in governance which promotes corruption to a system of horizontal accountability; one in which power is dispersed, where no one has a monopoly, and where each is separately accountable. Under a system of horizontal accountability, a virtuous circle is perfected: one in which each actor is both a watcher and is watched, is both a monitor and is monitored".[16] The National integrity system concept adopts a holistic and systemic approach to tackling corruption by providing for the building into governmental mechanisms and structures insitu parapets for transparency and accountability. The 1999 Constitution of Nigeria seeks to achieve this, by among other

[15] The other pillars include: civil service; watchdog agencies; civil society, including the professions and the private sector); mass media; international agencies. Ibid p. 36.
[16]Ibid .

things, entrenching the principle of separation of powers and checks and balances in the constitution.

The legislature constitutes one of the main pillars of the national integrity system. One of the indicators for assessing the viability of the legislature as a pillar of integrity is whether there are clear and well-understood conflicts of interests laws which constitute an effective barrier to elected members of the legislature using their positions for personal benefit.

Financial autonomy of the legislature per se is a subversion of the integrity system. A legislative body that proposes its own budget, approves the budget and executes the budget has put itself in a position where the interests of its members will often be in conflict with the national and public interests.

It has been pertinently observed that a major challenge facing the ordinary Nigerians in the current democratic dispensation is the failure of its representatives in the legislature to selflessly protect the interest of the people in the laws they make as, very often, personal and parochial goals have been the guiding principles in the legislative process.[17]

(d) **Whether the Alterations to Sections 81 and 121 of the Constitution imply the Financial Autonomy of the Legislature**

[17]Udombana, N.J. "Public Interest Consideration in Legislative Representation: Perspectives on the Nigerian National Assembly" (2016) 3 U.J.P.L. p. 1.

Proceeding from the premise that under a system of separation of powers, there is one government with three overlapping branches, it becomes necessary to determine whether money budgeted for capital projects stands to the credit of any other organ other than the executive. This calls for a definition of the organs and the nature of their respective functions. It is submitted that money can only stand to the credit of any of the organs according to the nature of the task to be performed, and not according to the organ where the task has to be performed bearing in mind that sections 4, 5, and 6 of the 1999 constitution which entrenched the doctrine of separation of powers have not been amended. Sections 4, 5, and 6 of the 1999 Constitution are under Chapter II of the Constitution with the heading: "Powers of the Federal Republic of Nigeria". "Power" is defined by section 318 of the Constitution to include functions and duty. It becomes pertinent to reproduce the relevant provisions of these sections.

Section 4 of the 1999 which provides for the legislative powers reads as follows:

> 4(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives. …
> (6) The legislative powers of a State of the Federation shall be vested in
> the House of Assembly of the State.

The executive power is provided for in section 5 of the 1999 constitution as follows.

5.(1) Subject to the provisions of this Constitution, the executive powers of the Federation:

(a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and

(b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

(2) Subject to the provisions of this Constitution, the executive powers of a State:

(a) shall be vested in the Governor of that State and may, subject as aforesaid and to the provisions of any Law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State; and

(b) shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws.

In respect of the judicial powers, section 6 of the 1999 constitution provides as follows.

> **6**(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
>
> (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

The Constitution went further to define and delimit the scope of judicial powers as follows.

> 6(6) (a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law
>
> (b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The constitution placed some limitations on judicial power in section 6(6)(c) and (d).

It is now necessary to define these powers, assuming that they were not sufficiently defined by the constitution. Legislative power has been defined as the power to make laws and to alter

them; a legislative body's exclusive authority to make, amend, and repeal laws.[18]

On the other hand, the executive organ has been described as that arm of the government which carries out or executes the will of the people as enacted in its laws.[19] Executive power is the power to see that laws are duly executed and enforced.[20]The enigmatic constitutional lawyer, Nwabueze gave a more comprehensive and lucid definition of the concept and scope of executive power as follows.

> The term "executive power" may be defined, first and foremost by reference to functions that partake indisputably of execution. Such, for example, is the doing or execution of physical acts e.g. construction works, provision of infrastructural facilities or welfare services, other activities involving physical action, like the conduct of military operations, the minting of coins, the printing of currency notes and stamps, and the award of contracts for such works.

He posited that interference with such functions by the Legislative Assembly is unconstitutional and void.[21]

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[18] See Garner, B. A. (ed) Black's Law Dictionary 8thedn (St. Paul, MN: West Publishing Co., 1990) p. 611

[19]Ojo, J.D. The Development of the Executive under the Nigerian Constitutions 1960-81 (Ibadan: University Press Limited, 1985) p. 1.

[20] Garner, B. A. op. cit. p. 919

[21] See http.//www.vanguard.com/2017/04 accessed on 24 January 2020.

Judicial power is the authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it.[22]Perhaps, the most widely accepted definition of judicial power was given by Chief Justice Griffith of the High Court of Australia in *Huddart, Parker & Co. Proprietary Ltd. v Moorehead*[23]. According to His Lordship, judicial power

> means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunals which have power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

This definition of judicial power was adopted without reservation by the Judicial Committee of the Privy Council in the Australian case of *Shell Co. of Australia v. Federal Commissioner of Taxation*[24] and the Nigerian Supreme Court in *Bronik Motors Ltd. v Wema Bank Ltd.*[25]

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[22] See Garner, B. A. op. cit. p. 865.
[23] (1909) 8 C.L.R. 330 at 338.
[24] (1931) A.C. 275 at 295 and 297.
[25] (1983) 1 SCNLR 296. See also Anakwenze v Aneke(1985) 1 NWLR (pt. 4) 771 (S.C.); Adesanya v President of the Federal Republic of Nigeria (1981) 2 NCLR 358. For further examination of the concept of judicial power and the characteristics of the judicial functions see Ogbu, O.N. Modern Nigerian Legal System 3rdedn (Enugu: SNAAP Press, 2013) p. 202.

The Supreme Court of Nigeria has pertinently expressed the opinion that under the 1999 constitution, a single executive is envisaged. In *Ag. Federation v Abubakar*[26] it was held that the Nigerian Constitution envisages a single executive for which the President is the head and has vested in him, the executive powers. And, the principle of a single executive implies the preclusion of a concurrent vesting of the executive powers in two or more persons of equal authority. The principle also has the effect that the legislative organ cannot take away from the President or confer on others, functions of strictly executive nature. Accordingly, it is submitted that execution of capital projects partakes of the nature of executive function, and therefore any fund for capital project stands to the credit of the executive irrespective of the branch of government where the project will be executed. One agrees with President Mohammed Buhari when he charged that the legislative arm must keep to its brief of making laws and carrying out oversight functions.[27] Nigerian courts have always urged that each arm of the government must keep to its mandate. In *Military Governor of Lagos State v Ojukwu*[28]Kayode Eso, J.S.C. said:

> Under the Constitution of the Federal Republic of Nigeria, 1979, the executive, the legislative, and the judiciary are equal partners in the running of a successful government. The powers granted by the constitution to these organs by section 4 (legislative powers), section 5 (executive powers), and section 6

[26] (2007) 10 NWLR (pt. 1041) 1.
[27] Inaugural Speech by President MuhammaduBuhari see The Guardian May 30, 2015 p. 3.
[28] (1986) 1 NWLR (pt. 18) 621.

> (judicial powers) are classified under an omnibus umbrella known under part II to the constitution as powers of the Federal Republic of Nigeria. The organs wield these powers and one must never exist in sabotage of the other or else there is a chaos.

The Nigerian Supreme Court like its United States counterpart has rendered other judgments that protect the sanctity of the constitutional separation of powers. In *Ag. Bendel*v Ag. *Federation* & 22 *others*[29], Fatai Williams, J.S.C., speaking for the Nigerian Supreme Court, said:

> What is this doctrine of separation of powers? The object of the constitution was to establish three great departments of government - the legislative, the executive, and the judiciary. The first was to pass the laws, the second to approve and execute them, and the third to expound and enforce them. The object of the creation by the constitution of the three separate departments of government is not merely a matter of convenience or of governmental mechanism but is basic and vital, to preclude a co-mingling of different powers in the same hands. Each of the three departments of government should be kept completely independent of the others so that the acts of each shall not be controlled by or subjected directly or indirectly to the coercive influence of either of the others. The doctrine

[29] (1982)3 SNCLR 1

> of separation of powers which is fundamental to the constitutional system of the Federal Republic of Nigeria arises not from any provision of the constitution but because behind the words of the constitutional provisions are postulates which limit and control the three departments of government.

One does not, however, agree that the doctrine arises not from any provision of the constitution as the constitution provides for the doctrine though without expressly mentioning separation of powers.

As if making a *volte face* from his earlier pronouncement that the legislature should confine itself to law-making and oversight functions, it has been reported that President Buhari has signed Executive Order No. 10 of 2020 for the implementation of financial autonomy of state legislatures and state judiciaries, and also set up a Presidential Implementation Committee to fashion out strategies and modalities for the implementation of the Order, allegedly in compliance with section 121(3) of the 1999 constitution. The Committee is expected to consider all other applicable laws, instruments, conventions and regulations, which provide for financial autonomy at the state tier of government. It was reasoned that the implementation of the Order would strengthen the institutions at the state level and make them more independent.[30] Based on the Order, all states of the federation shall include the allocations of the two arms of

[30] See Akaragha, Igho "Buhari Approves Order Granting Autonomy to State Legislatures, Judiciary" The Guardian 23 May 2020 p. 3.

government in their appropriation laws. Paragraph 6 of the Order provides as follows:

> Notwithstanding the provisions of this Executive Order, in the first three years of its implementation, there shall be special extraordinary capital allocations for the judiciary to undertake capital development of State Judiciary Complexes, High Court Complexes, Sharia Court of Appeal, Customary Court of Appeal and Court Complexes of other Courts befitting the status of a Court.

Paragraph 1(b) of the Executive Order 10 similarly provides as follows:

> The accountant-general of the Federation shall by this order and such any other orders, regulations or guidelines as may be issued by the attorney general of the Federation and minister of justice, authorize the deduction from source, in the course of Federation accounts allocation from the money allocated to any state of the Federation that fails to release allocation meant for the state legislature and state judiciary in line with the financial autonomy guaranteed by section 121(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)".

Apart from the Executive Order, a bill to grant financial autonomy to Houses of Assembly and the Judiciaries of States has already passed second reading in the House of

Representatives.[31] In any case, it is reported that the 36 State Governors have invoked the original jurisdiction of the Supreme Court to challenge the constitutionality of Executive Order 10.[32] While State Governors are kicking against the Executive, officials of the Presidency have risen in support of it. In justification of the Executive Order, the Senior Special Assistant to the President on Niger Delta Affairs, Senator Ita Enang[33] said that the constitution has provided that each of the three arms of government should be managing its own affairs and should have its own independence in terms of funding. She explained how the amendment to section 81(3) has been implemented at the Federal level as follows:

> In summary it is the same position that we have at the Federal level now where when there is Federation Accounts Allocation and the money of the Federal Government is given, the Accountant General of the Federation will release the money that is meant for the Judiciary to the Judiciary through the National Judicial Council. The National Judiciary Council through its Secretary will now make the money available to the Head of the Supreme Court, the money of the Court of Appeal to the Chief Registrar of the Court of Appeal, the one for the

[31] (Author not indicated) "Judiciary, Assembly Autonomy Bill scales second reading" The Guardian 28 July 2020 p. 24.

[32] See Unimah, A "States Drag FG to Supreme Court over Executive Order 10" Thisday.com, 29th December, 2020 accessed on 20th January, 2020.

[33] Formerly Senior Special Assistant to the President on National Assembly Matters (Senate).

> National Industrial Court goes to the Chief Registrar of the National Industrial Court to be administered at the instance and direction of the President of the National Industrial Court. The money meant for the Federal High Court goes to the Chief Registrar of the Federal High Court for the administration of all the Federal High Courts in the entire country. The one of the Customary Court of Appeal and the Sharia Court of Appeal goes to the respective courts. Therefore, it is the same model which the Committee recommended and the President has signed it as an executive order.[34]

The foregoing comments on the so-called financial autonomy of the National Assembly applies to the provisions of the Executive Order 10 *mutatis mutandis*.

D. THE PROPER ROLE OF THE LEGISLATURE IN THE MANAGEMENT OF PUBLIC FINANCE

Prior to the recent alteration of the constitution for the so called "financial autonomy of the legislature", the constitution made copious provisions on the role of the legislature in the management of public finance. The power of authorizing public expenditure is vested on the legislature – the National Assembly at the Federal level and the respective State Houses of Assembly. Part 1(E) of the constitution is on the powers and

[34] Ali, Yusuf et. al. "Governors kick as Buhari okays financial autonomy for assemblies, judiciary" The Nation May 24, 2020 pp. 4-5.

control over public funds by the legislature. Section 80 of the1999 Constitution provides as follows:

(1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.

(3) No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorised by an Act of the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation except in the manner prescribed by the National Assembly.[35]

Section 81 of the1999Constitution which deals with authorization of expenditure from the Consolidated Revenue Fund provides as follows.

(1) The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.

[35] Section 120 of the 1999 Constitution contains equivalent provision in relation to the States.

(2) The heads of expenditure contained in the estimates other than expenditure charged upon the Consolidated Revenue Fund of the Federation by the Constitution shall be included in a bill to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet the expenditure and the appropriation of those sums for the purposes specified therein.[36]

Thus, section 81 provides for what is popularly known as budgeting for the expenditure of public revenue.[37]A government budget is a document that sets out how a government proposes to collect and spend money over a given financial period. The proposals contained in a government's budget reflect its policy priorities and fiscal targets (expenditure versus revenue). In this way the budget expresses the objectives and aspirations of a government in power. In outlining its plans for spending money in the budget, the government is explaining how it intends spending money that belongs to the public in a democratic society.[38] Preparation of budgets for presentation

[36] Similar powers are vested on Governors by section 121 of the Constitution.

[37] See Guobadia, A, "The Legislature and Good Governance under the Constitution", in I.A. Ayuaet. al. (ed) Nigeria: Issues in the 1999 Constitution (Lagos: Nigerian Institute of Advanced Legal Studies, 2000) 43 at 47, cited by Nweze, C.C. "Legal Regulating of Budgeting in Nigeria" (2002) 1 J.E.S.C.R. p. 4.

[38] See "The Citizen's Handbook on Public Finance: A Focus on the Government Budget" developed by the National Accountability Group of Sierra Leone p. 13.

for legislative approval is invariably an executive function. Other arms of government can only make input by sending their proposals to the executive as it affects them but the executive is not bound by the proposals.

It is the legislature that has the power to appropriate money for the execution of the projects of the executive through passage of the appropriation bills. It is the executive that ought to initiate or make proposal for the expenditure. There is no constitutional provision that enables the legislature or any other arm for that matter to propose a budget and send it to the legislature for approval. The fact remains that the executive arm of government should be the ultimate controller of public finance and services.[39]

One controversy that has often arisen between the legislature and the executive is whether the legislature can increase the amount budgeted by the executive or whether the legislature can introduce new heads of expenditure that were not included in the appropriation bill presented by the executive. For instance, the year 2000 Federal budget was an issue of discord between the executive and the legislature. In the first place, President Obasanjo had calculated his budget proposals based on revenue projection of $18 dollars per barrel of crude oil. The National Assembly in approving the budget based its projection on $20 per barrel. At the end, while the executive had a budget of N570 billion the legislature approved a budget of N677 billion.[40] Incidentally the National Assembly was the greatest beneficiary

[39]Ibid.
[40]Newswatch, May 1 2000 pp. 11-12

of the budgetary increase. It increased both its capital and recurrent expenditure by over 500%.

A renowned legal luminary, Williams[41], took side against the National Assembly on this matter. He observed that under the constitution (section 81), proposals for public expenditure are to be put forward to the National Assembly by the executive. The National Assembly, according to him, may in its wisdom say that the money the President wants to spend is too much or that they do not agree that that amount of money be spent in the next 12 months, and for that reason, they may cut the estimate. For the legislature to assume the power to increase the estimate is in reality to usurp the initiative of the President to put forward proposals for the spending of public money.[42] He further argued that in the same vein, the legislature cannot create new expenditure heads. Furthermore, it will be wrong, he contended, for the legislature to move money around by virement from expenditure head to another.

This view is in tandem with the opinion expressed by Nwabueze, the eminent constitutional lawyer, on the matter. He said:

> The National Assembly . . . can reduce, but not increase the total amount . . . because an increase in the total amount partakes of the [nature of] initiation as regards the excess amount over and above the total figure in the appropriation bill.[43]

[41] Chief F.R.A. Williams was a Senior Advocate of Nigeria.
[42] See The Guardian, Monday, December 4, 2000 p. 8
[43]Nwabueze, B. O. "The President, the National Assembly and the Right to Initiate Budget" The Guardian, Monday, May 22, 2000 p. 8.

This position is also supported by many other respected jurists and academic commentators.[44] Notwithstanding the above views, the legislature has continued to increase budget estimates and also to introduce new budget heads. Unfortunately, the executive has not invoked the jurisdiction of the court for a judicial resolution of the question.

Currently, the National Assembly not only prepares its budget, approves the budget and executes or implements the budget in the guise of legislative autonomy, albeit unconstitutionally, but its budget is normally shrouded in secrecy. A civil society group which champions awareness on budget matters, BudgIT, has always faulted the claim that the budget of the National Assembly is not a secret document. According to the organization, no one can specifically state how the National Assembly spends its budget annually. The organization said that every release of the National Assembly budget only presented a single, total figure, which does not state exactly how much of taxpayers' funds are for personnel costs of the National Assembly members, or their allowances or other expenditures.[45]

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[44] For instance, Nweze, C.C. op. cit. p. 8.; Yakubu, M.G. "The Legislature as the Watchdog of Public Funds" in Umezulike, I.A. (ed) Towards the Stability of the 3rd Republic (Enugu: Fourth Dimension Publishers, 1993) p. 323; Ogbu, O. N. "The Doctrine of Separation of Powers and the Nigerian Nascent Democracy: Theory and Practice in Focus" (2001) The Constitution: A Journal of Constitutional Development Vol. 1 No. 3 p. 23 at 39; Iloegbune, C. U. "The Nigerian Constitution 1999 and the Law Maker" in Nweze, C.C. (ed) Justice in the Judicial Process (Enugu: Fourth Dimension Publishers, 2002) p. 320.

[45]Amzat, Ajibola "BudgIT faults Mark's claim on N'Assembly budget details" The Guardian June 3, 2015 p. 3.

E. EFFECT OF AUTONOMY OF THE LEGISLATURE ON GOVERNMENTAL EFFICIENCY

Americans are so obsessed with preventing tyranny through separation of powers that they are prepared to sacrifice efficiency in government for separation of powers. Placing the value of prevention of tyranny over governmental efficiency, Vile said:

> We are not prepared to accept that government can become, on the ground of 'efficiency' or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships. Some broad ideas about 'structure' must guide us in determining what is a 'desirable' organisation for government.46

This sentiment was echoed by Justice Branders of the U.S. Supreme Court, who said:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[47]

[46] Ibid p.320.
[47] See Youngstown Sheet & Tube Co. v Sawyer 343 US 579.

On the contrary, the Nigerian Supreme Court has expressed the opinion that the doctrine is intended to promote efficiency in governance in addition to preventing tyranny. Thus, Obaseki, JSC, speaking for the Nigerian Supreme Court in *Unongo*v *Aku*,said:

> I do not claim to know the reason for the adoption of the doctrine in the U.S Constitution but it seems to me that in so far as our Constitution is concerned observance of the doctrine is meant to promote both efficiency and preclude the exercise of arbitrary power.[48]

There will be efficiency when the different arms of government specializes in its field than being a jack of all trades and master of none. A legislative body that dabbles into the exercise of executive functions will not perform efficiently the executive functions. Perhaps, it may even affect the efficient performance of the legislative function.

Legislative autonomy will lead to duplication of governmental offices and officers. It will now mean that both the executive and the legislature will each employ its own architects, engineers, surveyors etc. for its own purposes when these offices which normally exist within the appropriate ministry in the executive branch of the government could have as well performed the functions.

Of course, efficiency is an element of good governance. Efficiency in governance means that processes and institutions

[48] (1983)2 SCNLR 332 at 361

produce result that meets the needs of society while making the best use of scarce resources at their disposal.[49]

F. LEGISLATIVE OVERSIGHT OVER THE LEGISLATURE

Section 88 of the 1999 Constitution which provides for the oversight functions of the National Assembly reads as follows.

> 88**.** (1) Subject to the provisions of this Constitution, each House of the National Assembly shall have power by resolution published in its journal or in the Official Gazette of the Government of the Federation to direct or cause to be directed investigation into -
> (a) any matter or thing with respect to which it has power to make laws, and
> (b) the conduct of affairs of any person, authority, ministry or government department charged, or intended to be charged, with the duty of or responsibility for -
> (i) executing or administering laws enacted by the National Assembly, and
> (ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly.
> (2) The powers conferred on the National Assembly under the provisions of this section

[49] The United Nations Economic and Social Commission for Asia and the Pacific defined good governance in terms of eight characteristics which includes efficiency.

> are exercisable only for the purpose of enabling it to -
> (a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and
> (b) expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.[50]

For the exercise of the oversight functions, the National Assembly is vested with the following powers under section 89 of the 1999 Constitution.

> 89. (1) For the purposes of any investigation under section 88 of this Constitutional and subject to the provisions thereof, the Senate or the House of Representatives or a committee appointed in accordance with section 62 of this Constitution shall have power to –
> (a) procure all such evidence, written or oral, direct or circumstantial, as it may think necessary or desirable, and examine all persons as witnesses whose evidence may be material or relevant to the subject matter;
> (b) require such evidence to be given on oath;
> (c) summon any person in Nigeria to give evidence at any place or produce any document or other thing in his possession or

[50] Section 128 of the Constitution contains equivalent provision in relation to the States.

> under his control, and examine him as a witness and require him to produce any document or other thing in his possession or under his control, subject to all just exceptions; and
> (d) issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails, refuses or neglects to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House or the committee in question, and order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his failure, refusal or neglect to obey the summons, and also to impose such fine as may be prescribed for any such failure, refused or neglect; and any fine so imposed shall be recoverable in the same manner as a fine imposed by a court of law.
> (2) A summons or warrant issued under this section may be served or executed by any member of the Nigeria Police Force or by any person authorised in that behalf by the President of the Senate or the Speaker of the House of Representatives, as the case may require.[51]

A community reading of sections 88 and 89 and other relevant provisions of the constitution makes it clear that legislative

[51] See section 129 of the 1999 Constitution which confers similar powers on State Houses of Assembly.

oversight is intended to be exercised by the legislature not over itself but over the executive organ of the government. When the legislature becomes autonomous and starts carrying out executive functions within its own branch, who will exercise legislative oversight in respect of the performance of those functions? The legislature is the watchdog of public fund. The task of the legislature has aptly been described as "to express the sovereign will of the people through their chosen representatives, who, on their behalf, hold the executive accountable on a day-to-day basis"[52].

On a proper construction of section 88(1)(b)(ii) of the 1999 constitution, the authority to investigate into the affairs of those disbursing or administering moneys appropriated, and indeed those to be appropriated, has been said to amounts to a constitutional warrant to control actual expenditure.[53]The Supreme Court in *A.G. Abia State v A.G. Federation*[54] defined the scope of oversight function as follows. "There are three types of oversight functions. These are the power of the legislature to conduct investigations, control and surveillance over the financial affairs of the executive, and control and supervision of government general business. A pertinent question will be whether the legislature will be exercising the control when it is spending the money it budgets for its own capital projects. Secondly, who will exercise the function in respect of the constituency projects being executed by the legislators?

[52] Pope, J. op. cit. p. 47
[53]Nweze, C.C. op. cit. p. 10.
[54] (2006)16 NWLR (pt. 1005) 265 at pp. 279-380.

All legislative bodies have some form of oversight authority which takes different forms depending on the governmental system. Citizens throughout the world increasingly insist on government accountability for both the manner in which in conducts public affairs and the outcome it achieves. Legislative oversight usually focuses on executive corruption and incompetence or on misuse of government funds and power, though it may deal with efficiency or effectiveness of government operations with the aim of uncovering administrative and other shortcomings.

Legislative oversight does not involve obtaining funds for projects, accepting gratifications from or trading favours with agencies being supervised as has become the trademark of Nigerian legislative bodies. The legislature is designed to act as a countervailing force against abuse of power and exercise of arbitrary powers. Unfortunately, some legislators are blinded by the desire of personal advantage.[55] The International Commission of Jurists in the Declaration of Delhi made the following pronouncement on what the function of the legislature in a free society should be.

> The function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic,

[55]Oko, Okechukwu "Building Cordial Legislature-Executive Relations in Nigeria" paper delivered at the National Conference on Executive-legislature Relations held at the International Conference Centre, Abuja on April 24, 2013 p. 3

> educational and cultural conditions which are essential to the full development of his personality.[56]

On the contrary, the Nigerian legislators are driven by self interest in the performance of their legislative functions. For instance, while Nigerian public servants are among the lowest paid in the world with a minimum wage of N30,000.00 per month, Nigerian legislators are among the highest paid in the world.[57]

H. EFFECT OF MAKING THE BUDGET OF THE LEGISLATURE A CHARGE ON THE CONSOLIDATED REVENUE FUND

[56] Clause I of conclusions of the Committee on the Legislative and the Law in "The Rule of Law in a Free Society" A Report on the International Congress of Jurists, New Delhi, India, 1959 p. 75

[57]For a breakdown of what members of the National Assembly earn, see Cole, P.D. "National Assembly Members' curious pay" The Guardian September 4 2020 p. 26 which is as follows. For a Senator: Newspaper Allowance - N1.24m; Wardrobe Allowance – N0.52m; Recess Allowance – N0.25m; Accommodation – N4.97m; Utilities – N0.83m; Domestic Staff – N1.86m; Entertainment – N0.83m; Personal Assistant – N0.62m; Vehicle Maintenance Allowance – N1.86m; Leave Allowance – N0,25m. The total running cost for a Senator is N13.58 million per month. His monthly salary is N750,000.00 per month. In addition, he is entitled to N200,000.00 annually to execute constituency projects. He also gets Severance Gratuity – N7.43m; Furniture Allowance – N7.45m; Motor Vehicle Allowance – N9,94m. The allowances and running costs of members of the House of Representatives are similar but slightly lower. The jumbo allowances and running costs are fallouts of the so-called autonomy of the legislature.

The Constitution (First Alteration) Act added the National Assembly to the list of bodies to receive direct payment of funds from the Consolidated Revenue Funds of the Federation. Traditionally, according to Akande, all moneys charged directly on the Consolidated Revenue Fund are not subject to annual debate in the National Assembly because once fixed they do not appear on the annual budget estimate presented in the Appropriation Bill because they are not subject to changes during the term of office of the incumbent office holder.[58] Normally, it is such expenditures like the emolument of judges that are charged to the Consolidated Revenue Fund to ensure that their emoluments are not altered to their disadvantage. For instance, by section 84 of the 1999 constitution, the emolument of certain public officers at the Federal level are charged to the Consolidated Revenue Fund of the Federation. Similarly, the emoluments of certain public officers at the State level are charged to the Consolidated Revenue Funds of the States. This is the usual way promoting the independence of such offices.

Purporting to be acting pursuant to the alteration to the section 81(3) of the 1999 constitution, the National Assembly removed its budget from the Federal Government overheads to part of the annual statutory transfers that must be released whenever demanded.[59] The implication of charging the entire budget of the National Assembly to the Consolidated Revenue Fund of the

[58]Akande, J. O. Akande: Introduction to the Constitution of the Federal Republic of Nigeria 1999 (Lagos: MIJ Professional Publishers Limited, 2000) p. 187.

[59]Udombana, N.J." Public Interest Consideration in Legislative Representation: Perspectives on the Nigerian National Assembly" (2016) 3 U.J.P.L.1 at 26-27.

Federation is that the executive will lose control of management of the economy. For instance, where there is a budget shortfall and the Government needs to cut down its budget, it cannot reduce the allocation for the legislature but must first release it to the National Assembly before attending to other non-statutory allocations. In effect, funding the legislature will take precedence over critical sectors like education, health, payment of the emoluments of public servants etc.[60]

It is being insinuated that because the legislators have dabbled into executive functions contrary to the constitution that they are now seeking to further amend the constitution to grant immunity to the principal officers of the legislature.[61]The bill for the purpose, if passed into law, will shield members of the leadership of the National and State Assemblies from prosecution for offences they may be suspected to have committed. Already the legislators enjoy immunity from being sued or prosecuted for what they do or say on the floor of the National Assembly.

I. CONCLUSIONS AND RECOMMENDATIONS

Section 81 of the 1999 Constitution were amended to give the National Assembly what has been termed "financial autonomy". Similar amendment was made to section 121 of the 1999 Constitution to give the State Houses of Assembly "financial autonomy". The amendments, as interpreted and implemented by the National Assembly, undermined the checks and balances provided for in the original constitution which constitutes part of

[60]Ibid.

[61]Mordi, Raymond "What manner of legislative autonomy?" The Nation 11 March 2020 p. 29.

the basic structure of the constitution. In the circumstance, the amendments are ultra vires the National Assembly. Furthermore, they will weaken the national integrity system thereby increasing the chances of corruption. The "autonomy of the legislature" will not only lead to governmental inefficiency but result in the legislature exercising oversight function over itself contrary to the letters and spirit of the original constitution. Furthermore, when the budget of the legislature constitutes a charge on the consolidated revenue fund of the Federation or State, as the case may be, it will be tantamount to giving priority to the budget of the legislature over essential services. The amendments will serve only the personal interests of the legislators and not the interest of the Nigerian people the legislators are supposed to be representing.

It is recommended that all the constitutional amendments relating to the "financial autonomy" of the legislature should be deleted through the process of amendment to restore the *status quo ante* in respect of separation of powers and checks and balances under the 1999 Constitution.