

CHECKING PRESIDENTIAL POWERS IN A NASCENT DEMOCRACY***Abstract**

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN), substantially, arrogates to the Nigerian President, executive powers that are similar to that of the President of the United States, even though the democracies in which they operate are at different levels of development. Whereas Nigeria gained independence in 1960 and has managed to run a government chequered with military coups, the United States has been in existence since the year 1776 and has never experienced a military coup. This paper, on the basis of constitutional concepts, interrogates the powers of the Nigerian President and examines the adequacy or otherwise of the control measures provided in the CFRN. In analysing the scope of presidential powers as enshrined in the CFRN, the study adopts the doctrinal approach and examines the legal provisions that provide for the powers of the Nigerian President, case laws and relevant literature. The study finds that presidential powers in Nigeria are wide and largely unyielding to adequate control from the legislative, judicial and executive branches of government. The situation increases the chances of abuse of power by the President and makes the people susceptible to oppression. Consequently, the recommendations essentially, points in the direction of constitutional review, particularly, by strengthening the control mechanisms contained in the CFRN with respect to the presidential powers.

Keywords: President of Nigeria, Powers, Democracy, Checks and Balances

1. Introduction

Generally, the presidential system of government permits the President of a given state to exercise full executive powers, as head of state and government;¹ just like the Nigerian President.² That is the common understanding.³ Accordingly, the powers are wide and the justification for the magnitude of presidential powers is that it enables the occupant of that office to mobilize resources of the nation with ease and to do what is necessary to execute laws made by the National Assembly.⁴ The powers of the Nigerian President have also been rationalised on the basis that the President is the only public officer who is elected for and by the entire country.⁵ This paper evaluates the content of presidential powers, especially with respect to the arms of government and it became obvious that his/her influence over the other arms of government arouses the question of the adequacy or otherwise of the constitutional control devises, especially in a relatively young, religious and ethno-centric democracy as Nigeria; a democracy having over two hundred and fifty ethnic groups⁶ that are unequal in terms of political influence⁷ and a literacy rate of 62.02%.⁸

The unequal political strength of the ethnic groups makes the country susceptible to conflict which rather inflates the influence of the President. Furthermore, the relatively low literacy level exacerbates

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¹ D. D. Dalhatu, 'The Imperatives of Sustaining Separation of Powers and Checks and Balances Under Presidential System of Government in Nigeria' (2016) (36) *Ahmadu Bello University Law Journal*; 247.

² Tunji Abajomi, *Constitutional Powers and Duties of the President*, (Law Searchers Nig. Ltd, Lagos, 2002), 3, noting that federal executive power is vested in the president of the Federal Republic of Nigeria and also noting that the President has the highest concentration of power when compared with the legislative and judicial arms of government in Nigeria.

³ Kehinde M. Mowoe, *Constitutional Law in Nigeria*, (Lagos, Malthouse Press, 2008), 126-7, stating that '...the only reasonable construction that can be placed on the method of grant of executive power under section 5 (a) of the 1999 Constitution is that it goes beyond powers expressly granted to the President in other provisions of the constitution, except where the power or authority is expressly prohibited by the constitution or a law made by the National Assembly...'

⁴ B. O. Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (Lagos State Ministry of Justice, 2003), 163, noting that the power to execute all laws vests in the President.

⁵ Abayomi, *op. cit.*, 1.

⁶ United States Embassy in Nigeria, 'Nigeria Fact Sheet,' available at www.nigeria.usembassy.gov; last accessed on 16th February, 2021.

⁷ *Ibid*, Hausa and Fulani has 29%, Yoruba 21%, Igbo 18%, Ijaw 10%, Kanuri 4%, Ibibio 3.5 % and Tiv 2.5%.

⁸ Macro Trends, 'Nigeria Literacy Rate 1991 – 2021,' available at: www.macrotrends.net; last accessed on 16th February, 2021. This is similar to a report which says that 35% of Nigerians are illiterate. See This Day, 'The Growing Illiteracy in Nigeria,' available at <https://www.-thisdaylive-com.cdn.ampproject.org/v/s/www.thisdaylive.com/index.php/2019/04/12/the-growing-illiteracy-in-nigeria-/a>; last accessed on 16th February, 2021.

the situation and impugns on the ability of the people to hold the President accountable. This paper argues that the interplay of these variables accentuates the need to adopt a peculiar approach which reflects the realities of Nigeria, in defining the constitutional functions of a Nigerian President. In addition, if the powers of the President of the United States and his/her Nigerian counterpart are substantially the same, then the control devices should be in equal proportion.

2. Constitutional Powers of the Nigerian President

The extensive powers of the Nigerian President are hinted in section 5 of the CFRN which provides that, '[s]ubject to the provisions of this Constitution, the executive power of the Federation shall be vested in the President...' ⁹ Section 130 (2) of the CFRN also states that, 'the President shall be the Head of State, the Chief Executive Officer of the Federation and Commander-in-Chief of the Armed Forces of the Federation.'¹⁰ The gamut of presidential power includes, 'except as otherwise provided for by the Constitution,... all powers enumerated, as well as all powers necessary, proper, warranted or incidental to the execution of the executive authority of the Federation.'¹¹ Thus, there are unwritten presidential powers that are inherent¹² and incidental to the functions of the President. For instance, the promulgation of Executive Orders by the President, although not expressly provided for by the Constitution, has its root in the inherent powers of the President.¹³ The magnitude of the President's power as contained in many sections across the CFRN permits him/her to exercise functions overreaching other arms of government. This paper focuses on those functions of the President which compromises the principle of separation of powers. This would help to reveal the extent of presidential influence.

Presidential Authority in Relation to the Judiciary

The Nigerian President has the power, upon the recommendation of the National Judicial Council and subject to confirmation of the Senate, to appoint the Chief Justice of Nigeria,¹⁴ Justices of the Supreme Court,¹⁵ President of the Court of Appeal,¹⁶ Chief Judge of the Federal High Court,¹⁷ Chief Judge of the High Court of the Federal Capital Territory, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory,¹⁸ President of the Customary Court of Appeal of the Federal Capital Territory.¹⁹ The President may also appoint the following judicial officer upon the recommendation of the National Judicial Council but without recourse to the Senate; Justices of the Court of Appeal,²⁰ Judges of the Federal High Court,²¹ Judges of the High Court of the Federal Capital Territory,²² Kadis of the Sharia Court of Appeal of the Federal Capital Territory²³ and Judges of the Customary Court of Appeal of the Federal Capital Territory.²⁴ Apart from the power to appoint judicial officers, the President is vested with power to grant pardon to persons who have been found guilty of crimes by the courts. Section 175 of the CFRN provides that the president may grant pardon to any person who has been convicted and have a sentence imposed on him. This has the effect of undoing what the Supreme Court has done with respect to criminal cases. The potential that judicial officers appointed by the President may be

⁹ Constitution of the Federal Republic of Nigeria, 1999 (as amended),(hereinafter referred to as CFRN) s. 5 (1).

¹⁰ CFRN, s. 130 (2).

¹¹ Abayomi, *op. cit.*, 20; Mowoe, *Op. cit.*, 127, noting that the power of the President '...goes beyond powers expressly granted to the President in other provisions of the constitution...'

¹² *Myers v. United States* 272 US 52, 115, 126 (1926); *United States v. Curtis Wright Corp* 299 US 304 (1936).

¹³ Sam Amadi, 'Executive Order and Presidential Power in the Nigerian Constitutional Democracy,' *The Guardian of 17th October, 2018*, available at: <https://m.guardian.ng/features/executive-order-and-presidential-power-in-th-nigerian-constitution>; last accessed on 22nd January, 2021, noting that Executive Orders which conform with the rule of law and under the contemplation of the Constitution are legitimate and valid.

¹⁴ CFRN, s. 231 (1).

¹⁵ *Ibid.*, s. 231 (1) & (2), which provides for Justices of the Supreme Court to be appointed by the President upon the recommendation of the National Judicial Council and subject to confirmation by the Senate.

¹⁶ *Ibid.*, s. 238 (1).

¹⁷ *Ibid.*, 250 (1).

¹⁸ CFRN, s. 261(1).

¹⁹ *Ibid.*, s. 266 (1).

²⁰ *Ibid.*, s. 238 (2).

²¹ *Ibid.*, s. 250 (2).

²² *Ibid.*, 256 (2).

²³ *Ibid.*, s. 261 (2).

²⁴ *Ibid.*, S. 266(2).

susceptible to the influence and control of the President is conceivable and this makes the influence of the President very potent and far reaching. If for instance, the President decides to appoint a person who shares his/her intimate ideology, or, a strong bond of affinity this would only further empower the President and render him/her an absolute monarch.

The Executive Powers of the President

The President enjoys wide powers to appoint principal members of the executive organ of government. Thus, he may appoint ministers,²⁵ chairmen and members of executive bodies established by the CFRN and the Inspector General of the Nigeria Police Force²⁶ subject to the approval of the Senate.²⁷ The President is also empowered by the CFRN to appoint, without recourse to the Senate, 'chairman or member of the Council of State or the National Defence Council or the National Security Council...'²⁸ Section 171 of the CFRN empowers the President to appoint and remove the Secretary to the Government of the Federation, the Head of the Civil Service of the Federation, Ambassadors, High Commissioners, Permanent Secretaries, Heads of Extra-Ministerial Departments of the Government of the Federation.

It is important to note that the appointees of the President hold their office at the pleasure of the President who may fire them at will. The power of appointment and dismissal is far reaching as appointees would almost always dance to the tunes of their principal and allow him/her to leverage on the functions of the office they hold. This means that the President could conveniently use his appointees as puppets at many levels/aspects such as law enforcement, finance, foreign engagements, *et cetera*. The Nigerian President also enjoys the exclusive power to declare a state of emergency in Nigeria or any part thereof;²⁹ licence the operation of Television and Radio stations³⁰ and act as Commander-in Chief of the Nigeria Armed Forces.³¹

The Powers of the President with Respect to the Legislature

The legislative powers of the President as expressed by the CFRN are significant and touch on the primary functions of the legislature. Thus, even the influence of the Nigerian legislature could be easily dismissed by the President. The following are the functions of the President which invades the sanctity of the legislature.

Initiation of Appropriation and Executive Bills

Section 81 (1) of the CFRN requires the President to prepare estimates of the revenues and expenditure of the Federation for the next following financial year and lay the estimates and revenue in the form of an appropriation Bill before each House of the National Assembly. This responsibility is addressed to the President exclusively and has formed the basis for condemning the National Assembly when they attempted to increase the amount contained in an appropriation Bill.³² It should be noted, however, that law making is the core function of the National Assembly³³ and that they possess the authority to amend Bills brought before them in the process of passing those Bills into laws. Thus, a reasonable amendment on Appropriation Bills should not be regarded as unconstitutional.³⁴ However, in 2016, it was reported that the budget for that year had been padded by the National Assembly and when same was transmitted

²⁵ *Ibid*, s. 147 (2).

²⁶ *Ibid*, s. 215.

²⁷ *Ibid*, s. 154 (1).

²⁸ CFRN, s. 154 (2). The composition and functions of the bodies established under section 153 (1) are contained in part 1 of the Third Schedule to the CFRN. See section 153 (2).

²⁹ CFRN, s. 305

³⁰ *Ibid*, s. 39 (2).

³¹ *Ibid*, s. 218 (1) – (3).

³² B. O. Nwabueze, *Constitutional Democracy in Nigeria* Vol. 1 (Spectrum Books Ltd., 2004), 264.

³³ CFRN, s. 4.

³⁴ I. J. Udofa, 'Presidential Law-Making Power in Nigeria and America: Turning Presidents into Supermen?' *Global Journal of Politics and Law Research* (5) (3) (2017) p. 5; C. N. Okuma and J. I. Kuma, 'Issues Relating to Budget Padding in Nigeria,' *International Journal of Advance Educational Research* (4) (4) (2019), 101, noting that since the National Assembly has the power to make laws, they cannot be accused of budget padding.

to the President for his assent,³⁵ assent was withheld and the Appropriation Bill returned. This scenario underscores the power of the President and the subservient nature of the stance of the National Assembly even in law-making. Furthermore, the effect of section 82 of the CFRN erodes the relevance of the National Assembly by allowing the President to authorise withdrawals from the Consolidated Revenue Fund of the Federation when the Appropriation Bill has not been passed. Accordingly, the President could do without the National Assembly. Apart from appropriation Bills, the President is entitled to send executive Bills to the National Assembly for enactment; most of the Bills received by the NA usually emanates from the executive arm of government³⁶ and this creates a platform for the President to exert his influence in terms of the content of the law.

Presidential Assent to Bills

Section 58 (3) of the CFRN requires the National Assembly to transmit Bills enacted by the house to the President for his/her assent before that Bill could become an Act of the National Assembly and have the force of law. Where a Bill is presented to the President for his assent, he shall signify within thirty days of receipt whether he assents to same or not.³⁷ If the President withholds his assent, the Bill does not become law. This function is a high legislative function and operates as a single pendulum which decides what Bill becomes law. Although the National Assembly may override the veto power of the President, the process for doing so is cumbersome since it requires the votes of two-thirds majority of the members of each House of the National Assembly;³⁸ ordinarily, Bills are passed in the House by a simple majority.³⁹ The implication of this is that the National Assembly hardly ever musters the steam required to override the veto of the President. In the end, the veto power of the President usually prevails most of the time.⁴⁰

Promulgation of Delegated Legislation

The inherent powers of the President include the faculty to issue executive orders which have the effect of regulating the operation of federal government ministries, departments and agencies.⁴¹ For instance, by virtue of section 315 (2) of the CFRN, the President may issue an order for the purpose of effecting amendments to an existing law for the purpose of bringing such law into conformity to the CFRN. The orders so made are generally referred to as delegated legislation and the courts have the jurisdiction to nullify those orders if they conflict with Acts of the National Assembly.⁴² Although these orders are subsidiary legislations, they have the effect of defining the general direction of government activities especially the executive arm of government. In the long run, these functions advance the increasingly dominating influence the President has over the legislative arm of government.

Political Influence of the President

In a polarized democracy like Nigeria, it is not uncommon to have the legislators from the same political party or ethnic group as the President to advance the interests of the President or even protect the President from sanctions which ought to have been meted out. For instance, when a chamber of the National Assembly summoned the President to a joint sitting over the rising cases of insecurity in the country, the President did not only refuse to attend but had support from Senators and the Attorney-General.⁴³ This is in spite of the provisions of sections 88 (1) (a and (b) and 89 (1) (c) of the CFRN which confers on the National Assembly, the power to investigate any: matter, person, conduct or activities with respect to which it has power to make laws and to invite anybody with respect to anything it has power to make law.⁴⁴ Considering the powers of the Nigerian President, it is almost irresistible to

³⁵ Okuma and Kuma, *op. cit.* 101.

³⁶ Udofa, *op. cit.* 3.

³⁷ CFRN, s. 58 (4).

³⁸ *Ibid.*, s. 58 (5).

³⁹ *Ibid.*, s. 56 (1).

⁴⁰ E. M. Joye and K Igweike, *Introduction to the 1979 Constitution* (London, MacMillan, 1982) 227.

⁴¹ Amadi, *op. cit.*

⁴² *A-G Lagos v. A-G Fed.* (2004) 18 NWLR (pt 904) 1.

⁴³ Vanguard, Why Buhari Can't Honour Reps' Summons – AGF Malami, available at <https://www.vanguardngr.com/2020/12/why-buhari-cant-honour-reps-summons-agf-malami>; last accessed on 16th February, 2021.

⁴⁴ CFRN, s. 89 (1) (c).

hold the view that huge governmental powers are reposed in him/her.⁴⁵ This is because s/he exercises absolute executive powers; enjoys legislative power at the highest level, by assenting to Bills from the National Assembly, appoints judicial officers and could grant pardon to persons found guilty of federal offences.⁴⁶ What the President does with the powers vested in him/her is totally at his discretion. If the agenda of the President is parochial, it could be realized through his/her influence on the arms of government and this arouses the question of whether the control mechanisms established by the CFRN are adequate.

3. Constitutional Restraints on the Powers of the President

In modern democracies, unlimited power is an aberration. Thus, the CFRN attempts to delimit the powers of the President and attempts to promote the interest of the people of Nigeria by codifying the doctrines of the rule of law⁴⁷ and popular sovereignty.⁴⁸ Further limitations on the power of the President as contained in the CFRN,⁴⁹ include principles of separation of powers,⁵⁰ checks and balances⁵¹ on those powers⁵² and human rights.⁵³

Rule of Law

Section 1(1) of the CFRN is unequivocal in declaring that the Constitution is supreme and that all persons and authority including the President are liable to submit to the overarching authority of the CFRN. The Supreme Court had the opportunity to pronounce on the supremacy of the Constitution in *FRN v. Anache* when it held that ‘as our country is sovereign, so too our Constitution and this court will always bow or kowtow to the sovereign nature of our constitution, a sovereignty which gives rise to its supremacy over all other laws of the land.’⁵⁴ Accordingly, the President, while discharging his responsibilities, is bound by the principle of the rule of law as provided for in the Constitution. Accordingly, in *Fawehinmi v President*⁵⁵ one of the bones of contention was whether the appellant had *locus standi* to sue the President who had elected to pay some ministers more emoluments than what was contemplated by law. The respondent contended that only the Attorney-General of the Federation could institute that kind of suit. The Court of Appeal recognized the fact that the Attorney-General would never bring such a suit⁵⁶ and therefore, held that, ‘...since the dominant objective of the rule of law is to ensure the observance of the law, it can best be achieved by permitting any citizen to put the judicial machinery in motion in Nigeria whereby any citizen could bring an action in respect of a public derelict. Thus, the requirement of *locus standi* becomes unnecessary in constitutional issues as it will merely impede judicial functions.’⁵⁷ On the other hand, the provision of section 308 which exempts the President from civil and criminal suits negates the provision of section 1 of the CFRN. Thus, in *Abacha*

⁴⁵ Tunji Abayomi, *Op. cit.*, 2, 21, noting that there is great difficulty in limiting executive power and at the same time maintaining a useful national government and that even the legislative arm of government can scarcely regulate the powers of the President.

⁴⁶ CFRN, s. 175.

⁴⁷ *Ibid.*, S. 1 (1).

⁴⁸ *Ibid.*, s. 14 (2) (a).

⁴⁹ *Ibid.*, 1999, s. 1(1) which provides that the Constitution is Supreme and that any law which conflicts with the provisions of the Constitutions shall to the extent of its inconsistency be null and void and the provisions of the CFRN shall prevail.

⁵⁰ Danjos Denis Danlhatu, ‘The Imperatives of Sustaining Separation of Powers and Checks and Balances Under Presidential System of Government in Nigeria,’ *Ahmadu Bello University Law Journal* 36, (2016): 247, pointing out that the provisions of the Nigerian Constitution, particularly, sections 4, 5 and 6 separate the legislative, executive and judicial powers of the Federal Government of Nigeria.

⁵¹ Markus Bockenforde, *A Practical Guide to Constitution Building: The Design of the Executive Branch*, (International Institute for Democracy and Electoral Assistance, 2011), 28, noting that ‘[a] way to control executive power is by designing a system of checks by and dependencies on the other branches of government.’ Checks on powers exercised by a branch of government are institutionalised mechanisms for controlling the exercise of governmental power. This may be achieved by making a particular arm of government dependent on another in the course of accomplishing an objective.

⁵² Sections 147 (2) and 231 (1) of the CFRN, for instance, provide institutional checks on the power of the President to appoint Ministers and the Chief Justice of the Federation and make him depend on the Senate for approval of his appointments.

⁵³ Abayomi, *op. cit.*

⁵⁴ *FRN v. Anache & 3 ors* (2004) 1 SCM 36

⁵⁵ *Supra.*

⁵⁶ *Ibid.* at 334.

⁵⁷ *Ibid.*

v. Fawehinmi,⁵⁸ the Supreme Court re-stated the law that the Nigerian Head of State could not be made liable to law suits.

Popular Sovereignty

According to the doctrine of popular sovereignty, supreme power belongs to the people who have the inherent authority to constitute a government. The principle is enshrined in section 14 (2) (a) of the CFRN which states that ‘sovereignty belongs to the people of Nigeria from whom government, through this Constitution, derives its powers and authority.’⁵⁹ The implications of the doctrine of popular sovereignty is to the effect that public servants, including the President stand accountable to the people and to this extent, the rights of citizens should be guaranteed by the constitution and be enforceable. Furthermore, it means that the people shall reserve the right to control their government⁶⁰ and it is safe to say that the principle of popular sovereignty not only limits the powers of the President but also implies that the President holds office at the will and discretion of the people. Thus, the people may, through mass action, force the President to vacate his office. Mass action, which is an expression of popular sovereignty, usually plays a vital role in the removal of a President. Merelli, while commenting on the impeachment proceedings levied against President Donald Trump of the United States, underscored the potency of mass action.⁶¹ She further argued that because impeachment proceedings were strengthened by mass protest, they were successful in South Korea in 2017, Brazil in 2016, Ukraine in 2014, Lithuania in 2004 and Indonesia in 2000.⁶² But mass action is difficult to accomplish in Nigeria because the constitutional safeguards that could sustain it (section 14 (2) of the CFRN) is significantly compromised by section 6 (6) (c) of the CFRN. Section 6 (6) (c) provides that, the judicial powers of the Federation, ‘shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.’ In other words, chapter II of the CFRN, which covers sections 13 – 24, including the principles of popular sovereignty covered by section 14, are not enforceable in court. This is the jurisprudence professed by the Courts. In *Archbishop Anthony Okogie v. Attorney General of Lagos*⁶³ the Court of Appeal, Lagos Division held that, ‘...section 6 (6) (c) of the Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principle of State Policy. It is also clear that section 13 has not made chapter II justiciable.’

The Supreme Court, in *AG Ondo v. AG Federation*,⁶⁴ confirmed the decision of the Court of Appeal by holding that the provisions contained in chapter II of the CFRN are merely declaratory and not enforceable in Court. Similarly, the Apex court held in *FRN v. Anache & 3 ors*⁶⁵ that section 15 (5) of the CFRN was unenforceable. Thus, mass actions in Nigeria, bereft of adequate constitutional guarantee,⁶⁶ usually suffer the same fate – clamp down.⁶⁷ This is why the #EndSARS protest was violently shut down amidst shedding of blood⁶⁸ and without serious consequences. Apart from the constitutional backflip on popular sovereignty, it is noteworthy that mass action in Nigeria is usually complicated by fragmentation, incursions or inertia. Ojukwu referred to the inertia of Nigerians when he said, ‘[t]he average Nigerian looks upon Nigeria as a theatre and the entire population representing

⁵⁸ (2000) 6 NWLR (pt. 660) 228

⁵⁹ CFRN, s. 14 (2) (a).

⁶⁰ Saraujo, *op. cit.*, 1482-3; International Covenant on Civil and Political Rights, G. A. Res 2200 A (XXI), U.N. GA OR, 21st Sess. Supp. No. 16 at 52, U.N. DOC. A/6316 (1966), preamble.

⁶¹ Analisa Merelli, ‘Impeachment Succeeds Best When Coupled with Mass Protests,’ *Quartz*, <https://qz.com/cdn.ampproject.org/v/s/qz.com/17625979/impeachment-succeeds-best-when>; last accessed on 26th January, 2021.

⁶² *Ibid.*

⁶³ (1981) 2 NCLR 337, 350.

⁶⁴ (2002) 9 NWLR (Pt. 772) 22

⁶⁵ (2004) 1 SCM 36 at 78.

⁶⁶ The right to protest is usually hinged upon the right to freedom of expression, assembly and association that are enshrined in sections 39 and 40 of the CFRN. These are not strong enough because the right to protest can only be implied.

⁶⁷ Aljazeera, ‘Timeline: #ENDSARS Protests in Nigeria,’ available at: <https://www-aljazeera.com/cdn.ampproject.org/v/s/www.aljazeera.com/amp/news/2020/10/22/timeline-on-nigeria-unrest?usqp=mq33>; last accessed on 15th February, 2021.

⁶⁸ *Ibid.*

and manifesting the full spectrum of act and actors... Our people become the audience- politics for them remain a spectator-spot.⁶⁹ Majority of Nigerians often stay away from mass action probably owing to the complications which often beset the activity. For instance, during the #ENDSARS protest, protesters in Abuja, Lagos and across the country were invaded and the protest hijacked by rampaging hoodlums⁷⁰ who damaged properties and risked the lives of other protesters. All these complications of whittle down the effectiveness of mass action in Nigeria and in the long run makes nonsense out of the functionality of popular sovereignty.

Checks and Balances

The concept of checks and balances refers to the constitutional devices put in place to restrain or control the exercise of governmental powers. The device permits the three organs of government to monitor and curtail one another in the exercise of governmental power.⁷¹ In line with this principle, the CFRN provides checks on the powers of the President. For instance, the power of legislative oversight enshrined in section 88 of the CFRN authorizes the National Assembly to invite the President of the Federal Republic of Nigeria to answer questions in relation to his execution of laws contained in the Exclusive Legislative List.⁷²

Legislative Check on Presidential Power

In *Governor of Ekiti State & ors v. Olayemi*⁷³ the court held that the legislative arm of government had the competence to exercise oversight functions over the executive arm of government.⁷⁴ However, the oversight powers of the legislature are limited.⁷⁵ Section 88 (2) of the CFRN provides that the oversight authority of the National Assembly is ‘exercisable only for the purpose of enabling it to (a) make laws... and correct any defects in existing laws; and (b) expose corruption, inefficiency or waste in the execution or administration of laws...’⁷⁶ This means that even where the National Assembly detects corruption or irregularities with respect to the activities of the President, it cannot react but take proactive measures against future occurrences. In December, 2020, the National Assembly invited the President over the rising incidents of insecurity to the House but the President failed to honour that invitation.⁷⁷ This incident accentuates the weakness inherent in the oversight functions of the National Assembly in the CFRN. Although the National Assembly has the power to impeach the President,⁷⁸ not all allegations would warrant/sustain the cumbersome and rigorous process of impeachment. Furthermore, it has been shown that this power is significantly ineffective where there is no mass action in support.⁷⁹ But mass action in Nigeria is also usually unsustainable and often violently suppressed; and the reason for the failure of previous mass action is not unconnected with the fact that the provision on popular sovereignty is unenforceable⁸⁰ and to that extent empty. There are many other instances where the exercise of presidential powers is constrained by constitutional requirements. For instance, the proclamation by the President of a state of emergency for a period longer than two days, or, ten days as the case may be, requires a resolution of the National Assembly that is supported by two-thirds majority.⁸¹ Similarly, a combined reading of sections 80 and 81 of the CFRN requires that the President, before making withdrawals from the public fund of the federation, to ‘cause to be prepared and laid before each House of the National Assembly... estimates of the revenues and expenditure of the

⁶⁹ Emeka Odumegwu-Ojukwu, *Because I am Involved* (Spectrum Books, 2011), xii.

⁷⁰ The Nation, #EndSARS Protest Hijacked to Destabilize Buhari Govt-FG, available at; <https://thenationonlineng-net.cdn.ampproject.org/v/s/thenationonlineng.net/endsars-protest-hijacked-t0-distabilize-buhari-govt-fg/>; last accessed on 16th February, 2021.

⁷¹ Dalhatu, *op. cit.*, 246.

⁷² Hilary Okoeguale, ‘Strengthening Legislative Controls Over Delegated Legislation in Nigeria,’ *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 10, (2) (2019): 40.

⁷³ (2016) 4 NWLR (pt. 1501) 1.

⁷⁴ *Ibid*, at 41- 42 paras G – A.

⁷⁵ Okoeguale, *op. cit.* 41.

⁷⁶ CFRN, s. 88 (2).

⁷⁷ Vanguard, Why Buhari Can’t Honour Reps’ Summons – AGF Malami, available at <https://www.vanguardngr.com/2020/12/why-buhari-cant-honour-reps-summons-agf-malami>; last accessed on 16th February, 2021.

⁷⁸ CFRN, s. 143.

⁷⁹ Mellier, *Op. cit.*

⁸⁰ CFRN, 1999, s. 6 (6) (c), *A-G Ondo v. A-G Fed, FRN v. Anache*

⁸¹ CFRN, s. 305 (6) (b).

federation for the next following financial year.⁸² But these provisions are undermined by other section 82 of the CFRN which creates alternatives for the President. Section 82 of the CFRN provides that the President may, if the Appropriation Bill has not been passed, 'authorise the withdrawals of monies from the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government...'⁸³ Upon the strength of section 82, the checks on the authority of the President by sections 80 and 81 is undermined and adds weight to the influence of the President which is already enormous.

Executive Control

Since the ultimate executive power is vested in the President personally, including the right to hire and fire the cabinet members, he is not accountable to any of them for his actions or inactions; the only option open to a disenchanted minister or member of the executive cabinet is to resign. For instance, in *Chief Gani Fawehinmi v. President of the Federal Republic of Nigeria*,⁸⁴ the Court of Appeal observed, *per* Aboki JCA, as follows: 'I know of no reported case of any superior court in Nigeria where the Attorney General of the Federation has instituted an action against the Federal Government...'⁸⁵ The court further pointed out that, 'in our present reality, the Attorney-General of the Federation is also the Minister of Justice and a member of the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is a part of, it may be tantamount to the Federal Government suing itself.'⁸⁶ Thus in Nigeria, it is unusual for the Attorney General to trigger a process that would essentially investigate the activities of the President. But this is not so in the United States where the Attorney General is empowered to appoint a special counsel, who could enquire into the activities of the President.

Historically, the power to investigate criminal activities amongst top officials was originally derived from the *Title IV of the Ethics in Government Act* of 1978, whereby the A.G is, by Law, obliged to investigate and prosecute suspected wrong doings of high executive officials.⁸⁷ By the law, the A.G, upon receiving credible information that a high government official has committed serious federal offences, or, when the Attorney General determined that an investigation of allegation would create a conflict of interest, the Attorney General would then trigger the process of appointing an independent Counsel.⁸⁸ In accordance with section 591 of the Act, the Attorney General shall initiate an inquiry and if s/he finds sufficient grounds for a full scale investigation request the 'Special Division to appoint independent counsel to proceed, meanwhile the A.G shall stop further investigation and allow the independent counsel to continue.'⁸⁹ The power to appoint independent counsels led to a controversy, since the President had no power to remove him, as to whether it did not 'violate the principle of separation of powers.' The Federal Supreme Court of the U.S. in *Morrison v. Olson*⁹⁰ found that since the restriction on the power of the President to remove the independent counsel did not 'impede the President in the execution of his duties; the restriction did not offend the doctrine of separation of power.'⁹¹ Today, although the Title IV Ethics in Government Act has expired, the Attorney General

⁸² *Ibid*, s. 81(1).

⁸³ *Ibid*, s. 82.

⁸⁴ (2007) 14 NWLT (pt. 1054) 275, 334.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, 334.

⁸⁷ Susan Low Bloch, 'The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism,' *Duke Law Journal*, (1989): 561, 630-1, last accessed on July 22, 2018, <http://scholarship.law.georgetown.edu/facpub/1204>.

⁸⁸ Jack Maskell, 'Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress,' *CRS Report for Congress*, (Congressional Research Service, R43112, 2013); 3.

⁸⁹ Bloch, 'The Early Role,' 630, noting that the Act grants the independent counsel 'full powers and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the A.G and any other officer or employee of the Department of Justice.' The A.G has no authority to remove the independent counsel except 'for good cause, physical disability, mental capacity, or any other condition that substantially impairs the performance of his duties; even the president cannot remove him from office.'

⁹⁰ *Morrison v. Olson* 108 S. Ct. 2597 (1988).

⁹¹ *Ibid*, 2619 – 2620.

still retains the power to appoint independent counsels⁹² where his political interest might conflict with the interest of the United States.⁹³ Thus, in 2017, ‘Deputy Attorney General Rod Rosenstein, acting on behalf of the Attorney General, Jeff Sessions, who had recused himself from any Trump campaign-related investigations, appointed Mueller as Special Counsel to investigate possible connections between the Trump Campaign and the Russian Government.’⁹⁴ The appointment was done in spite of the fact that the findings had the potentials of indicting the sitting President, Donald Trump. In Nigeria, there is no such procedure for appointing a special counsel or an independent counsel; and that makes the President unaccountable to the executive branch of government. The implication is that the President is untouchable and leaves room for mischief and abuse of office.

Judicial Controls

Section 308 of the CFRN makes the President immune from civil or criminal suit in the Court of law. However, if the civil suit is levied against the President nominally or in his official capacity, then the suit could be sustained. Thus, in *Fawehinmi v. President* the suit filed against the then sitting President was heard in court. Accordingly, while the office of the President may be subject of a law suit he remains immune to such suits that are directed at him personally. Even at that a prospective litigant is most likely going to be confronted with the question of *locus standi*. The case of *Fawehinmi* succeeded because the court found that the bone of contention was the enforcement of the CFRN, and so it concluded that a citizen could bring a law suit in order to stimulate the judicial control mechanism on the President. The law conferring immunity on the President from suit has been justified on the ground that it allows him to run the affairs of state without being distracted and that he is the symbol of sovereignty of the state. Be that as it may, the result is that the President remains significantly immune to executive, legislative and judicial control; he even has more access to more discretionary and unregulated powers than the President of the United States from where the Presidential system of government was imported into the Nigerian legal system. This situation is not particularly helpful to Nigeria’s fledgling democracy which is infested with poor accountability and corruption.

Separation of Powers

The reality that the CFRN delineates the scope of presidential powers is in tandem with the doctrine of separation of powers.⁹⁵ Thus, the President of the Federal Republic of Nigeria is, ordinarily, not authorised to carry out the basic functions of the National Assembly or the Judiciary except as permitted by law.⁹⁶ Specifically, the judicial and legislative arms of government exercise powers which, as a matter of course, act as checks on those of the President. Executive powers are limited to the execution of laws made by the legislative arm of government and are not expected to interfere with the functions of the other arms of government otherwise his action would be declared null and void by court. Commenting on the principles of separation of powers, the court, in *Ahmad v. Sokoto State*⁹⁷ observed that, ‘a President, however powerful ought not to make laws or indeed act except in execution of laws made by the legislature.’⁹⁸ In *A-G Lagos v. A-G Federation*⁹⁹ the Supreme Court was presented with the question whether the President of the Federal Republic of Nigeria had the power to withhold revenue meant for Lagos State which accrued from the Federation account, which the President withheld in

⁹² It must be noted, however, that the independent counsel in this instance is not completely insulated from the overriding power of the Attorney-General who makes the appointment and the indirect control of the President who may instruct the Attorney-General.

⁹³ Jack Maskell, ‘Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress,’ *CRS Report for Congress*, (Congressional Research Service, R43112, 2013); 3.

⁹⁴ Joshua Holzer, ‘Biden’s Special Counsel Problem,’ *Government Executive* of December 8th 2020, available at: <https://www.govexec.com/management/2020/12/bidens-special-counsel-problem/170587/>

⁹⁵ Matthew E. Glassman, *Separation of Power: An Overview*, (Congressional Research Service, 2016), 8, noting that the understanding which the founding fathers of the United States Democracy had was that the president should execute the law only. For instance, the American Constitution deliberately separates the establishment and roles of the Congress, President and Judiciary in Articles I, II and III respectively. Similarly, Sections 4, 5 and 6 of the CFRN delineates the legislative, executive and judicial powers of the Federal Republic of Nigeria. See also Ikenga K.E. Oraegbunam, ‘Separation of Powers and Nigerian Constitutional Democracy’. Available at <http://www.dawodu.com/oraegbunam1.htm>,9/3/2005,

⁹⁶ CFRN, 1999, s. 58(4) provides that the president may assent to a Bill passed by the National Assembly.

⁹⁷ (2002) 15 NWLR (pt. 791) 539.

⁹⁸ *Ibid.*

⁹⁹ (2004) 18 NWLR (pt 904) 1.

furtherance of his disapproval of the establishment of additional Local Government Development Authority in Lagos State. The Supreme was unequivocal in declaring that the withholding of revenue which accrued to Lagos State was *ultra vires* or beyond the powers of the President. The Supreme Court of the United States arrived at a similar conclusion in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁰ where, the Court, when presented with an issue on the constitutional powers of the President of the United States, which is similarly worded as that of the Nigerian Constitution, stated that, although the ‘President is the Commander-in-Chief of the Armed Forces, he is not the Commander-in-Chief of the country, its industries and its inhabitants.’¹⁰¹ Accordingly, the Constitution does not endow the President with powers to arbitrarily commandeer the streets and economy of the Federal Republic of Nigeria. The President, however as seen earlier, has the power to make executive orders which have the force of law; assent to Bills passed by the National Assembly; propose Bills to the National Assembly; appoint judicial officers and grant pardon even where courts have passed judgements and convicted a defendant.¹⁰² These functions transcend executive functions and to that extent, compromises the principle of separation of powers.

Human Rights

In order to further underscore the important position of the people and preserve their rights from abuses by a sitting President, fundamental rights have been enshrined in Chapter IV of the CFRN and may be enforced against the President nominally.¹⁰³ In *Abacha v. Fawehinmi*, the Supreme Court while acknowledging that the Head of State was immune to suit, held that the illegal detention of the Respondent constituted a violation of his human right to personal liberty as upheld in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act. Although the first generation rights contained in Chapter IV of the CFRN are justiciable,¹⁰⁴ the second generation rights which include the freedom of the press, right to adequate health care facilities, adequate means of livelihood, quality education and security as contained in Chapter II of the CFRN are not enforceable in court by virtue of the provisions of section 6 (6) (c) of the CFRN.¹⁰⁵ It must be noted, however, that those rights may be justiciable upon the strength of the African Charter on Human and Peoples’ Rights (ratification and Enforcement) Act¹⁰⁶ if they are contained therein. Given the perspective of this paper in examining the accountability measures in the CFRN, the freedom of the press is crucial but not sufficiently guaranteed in Nigeria. Section 22 of the CFRN provides that the press shall be free to uphold the accountability of the government. However, the section also suffers from the vice of unenforceability/non-justiciability. Section 39 of the CFRN attempts a rescue of the freedom of the press,¹⁰⁷ but its provisions are again compromised by its proviso which states thus: ‘provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.’¹⁰⁸ This provision leaves the press extremely weak and open to oppression. Consequently, the activities and functionality of President become shrouded in mystery.

4. Conclusion and Recommendations

The powers of the Nigerian President compromise all constitutional devices for the control of governmental power. Accordingly, the President is endowed with such amount of executive, legislative and judicial power that it may be regarded as unhealthy for a fledgling democracy. The result is that we have a President who is mysterious, powerful and girded with immunity. Consequently, the policies of the President whether sound or otherwise could be pushed through even at the detriment of the people.

¹⁰⁰ 343 US 579 (1952); *AFL-CIO v. Kahn* 618 F 2d 784 (CADDC) 443 US 915 (1979);

¹⁰¹ 343 US 579 (1952).

¹⁰² CFRN, s. 175 (1).

¹⁰³ *Ibid*, s. 308 (2).

¹⁰⁴ *Ibid*, s. 46 (1).

¹⁰⁵ *FRN v. Anache (supra)*.

¹⁰⁶ *Abacha v. Fawehinmi (supra)*.

¹⁰⁷ CFRN s. 39 (2), providing that, ‘...every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.’

¹⁰⁸ *Ibid*, 39 (2).

The current situation has heightened the distrust and lack of confidence in both the CFRN and the government that it births. Democratic principles which guarantee accountability and limit the possibility of power abuse in the CFRN, such as the rule of law, separation of powers, checks and balances and popular sovereignty are so severely compromised that the Nigerian President is left significantly unrestricted and more powerful than even the President of the United States. In view of this anomaly, this paper posits that the weakness inherent in the system is inimical to Nigeria's democracy and progress as a nation. It therefore suggests amendments to the CFRN in order to bring it into conformity with the principles of constitutional democracy. The paper, therefore, recommends the following amendments to the CFRN:

- a. Special Counsels: although executive powers reside in the President, the Attorney General should be empowered to appoint independent or special counsel who would have all the powers of the Attorney General to investigate allegations made against the President and other high-ranking government officials.
- b. The repeal of section 6 (6) (c) of the CFRN. The section hampers the enforcement in court of section 14 (2) of the CFRN, which provides for popular sovereignty. As a result, the right to protest becomes severely weakened.
- c. The key executive functions of the Federal Government, especially in relation to appointments and fiscal matters, should not be vested in the President alone as the Nigerian democracy which is marred by poor accountability mechanisms and worsened by low literacy levels has not advanced to the stage where one person could be trusted with such executive powers.
- d. The National Assembly should be endowed with more powers to oversee and check the powers of the President. For instance, there should be intermediate sanctions for actions that are not so severe as to warrant impeachment.