SEPARATION OF POWERS FOR SUSTAINABLE DEMOCRACY: THE NECESSITY OF A BOLD AND FEARLESS BAR*

Abstract

For the Judiciary to effectively perform its constitutional duty as the one of the three tiers of government, a separation of the Bar and the Bench is impossible. Even though intellectual ability is required of counsel to play this complementary role, boldness and fearlessness are foundational requirements. This paper discussed some instances where some actions of the Executive arm of government in Nigeria called to question, the existence or otherwise of these qualities in the Nigerian Bar Association as a body and the Nigerian lawyers as professionals. Their reactions to the Presidential Executive Order No.6 of 2018 and the recent suspension of the Chief Justice of Nigeria Onnoghen JSC by the President of the Federal Republic of Nigeria were focal points of discussion. The institutional and professional factors that could militate against or whittle down these prerequisites of a bold and fearless bar were discussed relying on both local judicial authorities and those of foreign jurisdictions.

Keywords: *Separation of Powers, Sustainable Democracy, Bold and Fearless Bar, Necessity of.*

1. Introduction

Conventional constitutional law teaches us that the three arms of government are the Executive, Legislature and Judiciary. It also teaches us that the basis for a separation of these three arms of government is so that they would act as checks and balances on each other so as to prevent any of the arms of government from accumulating to itself such measure of powers as would enable it to become a constitutional despot. Statistically, the interface of the average lawyer is greater with the third arm of government than with the other two. Of course, we would not ignore the fact that the executive and legislative arms encompass a good number of highly qualified, highly skilled and highly efficient lawyers working in those arms of government and adding value to them. However, it is in the third arm of government, the judiciary, that the training and skill of the lawyer is brought out to the greatest extent. If the lawyer is going to play any role in sustaining the constitutional concept of separation of powers, it is this area that is his bailiwick. From the perspective of the Constitution, the Judiciary as a third arm of government is hermetically and insularly defined and circumscribed to be limited to public officers. However, from the point of view of the justice delivery system, a separation of the Bar and the Bench is impossible. Accordingly, in this paper, we are not going to spend too much time on the legal theory of what judges ought to do or not do in order to sustain and maintain the concept of separation of powers. We will proceed on the basic predicate that whenever a separation of powers case comes up before the courts, whether it is initiated as public interest litigation or as a territorial challenge between the different arms of government, both the bench and the bar play cardinal complimentary roles in the determination of the claim. The requirement of a bold, courageous and fearless Bar is a given in the administration of justice. We will not therefore spend too much time on it, except to adumbrate on it within the context of current challenges. We will, however, focus on the often neglected half of it. Since this is a lawyers' gathering, we will expend some time to highlight on the complimentary requirement of a bold and fearless Bar as a necessary adjunct to a bold and fearless Bench.

In this regard, it is our assertion that even though intellectual ability is required of counsel to appreciate the sometimes very fine nuances disclosed in these types of cases, an incandescent intellect is not the primary requirement. In the light of the pressures that are occasionally brought on counsel involved in these types of cases to either compromise, abandon, temper or soften his commitment to forcing an institutional change through the legal process, we believe that the cardinal qualities of the lawyer who is charged with the responsibility of ensuring through the Court process that constitutional provision on separation of powers does not become a mere charade, utterly devoid of content are boldness and fearlessness in pushing the matter through.

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2. Necessity of a Bold and Fearless Bench

Sometime in July this year, the President of the Federal Republic issued the Presidential Executive Order No.6 of 2018 on The Preservation of Suspicious Assets Connected with Corruption and other Relevant Offences. In order to lay a proper background, we need to interrogate the juridical concept and content of Executive Orders. An Executive Order is: 'An Order issued by or on behalf of the President usually intended to direct or instruct the actions of executive agencies or government officials or to set policies for the Executive Branch to follow'.[1] Where an Executive Order is issued pursuant to the provisions of any law or judgment of the Court, for example, where under the Order, the Executive gives directions and instructions for the Executive enforcement or implementation of legislation or judgment of a Court, it is legal. To this end, an Executive Order is neither Legislative nor adjudicatory, but is Executive, rendered for speedy implementation and enforcement of legislative or judicial instruments. Since an Executive Order is rendered pursuant to constitutional powers bestowed on the Executive, it is of necessity moderated, curtailed and limited by the span of the powers given by the Constitution to the Executive branch. They are accordingly affected by the principle of *ultra vires*.

The prerogative writs also lie to quash either in whole or in the part, an Executive Order that is proclaimed outside the constitutional powers of the Executive. Executive Orders cannot be used to create new powers, duties and rights; or to expand existing ones beyond the scope of mandates given by the Legislature. Neither can they be used to encroach on the policy domains reserved for other branches of government. Executive Orders must be focused and limited in scope; and cannot be directed at solving all perceived problems of society.[2] Purporting to act by virtue of powers vested in him under Section 5 of the 1999 Constitution – which in actual fact did not give him any such powers, the President of the Federal Republic of Nigeria, in his Presidential Executive Order No.6 of 2018 declared as follows:

- All Assets of any Nigerian citizen within the territory of the Federal Republic of Nigeria, or within the possession or control of any person known to be a current or former government official, a person acting for or on behalf of such an official, any politically exposed person or any person who is responsible for or complicit in, or has directly or indirectly engaged in Corrupt Practices and Other Relevant Offences are forthwith to be protected from dissipation by employing all available lawful or statutory means, including seeking the appropriate Order(s) of Court where necessary, and shall not be transferred, withdrawn or dealt with in any way until the final determination by a court of competent jurisdiction of any corruption related matter against such a person. This provision shall, in particular, apply to those connected with persons listed in the First Schedule to this Order, (or any such list as may be issued by the Attorney General of the Federation and Minister of Justice).
- The authority of the Attorney General of the Federation to preserve Assets pursuant to this Order shall extend to any Person who is under investigation in accordance with applicable law in connection with having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or howsoever in support of any Corrupt Practices or Other Relevant Offences by any Person whose Assets are protected pursuant to this Order; or any Entity that has engaged in, or whose members have engaged in, any Corrupt Practices or Other Relevant Offences.
- Where the Attorney-General has reasonable cause to believe that any funds or assets within Nigeria is connected with Corruption, the Attorney-General may, subject to his powers under Section 174 of the Constitution and other laws enabling him in that regard, approach the Court for an Order blocking or freezing or confiscating such funds or assets pending the conclusion of an investigation or legal action.
- The 1st schedule contains a list of certain cases currently pending in court.

The most cursory look at the contents of this Executive Order discloses without any measure of doubt that it has at the same time, the characteristics of both a judgment and legislation. The question now is, what is the status of its legal validity? It would appear that the President is attempting to wield and replicate the same powers exercised by

[1]B. A. Garner (ed), Black's Law Dictionary, (West Publishing, St. Paul).
[2]Josef Omorotionmwan, 'Executive Order 6, A Decree misnamed? <https://www.vanguardngr.com/2018/07/executive-order-6-a-decree-misnamed/> accessed October 15, 2018.

the Supreme Military Council in his days as a young Army officer. The spirit and content of the Executive Order curiously mirrors the case of *Lakanmi v. A-G (West).*[3] It was this type of legislation that was being dealt with there in which the Supreme Court held that:

> We must here revert again to the separation of powers, which the Attorney-General himself did not dispute is still the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our Constitution is based on the separation of powers - the Legislature, the Executive and the Judiciary. Our Constitution clearly follows the model of the American Constitution. In the distribution of powers the courts are vested with the exclusive right to determine justiciable controversies between citizens and between citizens and the State. See *Attorney-General for Australia v. The Queen (1957) A.C. 288 at page 311, etc***.** In *Lovell v. United States* (1946) 66 Supreme Court Reports 1073 at page 1079, Mr. Justice Black said as follows: "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." These principles are so fundamental and must be recognised. It is to define the powers of the legislature that Constitutions are written and the purpose is that such powers that are left with the legislature be limited; and that the remainder be vested in the courts. …We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a section of the society which had engaged itself in corrupt practices - those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded to the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts, must intervene. Every case, we reiterate, must be considered on its own facts and the materials placed before us in this matter lead to no other conclusion than that the provisions of the Decree No.45 of 1968 are such as are not reasonably necessary to achieve the purpose which the Federal Military Government set out to fulfil. This appeal will therefore be allowed and both the Edict No.5 of 1967 and the Decree No.45 of 1968 are declared ultra vires; they are null and void.

In *Uyanage and others v The Queen*[4] Lord Pearce said in his judgment as follows:

> In so far as any Act passed without recourse to section 29(4) of the Constitution purports to usurp or infringe the judicial power it is ultra vires. It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particularly known individuals who had

[3](1970) SC 58/69, Ademola CJN delivered the judgment of the Court. The facts of the case are as follows:-
An application for an order of *certiorari* to remove an order dated August 31, 1967, for the purpose of being quashed, which order had provided that under the provisions of section 13(1) of Edict No.5 of 1967, it is hereby ordered that Mr. E.O. Lakanmi, Kikelomo Ola (his daughter) and all others who may be holding properties on behalf of or in trust for any of them, shall not dispose of or otherwise deal with any of the said properties of whatever nature (i.e., lands, houses, etc.), whether standing in their names, or in any others of their various names and/or aliases, until the Military Governor of the Western State of Nigeria shall otherwise direct; 2. In particular, it is hereby ordered that the said E.O. Lakanmi and his said daughter mentioned above shall not operate their individual bank accounts by means of withdrawal therefrom without the consent of and only to the extent that the Military Governor of the Western State shall permit in writing; 3. It is hereby further ordered that all rents due on the properties of the said persons from henceforth shall be paid by the tenants thereof into the Western State Sub-Treasury at Ikeja or the Treasury at Ibadan, until the Military Governor shall direct to the contrary pending the determination of the issues involved in the investigation into the assets of all those concerned; 4. Attention of all the persons concerned, and or their partners, co-directors, shareholders or nominees, or anyone who may like to have business transactions with them for any reasons or in any manner whatsoever is invited to these orders and the penalties provided by section 13(2) of the same Edict in case of the infringement thereof. When the appeal was pending, the Federal Military Government sought to strengthen the orders by passing three successive Decrees, namely: The Investigation of Assets (Public Officers and Other Persons) Decree, 1968; The Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree, 1968; The Forfeiture of Assets, etc. (Validation) Decree, 1968. The present applicants' names were included with others in the Schedule.

[4](1967) 1 A.C. 259 at page 289-290; (1966) All E.R. 650 at 659.

> been named….The first Act was wholly bad in that it was a special direction to the Judiciary as to the trial of particular prisoners who were identifiable and charged with particular offences on a particular occasion ...As has been indicated already, legislation *ad hominem* which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity….If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the Judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had the power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringed the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.

In *Buckley v. Attorney-General of Eire*[5] O'Byrne, J. said at page 84:

> There is another ground on which, in our view, the Act contravenes the Constitution. We have already referred to the distribution of powers effected by Article 6. The effect of that article and of Articles 34 to 37, inclusive, is to vest in the courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas to dismiss the plaintiff's claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution as being an unwarrantable interference by the Oireachtas with the operations of the courts in a purely judicial domain.

Without dissipating too much energy on the fine points of separation of powers, it is obvious to us all that the Executive Order number 6 issued by the President of the Federal Republic is an impermissible usurpation of both legislative and judicial powers. It is a violent breach of the concept of separation of powers enshrined in our Constitution. Section 2 (a) of the Executive Order states that:

> Any person who in circumvention of this Executive Order attempts to or in fact:
> (i) interferes with the free exercise of the authorities of the Office of the President,
> (ii) destroys evidence,
> (iii) corrupts witnesses through cash/kind inducements, and
> (iv) generally perverts the course of justice shall be prosecuted in line with the provision of any Law(s) governing unlawful acts.

Section 36 (12) of the Constitution provides that: 'A person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, and subsidiary legislation or instrument under the provisions of a law'.

It is beyond argument that the Executive Order is not an Act of the National Assembly, or a Law of a State, or subsidiary legislation or instrument under the provisions of a law. The Executive Order does not derive its existence from any written law in Nigeria. Accordingly, the attempt to criminalize the circumvention of the Order cannot stand as it infringes on the fundamental right to fair hearing.[6] In *Faith Okafor v. Governor of Lagos State & anor*[7] the Governor of Lagos State issued a directive restricting the movement of citizens and residents during the State's monthly environmental sanitation, the Court of Appeal unanimously held that the Appellant, Faith Okafor,

[5](1950) Irish Reports 67.
[6] In *Aoko v. Fagbemi* (1961) 1 All NLR 400 the Supreme Court held that an act or omission cannot constitute a crime except it is prescribed in a written law. See also *FRN v Ifegwu* [2003] 15 NWLR Part 842, 133
[7](2016) LPELR-41066 (CA)

could not be arrested or prosecuted for disobeying or flouting the Executive Order or Directive of the Governor of Lagos State because the Appellant could only be arrested and prosecuted for an offence that is prescribed in a written law. In his concurring judgment, Biobele Abraham Georgewill, JCA at p 46-47 stated thus:

> It is my view, that democracy thrives more on obeying and promoting the rule of law rather than the whims and caprices of the leaders against the lead. I find the conduct of the Respondent in not only persecuting the Appellant, yes that is what in my view it amounts to when a free Citizen of this great Country such as Citizen Faith Okafor, is put through the rigours of criminal process for an offence not prescribed in any written law but merely on the directive of the Governor of the Lagos State. An action which if allowed to thrive in a democracy such as ours could confer on such office holders infinite, absolute and autocratic powers contrary to the clear provisions of the Constitution of the land, to which both the leaders and the led are subject. I refuse to allow such autocratic, absolute and infinite powers to fester upon our nascent democracy.

Consequently, section 2(a) of Executive Order number 6 is inexcusably unconstitutional. Accordingly, it is submitted that no person can be arrested or prosecuted for circumventing or violating the Executive Order issued by President Buhari as it is unconstitutional and lacks the force of law[8]. Although we have the same Presidential government as USA, the circumstances of both countries are not the same. No two things are the same but be similar. Now we understand that the Federal High Court, in a case challenging the constitutionality of Executive Order 6 ruled that the Attorney-General may only exercise the vast powers given to him under that Order upon application to the court vide a motion on notice as contrasted to a motion *ex parte* provided in the Executive Order. Solomonic, that judgment may be, but judicial error it certainly is. When an action is unconstitutional and *ultra vires*, you don't reform it, you annul it. The judgment adopted a politically expedient alternative and fell short of the boldness and courage required of the bench in the face of an unwholesome, deliberate and mischievous subversion of a fundamental constitutional precept by the Executive.

This then brings us to the question of what is required of the judiciary to ensure that democratic rules, values and institutional shapes and integrity are sustained within the context of the constitutional provision on separation of powers. Our answer is short, brief and to the point. The judiciary should have the boldness to require, insist and ensure that each arm of government does not stray from its allotted constitutional space. The judiciary must employ the sanction of the law to compel, enjoin and constrain each arm of government to its constitutionally assigned role. Performing this task requires courage and boldness. This is more so when we are faced with an administration which is determined to enthrone autocracy and subvert constitutional rule. However, our records and history indicates that the judiciary has a long-established provenance of playing the particular role currently required of it. To paraphrase Honourable Justice Adetokunbo Ademola in *Lakanmi v. A-G (West)*, there is no doubt that the object of the Government, when it is engaged in this exercise, is to clean up a section of the society which had engaged itself in corrupt practices. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts, must intervene.

The duty required of our judiciary in protecting our democracy by ensuring a strict compliance with the constitutional rubric of separation of powers is to unhesitatingly declare Executive Order number 6, *ultra vires*, null and void, so also, every other effort by an arm of government to invade the constitutional territory of another arm of government

3. Necessity of a Bold and Fearless Bar

Our rules of professional conduct provide that it is the duty of a lawyer to devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the best interests of the

1 [8] Inibehe Effiong, 'Unconstitutional, Null and Void - Legal Opinion on Preservation of Suspicious Assets Order' <http;sahararporters.com/2018/07/09-unconstitutional-nul-and-void-legal-opinion> accessed October 16, 2018

clients.[9] Consequently, the court cannot restrict a counsel in his presentation of his client's case with all the strength and capacity at his disposal.[10] The right of a defendant to vigorous assistance of counsel is fundamental, and no unnecessary chilling of a counsel's inclination to pursue strenuously his client's interests through the courts is intended to be tolerated.[11] Accordingly, attorneys must be given great latitude and extreme liberality in the area of vigorous advocacy. Consequently, attorneys may be persistent, vociferous, contentious, and imposing even to the point of appearing obnoxious, when acting in their client's behalf.[12] The Supreme Court, if its aid be needed will unhesitatingly protect counsel in fearless, vigorous, and effective performance of every duty pertaining to the office of advocate on behalf of any person whatever;[13] and will readily shield the character and integrity of counsel from being needlessly impugned by the lower courts[14].

In the case of *Balonwu v. Governor of Anambra State*,[15] Honourable Justice Muntaka-Coomassie, JSC stated at page 1254D-G

> Learned counsel to the 1st respondent raised a preliminary objection to the 1st issue formulated by the appellants on the ground that the ground of appeal was not directed against any of the findings of the lower Court, other than on comments made by the presiding Justice, Omage JCA to the effect that the appellants' counsel was dishonest in the citation of the authorities. A close perusal of the brief of argument of the appellants before the lower Court revealed that it is the learned justice of the Court below (Omage JCA) that misquoted the authorities cited by the learned counsel to the appellants. Naturally, a counsel worth his salt would want to remove the tag of dishonesty placed on him by the learned Justice of the Court of Appeal. It is on this basis that I disagree with the respondents' counsel that the tag of dishonesty was 'a mere comment'. I cannot regard this as a mere comment as it touches on his integrity. This comment is utterly unjustifiable, it should not have been made. When a court comments of the conduct of a counsel in his handling of a case before it, a comment which impugns the character of counsel should not be made unless and until if the counsel's conduct is so disparaging and falls below the standard expected of him as a counsel.

What we seek to bring out here is that subject to the fact that the order and dignity of courtroom proceedings are essential elements in the provision of fair and even-handed judgment, and should thus be respected by counsel, an assertive and forceful presentation and advocacy are irreducible qualities required of the advocate. Why is this so? From very early times, it was recognised that if the concept of justice under the law must have any meaning, even the most abominable of offenders must be entitled to as committed a representation, as the purest of litigants. This is because, a less than committed representation of the infamous would transform the court from a temple of justice to a lynch gang. Consequently, it became not just acceptable, but required, that even murderers, arsonists, rapists, paedophiles and all manner of vile offenders should be entitled to the best their counsel had to offer. In fact, convictions had been overturned due to lacklustre performance of counsel charged with the defence. Now, if in the affairs of others, that is, in representing his retainers, the lawyer is charged with a duty of fearlessness and zeal, should less be expected of him in the conduct of matters that impact directly on his welfare, his professional association and the bench? My answer is an emphatic *'No!!!!.* Consequently, the boldness, courage, zeal, passion and ardour that is expected to be the normal hallmark of the advocate is not just expected, but required to be in prominent manifestation and display when it concerns matters that have to do with the administration of justice or the justice delivery system. Let's put it in another way, the work of the lawyer has both a business and a social perspective. The business facet is basically about doing well – obtaining clients, doing the job and getting paid. The social perspective is about doing good. It is about the soul of the law. It is about doing justice, doing the right thing.

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[9] Article 14(1) of Rules of Professional Conduct for Legal Practitioners, 2007.
[10] Usani v. Duke, [2006] 17 NWLR Part 1009, 610.
[11] *Greene v. Tucker*, 4 F.P.D. 2d 703.
[12] In re Dellinger, 4 F.P.D. 2d 678.
[13] *Sacher v. United States*, 343 US 1, 72 S Ct 451, 96 l Ed 717.

[15][2010] All FWLR Part 503, 1206,

The job the lawyer is called to do in public interest litigation is about doing good. It is about ensuring that the social fabric of society is preserved and that the streams of justice are kept pure.

In fact, Lawyers should ensure that our legal system shall not fail to take cognisance of the effect of Executive Order Number 6 *ab inconvenienti* in order to avoid a result that might involve total destruction of society. It is about ensuring that the constitutional rules laid down for the corporate existence of society are obeyed, not for any other reason than that it is the proper thing to do. In the process of doing this, he is brought into confrontation with forces that profit not just from deliberate subversion of the Constitution, but from lawlessness. It is a 'good versus evil fight' for supremacy. The only way the lawyer can prevail in this fight is not just by a strong personal belief in the rightness of his cause, but by an unflinching dedication and application of himself to carrying his cause through. It is within this rubric that we locate the work of the lawyer who finds himself required to insist on and professionally resist those who with might, authority and power on their side, seek to subvert, breach and violate their assigned constitutional space.

4. Factors Militating against the Emergence of a Bold and Fearless Bar

Institutional Factors

Lately, the news coming out of law enforcement agencies have given everyone cause for concern. It took the combined effort of the Nigerian Bar Association to excise the legal profession from a regulatory requirement that lawyers should register and disclose their sources of fees to a regulatory body seeking to control money laundering. Some months back, the Acting Chairman of the EFCC was reported to have castigated lawyers for accepting payment of their fees from persons charged with corruption offences. Some months ago, lawyers in Owerri had to lock horns with the police authorities for arresting, detaining and charging counsel who was representing certain accused persons all in the bid to intimidate the lawyer of offering representation to the said accused persons. A few months ago, I also understand the Anambra Bar had a similar case on its hands when a counsel who went to the Police Station to interview her client who was detained by the police was also arrested and detained all in the bid to frustrate and intimidate her. There are also a few high profile cases where even very senior lawyers have been requested (the real term is 'commanded') from 'above' not to represent certain persons. What did the Constitution say? I need to emphasise that the lawyer in professional practise is subject only to the regulation of his professional body and his conscience. No other authority however high or lofty has any right or competence to prescribe acceptable conduct to the lawyer. In the discharge of his duty to his client and the court, counsel has no responsibility to make the EFCC chairman, or the IGP or even the President happy. Not even the Judge. Not anyone. Counsel is responsible only to conform and comply with the requirements of the rules of professional conduct and his conscience. In fact, it is utter cowardice for counsel in the discharge of his duty to seek the approbation of the very purveyors of unconstitutional conduct he is required to call to account. In this regard, we adopt the unflinching position that no form of institutional pressure should be sufficient to make a counsel worth his salt to abandon ship or compromise the tenacity with which he is required to advocate a client's cause. Take another example, most lawyers I have talked with agree that the EFCC Act contains some of the most unconstitutional provisions in our statute books in respect of criminal justice administration[16]. The Act authorises

[16]Economic and Financial Crimes Commission (Establishment) Act,2004

27.---(1) Where a person is arrested for committing an offence under this Act, such person shall make a full disclosure of all his assets and properties by completing the Declaration
of Assets Form as specified in Form A of the Schedule to this Act.

(2) The completed Declaration of Assets Form shall be investigated by the Commission.

(3) ……..

(4) Subject to the provisions of section 24 of this Act, whenever the assets and properties of any person arrested under this Act are attached, the Commission shall apply to the Court for an interim forfeiture order under the provisions of this Act.

(5) ……

28. Where a person is arrested for an offence under this Act, the Commission shall immediately trace and attach all the assets and properties of the person acquired as a result of such economic or financial crime and shall thereafter cause to be obtained an interim attachment order from the Court.

the interim forfeiture of the properties of a person who has not yet been charged before the court for any offence, thus negating the constitutional presumption of innocence. The Act permits this forfeiture to be accomplished through an *ex parte* application, thus violating the constitutional right to fair hearing. The very act of the forfeiture itself deprives the accused person of the means to prosecute his defence when he is eventually charged, thus denying him of the protection of due process. Most importantly, by requiring the interim forfeiture to be made to someone other than the court or its Registrar or other of its officials, the Act deprives the court of the custody of the *res* of a dispute and this is a contravention of the constitutional principle of separation of powers. In this respect, it must be emphasised that until a case is finally determined, every facet of the case, including the persons and properties in dispute must remain in the custody and control of the courts. For an order of forfeiture in a pending case to be made for the property to remain in the custody of an amorphous 'Federal Government' which is in actual fact, a cloak and cover for the EFCC is an egregious breach of the Constitution. Most lawyers I have talked with know this. However, none is willing to challenge it. According to them, '*they don't want EFCC trouble*'. When did we sink this low and lose all our courage? When did keeping quiet in the face of illegality become a virtue? Even though we would prefer to let it go unspoken, we are all aware that sometimes judicial officers are also under institutional pressure to adjudicate in a certain manner. The judiciary we desire can only come about with our input. A fearless judiciary is the product of a fearless Bar. The judge is better able to withstand institutional pressure when he is surrounded by lawyers who with all boldness, tenacity and courage are holding their ground. The judiciary cannot play its role in insisting and ensuring compliance with constitutional provisions for separation of powers unless the judge has before him and around him, lawyers who even at great personal cost, would insist that the proper thing must be done.

Sometime back, we all woke up and were confronted with the monstrosity of a barbaric invasion of the homes of Judges by the DSS. Amongst the Judges whose homes were invaded was a Justice of the Supreme Court. The explanation from government was that allegations of official corruption were made against the respective Judges. It is necessary to put these events in their proper legal context. First of all, from the perspective of constitutional powers, the DSS does not have any powers to meddle in the civil or ordinary criminal matters; not even in the most egregious corruption allegations. Secondly, The National Judicial Council is the only body charged by the Constitution to investigate any complaint or act of grave misconduct against any Judge or Justice and to make such recommendation it deems fit[17]. Every day in court, as learned gentlemen, you apply the canon of statutory interpretation that states that '*expressio inclusio unis est expressio exclusio altrius'.* The '*express inclusion of one thing, is the express exclusion of the other*'.

Consequently, when the Constitution made express provision for the mode of sanctioning judicial officers who had soiled their robes, it was intended to foreclose other modes of sanctioning them while they remain judicial officers. The jurisprudential basis for the constitutional prescription for the judiciary doing its own housekeeping is that giving the executive powers of regulation over judicial misconduct would compromise the concept of separation of powers. It is for that same reason that even though the executive does not possess judicial powers, executive tribunals are permitted to exercise quasi-judicial powers over members of the executive. This is because due to the concept of separation of powers, the executive is also entitled to do its own housekeeping and sanction erring members of the executive without recourse to the judiciary, except whether there has been a breach of Constitutional rights or applicable procedure and laws. Consequently, when the DSS invaded the homes of Judges to execute arrests and search warrants, they were not just acting without constitutional cover, they were acting in an egregious breach of the constitution. However, even if we can overlook the obvious attempts and efforts of the

29. Where- (a) the assets or properties of any person arrested for an offence under this Act has been seized ; or (b) Any assets or property has been seized by the Commission Under this Act, The Commission Shall cause an *ex-parte* application to be made to the Court For an interim order forfeiting the property concerned to the Federal Government And the Court shall, if satisfied that there is prima facie evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

[17] *Eri v. Kogi State House of Assembly*, [2009] All F. W. L. R. Part 468, 348.

executive to intimidate and emasculate the bench, what do we do about the lawyers who, either in ignorance of the law, or in ignorance of the applicable constitutional concepts, or in deliberate mischievous effort at enhancing stomach infrastructure, went all out, spouting repellent hypotheses to justify this travesty. Ordinarily, Judges are helpless in defending themselves against hostile press and public opinion. It is the work of the Bar to defend the judges. This incidence was one where the entire bar was expected to rise up as one and condemn the brazen, unjustified, unjustifiable and lawless attempt to intimidate the judiciary. It was one occasion where boldness and fearlessness was expected from the Bar.

The voice of the Bar was expected to sound with the precise clearness of Gideon's trumpet calling the children of Israel to battle. Unfortunately, the trumpet the bar blew was muted. It was muted by fear. It was muted by self-interest. It was muted by the avaricious desire of not alienating the clientele of government agencies. The Bar left the judiciary to fight that battle alone. Luckily and happily, the judiciary gave a credible account of itself and handled the matter satisfactorily. This ominous inaction from the Bar further emboldened the President to 'prosecute and pass sentence' on the Chief Justice of Nigeria, Onnoghen JSC who adjudged guilty of corrupt practices and thus suspended from office. Surprisingly, the voices of the lay public are louder in condemnation than those of the Bar some of which accord an imprimatur totheehibition of executive rascality of the President. However, the one lesson we ought to take away from that incidence is that between the judiciary and a third party, from the perspective of the Bar, the judiciary can never ever be wrong. The Bar must be ready to mobilise its entire resources to provide and unflinching, unwavering, undaunted and resolute support to the judiciary. That is the only way the judiciary will have the courage and confidence, to do the right thing when confronted with the politically charged emotionalism that normally attends separation of powers adjudication.

Professional Factors

A professional colleague was arguing a matter in court. Both the law and the facts were in his favour. Surprisingly, the judge was adversarial to him. However, he refused to be intimidated and insisted, as was his right that the proceedings must go in a certain way. While his exchange with the judge was on-going, several members of the Bar who sat close to him were pulling him on his gown and asking him to permit the judge have his way. Of course he ignored them all. At the end of the day, the Judge acceded to him, as was the correct thing to have been done in the circumstances. When he left the courtroom, at least five lawyers followed him out of the court to shake his hands and tell him he did the right thing by refusing to be intimidated by the Judge. He then asked them why they were pulling on his gown and asking him to let the Judge have his way. Their general response was that one should be careful not to offend these judges so that when you apply for appointment as Senior Advocate of Nigeria, they will not render a hostile report against you. The question I ask everyone here is why and when did we fall this far? If you pick up the law reports of 40, 30, 20 years, you will hardly see any adverse comments on the conduct of counsel. It does not mean that counsel of those days did no occasionally get it wrong. The practise then was that even where counsel misbehaved, the Judges cautioned counsel *viva voce*. Judicial ink was not spent developing jurisprudence on the mistakes and errors of counsel. Judges respected the lawyers and made sure the respect showed even in the judgments and rulings they wrote. Castigation of counsel was not permitted to attain the status of high art. However, if you pick up our contemporary reports, you will be hard put not to see the copious references to error and misconduct of counsel. Are today's lawyers worse behaved than lawyers of years ago? The answer is no. So, what has changed? What really changed is that today's lawyers have forgotten how to carry themselves with dignity. The desire to attain the eminence of Senior Advocate of Nigeria has unfortunately created a generation of timorous lawyers who are unable to look the Judges in the face and politely, but firmly refuse to be intimidated. Diffidence and insecurity do not command respect. It is impossible to respect a lawyer, who like a shy dog would slink away with his tail between his legs in a situation where he was entitled to insist on being given his full measure as a counsel.

The institution of the Senior Advocate of Nigeria is good. Make no mistake about it. A professional system that was designed to recognise and celebrate members of the profession who by hard work and diligence had attained eminence in professional practice must be commended. I am not going to get into the argument that creation and maintenance of individual privileges in the administration of justice is a subversion of the due process and equality

clauses. However, I admit that the argument has been made. What is important to us here is that maintenance of that system at the price of the dignity, self-esteem and self-worth of lawyers who must crawl, grovel, cringe and generally debase and abase themselves before judges in order to be found worthy of the privilege should not be encouraged or condoned. The creation of a generation of lawyers who must lose the fire in their hearts and become minions of the bench was not in contemplation when that system of privilege was created. The Bible says that when salt loses it taste, it is good for nothing but the garbage dump. Gentlemen, decide amongst you, what good is a lawyer who has lost his zeal, fire and courage? Decide and give the answer to yourself.

5. Conclusion

Gentlemen, the legal profession has been good to us. Through it, we have attained if not wealth, at least comfort; if not fame, at least eminence, if not honour, at least respect. It has placed us in a position where we constitute an aristocracy in our societies, leading, directing and guiding others as to the proper mode of conducting their affairs. It has placed us far ahead of our peers and other professions in esteem, honour and affluence. It has however given us a heavy duty, obligation and responsibility of being the praetorian guards of our democracy. Every single revolution in modern history has been saturated by the presence of lawyers playing cardinal roles in midwifing the revolution. Of the six most important men in the French revolution, Danton, Robespierre and Desmoulins were lawyers. In the American Revolution, of the fifty-six men who signed the Declaration of Independence, at least twenty-eight were lawyers. In fact, the principal draftsman of the document, Thomas Jefferson was a young lawyer of only thirty-three years of age. The US Constitution was adopted in 1787 with the signatures of thirty-nine Constitutional Convention delegates, including twenty-one lawyers, amounting to more than half of the signatories. With respect to the Russian revolution, of course Lenin the leader of the revolution studied law at University of St Petersburg, and started his law practice in Samara. In the days that military rule, autocracy and dictatorship had reigned with impunity, the Nigerian society had generally looked up to lawyers for leadership and direction. We remember the courage of people like Professor Ben Nwabueze, (SAN), Late Chief Gani Fawehinmi, (SAN), Late Alao Aka-Bashorun and Mr. Olisa Agbakoba, (SAN).These played frontline roles in confronting military dictatorship and insisting that the people must not be shorn of every vestige of dignity. They used the instrument of the law with all boldness and courage. They fought the beast. Yes they suffered great personal discomforts and loss. But, they overcame the beast. Because of the rare personal courage of men such as these, democracy has become the only acceptable norm of governance in Nigeria. The democracy which we obtained through the instrumentality of the law and great personal courage of lawyers also requires the instrumentality of the law and great personal courage of lawyers to be sustained. That is the task before the current generation of lawyers. Self-imposed reasons for timidity do not avail. The only way we can ensure the sustenance of our democracy is not by a textbook exegesis of the jurisprudential basis for separation of powers. It is by an unflinching demand for accountability and respect of the constitutional process, irrespective of whatever personal discomfort and loss we may suffer in the process.