CHALLENGES OF THE DOCTRINE OF SEPERATION OF POWER UNDER THE 1999 NIGERIAN CONSTITUTION

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BENIN CITY

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A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF BACHELOR OF LAWS (LL. B) DEGREE OF THE UNIVERSITY OF BENIN, BENIN CITY.

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CERTIFICATION

I, **Etinosa John OMOROGIEVA**, with Matriculation Number **LAW1604724**, hereby certify that apart from references to other persons' works which have been duly acknowledged, the entire work is a product of my personal research, and this project has neither in whole nor in part been presented for another degree elsewhere.

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APPROVAL

We certify that this project was written and completed by **Etinosa John OMOROGIEVA**, with Matriculation Number **LAW1604724** in partial fulfillment of the requirements for the award of a Bachelor of Laws (LL.B) degree.

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DEDICATION

I dedicate this project to God almighty for making this possible and for seeing me through; and also to my family and friends for their unending support thus far.

ACKNOWLEDGMENT

Whenever I count my blessings, I see more reasons to be grateful for the good things of life outweigh the not so pleasant things that have occurred in my life

By direct and indirect contact, this completed work and my journey through the University of Benin is solely because of God and the people that have been strong support system around me. In these people, I have found my blessings, answers to prayers and life changing experiences. These people remind me that I am not self-made and that no man is an island.

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LIST OF ABBREVIATIONS

- A.G Attorney General
- AC: Appeal Cases
- ACN Action Congress of Nigeria
- ALL NLR: All Nigeria Law Report
- APC All Progressive Congress
- CA Court of Appeal
- CA: Court of Appeal
- CFRN Constitution of Federal Republic of Nigeria
- EFCC: Economic and Financial Crime Commission
- FMG Federal Military Government
- JCA Justice of Court of Appeal
- JSC: Justice of the Supreme Court
- NJC National Judicial Council
- NLR: Nigerian Law Report
- NWLR: Nigerian Weekly Law Report
- PDP People's Democratic Party
- SEC Security and Exchange Commission
- USA United States of America
- WRN Weekly Report of Nigeria

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ABSTRACT

The constitution of the Federal Republic of Nigeria, 1999 (as amended) made the theory of separation of powers a fundamental principle of state governance. This essay examines the doctrine of separation of powers under the 1999 Constitution of the Federal Republic of Nigeria with a view to critically assessing the challenges facing same in Nigeria. The 1999 Constitution in different sections vested the powers of government in separate organs of government as follows: section 4 deals with the legislative powers; section 5 deals with the executive powers, while section 6 is concerned with judicial powers. This kind of separation of powers is known as the horizontal separation of powers.

It has been discovered, by the adoption of doctrinal methodology as well as comparative research methodology, that a water-tight application of the doctrine of Separation of Powers is not possible. It is in recognition of this fact that the founders of the doctrine developed the principle of checks and balances which empowers each arm of government to serve as a check on the others to ensure that they do not go out of their constitutionally assigned roles. This concept of checks and balances is as well provided for in the constitution of the Federal Republic of Nigeria, 1999 (as amended).

Despite these provisions of the constitution, there are presently in Nigeria disputes and controversies concerning the meeting points of the powers allotted the various arms of government. The executive arm of government by virtue of the amplitude and plentitude of powers allotted to them by the constitution. The judicial arms of government appear to be at the receiving end of this power tussle. There are however certain salient areas in the interplay of powers where the three arms of government must converge or meet for the orderly regulation or governance of Nigerian society. This long essay reviewed the hallowed concept of separated

powers of government, the doctrine of checks and balances as well as the Independence of judiciary, the meeting points of the powers and their areas of dislocation. Some recommendations that will uplift the law and practice of separated powers in Nigeria were made.

CHAPTER ONE

1.1 INTRODUCTION

The constitution of the Federal Republic of Nigeria, 1999 (as amended) made the theory of separation of powers a fundamental principle of state governance. This essay examines the doctrine of separation of powers under the 1999 Constitution of the Federal Republic of Nigeria with a view to critically assessing the challenges facing same in Nigeria. The 1999 Constitution in different sections vested the powers of government in separate organs of government as follows: section 4 deals with the legislative powers; section 5 deals with the executive powers, while section 6 is concerned with judicial powers. This kind of separation of powers is known as the horizontal separation of powers.

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powers where the three arms of government must converge or meet for the orderly regulation or governance of Nigerian society. This long essay reviewed the hallowed concept of separated powers of government, the doctrine of checks and balances as well as the Independence of judiciary, the meeting points of the powers and their areas of dislocation. Some recommendations that will uplift the law and practice of separated powers in Nigeria were made.

1.2 STATEMENT OF RESEARCH PROBLEM

The idea of separation of power is considered by many people to be among basic way of achieving good governance in any country, and a government of separated powers is less likely to be tyrannical and more likely to follow the rule of law that is the principle whereby government actions are constrained by laws. The 1999 constitution of Federal Republic of Nigeria as amended several times argues that, the country is indeed following this doctrine of separation of power. But despite of the presence of this constitution, several cases of one body among the three bodies violating the doctrine and overlapping it boundaries have been reported, which in turn poses the question to whether the country is indeed following the doctrine of separation of powers as proposed in the constitution or otherwise. Such questions arise from the series of cases on which instead of the judiciary to perform its function without interference, the judiciary is interfered with other bodies trying to affect the decision of the judiciary to favor their cause. Also, apart from that, the constitution itself contains some weaknesses in terms of provisions that are included. Example of such occurred when the Constitution confers legislative power in the National Assembly, so also the President is vested with the power to “modify” existing laws. This power is viewed as negating the intent and meaning of the separation of powers, and is capable of portraying the President as being involved in legislation. which in turn

possess the question to whether the country follows this doctrine or it is just written but in actual form it's not applicable.

Some other provision of the constitution show there must be an independent judiciary, but another section shows the Judges must be appointed by the president, also a provision shows the president can pardon, set free people who have been convicted. All these cases indicate the presence of a system where the doctrine of separation of power is not effectively followed due to presence of contradictions that lead to part of the government to interfere with another part. It is from this ground, that the researcher is attempting a systematic study on the dimensions of separation of power in Nigeria so as to determine its effectiveness in promoting good governance.

1.3 AIM AND OBJECTIVES

The aim of this study is to assess the extent of dimensions of separation of power in promoting good governance in Nigeria.

The objectives of this study are to:

2. Assess the existence of separation of power in Nigeria.
3. Determine the extent to which separation of power is practiced in Nigeria.
4. Identify factors hindering effective performance of the doctrine in Nigeria.
5. Propose measure to ensure effective performance of the doctrine in Nigeria.

1.4 SCOPE OF STUDY

The scope of this research is confined to the separation of powers granted to each of the three arms of government under the relevant sections of the constitutions as well as the other

provisions contained in the constitutions which provided means of checking each arm of the government from acting ultra vires.

Also, the content encompasses different exposition on the concept of separation or powers, origin, meaning, scope, applicability, its limitations, an overview of doctrine through judicial interpretations of the constitution of the Federal Republic of Nigeria 1999, (as amended).

1.5 METHODOLOGY

The methodology to be adopted in this work are the doctrinal research methodology and the comparative research methodology.

The doctrinal method is used to achieve the set of objectives. This method is applied whereby information, facts and laws are collected and analyzed, having due regard to the constitutional provisions governing the topic of this research. The main sources include the use of relevant text books, articles and journals, both from the law library and online, internet publications, current and relevant judicial decisions and authorities; relevant quotes from notable authors, jurist and scholars have also been employed in the research.

The comparative research methodology will be used to compare the doctrine of separation of powers in Nigeria with other jurisdiction like in England and the United States. It is considered essential to a democratic country for the graceful running of the government to guard individual liberty and to avoid confrontation among the legislative, executive and judiciary; the separation of powers during a check and balance form is very needed in order that three organs cannot trespass with the confined area of the other.

1.6 EXPECTED FINDINGS

The expected findings of this academic research project are:

a. Separation of powers in a strict sense is impossible, but with check and balance, it is quite possible which makes filtration of the arbitrariness of the powers of others.
b. The study gives out important information to the general public and the government on the practice of separation of powers which is enshrined in the 1999 constitution of the Federal Republic of Nigeria as well as identifying areas of weakness which hinder effective adherence to the doctrine of separation of power in Nigeria such as limited Independence of the judiciary, instability in Nigerian polity and interference with the leadership of the legislature.
c. Factors used to ensure the three organs of the state abide to the doctrine of separation of powers include legislative checks, executive checks, and judicial review
d. And lastly, the measures to ensure effective performance is to identify the structural abilities of the three arms of government, analyzing major public issues and identifying the branch of government most appropriate to make decisions on such issues.

1.7 CONTRIBUTIONS TO KNOWLEDGE

The expected contributions to knowledge of this study are:

1. Provides understanding of the need for an effective framework for the application of the doctrine of separation of powers in Nigeria and the challenges it is faced with.
2. Explains the position that one authority or arm of government can effectively act alone as this will surely rock the boat of stability and usurp due constitutional order or process. The

marriage or convergence of this power act as a restraint, a brake on the arbitrary exercise of power to the detriment of any section of the society.

1.8 CONCLUSION

A fundamental principle undergirding the design of modern governments is that of the separation of powers. However, this study has stated that the doctrine of separation of powers can only function properly where there is an interplay of checks and balances. By this interplay, the fiction is that, each arm shall be autonomous within its own sphere. This is a fiction properly so called because the three arms of government are by the Constitutional framework expected to operate an overlapping system of administration. Each must carry on in a manner that is complimentary to and not subversive of the other two towards peace and good government. This practice however is fraught with challenges in Nigeria. This research work has addressed these challenges. In the course of this study also, the researcher has established the roles each arm of government plays in checking the activities of the others.

Equally, the study has posited that members of the executive and legislative organs of government pledge their loyalties to their respective parties and not to the electorates to the detriment of the citizens. It is in light of this that the researcher submits that, in spite of structural deficits and some other problems, constitutionalism still holds a better prospect for political stability in Nigeria, if the factors that promote these challenges can be attenuated.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF SEPERATION OF POWERS

2.1 INTRODUCTION TO THE HISTORICAL DEVELOPMENT OF SEPARATION OF POWERS

Among the numerous political theories operating in a democracy, none deserves to be more developed than the principle of power division and separation. In every democratic State, the major institutions of the State are divided into three- the executive, the legislature and the judiciary. It is however important that those to be in charge of running these institutions are independent of the other. According to Montesquieu in his book[1], when the legislature and executive powers are united in the same person or body of officials, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. The guarantee of liberty in any given government thus is the practice of the principle of checks and balances.

The principle is a constitutional control whereby separate branches of government have limiting powers over each other so that no branch will become supreme. The concept of the principle of checks and balances arose as an outgrowth of the classical theory of separation of powers, by which the legislative, executive, and judicial powers of government were held properly to be vested in three different units. The purpose of this, and of the later development of checks and balances, was to ensure that governmental power would not be used in an abusive manner. Separation of powers according to Gettel, implies that, the three functions of the government 'should be performed by different bodies of persons; each department limited

[1] Baron De Montesquieu, *De l'espirit des Lois (The Spirit of the Laws)* published in 1748

to its own sphere of action and within that sphere should be independent and supreme'. The doctrine of separation of powers is based on the acceptance that there is a division of governmental powers into the three branches of legislative, executive and judicial powers, each to be exercised by a separate and independent arm of government as a preventive measure against abuse of power, which will occur if the three powers are exercised by the same person or group of people[2]. Its justification was based on the natural law philosophy traceable back to Plato and Aristotle and later articulated by the 16th and 17th centuries French Philosopher Jean Bodin and British politician John Locke. However, it is the French Montesquieu who formulated the doctrine systematically and scientifically in his book[3]. He was not the pioneer of the doctrine as Aristotle in his Treatise known as Politics had made the same distinctions but Montesquieu gave it clarity and developed a model which has with variations influenced the format of modern constitutions[4]. It is indisputable among constitutional lawyers that the Montesquieu model of separation of powers is theoretically plausible but difficult to effect in practice without modification or adaptations. The Montesquieu model is without its defects; it is in addressing the defects that some constitutional lawyers argue that there are two dimensions of the doctrine- one being institutional and the other functional. It is in relation to the functional aspect that the doctrine should be taken to mean checks and balances based on a constitutional scheme. What is important in modern democracies is not separation in the strict sense of it but checks and balances. This is obviously because the concentration of power in one branch can cause grave

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2 Malemi E., *The Nigerian Constitutional Law* (Lagos: Princeton Publishing Co., 2006) p. 65

3 Ibid.

4 Aristotle, *politics*, Translated with Introduction by C.D.C Reeve,(Indianapolis, Hackett Publishing Company, 1998)

hardship on the citizens thereby jeopardizing the idea of democratic value and constitutionalism. With the changing needs of the society, it is important that reasonable restrictions be placed upon the executive, legislature and the judiciary in a compartmentalized form albeit not a water tight one.

2.2 CONCEPTUAL CLASSFICATION OF KEY TERMS

For the purpose of this work, unless otherwise stated, the following terms mean:

a. Separation of Power

This can be defined as the division of governmental authority into three branches of government- legislative, executive and judicial- each with specified duties on which neither of the other branches can encroach; the constitutional doctrine of checks and balances by which the people are protected against tyranny.[5]

b. Checks and Balances

The theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government.[6] This principle is in place to prevent the abuse of Separation of Power.

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5 H.C. Black, *Black's Law Dictionary* (8th ed. West Group, 2004)

6 Ibid

c. Rule of Law

The doctrine that every person is subject to the ordinary law within the jurisdiction.[7] In its most basic form, it is the principle that no one is above the law. The doctrine is arguably as supreme as the constitution.

d. **Constitution**

The fundamental and organic law of a nation or State that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and liberties. Every democratic State must have a constitution. They may be written or unwritten and is supreme over every person in the State.

e. **Executive**

The branch of government responsible for effecting and enforcing laws; the person or persons who constitute this branch.

f. **Legislature**

The branch of government responsible for making statutory law

g. **Judiciary**

The branch of government responsible for interpreting the laws and administering justice. A system of Courts. It also means A body of Judges.

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7 Ibid

h. State

A State is the political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people. It is also an independent political society occupying a defined territory. The members of which are united together for the purpose of resisting external aggression and preservation of internal order.

2.3 EVOLUTION OF THE DOCTRINE OF SEPARETION OF POWERS

The doctrine separation of powers was developed over many centuries ago. Although the phrase "separation of powers" was coined by Charles Baron de Montesquieu, the actual practice of the doctrine goes back in history much further. Aristotle first mentioned the idea of a "mixed government" or hybrid government in his work politics where he drew upon many of the constitutional forms in the city-states of Ancient Greece. He observed that every government, no matter its form, performed three distinct functions; "the deliberative, the magisterial, and the judicative". According to him,

There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to correspond to the differences between each of these elements. These are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element.[8]

In modern terminology these activities correlate respectively to the legislative, executive and judicial functions of government.

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[8] Ibid

Although Aristotle identified these basic powers common to all governments, he did not necessarily suggest that these powers should be exercised by different branches. In the Roman Republic, the Roman Senate Consuls and the Assemblies carried out a mixed government[9] similar to that conceived by Aristotle. There was a system of checks and balances on the Roman rule in the early republic which was several. The ruler had his powers checked on by the Senate which was made up of the landed class. The Senate in turn, had its power checked by the Tribunes. The citizens were in turn subject to the principles of justice as spelt out in the twelve tables which was a set of laws which governed all Roman citizens equally.[10]

The evolution of this concept can also be traced to the British Parliament's gradual assertion of power and resistance to the royal decrees during the 14th Century. The English scholar, James Harrington, was one of the first modern philosophers to analyze the doctrine. In his essay, "Commonwealth of Oceana" (1656), Harrington, building upon the works of earlier philosophers like Aristotle, Plato and Machiavelli, described a utopian political system that included a separation of powers. [11] English political theorist, John Locke, gave the separation concept more refined treatment in his Second Treatise on Government (1690) where He observed the conditions of 17th century England. According to him, it was convenient to separate the legislative and executive powers of government so that the legislature can act quickly at intervals and the executive can constantly be at work so that lawmakers will not exempt themselves from obedience and make the laws to suit their individual interests. In his words,

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9 Polybius; *Histories*, Book 6, 11-13

10 www.newworldencyclopedia .org/checks_and_balances accessed on 29th January, 2022

11 Separation of Powers and Nigerian Constitutional Democracy op. cit

"It may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantage."[12]

Montesquieu accorded the doctrine a more important position than did most previous writers in his book.[13] While john Locke made the case for separating the legislative and executive powers, Montesquieu provided a convincing defense for an independent judiciary:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty… Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[14]

To discover the constitutional principles which best promoted political liberty, Montesquieu looked to the English Constitution which in his belief, was the only one having liberty as its chief object. Though the English constitution classified political power primarily in terms of 'legislative' and 'executive' functions and further sub-divided the latter to take into account Locke's distinction between 'executive' and 'federative' functions, he decided to call the

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12 www.newworldencyclopedia .org/entry/checks_and_balances accessed on 29th January, 2022

13 Ibid

14 Ibid

conduct of foreign affairs as ‘executive power’ and the execution of domestic law as ‘judicial power’. It is based on this broad classification that he divided governmental power into legislative, executive and judicial functions. Of the trio, he considered judicial power as the most frightening power since in his opinion executive could not harm a subject’s life, liberty or property until after a judicial decision. His idea of separation of powers was a major influence on the founders and framers of the American constitution. Article I; Section 1 vests all legislative powers in the Congress. Article II; section 1 vest all executive powers in the President and Article III; Section 1 vests all judicial powers in the Supreme Court.

Despite the safeguards against tyranny, the modern-day societies find it difficult to apply the doctrine rigidly. While America adopts the doctrine with only slight modifications, the United Kingdom follows a parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature and even holds the power to dissolve the assembly. The vesting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.

Authors who believe there is an application of the doctrine in the modern United Kingdom have described only the independence of the judiciary as evidence that the model applies. The influence of the doctrine of separation of powers to the Nigerian Constitution is to a large extent based on the American understanding of it. This is clearly discernible in the Constitutions of 1979 and 1999.

2.4 DOCTRINAL BASIS OF SEPARATION OF POWERS

The rationale behind the doctrine of separation of powers is that neither the legislature, the executive nor the judiciary should exercise the whole or part of another's powers, but it does not exclude checks by one branch over the other. In the United State and Nigeria, separation of powers is understood to mean an executive composed of non-parliamentary members. These States practice a presidential system of government where executive powers are vested in the president who has a cabinet made of the heads of departments under the executive arm. The heads of departments are personally responsible to the President and neither to the Congress nor the National Assembly.[15]

The importance of this doctrine has been judicially emphasized in Liyanage V. The Queen[16] where the Judicial committee of the Privy Council pointed out that, there exist under the Ceylonese Constitution a tripartite division of power- legislature, executive and judiciary and it would be unconstitutional if judicial functions were allowed to be interfered with by the legislature by means of an Act of parliament.

The import of this doctrine transcends the liberty of citizens; it goes as far as the protection of government organs as it prevents an organ from the subjugation of others. Justice Louis Dembitz Brandeis[17] of the U.S Supreme Court in Myers V. U.S.A[18] said 'the doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary powers.' The purpose was not to avoid friction incident to the distribution of

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15 Suleiman Hassan, *Parliamentary control of administrative agencies*, (being a paper presented at 2003/2004 LLM class at the Faculty of Law Obafemi Awolowo University, Ile-Ife, Nigeria) 2005.

16 [1967] 1 AC 259

17 Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, (Dent, London, 1957) 94

18 (1926) 272 U.S 52 at 293

governmental powers among the three departments, but to save the people from autocracy. This is a point to be deciphered from the diction of Dean J. in the High Court of Australia in the case of Polyukhovich v. Commonwealth**.**[19] Thus, the main objective of the doctrine is to ensure that the life, liberty and property of the subjects are not to be found in the hands of arbitrary judges whose decisions are then regulated only by their own opinions and not by any fundamental principles of law.

Also, in the Nigerian case of Kayode V. The Governor of Kwara State[20]**,** the Court of Appeal held that:

*"*In a Presidential system of government which Nigeria is currently operating, there are three arms of government, the Executive, the legislative and the Judiciary. The functions of each are clearly defined and set out in the constitution which is the grundnorm, any action taken or to be taken by each arm must be within the provision of the said constitution or else it will be declared ultra vires to the powers given to that arm of government*."*

This is also consistent with the decision of the Court of Appeal in Hon. Abdullahi Maccido Ahmad V. Sokoto State House of Assembly & Anor*[21],* where the Court Per Salami JCA held that the doctrine of separation of powers has three implications.

(a) That the same person should not be part of more than one of the arms or division of government;

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19 (1991) 172 CLR 501 at 606

20 (2005) 18 N.W.L.R (Pt. 957) 324 at 352

21 (2002) 44 WRN 52

(b) that one branch should not dominate or control another arm. This is particularly important in the relationship between (the) executive and the courts;

(c) that one branch should not attempt to exercise the functions of the other.

The essence of the doctrine of separation of powers is to provide a safeguard against the abuse of authority by one arm of government which is the very definition of tyranny. What is meant by this is that, the existing powers must be separated into different organs and whatever power is vested in any organ should not be encroached upon by another organ.[22] By this system, each arm of government through the exercise of its defined powers checks the excesses and abuses of the others. A popularly elected legislature makes the laws and monitors their faithful execution by an elected executive. The judiciary applies its power of judicial review to keep the legislature within the confines of the Constitution. By the same token, bicameralism has made it possible for the exercise of checks on the operations of one arm of the National Assembly by the other in Nigeria and USA.

While it is important that each arm serves as a check on the other, it has been held that no one arm should be carried away with its powers to carry out checks to encroach on the constitutional powers of another. It is to this end that the court in Senator Abraham Adesanya V. President of the Federal Republic of Nigeria[23] held that:

*"*Each section should not encroach on the sphere of authority of the other. The courts do not have a veto power over the work of the National Assembly but a supervisory power which can best be exercised on the occasions when a clarification by the court is deemed absolutely imperative*."*

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22 D.O Odeleye and Mohammed Etudaye, "The Theory and Practice of Separation of Powers in a Presidential Constitution- The Nigerian Experience". *Abuja Journal of Public and International Law* (2010)1:1, P.297

23 (1981) All N.L.R 904

Jeremy Bentham (The Utilitarian) on his part criticized the theory basically on the fact that compartmentalization of governmental powers and tendency for such rigid separation is impracticable as it would breed unbridled power in each of separated arms within its sphere of competence. An American scholar explained the doctrine thus:

First, it groups governmental functions under three general powers: legislative, executive and judicial. Second, it allocates the three powers with some intermixing, to separate departments or branches of government. Third, it provides for a coordinate status among the three branches.[24]

In effect, the separation of powers seeks to create not three separate governments, but one government, working as a unit but through diversity. As Justice Jackson put it;

While the constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity[25]

The premise behind the separation of powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The doctrine therefore holds that liberty is best preserved if the tripartite functions of government- legislation, law enforcement and adjudication are in different hands. It is generally accepted that there are three main categories of governmental functions- the Legislative, Executive and Judicial. According to the doctrine, these three powers and functions of government must, in a free democracy, always be kept separate and exercised by separate organs of government. The legislature cannot therefore

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24 Robert S. *The Supreme Court and the Presidency* (New York; Free press, 1971) p. 2

25 Youngstown Sheet & Tube Co. v. Sawyer, 342 U.S. 579, 635 (1952)

exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the government.[26]

2.5 SCHOLARLY EXPOSITION OF THEORIST AND JURISTS

There is no gainsaying that the doctrine of separation of powers is one of the most-coveted areas of both past and present proponents. This is made evident in the array of dictions that has been rendered to eulogize the doctrine. John Adams[27] said:

A legislative, an executive and a judiciary comprehend the whole of what is meant and understood by Government. It is by balancing each of these powers against the other two, that efforts in human nature towards tyranny, can alone be checked and restrained, and any freedom preserved in the constitution

Some schools of thought argue that the goal of separation of powers is analogous to that of division of labour. According to this school, like the principle of "division of labour" in Adam Smith's economics, the doctrine of separation of powers is geared towards efficiency but also more importantly, towards guarding against abuse of authority.[28]

In a similar vein, the Liberty school of thought has an affinity with Montesquieu who said:

> "Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the very nature of things that one power should be a check on another. When the legislative and executive powers are united in the same person or body there can be no liberty. Again, there is no liberty if the judicial power is not separated from the

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26 C.K Takwani, *Lectures on Administrative Law* (India: Eastern Book Company, 2008) P. 31

27 In his letter to Richard Lee in 1775 on a proposed plan for a new state government with three branches

28 Malemi E. Op. cit

> legislature and executive. There would be an end to everything if the same person or body, whether of the nobles or of the people, were to exercise all these powers."

It is for this reason that the 1999 Constitution of the Federal Republic of Nigeria splits the powers of governance into what is described as a "horizontal" separation of powers which consists of the legislature, executive and the judiciary. Under the constitution also, power is distributed into a "vertical" separation of powers which consists of the central, state and local governments.

2.6 CONCLUSION

The import of this doctrine transcends the liberty of citizens; it goes as far as the protection of government organs as it prevents an organ from the subjugation of others. Justice Louis Dembits Brandeis of the U.S Supreme Court in Myers V. U.S.A said "the doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary powers." The purpose was not to avoid friction incident to the distribution of governmental powers among the three departments, but to save the people from autocracy.

It is note worthy that separation of powers is not a question of mere convenience, nor is it an accident of political history, but a deliberate regulatory step to prevent an imbroglio by conferring specific authorities and functions on each organ of government. This is a point to be deciphered from the diction of Dean J. in the High Court of Australia in the case of Polyukhovich v. Commonwealth. Thus, the main objective of the doctrine is to ensure that the life, liberty and property of the subjects are not to be found in the hands of arbitrary judges whose decisions are then regulated only by their own opinions and not by any fundamental principles of law.

Jeremy Bentham (The Utilitarian) on his part criticized the theory basically on the fact that compartmentalization of governmental powers and tendency for such rigid separation is impracticable as it would breed unbridled power in each of separated arms within its sphere of competence. An American scholar explained the doctrine thus: “First, it groups governmental functions under three general powers: legislative, executive and judiciary. Second, it allocates the three powers with some intermixing, to separate departments or branches of government. Third, it provides for a coordinate status among the three branches”.

In effect, the separation of powers seeks to create not three separate governments, but one government, working as a unit through diversity.

CHAPTER THREE

THE DOCTRINE OF SEPERATION OF POWERS UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999.

3.1 INTRODUCTION

Before the coming of the 1999 Constitution of The Federal Republic of Nigeria, Nigeria's democracy evolved through phases. One of those phases was the undue interference on the country's democratic process by successive military regimes. The organization of government under the military rule is contrary to the concept of separation of powers, traditional or modern.[29] With the advent of the military rule in Nigeria beginning from January 15, 1966, the military suspended and modified the 1963 Constitution by virtue of the Constitution (suspension and modification) Decree No. 1, 1966. The decree dissolved the parliament and fused the legislative and executive powers in the Supreme Military Council (SMC) which was the ruling military council. This fusion of both legislative and executive functions is repeated in every military regime. The military did not stop at this; the military constantly and arrogantly took a swipe at the judiciary by the promulgation of decrees purporting to oust the jurisdiction of the courts in various matters- although they were met with constant resistance by the courts.

In this Chapter, an attempt will be made to trace the root of the doctrine of Separation of Power from the 1st Republic to the Military Regime down to the 1999 Constitution in order succinctly appraise the workability and the effectiveness of the principle of separation of powers as entrenched under each of these regimes.

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[29] E. E. *Military Rule and Separation of Powers,* www.researchfaculty.com/2015/04/military-rule-and-separation-of-powers.html?m=1. Accessed on 31th October 2022

3.2 DOCTRINE OF SEPERATION OF POWER

The doctrine of separation of powers as it is known today developed from the writings of classical and medieval thinkers such as Aristotle who opined that:

"There are three elements in each Constitution in respect of which every serious lawgiver must look for what is advantageous to it, if these are well arranged, the constitution is bound to correspond to the differences between each of these elements. These are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element,

According to Madison, "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."

The doctrine of separation of power is a fundamental component of most modern democratic political systems. The doctrine presupposes an arrangement whereby the political powers which exist in any form of government should not be consolidated or concentrated in one person or group of persons. What is meant by this is that, the existing powers must be separated into different organs and whatever power is vested in any organ should not be encroached upon by another organ[30]. The premise behind the separation of powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The doctrine therefore holds that liberty is best preserved if the tripartite functions of government- legislation, law enforcement and adjudication are in different hands. It is generally accepted that there are

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[30] D.O. O and M. , "The Theory and Practice of Separation of Powers in a Presidential Constitution- The Nigerian Experience". *Abuja Journal of Public and International Law* (2010)1:1, 297

three main categories of governmental functions- the Legislative, Executive and Judicial. According to the doctrine, these three powers and functions of government must, in a free democracy, always be kept separate and exercised by separate organs of government. The legislature cannot therefore exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the government[31].

The concept of 'separation of powers' means three different things as explained by Wade and Philips[33].

1. That the same persons should not form part of more than one of the three organs of Government, e.g. the Ministers should not sit in Parliaments;
2. That one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament.
3. That one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.

Thus, the whole purpose of the doctrine is to avoid tyranny in government. There is no gainsaying the fact that a government of separated powers is likely not to be tyrannical and more likely to follow the rule of law. However, it must be pointed out from the onset that there is no rigid application of the doctrine of separation of powers in the constitutional framework of any democratic State. The main object as per Montesquieu- is that there should be government of law rather than having willed and whims of the official. It is to this end that the three branches of government usually have some overlap in their constitutionally assigned

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[31] C.K. T, *Lectures on Administrative Law* (India: Eastern Book Company, 2008)
31 [33] *Constitutional Law* (1960) 22

functions. There is no way in which all the powers of the State and functions of government can be shared out and put into mutually exclusive compartments and assigned to different segments of government as observed by Justice Oluwadare Aguda[32]. Some overlapping is bound to occur and occurs at various times. He noted further that, while much of the overlapping of powers between the different arms of government may not be intended by the Constitution, yet the most importance of such overlapping arises from the powers allowed by the Constitution itself.

3.3 SEPARATION OF POWER UNDER THE 1999 CONSTITUTION

In Nigeria, the doctrine of separation of powers dates back to the pre-colonial era. A perfect reflection of the doctrine is that of the old Oyo Empire where there were in existence the Alafin, Oyo Mesi, the Ogboni cult and other traditional title holders who played pivotal roles in the administration of the said empire. The Alafin rarely wielded autocratic power as he was in fact, subjected to elaborate restraints embedded in the custom (which can justifiably be called constitution) of the kingdom. He had to submit his decisions in the first place to his council of seven notabilities, the Oyo Mesi whose principal officer was the chief known as the Basorun. In turn, the Oyo Mesi were checked by the council of Ogboni, a society which, in its worship of the earth, embodied both religious and political sanctions. This and more clearly shows that in line with the doctrine of separation of powers, power was not concentrated in the king during the pre-colonial era.

It is common knowledge that before the coming of the 1999 Constitution of the Federal Republic of Nigeria, Nigeria's democracy evolved through phases. One of those phases was the undue

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[32] O. A., *Understanding the Nigerian Constitution of 1999* (Lagos: MIJ Professional Publishers) 2000

interference on the country's democratic process by successive military regimes. The organization of government under the military rule is contrary to the concept of separation of powers, traditional or modern. The primary purpose of the doctrine is to safeguard against dictatorial rule by avoiding concentration of all powers of government in one hand. With the advent of the military rule in Nigeria beginning from January 15, 1966, the military suspended and modified the 1963 Constitution by virtue of the constitution (suspension and modification) Decree No. 1, 1966. The decree dissolved the parliament and fused the legislative and executive powers in the Supreme Military Council (SMC) which was the ruling military council. This fusion of both legislative and executive functions is repeated in every military regime. The military did not stop at this; the military constantly and arrogantly took a swipe at the judiciary by the promulgation of decrees purporting to oust the jurisdiction of the courts in various matters- although they were met with constant resistance by the courts. From the above, it can be apparently deciphered that the issue of observance of the principle of separation of powers was almost a mirage during the military regimes, in spite of the constitutional provisions for same.

The 1999 Constitution of the Federal Republic of Nigeria came into force on 29th May 1999 following the transition from military rule under General Sani Abacha to a civil rule. Apart from few innovations contained in the 1999 Constitution, the Constitution is almost a replica of the 1979 Constitution. In view of the foregoing, the provisions of the 1979 Constitution that relate to the principle of separation of powers remain unchanged in the 1999 Constitution. An appraisal of the relevant sections of the Constitution as they relate to the powers of the three arms of government- the Legislature, Executive and the Judiciary will be made as follows.

3.3.1 LEGISLATIVE POWER

Legislative functions require that, laws should be made for the generality of the population. The best guarantee against arbitrariness in the exercise of legislative functions is to require legislations to be made for every citizen in a State and not separately for each individual or for each situation. This was affirmed in *Abraham Adesanya v President Federal Republic of Nigeria.*[33] In this case, it was held that if we are to keep our democracy, there must be one commandment: Thou shall not ration justice. For the assurance of liberty, equal and uniform treatment of the citizens there must be compartmentalization of powers as conveyed in the words of Montesquieu that *"*there is no liberty yet, if the power to judge is not separated from the legislative function and executive power"[34]. Section 4 of the 1999 Constitution confers legislative powers on the National Assembly and the House of Assembly of a State.

Section 4(1) of the Constitution of the Federal Republic of Nigeria (as amended) provides thus:

> The legislative powers of the Federal Republic of Nigeria shall be vested in a National assembly for the Federation which shall consist of senate and a House of Representatives. Though conferred with exclusive power to make laws for the Federation, the National Assembly does not have the prerogative power to make just any kind of law. The National Assembly shall have power only to make laws for the pea order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution[35]. In addition to this, section 4(4) of the Constitution provides that:

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33 Supra

34 M. C., *Constitutionalism: Ancient and Modern* (New York: Cornell University Press, 1941) 21

35 CFRN 1999 (as amended), s. 4(2)

In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:

(A) any matter in the Concurrent Legislative List set out in the first column of Part II of the second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(B) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

Section 4(7) confers on the House of Assembly of a State the power to make laws for the peace, order and good government of the State or any part thereof with respect to matters contained in sections 4(7) (a), (b) and (c) of the Constitution. As in the case of the National Assembly, the House of Assembly of a State is also limited as to the type of laws it can make. It is to this end that section 4(9) provides as follows:

Notwithstanding the foregoing provisions of this section, the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.

The doctrine of separation of powers cannot be said to exist where a member of the legislature is also a member of the executive or the judiciary. It is in recognition of this that section 147(4) of the Constitution provides that:

Where a member of the National Assembly or of a House of Assembly is appointed as Minister of the Government of the Federation, he shall be deemed to have resigned his membership of the National assembly or of House of Assembly on his taking the oath of office as Minister.

This is also consistent with the decision of the Court of Appeal in *Hon. Abdullahi Maccido Ahmad v Sokoto State House of Assembly & Anor*[36], where the Court held Per Salami JCA held that the doctrine of separation of powers has three implications. (a) That the same person should not be part of more than one of the arms or division of government;

(b) that one branch should not dominate or control another arm. This is particularly important in the relationship between (the) executive and the courts;

(c) that one branch should not attempt to exercise the functions of the other.

In what would seem as the recognition for the need to allow some overlap of powers, the constitution empowers the legislature to conduct investigations (which are strictly quasi-judicial) in order, amongst other things, to expose corruption, inefficiency or waste in the execution or administration of funds appropriated by it[37]. The Constitution of the Federal Republic of Nigeria 1999(as amended). also gave what may be considered judicial power to the Senate or the House of Representatives or a Committee so appointed[38]. Such power include the power to issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails, refuses or neglects to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House or Committee in question.

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36 (2002) 44 WRN 52

37 CFRN 1999 (as amended), s. 88(2) and 128(2)

38 CFRN 1999 (as amended), s. 89 and 129

In view of these provisions, the Court of Appeal in Senate of the National Assembly & Ors. v Momoh[39] held inter alia that the provision of the equivalent of section 89 of the 1999 Constitution did not amount to an infraction on the powers of the judiciary and executive.

3.3.2 EXECUTIVE POWER

The executive is an important organ in the tripartite classification of powers. It is evident that the government of any nation is seen in the picture of the executive. The relevant provisions of the Constitution of the Federal Republic of Nigeria, epitomizes the importance of this organ of government. Section 5 of the Constitution confers executive powers on the President and the Governor of a State. It provides thus:

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

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

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

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

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39 (1984) 4 NCLR 269 CA

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

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

(3) The executive powers vested in a State under subsection (2) of this section shall be so exercised as not to:

(a) impede or prejudice the exercise of the executive powers of the executive powers of the Federation;

(b) endanger any asset or investment of the Government of the Federation in that State, or

(c) endanger the continuance of a Federal Government in Nigeria.

It can be deduced from the foregoing that only the President and a State Governor have the power to carry out executive functions of the Federal and State governments respectively and they may delegate those powers to the above named officers as they deem fit but not to a member of the National or State House of Assembly or a member of the judicial arm of government. Executive powers of the President and State Governor in this sense includes the power to formulate policies and implement them, initiation of legislations, maintenance of law and order, the direction of foreign policy (in the case of the President) and enhancement of economic and social welfare.

The Constitution of the Federal Republic of Nigeria 1999 (as amended), confers on the executive the power to carry out functions which may seem exclusive to the legislature and the judiciary. The President of the Federal Republic of Nigeria is empowered under section 32 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) to make regulations concerning citizenship and immigration matters. Whereas, section 32(2) requires the President to lay before the National Assembly such regulations. Again, the president or the governor as the case may be is empowered under section 175 and 212 respectively to pardon convicted persons or to exercise his prerogative of mercy. Furthermore, sections 160 and 204 of the Constitution, allow certain executive bodies established under the Constitution to regulate their own procedure, confer powers and impose duties on any officer or authority, for the purpose of discharging its functions, provided the approval of the president or the governor is obtained beforehand.

3.3.3 JUDICIAL POWERS

The judiciary in every democratic State is the body saddled with the constitutional function of justice administration. It is therefore important that the judiciary has its powers separated from the legislature and the executive. The idea of judicial independence is protected by various sections of the Nigerian Constitution. The judicial powers under the 1999 Constitution are not separated. Unlike the case of the executive and legislature, the judicial powers are interwoven in terms of exercise of those powers. Both Federal and State judicial powers operate on the same hierarchical structure to the extent that a case that was handled by State courts can reach Federal courts when appealed against; there are therefore inter-relations between the State and Federal judicial powers.

Sections 6(1) and (2) of the 1999 Constitution vests the judicial powers of the Federation and a State in the courts established for the Federation and States respectively. These courts include:

(A) the Supreme Court of Nigeria;

(B) the Court of Appeal;

(C) the Federal High Court;

(D) the High Court of the Federal Capital Territory, Abuja;

(E) a High Court of a State;

(F) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;

(G) a Sharia Court of appeal of a State;

(H) the Customary Court of Appeal of the Federal Capital Territory, Abuja;

(I) a Customary Court of Appeal of a State;

(J) such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which, the National Assembly may make laws; and

(K) such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.[40]

The Constitution grants the National Assembly and State Houses of Assembly the powers to establish courts other than those to which section 6 relates, with subordinate jurisdiction to that of a High Court. The National Assembly and State Houses of Assembly also have the power to abolish any court which any of them has brought into being[41]. In Abraham Adesanya

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40 Section 6(5) 1999 CFRN 1999 (as amended), s. 6(5)

41 CFRN 1999 (as amended), s. 6(4)(a) and (b)

V. President Federal Republic of Nigeria & Anor[42]. Idigbe JSC (as he then was) described judicial power as "the power of the Court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision". The judiciary shall therefore exercise its judicial powers only to the extent provided for in section 6(6) of the Constitution.

The judiciary as the third arm of government exercises its powers of adjudication and interpretation of the constitution and laws made by the legislature through the courts. Therefore, the judiciary and courts may be used interchangeably as they imply the same thing. Visible overlaps are found in the judiciary as it is granted legislative powers in the 1999 Constitution. The judiciary may, under powers delegated to it by the legislature, through the Chief Justice of Nigeria make rules with respect to the practice and procedure of a High Court for the enforcement of fundamental rights[43], a function that is legislative in nature. Closely knit with this are the provisions of sections 236, 248, 259, 264, 269, 274, 279 and 284 of the constitution which grants the power to make rules for regulating the practice and procedure on the Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the High Court of a State, Grand Kadi, and the President of the Customary Court of Appeal of the respective Courts.

Flowing from the above, it can be said that the 1999 Constitution splits the powers governance into what is described as horizontal and vertical separation of powers.

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42 Supra

43 CFRN 1999 (as amended), s. 46(1)

3.4 HORIZONTAL SEPARATION OF POWER

Today the separation of the Legislative, Executive and Judicial powers is recognized and accepted as political common sense in modern democratic States. It is in line with this that the constitution confers governmental powers not in one person but the President as the head of the executive, legislators and judicial members for the judiciary. This is provided for by the Constitution and is what is meant by the horizontal separation of powers.

James Madison recognized that a horizontal separation of powers was absolutely essential to a free society and opined that *"*the holding of all powers- legislative, executive and judiciary in the same hands whether hereditary, self-appointed or elective is the very definition of tyranny.*"*[44] The founders of separation of powers knew that being governed by elected representatives was no guarantee that the government would not become oppressive; Madison expressed this view in these words *"*Dependency on the people is, no doubt, the primary control on the government. But experience has taught mankind that auxiliary precautions are necessary*"*.[45]

One of the "auxiliary precautions" taken by the Constitution was to split the performance of Executive, Legislative and the Judicial functions into different persons and further divide the legislature into Senate and House of Representatives at the Federal level. As noted earlier, in practice, a water-tight separation of powers is likely to be counter-productive and it is in recognition of this fact that the constitution allows for some overlapping of powers. The legislature being the first leg of the tripod classification of powers must take note not to exceed its constitutional powers and not get carried away by what seems to be a conferment of wide powers on it by the constitution to interfere with the powers of other arms.

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44 Ielarrylions.com/2006/07/horizontal_vertical_separation_of.html?m=1. Accessed on 1st November, 2022

45 Ibid

This position was affirmed in A.G. Abia State V. A.G Federation[46] where Ogundare JSC was held thus:

Section 25 subsection (1) CFRN 1999 (as amended)seeks to limit the period within which any judicial proceedings must be concluded. This infringes on the principle of separation of powers as entrenched in the Constitution. The National Assembly has no power to dictate to the Judiciary how to conduct its affairs, just as the Judiciary cannot fix a time limit for the proceedings in the National Assembly.

It is imperative also that the executive confines itself to its constitutionally guaranteed powers and not interfere with the powers of other arms of government. The judiciary being an important arm of government is pivotal to the effective operation of the doctrine of separation of powers. Its duty under the doctrine is restricted to the adjudication and interpretation of the law and must at all times be independent of the executive and legislature.

3.5 VERTICAL SEPARATION OF POWER

Nigeria shall be a Federation consisting of States and a Federal Capital Territory as declared by the Constitution of the Federal Republic of Nigeria 1999(as amended)[47] . Section 2(3) provides that there shall be thirty-six (36) States in Nigeria and goes on to list them. The import of this is that Nigeria operates Federalism and has its division and sharing of governmental powers between the Federal and the regional (or State) governments. While the horizontal separation of powers requires that governmental powers be shared between the executive, legislature and the

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46 50 (2002) 6 N.W.L.R (Pt. 763) 265 at 397

47 CFRN 1999 (as amended), s. 2(2)

judiciary, the division of powers between the Federal and State governments is referred to as vertical separation of powers.

Madison in his work described how vertical separation of powers would work with horizontal separation of powers to safeguard the liberty of the people as follows;

...the power surrendered by the people is first divided between the distinct governments, State and Federal. Then the portion allotted to each is subdivided among distinct and separate branches. Hence the rights of the people are doubly protected. The different governments [State and Federal], will control each other, at the same time each will be controlled by itself.[48]

Vertical separation of powers between the Federal and State governments is written into the constitution. At the executive level, executive powers of the Federation are vested in the Governor of a State[49] which suggests that the president in carrying out his constitutional powers is independent of a State governor and vice versa. This has however not been the case in Nigeria as in 2004, the Lagos State House of Assembly acting on its constitutionally guaranteed power to create new Local Government Areas, created same. The then President, Chief Olusegun Obasanjo frowned at this and argued that the creation of new Local Government Areas were not done in conformity with section 8(5) of the Constitution. He wrote a letter to States who had done same. These States were Ebonyi, Katsina, Nasarawa, and Niger asking them to reverse the creation of the new Local Government Areas since they did not conform with section 8(5) of the Constitution. The Attorney General of Lagos State took out an originating summons on behalf of the Government of Lagos State where he among other things asked the Court to interpret section 162(5) of the Constitution since the president had withheld the Statutory Allocation due and

48 Supra

49 Ibid

payable to Lagos State Government. In its decision, the Court held that the President of the Federal Republic of Nigeria has no power to suspend, withhold or direct suspension or withholding (whether by way of administrative action or executive fiat) for any period, the statutory allocations due and payable to the Local Government Councils in accordance with the provisions of the Constitution. The Court further held that whenever there is any disagreement or dispute between the Federation and the States, the avenue for the settlement are, according to section 6 of the Constitution the superior courts of record.[50] By the same token, the executive at the Federal level must take due care not interfere with the constitutional powers of a State House of Assembly.

The constitution vests the Federal legislative powers of the country in the National Assembly while the State legislative power is conferred on the House of Assembly of the relevant State. The power of the National Assembly is limited to making laws for the peace, order and good governance of the Federation only and their right to interfere with the powers of the State House of Assembly is limited to section 11(4). Which provided for situations whereby the National Assembly may make laws for peace, order and good governance for a State if the House of Assembly of such State is unable to perform its functions by reason of the situation prevailing in that State. Section 11(5) goes on to provide that a House of Assembly shall not be deemed to be unable to perform its functions so long as the House of Assembly can hold a meeting and transact business.

The constitution also provides expressly that the House of Assembly a State shall not make a law that is inconsistent with any law validly made by the National Assembly; where a law made by a House of Assembly is inconsistent with a law made by the National Assembly shall prevail, and

[50] A.G of Lagos State v A.G of the Federation (2004) 20 NSCQLR 99

that other law shall to the extent of the inconsistency be void.[51] This was affirmed in A.G. Ogun *State v A.G. Federation*,[52] Per Justice Idigbe.

The vertical separation of powers is not just between the State and Federal Government. This principle is meant to operate through all the levels of government all the way down to the most local level. Thomas Jefferson explained,

*"*The way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent perform best. Let the national government be entrusted with the defense of the nation, and its foreign and federal relations; the state governments with the civil rights, laws police and administration of what concerns the State generally; the counties with the local concerns of the counties, and each ward (township) direct the interest within itself. It is by dividing these republics, from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under everyone what his own eye may superintend, that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body…. *"*[53]

The existence of local government administration in Nigeria is the creation of the constitution. Its existence is constitutionally entrenched as an order of government alongside the Federal and State governments. The constitution requires all States to enact legislation providing for the

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51 CFRN 1999 (as amended), s. 4(5)

52 (1982) 3 NCLR 166

53 The Writings of Thomas Jefferson available at http://press-pubs.uchicago.edu/founders/documents/v1ch4s34.html accessed on 1st November, 2022

establishment, structure, composition, finance and function of local governments within their jurisdiction.[54]

One interesting fact to note is that the constitution failed to provide for the law-making powers of the local government, as well as the modalities for the making of such laws. Thus, barring for the provision of the existence and function of the local government as a third tier of government, the constitution is silent on the question of separation of powers and the general structure of government at the local level. This task is overwhelmingly confirmed on the State Houses of Assembly, which are allowed to choose any structure or composition of councils within their domain. The constitution therefore does not compel the State Houses of Assembly to maintain the presidential structure of governance stipulated for the Federal and State governments at the local government level. The above summation raises the question as to what extent the doctrine of separation of powers apply under the 1999 Constitution of Nigeria to local governments?

It is submitted that irrespective of the extensive provisions of the constitution in respect of their existence and functions, local government are not autonomous.[55] In practice, State governments are reluctant to allow local governments conduct their affairs freely. The recurrent problem areas in the relations between the local government and the other tiers of government has bordered on finance, functions and staffing. State governments have routinely hijacked varying proportions of the allocations to local governments from the Federation Account. Sometimes the Federal government itself is guilty of this.[56] These among other examples show that while the constitution recognizes the local government as a tier of government, it does not suggest

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54 CFRN 1999 (as amended), s. 7(1)

55 H. G, "Local Government in Nigeria". *Local Government Bulletin* (2007) 9:3, 26

56 Hhttp://www.ialsnet.org/meetings/constit/papers/AmupitanJoash(Nigeria).pdf. Accessed on November 1, 2022

expressly that it should enjoy separate powers as is enjoyed by the executive, legislature and the judiciary at the Federal and State levels.

All these conflicts have resulted in serious political chaos which ended up in court; In *AG. Abia State & 2 Ors. v AG. Federation & Ors*[57] the Supreme Court held that the powers of the National Assembly over funds accruable to the local government councils in Nigeria under sections 7(6) and 162(5) of the 1999 constitution are only limited to allocation of such funds and it did not extend to monitoring such funds. Similarly, the Court of Appeal in *A.G. Plateau State V. Goyol & Ors.*[58] *and A.G. Benue State v Umar & Ors.*[59] declared the actions of the Plateau State Governor and that of Benue State respectively in dissolving the local government councils in those States as unconstitutional, null and void. The laws made by the two State Houses of Assembly which authorized the governors to impede the smooth running of the local government councils were also declared to be null and void.

3.6 CONCLUSION

The point being made thus far is that the doctrine of separation of powers is recognized by the 1999 Constitution of the Federal Republic of Nigeria as reflected in sections 4(1), 4(6), 5(1), 5(3) and 6. This position has also been affirmed by the Courts. *In Lakanmi & Anor. v A.G. of Western Sate & Ors,*[60] the Court held thus:

*"*We must here revert once again to the separation of powers, which the learned A.G himself did not dispute, still represents the structure of our system of government. In the absence of anything

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57 (2006) 7 SCNJ 1

58 (2007) 12 NWLR (Pt. 1059) 59

59 [2008] 1 NWLR (Pt.1068)

60 (1971) 1 U.I.L.R 201

to the contrary, it has to be admitted that the structure of our Constitution is based on separation of powers- the Legislative, the Executive and the Judiciary…"

The doctrine standing alone as a theory of government, as will be seen later does not provide an adequate basis for an effective and stable political system. It has therefore been combined with other political ideas like y of mixed government, and the concept of checks and balances to form the complex constitutional theories that provided the basis for modern political systems.

CHAPTER FOUR

THE PRINCIPLES OF CHECKS AND BALANCES AND CHALLENGES POSED TO TE DOCTRINE OF SEPARATION OF POWERS.

4.1 Introduction

Although separation of power is key to the workings of any State, no democratic system exists with an absolute application or an absolute lack of it. Governmental powers intentionally overlap; they are too complex and interrelated to be neatly compartmentalized. It is for this reason that it became necessary for the adoption of the principles of checks and balances which now accounts for tranquility in governance.

The main object is that there should be government of law rather than having willed and whims of the official. It is to this end that the three branches of government usually have some overlap in their constitutionally assigned functions. There is no way in which all the powers of the State and functions of government can be shared out and put into mutually exclusive compartments and assigned to different segments of government as observed by Justice Oluwadare Aguda.[61] . Some overlapping is bound to occur and occurs at various times. While much of the overlapping of powers between the different arms of government may not be intended by the Constitution, yet the most importance of such overlapping arises from the powers allowed by the Constitution itself.

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[61] O. A., *Understanding the Nigerian Constitution of 1999* (Lagos: MIJ Professional Publishers) 2000

4.2 Comparative basis of separation of powers

The doctrine of separation of power emphasizes the mutual exclusiveness of the three organs of government, viz., legislature, executive and judiciary. The main underlying idea is that each of these organs should exercise only one type of function. There should not be concentration of all the functions in one organ otherwise it will pose a threat to personal freedom.

There is an old adage containing a lot of truth that "power corrupts and absolute power corrupts absolutely". To evolve effective control mechanism, a man had been looking for devices to contain the forces of tyranny and authoritarianism. It may not be possible to state precisely the origins of the doctrine of separation of powers. However, if we look to the writings of the Greek philosopher Aristotle, it is possible to discern a rudimentary separation of powers doctrine. Thus, in his Politics, Aristotle remarked that: "there are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. The three are, first the deliberative, which discuss everything of common importance; second, the officials…; and third, the judicial element.

The English political theorist, John Locke (1632-1704), also envisaged a threefold classification of powers. Writing in The Second Treatise of Government (1689), Locke drew a distinction between three types of power: legislative, executive and federative. In Locke's analysis the legislative power was supreme and although the executive and federative powers were distinct, the one concerned with the execution of domestic law within the state and the other with a state's security and external relations, he nevertheless took the view that 'they are always united' in the hands of the same person.

The doctrine saw its full expansion in the hands of Charles Louis de Secondat, otherwise known as Baron de Montesquieu (1689-1755). He felt that the history of despotic Tudors and absolutist Stuarts, showed that freedom was not secured, if the exercise and the legislative powers were held in the same hands. He deduced his idea of separation of powers from his observation and ideas of the relationships between the Stuart King and the Parliament. He thought that Parliament would never be arbitrary, and the denial of legislative power to the king alone could make the rule by extemporary decrees impossible. Montesquieu having experienced the tyrannies in the monarchial France, must have watched the conditions on the other side of the channel with envy.

Separation of powers in India

In India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.

As a general provision, Parliament is entrusted to make the law for the union. Executive is entrusted with duty of implementing of law and judiciary is also considered to be independent under the constitutional scheme in India. However, there are many exceptions which negate the application of this doctrine.

Under Article 53 of the Constitution of India 1949, the executive powers of the union are vested with the president and under Article 154 the Governor is vested with executive powers but they do exercise their power with the aid and advice of the council of ministers at the Centre (Article 74) and at the State, as the case may be. Both President and Governor exercise the power of ordnance making under the constitution thus performing legislative functions. President make

laws for a State, after the dissolution of the state legislature, following the imposition of the President's Rule (Article 356). President has the power to disqualify any member of the house under Article 103 of the Constitution of India 1949.

The judges of the supreme court are appointed by the President, while the Parliament has the power to impeach the judges. The President has the power to decide a disputed question of the age of a judge of Supreme Court or any High Court for purpose of set restrain from the judge service.

The judicial function of the parliament is too substantial in certain respects. It can consider the question of breach of any known parliamentary privilege; and in a case where the charge is established have power to punish for their contempt.

Separation of powers in USA

The doctrine of separation of forms the basis of American constitutional structure. Article I, II and III delegate and separate powers and also exemplify the concept of separation of powers. Article I vests legislative power in the Congress; Article II vests executive power in the President and Article III vests judicial power in the Supreme Court. The idea of separation, both functional and personnel is yet unrealized but nearest approximation is reached in the state Constitution of Massachusetts in the U.S. It is said therein, that- … The legislative department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative or executive powers, or either of them; to the end it may be a government of law and not of men.

In the U.S.A., the President is not in theory responsible to the congress unlike India where the cabinet is collectively responsible to the Parliament. The President has a fixed tenure of office

and does not depend on majority support in the Congress. Before the expiry of his term, he can be removed only by the extremely cumbersome process of impeachment. Nor can the President dissolve the Congress whereas in India, Prime minister has the power to seek dissolution of the Parliament. The executive therefore is not in a position to provide effective leadership to the legislature and it is not always that the Congress accepts the programme and the policy proposed

The U.S. Constitution however incorporates some exceptions to the doctrine of separation with a view to introduce the system of checks and balances. For instance, a bill passed by the Congress may be vetoed by the President and, to this extent the President may be said to be exercising a legislative function. Again, appointment of certain high officials is subject to the approval of the Senate. Also, treaties made by the President are not effective until approved by the senate; to this extent, therefore, the senate may be deemed to be exercising executive functions. The supreme court has the power to declare Acts passed by the congress unconstitutional.

Separation of powers in England

Maitland traces the doctrine of Separation of Powers in England to the reign of King Edward I (1239-1307) in his book "Remarks on the History of England" advanced the idea of separation of powers. He laid emphasis on balance of powers within the constitution because an imbalance would destroy it. He asserts that for protection of liberty and security in a state, equilibrium is needed between Crown, the Parliament and the people.

Although Montesquieu derived the concept of his doctrine f separation of powers from the British Constitution, as a matter of fact at no point of time this doctrine was accepted in its strict sense in England. On the contrary, in reality, the theory of integration of powers has been adopted in England. It is true that the three powers are vested in three organs and each has its

own peculiar features, but it cannot be said that there is no 'sharing out' of the powers of the government. Thus, the King, though an executive head is also an integral part of the legislature. Similarly, all his ministers are also members of one or the other House of the Parliament. The Lord Chancellor is the head of judiciary, Chairman of the House of Commons (legislature), a member of the executive and often a member of the cabinet. The House of Commons ultimately controls the Legislative. The judiciary is independent but the judges of the superior courts can be removed on an address from both Houses of Parliament.

The United Kingdom does have a kind of separation of powers, but unlike United States it is informal. Black Stone theory of 'Mixed Government' with checks and balances is more relevant to the U.K. separation of powers is not an absolute or predominant feature of the U.K. Constitution. The three branches are not formally separated and continue to have significant overlap.

Conclusion

In conclusion, the modern interpretation of the doctrine of separation or powers is not mere theoretical philosopher's conception. It is a practical work-a-day principle. The division of government into three branches does not imply, as its critics would have us to think, three water-tight compartments. The machinery and procedure of legislative impeachment of executive officers and judges, executive veto over legislation and appointment of judges and judicial review of legislation and executive action are essential features of any sound constitutional system. It is said that instead of applying the doctrine in a strict sense of the functional machinery and procedures of the Government, the doctrine should be deemed to require a system

of checks and balances among the three departments of the Government while opposing the concentration of government powers in any of the three departments.

4.3 Checks and balances in Nigeria

A fundamental principle undergirding the design of modern governments is that of the separation of powers, but to the way of thinking of the framers of modern day Constitutions, they knew a water-tight application of Separation of Power could possibly bring anarchy, they carefully constructed a system that provided specific levers of power to allow each of the branches to influence the actions of the others in an orderly and predictable manner. Those levers are the system of checks and balances.

Checks and balances which like separation of powers is generally credited to Montesquieu is a government structure that gives each branch some control of the actions of the others and requires cooperation among the branches. A system of checks and balances minimizes the risk that one branch might completely take over the government or stray too far politically from the other branches. The principle has been a key factor in a constitution's survival, assuring evolution in government rather than revolution. Due to a system of checks and balances, the legislature, executive and judicial branches' powers overlap, and each branch exerts some power over the others. The core idea of the principle of checks and balances therefore, was that no branch of government should be able to get too far out of control without being put in check by the others. The most important result is that getting anything done within any democratic system of government typically requires the cooperation (or at least the acquiescence) of more than one branch of government. It was Madison who said:

> "Separation of powers means that one of three departments of government must not have the whole of another branch's powers vested

> in it nor obtain control over another branch. But even if they are separated, they must be connected by a system of checks and balances".[62]

It is in the above relative form that the principle of checks and balances found its way into the Nigerian political system. This was done through the 1979 Constitution, and the position under that Constitution vis-à-vis the principle has been largely retained by the 1999 Constitution of the Federal Republic of Nigeria. An appraisal of how the three branches of government in Nigeria apply their powers of checks and balances will now be made.

4.3.1 Legislative check

This is a check on the executive and judiciary, having power to nominate new judges or approve or disapprove nominations of judges.

4.3.1.1 Removal

The power to remove an elected executive officer is an ultimate weapon the principle of checks and balances gives to the legislature. This power is granted to the legislature to check the abuse of the enormous executive powers exercised and exercisable by them. This is important since they are shielded from prosecution from criminal or civil charges (in their personal capacities) while in office.[63] Thus, as a check on the executive, the legislature may remove the President or Vice-President,[64] a Governor or his Deputy[65] where one or more of them is found guilty of gross

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62 J. M, *The Federalist: A commentary on the Constitution of the United States* (New York: Random House Modern Library, 1937) 237

63 CFRN 1999 (as amended), s.308

64 CFRN 1999 (as amended), s. 143

65 CFRN 1999 (as amended), s. 188

misconduct in the performance of the functions of their office. Thus, the Supreme Court opined in *Attorney General* of *The Federal & Ors v Atiku Abubakar & Ors*[66] that:

"Impeachment or removal of the President or Vice President from office by the National Assembly is a strong political weapon and solution to political problems that may arise in the Presidency either in the discharge of the constitutional function or conduct of the personality involved."

Also, the Constitution provided that the president, together with the Senate or a Governor together with a House of Assembly may remove a judicial officer for stated misconduct.[67]

4.3.1.2 Law Function

The primary function of the legislature is to make laws for the society for the good of the people. Thus, where the executive intends a policy to become law, it does not have the power to make it law except it is ascertained and approved by the National Assembly. Where the executive sends a Bill to the necessary Assembly, the Assembly scrutinizes such a Bill before it becomes Law. This is important as it will enable the legislature to ascertain whether or not the Bill will be beneficial to the people when it eventually becomes Law.[68]

In addition, the President of the Federal Republic of Nigeria is empowered to make regulations, under section 32 of the Constitution, concerning citizenship and immigration matters. Whereas subsection (2) of section 32 requires the president to lay before the National Assembly such regulations.

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66 (2007) 10 NWLR (Pt. 1041) 1 at 125 (Para. E-F)

67 CFRN 1999 (as amended), s. 292

68 CFRN 1999 (as amended), s.59

Lastly, the president can exercise veto powers over laws made by the legislature, but where such powers were exercised unnecessarily, such can be overruled by two-thirds majority of the National Assembly.[69] However, *in National Assembly v. President of the Federal Republic of Nigeria*,[70] the Supreme Court held that such a veto can only be overturned by a two-thirds majority of the whole house and not a quorum and there must be a full reconsideration of the vetoed bill. That is, it must go through all the stages for consideration of a bill.

4.3.1.3 Appropriation Function

Appropriation is the responsibility of the executive in Nigeria. The Constitution therefore gives powers to the President or the Governor as the case may be, to submit an Appropriation Bill, which shall be the heads of estimate for the various sectors of government to the legislature for approval.[71] During the appropriation process, ministries, agencies and other departments of government are called upon by the legislature to defend their respective budgetary proposals. The relevance of the legislature in this process is assessed in the constructive perspective in the following words:

The power to pass or reject an Appropriation Bill affords the legislature the opportunity for a thorough sanitary and criticism of the proposals contained therein. The debate involved before its passage has its impact on government indeed it is the critical quality and effectiveness of such debate that determines the character of a legislative body.[72]

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69 CFRN 1999(as amended), s.58 and 159

70 (2003) 41 WRN 94

71 CFRN 1999 (as amended), s. 81 (1) and 121 (1)

72 A.O. Popoola, *Enforcing the Principle of Separation of Powers: A review of the 1999 Constitution,* being a paper presented at a seminar on upholding the Rule of Law: Jurist (The Judiciary, Legal Profession) and 1999 Constitution of Nigeria, 14th-16th Feb., 2000

This suggests that a legislative body which is worth its salt must take debate on the Appropriation Bill seriously and use the opportunity to convey its views and positions across to the executive which will in turn put the executive on its toes and make it more responsible. It is however sad that this opportunity is often left unutilized in many legislative houses (both National and States) as, instead of taking the time to make an impact on the executive arm, the legislators get themselves embroiled in a duel for party supremacy or seize the opportunity to demand for settlement from the executive with the attendant suffering inflicted on the people.

4.3.1.4. Confirmation Function

The Presidential system in Nigeria as in the United States of America allows the President or Governor of a State to perform the functions of his office either directly or indirectly through the Vice-President, the Ministers or subordinate officials.[73] Flowing from this, the President is empowered to appoint Ministers who form members of his cabinet subject to confirmation by the Senate.[74] The President thus in practice only nominates ministers who are to form part of his cabinet; no nominee becomes a minister unless and until the nomination is confirmed by the Senate. This is to ensure that the President does not bring into government incompetent people who do not have an idea of how government is being run.

Furthermore, appointment of certain judicial officers is subject to confirmation by the Senate.[75] The President appoints the category of judicial officers on the recommendation of the National Judicial Council. The role of the Senate in the appointment though confirmatory, is mandatory and no such appointment is valid without a confirmation. The members of the National Judicial

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73 CFRN 1999 (as amended), s.5(1) and (2)

74 CFRN 1999 (as amended), s. 147 (2)

75 CFRN 1999 (as amended), s. 232(1) and (2), 238 (1)and (2), 250 (1) and 261 (1)

Council themselves are not appointed unilaterally by the President; they must be confirmed by the Senate before their appointment can be valid.[76] By a similar token, the Chief Judge of a State though appointed by the Governor on the recommendation of the National Judicial Council is subject to confirmation by the House of Assembly of the State.[77]

4.3.1.5 Oversight Function

The legislature is mandated by the people through the Constitution to carry out necessary investigation with the view to exposing corruption, inefficiency or waste in the administration of the laws made by the necessary Assembly.[78] This puts the executive on its toes at all times to reduce corruption in the administration of its activities to the barest minimum lest it be found wanting.

By the same token, a Minister of the Federal Government is obliged to attend either House of the National Assembly, if invited to explain to the House the conduct of his ministry and in particular when the affairs of that ministry were under discussion.[79] Similarly, a Commissioner of a state if invited to explain to the Assembly the conduct of his ministry and in particular when the affairs of that ministry were under discussion.[80] In addition, the constitution also gave powers to the Senate or the House of Representatives or a Committee so appointed[81] *inter alia*, to issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails,

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76 CFRN 1999 (as amended), s. 154 (1)

77 Section 271 (1) CFRN 1999 (as amended), s. 271 (1)

78 Op. cit. fn 14

79 CFRN 1999 (as amended), s. 67(2)

80 CFRN 1999 (as amended), s.108(2)

81 CFRN 1999 (as amended), s. 89

refuses or neglect to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House or the Committee in question.[82]

Finally, the President does not have the unilateral power to give a treaty entered into between the Federation and any other country the force of law as the National Assembly shall be the one to enact such a treaty into law.[83] The essence of this is to prevent the President from entering into a treaty with another country that is tyrannical in nature or purports to surrender the sovereignty of the Federal Republic of Nigeria to the other country.

4.3.1.6 Remuneration check

The National Assembly has authority over public funds and to determine the remuneration of members of the executive and the judiciary.[84] However, such remuneration must be charged on the Consolidated Revenue Fund. It must also not exceed what the Revenue Mobilization and Fiscal Commission prescribe.

In view of this provision, the Court of Appeal has held, *inter alia* and to the effect that the provision of the equivalent of *section 89* of the 1999 constitution did not amount to an infraction on the powers of the judiciary and the executive *in Senate of the National Assembly & Ors v Momoh*[85]

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82 CFRN 1999 (as amended), s. 89 (1) Section 89 (1)

83 CFRN 1999 (as amended), s. 12 (1)

84 CFRN 1999 (as amended) s. 84

85 (1984) 4 NCLR 269 CA

4.3.2 Executive check

This is the power exercised by the executive over the legislative and the judiciary arm of government.

4.3.2.1 Legislative Check

The National Assembly and a State House of Assembly makes laws for the Federation and State respectively. No Bill passed the National Assembly or a State House of Assembly becomes law unless the President or Governor as the case may be gives his assent to it (Although they may veto the President's assent after 30 days of his refusal to grant assent to the Bill). Where a Bill is presented to the President or Governor and he refuses to assent to the Bill, he must within 30 days communicate to the National Assembly or the State House of Assembly with reasons of his refusal to assent to the Bill.[86]

If the President withholds his assent and the bill is again passed by each House by two-third majority, the bill shall become law and the assent of the President shall not be required' For example the Court of Appeal refused to accept what the National Assembly did in merely passing a motion of veto to override 'the President's decline of assent as not meeting the requirement of S.58(5) in *National Assembly v. The President of Nigeria,*[87]. It held that 'Under section 58(5) of the Constitution, in order to override the veto of the 1st Respondent each of the two Houses of the National Assembly has to pass the bill again. The language used by S.58 (5) is 'and the bill is again passed by each House'. This means that the bill must go through the same

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86 CFRN 1999 (as amended), s. 58 (4)

87 (2003)9 NWLR (pt.824)104 at 150.

process it had previously gone through when it was first passed...It means the repetition of the earlier process.[88]

The beauty of this process and of the principles of checks and balances came to the fore in 2015 when the National Assembly sought to among other things separate the office of the Attorney-General of the Federation from that of Minister of Justice and forwarded the document to the President for his assent. The President relying on section 9 (3) of the constitution refused to give his assent to the amendments of some sections of the constitution in the document sent to him by the National Assembly.[89] Section 9 (3) of the constitution provides thus:

An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.

The President explained his position on the amendment and why he declined to sign the document into law.

*"*In view of the foregoing and absence of credible evidence that the Constitution of the Federal Republic of Nigeria (Fourth Alteration) Act 2015 satisfied the strict requirements of section 9 (3) of the 1999 Constitution, it will be unconstitutional for me to assent to it, "I therefore withhold my assent and accordingly remit Constitution of the Federal Republic of Nigeria (Fourth

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88 Per Oguntade JCA (as he then was)

Alteration) Act 2015 to the Senate/House of Representatives of the Federal Republic of Nigeria.*"*

However, the National Assembly threatened to veto the president after 30 days and he (the President) approached the Supreme Court through a former Attorney-General of the Federation, Bayo Ojo, on behalf of the incumbent Attorney-General of the Federation at the time, Mohammed Adoke for determination of two questions and an order nullifying and setting aside sections it thought contravened section 9 (3) of the constitution.

4.3.2.2 Judicial Check

The judiciary has the constitutional power to among other things adjudicate on matters between the executive and legislature and to also interpret laws made by the legislature. This does not exclude the judiciary from being checked by the executive as it has power to appoint certain judicial officers who serves in the court in the first place on the recommendation of the National Judicial Council.[90] Similarly, the President may recommend to the Senate the removal of a judicial officer who has been found guilty of judicial misconduct.

Again, the President, or the Governor as the case may be, is empowered, to pardon convicted persons or to exercise his prerogative of mercy, by remitting, blotting out or extinguishing a convict's sentence imposed by the judiciary[91] after consultation with the Council of State.

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90 CFRN 1999 (as amended), s. 231 (1) and (2), 238 (1) and (2), 250 (1), 256 (1) and 261 (1)

91 CFRN 1999 (as amended), s. 175 and 212

4.3.3 Judicial Check

This power is exercised buy the judiciary to curtail the excesses and guide the actions of the executive and the legislature.

4.3.3.1 Judicial Review

The actions or inactions of the other organs of government are subject to the judiciary's power of review. Judicial Review is defined as a Court's power to review the actions of other branches or levels of government.[92] Constitutional experience in Nigeria where elected State officials and their unelected party officials often engage in abuse of office, corruption, lawlessness and lack of respect for the rule of law gives credence to the need to check and balance the legislature and executive through judicial review.

The Constitution of the Federal Republic of Nigeria, stated that the exercise of the legislative powers of both National Assembly and a State Assembly "shall be subject to the jurisdiction of court of law and of judicial tribunals established by law."[93] The second part of the provision is to the effect that the National Assembly or a House of Assembly "shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law."[94] This completes the circle of an effect check on the powers of the legislature and also positions the judiciary as the custodian of the rule of law.

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92 H.C. Black, *Black's Law Dictionary* (8th ed. West Group, 2004)

93 CFRN 1999(as amended), s. 4(8)

94 Ibid

Consistent with this declaration, is the view of *Mustapher JSC in Inakoju v Adeleke.*[95] It is to the effect that:

*"*The courts have the jurisdiction and the competence and indeed are duty bound, to exercise their jurisdiction to ensure that the legislature comply with constitutional requirement*."*

The Court held *inter alia* that the constitution clearly sets out the powers of the three arms of government, and if the legislature passes any law which is beyond its competence, and which it has no jurisdiction to pass, whether or not it was passes by all the members of the House, any member of the house or the public who is affected can challenge it in court, and nothing prevents the court from setting it aside and declaring it ultra vires the legislature in the case of *Honourable Godwin Jideonwu & Ors v Governor of Bendel State & Ors,*[96]. Indeed, nothing prevents a court of competent jurisdiction from hearing and determining matters that had been discussed in the House. This was also established in *Tony Momoh v. Senate of the National Assembly & Ors .*[97] The court also held inter alia that by virtue of section 4(8) of the 1979 Constitution, the courts of law in Nigeria have the power and duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural, as laid down in the Constitution *in Attorney-General of Bendel State v. Attorney-General of the Federation and 22 Ors,*[98]. If there is such infraction, the courts have the power to declare any legislation passed pursuant to it unconstitutional and invalid: This was also established in Bello v. Sanni & Ors.[99]

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95 (2007) 13 NWLR 427 at 670

96 (1981)1 NCLR 4

97 (1981) NCLR 105

98 (1982) 3 NCLR 1

99 (1982) 3 NCLR 831

The Supreme Court in exercise of its power of judicial review, declared the withholding of money due to Lagos State by the President from the Federation Account as unconstitutional, null and void *in A.G. Lagos State V. A.G. Federation*[100]. The contemporary situation in Nigeria shows that rather than being anti-democratic, judicial review is most appropriately the bedrock of democracy and without it, not only the lives and liberty of the people would be in jeopardy, the democratic rights and competencies of one branch of government may be with recklessness, put in jeopardy or rendered ineffectual by another branch. Similarly, the judiciary will act as a check on the legislature to declare as null and void a law passed by the legislature that does not follow the due process of law or does not favor the people.

However, the power of Judicial Review is not absolute as it has limitation. It was decided inter alia by majority of the Justices of the Supreme Court that the courts have no power to challenge an Act of the legislature except in certain circumstances, such as, where civil rights are violated in the case of *Senator Abraham Adesanya v. President of Nigeria*,[101]. According to Idigbe JSC in that case, the circumstances in which the judicial power of the court under section 6(6)(b) can be exercised by the court to pronounce on the constitutional validity of any legislation must be limited to those occasions in which it has become necessary for it, in the determination of a justifiable controversy or case, based on bona fide assertion of rights by adverse litigants before it, to make such a pronouncement. The court does not possess general veto power over Acts or Legislation by the National Assembly. Its powers are supervisory and can only be properly exercised in the circumstances above.

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100 Supra

101 (1981) 2 NCLR 358

4.4 Challenges to the doctrine of separation of powers

The Constitution of the Federal Republic of Nigeria although does not provide in express terms that the doctrine of separation of powers should apply in Nigeria, provisions contained therein as discussed earlier recognizes the need to confer governmental powers in different persons and organs of government. As lofty as the doctrine seems, in practice it has suffered several setbacks which officers of the executive, legislative and judicial arms of government are responsible for. More often than not, the challenges faced by the doctrine arise when the various organs of government carry out their constitutional function of checks and balances on each other. In appraising these challenges, the researcher will restrict himself to the challenges faced by the doctrine since the return of representative democracy in 1999.

4.4.1 Legislative oversight

Legislative oversight takes place when the National Assembly or a State House of Assembly continually review the effectiveness of the executive arm in carrying out the constitutional mandates through supervision, watchfulness, or review of executive actions and activities. This legislative process affords the electorates the opportunity to see what public office holders are actually doing, whether they are really serving their collective interest or not.

In spite of the importance of legislative oversight in contemporary democratic governance, it has been controversial in all ramifications in Nigeria's political scene as it has often led to the legislature encroaching on the powers of other organs of government and has remained the major source of executive and legislative conflict in Nigeria.

On March 14 2012, a public hearing was conducted by the House of Representatives Committee on Capital Market and Institutions during which specific charges of corruption were made by the

Director General of the Security and Exchange Commission (SEC), Ms. Aruma Oteh against the Chairman of the Committee Mr. Herman Hembe. In the course of the hearing, the Chairman took Ms. Aruma Oteh by surprise by accusing her of "spending money as if it is going out fashion since assuming office one year ago" and went on to list particulars of how she spent the money. Taken by surprise, Ms. Oteh could not put up a defence on the spot but managed to say the Chairman was guilty of corrupt practices and did not give her fair hearing.[102]

While bribery and corruption could seriously undermine any system of government, they are not as fundamental in the damage they can do to a system of government as the breach of the principle of separation of powers.[103] The fundamental issue here is that Mr. Hembe's Committee of the legislature breached the doctrine of separation of powers by conducting judicial proceedings which are clearly within the powers of the Court. In so doing, the Committee violated the principle of fair hearing by obtaining information from the SEC without giving that body or Ms. Oteh the opportunity of commenting on it before using it to arrive at his judgment. He did not let Ms. Oteh know in advance the charge or charges she was coming to meet during his Committee's investigation thereby making Mr. Hembe the accuser, the prosecutor and the judge during the probe. The obviously flawed approach adopted by the House of Representatives' Committee in its conduct of the quasi-judicial proceedings makes it clear why, under the doctrine of separation of powers, judicial functions are assigned to the judiciary under the constitution.[104]

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102 National Assembly Oversight Functions and Fair Hearing available at http://newjurist.com/national-assemblys-oversight-functions-and-fair-hearing.html (Accessed on 2nd November 2022)

103 Ibid.

104 Ibid

Another area where the legislature tries to encroach on the powers of the executive is the issue of budget. The controversy that surrounded the 2016 budget is instructive on this. The controversy took another turn with the National Assembly returning to the president a budget with omission of certain projects and inclusion of others not proposed by the executive for assent.[105] This was an usurpation of the executive powers to prepare and lay before the National Assembly estimates of the revenues and expenditure of the Federation for a new financial year.[106] The legislature ought not to presume and proceed to estimate and allocate monies the president does not ask for but to vet and approve estimates of Ministries, Departments and Agencies as presented by the executive. Where the National Assembly thinks there is a need to add a project to the budget, the expectation is that it should lobby the executive to make such an addition and not to unilaterally make such inclusion without putting the executive on notice.

This attempt to usurp the power of the executive is fraught with grave dangers for the realization of democracy and good governance anchored on accountability and service delivery. For instance, if the President as the head of the executive arm has no prior information as to what the legislature allocates for a ministry as an executive agency, he may not be able to properly direct and coordinate programme implementation. Secondly, if the legislature allocates fund to projects not captured in the manifesto of the President, the legislature could find it difficult to hold the President to account for performance, while the electorates who voted on the basis of the President's manifesto are shortchanged.[107]

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105 What is the Purpose of Legislative Oversight Available at http://legalprincipal.com/what-is-the-purpose-of-legislative-oversight (Accessed on 2nd November 2022)

106 CFRN 1999(as amended), s. 81 (1)

107 S.U Akpan *Legislature's Job not to Prepare Budget Estimates for Executive,* thenationonlineng.net/dialectics-sarah-palin-donald-trump/. Accessed on 2nd November 2022

4.4.2 Executive lawlessness

The executive organ is traditionally vested with the responsibility of carrying out or implementing the laws made by the legislature, the policies made by quasi-judicial legislative bodies or the decisions, judgment or orders rolled out by the judiciary.

Since the return of representative democracy in 1999, there have been instances where the executive arm has violated the doctrine of separation of powers entrenched in the constitution in the performance of its duties and responsibilities thereby exceeding the limits and extent of the provisions of such powers. In 2002, it was alleged that former President Olusegun Obasanjo smuggled into the Electoral Bill 2001, passed by the National Assembly and sent to him for his assent, provisions which were not in the Bill when the National Assembly passed it and he (Obasanjo) proceeded to sign it into law.[108] Meanwhile, the provisions smuggled into the Bill and signed by the president became the law even though it was not passed by the authority of the National Assembly which is vested with the constitutional power to pass such a law. This act constituted a blatant subversion of the substantive and procedural provisions of the constitution regulating how laws should be made and an encroachment on the powers of the legislature.

Sometime in 2006 also, former President Obasanjo declared the Office of the Vice-President vacant. This was done because the occupier of the Office at the time, Atiku Abubakar had defected from the People's Democratic Party to Action Congress of Nigeria (ACN).[109] This was

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[108] M. H, *A President and his credibility problem www.thenationonlineng. net/archive2/tblnews _Detail.php?id= 12236. Accessed on 2nd of November 2022*

[109] I. O. M., ''Executive Presidency and Intra-Institutional Crisis in Nigeria, 1999 – 2015'' (2016) 16 *Global Journal of HUMAN-SOCIAL SCIENCE: F Political Science,* 9-10

tantamount to executive lawlessness to the extent that the constitution[110] did not expressly and/or explicitly confer such power on the president so to exercise.

The legislature often raises alarm where the executive is attempting to or has encroached on its powers. In a speech to mark the end of the third session of the 7th House in 2014, the Speaker of the House of Representatives Aminu Tambuwal accused the executive of encroaching into the legislature's area of jurisdiction.[111] Citing the suit by the Minister of Petroleum Resources Mrs. Deziani Alison- Madueke seeking an order to stop the House Committee on Public Accounts from going ahead with its planned probe of her alleged spending of N10 billion for the chattering of private jets, Tambuwal said it was unheard of that an official of an arm of government would try to use the court to stop another arm from carrying out its constitutional assignment.[112]

The usual democratic practice is that the powers of the Courts act as a means to challenge laws enacted by the legislature. This is the proper manner in which the judiciary is enabled to perform its constitutional function as the interpreter of both the constitution and duly enacted laws.[113]

It is neither usual nor appropriate for the judiciary to be used pre-emptively to stop the legislature from acting in the first place. This is an encroachment on the powers of the legislature and against the principle of separation of powers.[114]

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110 CFRN 1999 (as amended), s. 146 (3)

111 Executive Encroachment, a Slap on Separation of Powers- Tambuwal by Emman Uvuakporie, www.vanguard.com/2014/06/executive-encroaching-territory-tambuwal/. Accessed on 2nd of November 2022

112 Ibid

113 Ibid

114 Ibid

Recently in January 2019, President Buhari suspended the Chief Justice of Nigeria on the Allegation of non-declaration of Asset. Whether the Allegation is true or otherwise, the Constitution of the Federal Republic of Nigeria 1999 (as amended), does not grant the President such power.

Another example is the incident that took place at the National Assembly Abuja on Thursday 20th November, 2014 where the Nigeria police (an agency of the executive arm and acting on the orders of same) took over the premises of the Complex in a bid to prevent the Speaker of the House of Representatives Hon. Aminu Tambuwal from gaining entrance to the Chambers for their Plenary Session summoned to consider the extension of emergency rule in parts of North East.[115] The reason for this may be because the Speaker had defected from the then ruling People's Democratic Party (PDP) to the All Progressives Congress (APC).

Shortly after assuming office, President Muhammadu Buhari reiterated his commitment to ensure compliance to the rule of law by all agencies of government under his administration. Similarly, Vice President Yemi Osinbajo in an interview with journalists in April restated the administration's commitment to the rule of law including obedience of court orders.[116]

Despite the verbal statements of the president and his deputy, however, two cases highlight how the Buhari administration has serially violated court orders, going against the rule of law it has repeatedly touted.

As part of the Buhari administration's commitment to tacking corruption, several officials of the previous administration, accused of mismanaging public funds, were charged to court. Prominent

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115 J. U, *Separation of Powers & Executive Recklessness,* 247ureports.com/separation-of-powers-and-executive-recklessness-in-national-assembly-by-jerry-uhuo/. Accessed on 2nd November 2022

among such persons was the former National Security Adviser, Sambo Dasuki. Mr. Dasuki is facing multiple charges for alleged diversion of $2.1 billion and illegal possession of fire arms. Although Mr. Dasuki has been granted bail on at least six different occasions by various courts, the Nigerian government has persistently refused to comply with the court orders.[117]

In the wake of his trial, a Federal High Court in Abuja, presided over by Justice Adeniyi Ademola in 2015 ordered the release of Mr. Dasuki's passport and granted him permission to travel abroad for three weeks on medical grounds. Despite the order made on November 3, the SSS refused to release Mr. Dasuki. Again, on 5 different occasions including an order of ECOWAS Court in 2016, Mr Dasuki has been granted bail with the conditions being fulfilled, the court orders is yet to be obeyed by the Nigerian government.

In addition, the most absurd of violation of human rights by the Buhari administration is its treatment of Ibraheem El-Zakzaky, a leader of a Shiite group, IMN. Mr. El-Zakzaky has been in detention without any trial for over 17 months. On December 2, 2016 the Abuja Division of the Federal High Court ordered his release with the judge berating the Nigerian government for violating his rights.

Mr. El-Zakzaky was arrested by the military on December 14, 2015 after a clash between his IMN and officers of the Nigerian Army. Delivering the court order for the release of Mr. El-Zakzaky and his wife, the presiding judge, Gabriel Kolawole, also asked that a fine of N50 million be paid to the detainees, while an accommodation be provided for them and their family. Despite warnings by the court that the Nigerian government would face further sanctions if it

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117 Ibid

refused to abide by the order for the release of Mr. El-Zakzaky and his wife, that decision has not been complied with long after the 45 days ultimatum given by the court of law.

Not interested in obeying the December 2, 2016 court order, the federal government filed an appeal against the ruling, 10 days after the expiration of the deadline for Mr. El-Zakzaky's release. Several rallies have been held by members of the Shiite group demanding the release of their leader and his wife. Also, the government is yet to accuse him of any crime or file any charges against him.

Buhari administration was berated for selecting court orders it wishes to obey. This was done by Chidi Odinkalu,[118]

"It's as if government is picking and choosing what court judgements to respect and the ones not to respect. There are many problems with that; one of which is that people will begin to feel that courts no longer matter. In that case the only thing that matters is that if you can overcome somebody then you win, but if you can't, then you will lose. That becomes a circumstance of rule of war, not rule of law."[119]

4.4.3 Interference with the leadership of the legislature.

The doctrine of separation of powers requires that one organ of government should not exercise the functions of another. With this in mind, it makes constitutional and political sense that members of the legislature only should determine who should lead them. During the days of former President Obasanjo, there were several attempts to muzzle the legislature via constant interference with the leadership of the various legislative houses. This was evident in the

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118 Former Chairman Nigeria's National Human Rights Commission

119 Supra

removal of three (3) Senate Presidents in three (3) years. In the circumstances that led to the removal of Senators Evan Enwerem, Chuba Okadigbo and Adolphus Wabara as Senate Presidents, the connivance, collusion or involvement of the executive was always alleged.[120]

The consequence of this was the instability that characterized the National Assembly (particularly the Senate) during Obasanjo's administration. Most Senate Presidents were either appointed (indirectly) by the President on the basis of their willingness to be subservient, or alternatively deposed as a result of their tendencies to assert their independence against the wishes of the President. Although the President was resisted by the House of Representatives where attempts to unseat former Speaker Ghali Umar Na'Abba was aborted, the overturning of the leadership of any Senate President or House Speaker that refused to bend over to the dictates of the executive was the situation that pervaded the Hallowed Chambers of the National Assembly in the eight years that Obasanjo held sway.[121]

The legislature's attempt to assert its independence from the executive by performing its constitutional duties has equally caused the loss of a number of Speakers at the State level. In 2015, the Speaker of the Enugu State House of Assembly was removed by eight (8) lawmakers. The removed Speaker pointed accusing fingers at the Governor, Sullivan Chime as being the mastermind behind his removal after the Speaker along with fourteen (14) other members of the State House of Assembly attempted to remove the Governor for among other things, manipulating the 2014 Appropriation Bill.

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120 Interference with the leadership of the legislature http://legalprincipal.com/interference-with-the-leadership-of-the-legislature/ (Accessed on 2nd November, 2022)

121 Ibid

Closely related with the above is the anointing of Hon. Mulikat Adeola Akande by the PDP to succeed Oladimeji Bankole as Speaker of the House of Representatives. The members of the House resisted this imposition by voting Hon. Aminu Tambuwal as Speaker. Similarly, the Senate resisted attempts by the All Progressives Congress (APC) to impose on it, Senator Ahmed Lawan as Senate President by rather electing Senator Bukola Saraki.[122]

Recently the All Progressive Party publicly endorsed a Senator and a House of Representatives Member as their candidate for the 2019 National Assembly leadership.[123] This is an attempt to interfere in the affair of the National assembly and should such candidates emerge as the winners of various houses, they will have no choice but to yield to the dictates of the party and that of the Executives. This in turn will make the National Assembly a toothless Bull Dog that cannot bite. It should be noted that in Nigeria, the President is the leader of his party and any decision or action taken by his/her party is taken with acquiescence of the President.

4.4.4 Unconstitutional removal of elected ifficers

The 1999 constitution of the Federal Republic of Nigeria as earlier discussed recognizes the following:

i. Only the National Assembly or the House of Assembly of a State have the constitutional power to remove a President/Vice-President or Governor/Deputy Governor from office.[124]

ii. There is a vertical separation of powers between the Central and State Governments which implies that the President is independent of a State Governor and vice-versa.

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122 Interference with the leadership of the legislature *Op. Cit*

123 Buhari, APC chiefs endorse Lawan for Senate President Available at https://thenationonlineng.net/buhari-apc-chiefs-endorse-lawan-for-senate-president/ (accessed on 2nd November 2022)

124 Sections 143 and 188 CFRN, 1999

The Constitution provides that the abovenamed Officers may only be removed from office where they have been found guilty of gross misconduct in the performance of the functions of their office. Since 1999 however, accusing fingers have been pointed at the executive at the Federal level of being responsible for the removal of some governors which negates the principle of 'vertical' separation of powers. It is being known that the President propels the members of the State House of Assembly to remove their Governor while such members under the guise of 'gross misconduct' do the removing. The eventual result is that the legislators rush to remove their governors thereby tainting the removal process with constitutional irregularities.

This was the case in Anambra State where President Obasanjo was accused of being responsible for the removal of Governor Peter Obi who was elected on the platform of All Progressive Grand Alliance (APGA). In his usual jocular manner, it was said that the former President had told Obi to forget re-election in 2007 if he did not join the PDP because he (Obasanjo) would not support a non-PDP member. True to Obasanjo's postulations, Mr. Obi, was removed on November 2, 2006 after seven (7) months in office in a controversial manner. Similarly, Obasanjo was alleged to be responsible for the removal of Governor Fayose in his first term after he (Fayose) who was a former ally of Obasanjo fell out with the latter.[125] It was also the practice during Obasanjo's tenure to use Federal Might to hound members of any State House of Assembly where he wanted the Governor removed if they tried to assert their independence. This the executive did by deploying the police and the EFCC to go after such members until they did the bidding of the executive.

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125 U. A. *Impeachment as Weapon against Opposition,* leadership.ng/news/politics/378378/impeachment-weapon-opposition. Accessed on 2nd November 2022

The Federal Government used the EFCC and the House of Assembly of Bayelsa State to remove the Governor of Bayelsa State for alleged money laundering. The Speaker of the House who had earlier indicated that the House was not interested in removing the Governor was later intimidated and hounded by the EFCC into removing the Governor.[126]

4.4.5 Lack of judicial independence

The role of independent judiciary is an essential element in achieving sustainable democracy in any democratic State. This implies that democracy without an Independent Judiciary would fail and turn into tyranny, whereas, tyranny would inevitably collapse in the presence of a fair and Independent Judiciary. Failed tyranny would probably give way to democracy. The theory and practice of separation of powers is the premise upon which independent judiciary predicates, that over time will necessitate the inevitable collapse of dictatorial leadership and tyranny, thus, enthrones the rule of law for good governance and sustainable democracy.

The role of a fair and Independent Judiciary was vividly explained by Kriegler. J, in the South African case *of S v Mamabolo* (ETV and others intervening).

The judiciary is charged with the function and responsibility to determine all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating to the determination of any questions as to the civil rights and obligations of any person. As important as the judiciary is to the sustenance of the rule of law and democracy, it is the most vulnerable of the three arms of government as it always depends on the other arms to perform its functions. Likewise, its powers are deliberately encroached upon by the executive and legislature.

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126 House Drags EFCC to Court, *Source Magazine,* 19th June 2006, 6

Judicial independence can be defined as the total freedom from the other two arms (executive and legislature) of government. The purpose of this is to ensure the entrenchment of democracy.[127] Independence protects the judicial institution from the executive and from the legislature. As such, it lies at the very heart of separation of powers. It is well accepted among advocates of judicial independence that the following are the key indicators of an independent judiciary:

i. Appointment and removal process of judicial officers

ii. How the judiciary is funded

iii. Extent of individual and institutional freedom from unwarranted interference with the judicial process by the executive and legislative arms of government.

The role of the Judiciary on maintaining sustainable democracy can be succinctly illustrated using incidences of election and impeachment sagas of Governors Peter Obi and Rotimi Chibuke Amaechi.[128] This judgment of the country's apex court averted imminent anarchy in Anambra State, which would have resulted in declaration of the state of emergency and its attendant consequences on the Anambra State political system and Nigerian political system in general. History would have repeated itself in Anambra State as it was in the case of the Western Region, Action Group Party and the Federal Government led by the Prime Minister, Sir Abubakar Tafawa Balewa in the First Republic, if not for the apex court acting independent of other organs of government control.[129]

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127 O. G, *An Independent Judicial System in Nigeria: The Challenges*

128 The Guardian Newspaper, October 26, 2007

129 Ibid

For the judiciary to be seen as independent, the way in which Judges are appointed and subsequently promoted are crucial to their independence. They must not be seen as political appointees, but solely rather for their competence and political neutrality. The appointment of top judicial officers in Nigeria is made by the President on the recommendation of the National Judicial Council (NJC) subject to the confirmation of the Senate at the Federal level.[130] At the State level, the appointment of top judicial officers is made by the Governor of the State on the recommendation of the National Judicial Council. It is submitted that this process is not healthy for the doctrine of separation of powers. This is so because as politicians, the President and members of the National Assembly or Governor and members of the State House of Assembly may be swayed to make such appointments on political connections, religious leanings, "federal character" without any regard for merit and competence. Where this is done, the consequence is the proverbial "he who pays the piper dictates the tune."

In Nigeria, the President on the recommendation of the National Judicial Council can remove a Federal Judicial Officer.[131] Likewise, the Governor of a State, on the recommendation of the National Judicial Council can remove a State Judicial Officer.[132] Although the constitution stipulates the condition for which the appointment of a judicial officer may be terminated,[133] a noticeable inadequacy of this process is that a Judge who was appointed because of his/her loyalty or constructive inclination towards the government may be removed when he/she seems to be on a 'warpath' to the government's policies or interest.

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130 CFRN 1999 (as amended), s. 231, 238, 250

131 CFRN 1999 (as amended), para 21 (b) of Part I of the Third Schedule

132 CFRN 1999 (as amended), para 21 (d) of Part I of the Third Schedule

133 CFRN 1999 (as amended), s. 292

4.5 CONCLUSION

If anything at all, the situation discussed above does not make for the independence of the judiciary.

In addition, the executive has often been accused of interfering in the functions of the judiciary. Notable among them is the role the executive played in the removal of former President of the Court of Appeal, Justice Ayo Salami. The judiciary itself cannot be absolved of blame as most times, it is discovered that it aides the other arms of government in interfering with its activities. It is on the premise of this that Justice Ayo Salami (Rtd.) at a lecture in 2015 said:

> "What I am driving at here is that Hon. Justice Dahiru Musdapher and Aloma Mukhtar did not resist the Presidency from undermining the independence of the judiciary. They allowed the erosion of the separation of powers. Even after I was declared innocent, they failed to muster the courage to recall me. Rather, the two of them jointly and severally fiddled while the time for my retirement was ticking; notwithstanding Hon. Justice Uwais' statement to the effect that the National Judicial Council and not the President was vested with the authority to recall me".[134]

By and large, maintaining the independence of the judiciary ought to be a collaborative effort between the three organs of government. However, members of the executive and legislature are by their very nature politicians and would not waste time to muzzle the judiciary where it tends to be against laws and policies made by them.

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[134] I.A., Salami, *Eradicating Corruption in the Judiciary,* being a paper delivered by the Hon. Justice Isa Ayo Salami, OFR, President Court of Appeal (RTD) at the 8th Annual Forum of the Laureates of the Nigerian National Order of Merit (NNOM) and the Award winners' Lecture on Tuesday, 1st December, 2015.

CHAPTER FIVE

5.1 Conclusion

A fundamental principle undergirding the design of modern governments is that of the separation of powers. However, this research work has stated that the doctrine of separation of powers can only function properly where there is an interplay of checks and balances. By this interplay, the fiction is that, each arm shall be autonomous within its own sphere. This is a fiction properly so called because the three arms of government are by the Constitutional framework expected to operate an overlapping system of administration. Each must carry on in a manner that is complimentary to and not subversive of the other two towards peace and good government. This practice however is fraught with challenges in Nigeria. This research work has addressed these challenges. In the course of this study also, the researcher has established the roles each arm of government plays in checking the activities of the others.

Equally, the researcher has posited that members of the executive and legislative organs of government pledge their loyalties to their respective parties and not to the electorates to the detriment of the citizens. It is in light of this that the researcher submits that, in spite of structural deficits and some other problems, constitutionalism still holds a better prospect for political stability in Nigeria, if the factors that promote these challenges can be attenuated.

5.2 Findings

In the course of this research, I have found the following:

1. Among the three arms of government in Nigeria, the one that looks most institutionalized to carry the tottering weight of the other two is the judiciary. It has been

observed that this arm of government has been a victim of systemic and systematic abuse orchestrated by the other organs of government. The judiciary has also been denied of its financial autonomy and judges the subject of frequent intimidation by politicians. This is done to make judges puppets or to deal with the judiciary where judgments do not go in their favour

2. It has also been found that while carrying out their constitutional duties, the executive and legislature constantly accuse each other of attempting to take over the responsibilities of the other. This is usually frowned at and most times lead to a long battle for supremacy. The controversy that surrounded the 2016 Appropriation Bill is instructive on this

As earlier noted, the executive has the constitutional power to appoint certain judicial officers on the recommendation of the National Judicial Council. This study finds this process makes judges look like political appointees whom other arms of government expect to be their stooges as a payback for appointing them in the first place

The importance of political parties in Nigeria cannot be overemphasized. Political parties are so important that no candidate can contest for a political office without first being a member of a political party and contesting under that party. However, experience has shown that political parties do not exert disciplinary and supervisory control over their elected members. They in fact lack strong ideological foundations and do not carry out frequent trainings for their elected members on the importance of separation of powers.

5.2 Recommendations

This study makes the following recommendations to assist all the three arms of government to come to terms with the onerous duties and obligations cast upon them by the Constitution. the recommendations are by no means exhaustive but if implemented will go a long way in

promoting the ideals of separation of powers as entrenched in the 1999 Constitution (as amended).

1. The judiciary should be granted the much-needed independence and in addition to this, it should be granted financial autonomy as contained in the 1999 Constitution of the Federal Republic of Nigeria by the executive. It is by doing this that the judiciary can effectively and satisfactorily keep tab on the activities of the executive and legislature so as to checkmate likely lawlessness and highhandedness especially in the performance of their constitutional functions.

2. There is a need for the executive to grant more autonomy to the legislature in the running of its activities. The legislature on its part should not be out to victimize or vilify the executive by unnecessarily withholding approval where one is required.

3. Similarly, where disagreements between both arms of government, recourse should be made to the courts which have the constitutional power to interpret and clarify ambiguous provisions of the law rather than going into an all-or-nothing showdown.

4. It is recommended that the process of appointment of judicial officers like the Chief Justice of Nigeria, Justices of the Supreme Court, President of the Court of Appeal etc. should end at the National Judicial Council who should be responsible for the screening of qualified candidates. Alternatively, advertisements should be made where there are vacancies for the position of judges. Furthermore, qualified candidates should be made to write examination by the National Judicial Council which will be the basis for appointing successful candidates.

5. There should be extensive education for the practitioners of the Constitution with their limitation and powers, this will to a greater extent reduce the simmering rancour among the three arms of government.

6. Court orders are meant to be obeyed by the concerned parties (the plaintiff, the defendant and the prosecutor). Disobedience to court orders can subvert judicial powers and incessant disobedience to court orders can undermine democracy. Thus, this study recommends that state actors and the general public should always stand up to defend democracy through public opinion, judicial orders and authentic judicial precedence. More so, civic education will enhance the support for court orders and judicial precedence. That will elicit public support and anyone who tries to undermine the Judiciary will be widely criticized.

7. Provisions should be made for a residual legislative list, this will eliminate the conflict between the federal and state governments on the areas of their legislative competence.

8. Some of the items contained in the exclusive legislative list such as borrowing of money by a state, company or any other entity, evidence, labour, trade unions, industrial relation, which ought to be in the concurrent list should be looked into and put in the concurrent list.

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