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Appraisal of the Doctrine of Separation of Powers and Its Applicability in Modern Governance for National Development in Nigeria

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Abstract

In every society, especially one that upholds democratic principles, there are usually laid down rules, principles and customs to guide the society referred to as the Constitution. A constitution is the organic law of a nation. It may be written or unwritten. By nature, the primary objective of the constitution is to lay down the basic principles to which an internal life of a country is conformed, organizing the government, regulating, distributing and limiting the functions of its three different principal organs. This paper seeks to examine the doctrine of separation of powers and its applicability in modern governance in Nigeria. The objective of this is to expose its use as instrument of national development. The paper adopts the doctrinal methodology in search for data. It reveals that a fundamental principle underpinning modern governments is that of separation of powers, with a rider that separation of powers can only function properly where there is interplay between it and the principle of checks and balances. The doctrine is presented as a prelude to the conclusion proposed in this paper, which amongst others include that the people who constitute the government should observe the doctrine of separation of powers within the context of the concept of checks and balances as antidote to abuse of power.

Keywords: Theoretical Framework, Separation of Power, Modern Governance and National Development

1. Introduction

The theoretical framework for the doctrine of separation of powers is not a new phenomenon. The doctrine is as old as man.[1] According to Viles,[2] the doctrine finds its roots in the ancient world, where the concepts of governmental functions, and the theories of mixed and balanced government, were evolved. Their transmission through medieval writings, to provide the basis of the ideas of constitutionalism in England, enabled the doctrine of separation of powers to emerge

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[1] Alli, Y. O, 'The Limit of the Doctrine of Separation of Power in the Constitution of the Federal Republic of Nigeria', available at:https://www.yusufali.net/articles/the_limit_of_the_doctrine_of_separation_of-power....> accessed on 11th December, 2018

[2] Vile, M. J. C, *Constitutionalism and the Separation of Power* (2nd edn. United States of America: Liberty Fund Inc, 1998), p. 3,

as an alternative, but closely related, formulation of the proper articulation of the parts of government. However, it was in the seventeenth-century England that it emerged for the first time as a coherent theory of government, explicitly set out, and urged as the "grand secret of liberty and good government".[3]

In the upheaval of civil war, the doctrine emerged as a response to the need for a new constitutional theory, when a system of government based upon a 'mixture' of King, Lords, and Commons seemed no longer relevant. Growing out of the more ancient theory, the doctrine of separation of powers became both a rival to it, and also a means of broadening and developing it into the eighteenth-century theory of the balanced constitution. Thus began the complex interaction between the separation of powers and other constitutional theories, which dominated the eighteenth century.[4]

In England, France, and America, this pattern of attraction and repulsion between related yet potentially incompatible theories of government provided the fabric into which was woven the varied combinations of institutional theories that characterised the thought of these countries in that eventful century. The revolutionary potentialities of the doctrine of the separation of powers in the hands of the opponents of aristocratic privilege and monarchical power were fully realized in America and France, and its viability as a theory of government was tested in those countries in a way that all too clearly revealed its weaknesses.[5] Nevertheless, the separation of powers, although rejected in its extreme form, remained in all three countries an essential element in constitutional thought, and a useful, if vague, guide for institutional development. This doctrine has been adopted in Nigeria and presently enshrine in the Constitution of the Federal Republic of Nigeria 1999 (as amended) as an important democratic tenet.

The doctrine of 'separation of powers' in its modern connotation is an influential concept especially in democratic governance. It deals with the distribution of governmental powers, among the three organs of government. Of note in the history of the doctrine are the two schools of thoughts and opinions. First, there is school of Division of Labour in politics. This school of thoughts, according to Malemi,[6] argues that separation of powers in government springs from the eminent English economist, Adam Smith's theory of division of labour. The doctrine is directed towards ensuring specialisation or expertise in the art of governance, and more importantly, it provide for greater efficiency in government.[7] The second school of thought maintains that liberty of the citizen is the primary and real reason for separation of powers in government.[8]

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[3] *Ibid.*

[4] In this context, are the doctrines of the Rule of Law, Ministerial Responsibility and Parliamentary and Constitutional Sovereignty etc.

[5] For instance, it is difficult to operate the doctrine in a water tight compartment without jeopardizing the smooth governance in administration

[6] Malemi, E, *Administrative Law* (4th edn. Ikeja: Princeton Publishing Co., 2012) p. 67

[7] Ibid, 68

[8] The second school appears to be more favoured than the theory of division of labour in politics or government efficiency most especially in common law countries and in particular countries that operate constitutional democracy like United States of America. For instance, in the case of *USA v Brown* 381 US 437 (1965). In that case, Early ,Warren CJ supported the liberty school of thought and opined as follows: "The Separation of powers under the American Constitution was obviously not instituted with the idea that it would promote government efficiency. It was in the contrary, looked as a bulwark against tyranny"

In simple terms, the doctrine of separation of powers envisages that while the legislature is assigned with the responsibility for enacting law, the executive is charged with the responsibility of administering law and the judiciary is responsible for the interpretation, adjudicative and application of the laws. Such arrangement is described as horizontal (parallel) separation of powers in a state.[9]James Madison recognised that a horizontal separation of powers was absolutely essential to a free society. He argues that 'the holding of all powers – legislative, executive, and judiciary in the same hands, whether by one person, a few, or many, and whether hereditary, self-appointed or elective, is the very definition of tyranny.[10]In a federal structure like Nigeria, governmental powers are diffused in a manner term vertical separation of powers whereby governmental powers are shared amongst central government, state government and local government.[11]This practice is better explained in terms of exclusive legislative lists assigned to the National Assembly,[12] concurrent legislative list assigned to the National Assembly and House of Assembly of a State[13] subject to the principle of covering the field to take care of conflicts in the laws of both legislatures. This arrangement is designed to guarantee that each government comprising its three arms deals with any matter within its sphere of authority and to avoid unnecessary friction in the art of governance.

This paper seeks to examine the doctrine of separation of power and its practical applicability in modern governance. The objective of the paper is to expose the impact of separation of powers on national development within the context of the established principle of checks and balances. The doctrine, in this paper, is discussed through the lens of Nigerian constitutional prescriptions. However, to promote an in-depth understanding of the doctrine, references are made to other jurisdictions. Thus, the paper is divided into seven sections. Following this introduction, the paper discusses meaning and objectives of the doctrine of separation of powers. Section three, sheds light on the origin of the doctrine, while section four is devoted to discussion of the doctrine in Nigeria during the First Republic. Section five, examines the interplay between separation of powers and the principle of checks and balances. In section six, the papers discusses the practical applicability of separation of powers in Nigeria. Section seven, which is the concluding section

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[9] Nguyen, X. T, 'Horizontal Separation of Powers Law Constitutional Administrative Essay' https://www.uniassignment.com/essay-samples/law/horizontal-separation-of-powers-law> accessed on 11th December, 2018.

[10] Lyon, L, 'Horizontal & Vertical Separation of Powers' <ielarrylions.blogspot.com> accessed on 11th December, 2018; Webster, M. E, *The Federalist Papers: In Modern Language Indexed for Today's Political Issues* (Merril Press/Bellevue, Washington, 1999) p.197.

[11] The vertical separation of powers is more widely known as federalism. It was considered to be of great importance to the constitutional system by the Founding Fathers, framers of the constitution, who directly postulated in the United States Bill of Rights (Lowe). Federalism refers to a government system whose authorities are evenly divided among the central government, or the federal government, and regional government, often called state governments. A federal state rests on a division of governmental powers between the national government and constituent units, such as states, provinces, republics or cantons. Such a division of power is embedded in the provisions of the constitution, and all federal states that have written constitutions. See Theory of Separation of Powers and Judicial Review http://shodhganga.inflibnet.ac.in/bitstream/10603/95998/1/10-introduction.pdf> accessed on 5th December, 2018 at 4.27am. see also Oyewo, O, *Modern Administrative Law & Practice in Nigeria,* (Akoka, Lagos: University of Lagos Press and Bookshop Ltd., 2016) 57 and Afigbo, E. A, 'Background to Nigerian Federalism: Federal Features in the Colonial State' (1991) 21 (4) *Publius*13-29. Nguyen, X. T., *ibid.*

[12]The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 4 (2) and (3).

[13]*Ibid*, s 4 (4) and (5).

reveals that the principle of checks and balances is more practicable in a presidential system than a parliamentary system of government, where there is fusion of executive and legislative powers in one body. It concludes among others things that it is important that the people who constitute government must observe the doctrine of separation of power within the context of its twin concept of checks and balances as antidote to abuse of powers.

2. Meaning and Objectives of the Doctrine of Separation of Powers

The term "triaspolitica" or "separation of powers" was coined by Charles-Louis de Second at, baron de La Brèdeet de Montesquieu, an 18th century French social and political philosopher. His publication, *Spirit of the Laws*, is considered one of the great works in the history of political theory and jurisprudence, and it inspired the French Declaration of the Rights of Man in 1789 and the framing of the Constitution of the United States of America in the 1780s.[14] Under his model, the political authority of the state is divided into legislative, executive and judiciary powers. He asserted that, to promote liberty effectively, these three powers must be separated and act independently.[15]

The essence of the doctrine is to ensure that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. Within the constitutional framework, the meaning of the terms legislative, executive and judicial authority are of importance.[16] In theory, if one of the three organs of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute law. The essence of the doctrine of separation of power as understood in England was captured by Lord Mustill in the case of *R v Home Secretary, Ex p Fine Brigades Union,*[17] in the following words:

> It is a feature of the peculiarly British conception of the Separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

Similarly, the case of *Lakanmi& Another v. A.G Western State and others*[18] captured the adaptation and operation of separation of powers in Nigeria. In that case, Ademola C.J.N (as he then was) summarised the Nigeria position as follows:

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[14]Separation of Powers -- An Overview http://www.ncsl.org/research/about-state-legislatures/separation-of-power-an-overview.aspx accessed 5th December, 2018 at 7.49pm; Regan, K. O, 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Power under the South African Constitution' (2005) 8 (1) *PER/PELJ* , 120-150: 122.

[15] ibid

[16] Phineas M. Mojapelo, The doctrine of separation of powers (a South African Perspective) 2013 *Advocate* 37

[17] [1995] 2 at 513 at 567.

[18] (1971) 1. UILR 201 at 218.

> We must here revert again to the separation of powers, which the learned Attorney General himself did not dispute is still the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our constitution is based on separation of power – the legislature, the executive and the judiciary. Our Constitution clearly follows the model of the American Constitution in the distribution of powers. The courts are vested with the exclusive right to determine justifiable controversies between citizens and the state. See *Attorney General for Australia v. The Queen* (1957) A.C. 288 at p.311 etc. In *Loyell v. United States* (1946) 66 Supreme Court Reports 1079. Mr. Justice Black said as follows: 'those who write our constitution well know the danger inherent in special legislative acts which take away the life, liberty or property of particular named person, because the legislature think them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts'. These principles are so fundamental and must be recognized. It is to define the powers of the legislature that constitutions are written and the purpose is that such powers that are left with the legislature be limited; and that the reminder be vested in the courts.

Identifying the objectives of the doctrine of separation of power, Kwagha*et al*,[19] listed the following among others; (i). Avoidance of tyranny and ultimate safeguard of labour, all arm works for peace and co-existence in the society. (ii) Efficiency is employed in the most suitable position as a result of concentration in specialize functions. Thus, separation of powers brings about higher productivity as a result of dexterity in performance.[20]The objective of the principle of separation of powers was conceived to protect the liberty of the citizens of the state and specifically aimed at preventing tyranny and preventing an individual or group of individuals to combine two or more state powers in their hands. The origin of the doctrine is the topic for next section.

3. Origin of the Doctrine of Separation of Power

The doctrine is of great antiquity, dating back to the classical period of great Greek city-states and spanning through the middle ages, the turbulent revolutionary periods of the 17th and 18th centuries to the democratic administration of the present. Prominent Greek Philosophers like Plato and Aristotle muted the idea of modern state as a means of avoiding undue concentration of government powers in one class or group of persons.

Apart from classical and medieval periods, the evolution of the doctrine is also traceable to the resistance of British Parliaments to the Decrees of British monarchs, and gradual assertion of powers in the 14th century. The English scholar, James Harrington was one of the first modern Philosophers to analyse the doctrine. In the essay "Commonwealth of Oceana," (1656), building

[19]Kwagha, B and Echikwonye, R, 'Separation of Powers and Sustainability of Democracy in Nigeria: A Challenge' (2011) 3, *Journal of Science and Public Policy*, 27.

[20]Zaid, A &Jayum A. J, 'Factors Influencing the Executive and Legislative Conflict in Nigeria Political Development' (2016) 21 (issue 8) (ver7) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* pp. 20-25: 21.

upon the works of the earlier philosophers like Aristotle, Plato and Machiavelli, Harrington described as utopian (imperfect) any political system that exclude a separation of powers. An English political theorist, John Locke (1632-1704)[21] gave the concept more refined treatment in his second Treatise on Government (Treatise and Civil Government (1690). He argued that legislative and executive powers were conceptually different, but that it was always necessary to separate them in different institutions. Judicial powers, however, played no role in his thinking. Locke thought that it was convenient to confer legislative and executive powers on different organs of government as the legislative can act quickly and at interval while the executive must constantly be at work.[22] He argued that it was foolhardy to give to lawmakers the power of executing the laws, because in the process they might exempt themselves from obedience and suit of the law (both in making and executing) in their own interest.

The modern idea of the concept was explored more profoundly in the "Spirit of the Law" (1759), a study by a French Political Philosopher, Charles Louis Montesquieu, who was considered the author of the system of checks and balances, and the organisation of the theory of separation of powers.[23] In developing his theory of separation of powers, he argued that in every government there should be three types of powers: the legislative, the executive, and the judicial powers. Montesquieu was concerned with the preservation of political liberty. According to him, it is requisite that the government be construed so that one man need not be afraid of another. He argued that when the legislative and executive powers are united in the same person there can be no liberty, because apprehensions may arise lest the same person or senate should enact tyrannical laws, and execute them in a tyrannical manner. Again, there is no liberty if the judicial power is not separated from the legislative and the executive powers.[24]

Where judicial power is joined with the legislative power, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would then be the legislator, where it is joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything where the same man or the same body, whether of the nobles or of the people exercise those three powers, that is, that of enacting laws, that of executing public resolutions and of trying the course of individuals concluded Montesquieu.[25]

The separation of powers, therefore, refers to the division of government responsibilities into distinct branches. Montesquieu asserted that these three branches of powers must be divided in person and in function and they must act independently, limiting any one branch from exercising the core functions of another. It is a way to most effectively safeguard liberties and guard against tyranny.[26] According to Viles,[27] Montesquieu 'paved the way for the doctrine of the separation of

[21]Malemi, E. (n. 6) p. 62.
[22]*Ibid.*
[23] It is worthy of note that the principle of separation of power was not in operation in his country France at that time, even up till today the executive and legislature functions are concentrated in the hands of the same group of people in France. See Alli, Y. O. (n 1).
[24]Espriti Des Lois, (Spirit of Law) Chapter 11, 3-6.
[25] The standard edition of *The Complete Work of M. de Montesquieu* translated from the French in Four Volumes, Volume the First (The Spirit of Laws), by T. Evans and W. Davies, London 1777<http://lf-oll.s3.amazonaws.com/titles/837/0171-01_Bk_Sm.pdf> accessed on 30 November 2018.
[26]Separation of Powers – An Overview, National Conference of State Legislatures – NCSLhttp://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx accessed on 10th December, 2018.

powers to emerge again as an autonomous theory of government'. This theory was to develop in very different ways in Britain, in America, and on the continent of Europe, but from this time on, the doctrine of separation of powers was no longer an English theory; it had become a universal criterion for constitutional governance around the world.

4. Applicability of the Doctrine in Nigeria during the First Republic

Nigeria, being a British colony, adopted parliamentary system of government in her first republic experience,[28] during this period, there was partial separation of powers. The parliamentary system of government as practiced under the Westminster constitution was explained by Wells,[29] *inter alia* that 'lack of a complete separation between executive and legislature in Westminster constitutions means that a government that decides to grasp the nettle can actually do things. Because our Cabinets are chosen from Members of Parliament, the Cabinet has to be the group that has the numbers in the Parliament. Unlike an American President, an Australian or New Zealand Prime Minister or an Australian State Premier doesn't spend a lot of time wondering whether government policy is going to be knocked over in the Lower House. It does happen here, but very rarely. It usually takes that other check and balance, an Upper House, to deliver that sort of paralysis'.

In a parliamentary system of government, the separation of powers is most complete in respect of the judiciary, but between the executive and the legislature, there are conventions, particularly the convention of the sovereignty of Parliament, which governs what is a matter for Cabinet and what is a matter for Parliament.[30] The *modus vivendi* could easily be upset. For example, judges could, *en masse,* set out to make new law rather than simply to find the law. Or Cabinet could deliberately set out to use its subordinate legislation power to undercut the intentions of Parliament. Or the Legislature could go to town on the establishment of Commissions of Inquiry so as to undercut the judicial sphere.[31] Wells explained further that for the separation of powers to work in the Westminster system, there has to be a certain degree of restraint, and the executive, the legislature and the judiciary have to respect each other's territory. This is known as the Principle of Mutual Restraint. It is referred to, for example, in the speech of Lord Browne-Wilkinson in the Privy Council case of *Prebble v. Television New Zealand,*[32] His Lordship says, 'There is a long line of authority which supports a wider principle... that the Courts and Parliament are both astute to recognise their respective constitutional roles'.

When the principle is being carefully observed, the institutions of government tend to concentrate on what they do best and stay off each other's turf. Under the parliamentary system during the first republic in Nigeria, the functions of government were assigned to the traditional arms of government so as to reflect separation of power. However, in reality, there was no strict adherence to this principle since the executive and legislature were fused while the judiciary was

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[27] Vile, M. J. C. (n 2), p. 105.

[28] The is the period covering October 1, 1960 and January 15 1966, when the first military coup d'etat took place. Although, we have in-between the Republican Constitution of 1963 which was premised on the principle pf parliamentary system of government.

[29] Wells, 'Current Challenges for the Doctrine of the Separation of Powers – The Ghosts in the Machinery of Government, being text of lecture given at Queensland University of Technology on 26 April 2006, p. 4.

[30] *Ibid.*

[31] *Ibid.*

[32] [1994] All E. R. 407, 413.

independent. This was portrayed in several lines of cases decided at this period. For instance, in the case of *Williams v Majekodunmi*[33] the court held that the action of the executive in restricting the movement of the plaintiff was void.

When the military came to power in 1966, law-making and executive powers were fused in the Supreme Military Council (SMC), while judiciary was distinct from the other arms of government. In practice, the first assignment usually undertaken by military dictators immediately they usurp power by unconventional means was to put some parts of the Constitution in abeyance, regardless of the ways or procedure laid down in the constitution for its amendment.[34] This attitude according to Alli,[35] is only to demonstrate that the successive military regimes in Nigeria considered the principle of separation of powers as aberration during their tenure of office. Prima facie, the military regime combines both legislative and executive powers in themselves.[36] Not only that, the military also frustrated the judiciary and apparently rendered it ineffective whenever in power, despite the judicial powers vested in them under the various Constitutions. The military constantly and arrogantly took a swipe at the judiciary by the promulgating of Decree purporting to oust the jurisdiction of the court and in effect prevent the courts from exercising the powers and /or duties conferred on them by the Constitution.[37]

Under the 1960 Constitution and 1963 Republican Constitution, there were partial separation of powers in the system since the two Constitutions was tie to the apron string of parliamentary system of government inherited from the British Government. For instance, apart from the judiciary, which exercised full judicial power under the 1963 Constitution, the executive authority of the Federation also extended to the execution and maintenance of the constitution and to all matters with respect to which parliament has for the time being power to make laws.[38]Thus, the Supreme Court in the case of *Lakanmi v. Attorney General (Western State)*[39] succinctly captured the nature separation of power in a parliamentary system when it held that "in the distribution of powers, the courts are vested with the exclusive rights to determine justifiable controversies between citizens and between citizens and the state…."

Upon return to civil rule in 1979, Nigeria adopted the United States of America presidential model. The 1979 Constitution thus established a clearly define separation of governmental powers among the three organs of government with separate functions and functionaries. This position is sustained in the 1999 Constitution (as amended). The theoretical principle of separation of powers has become part and parcel of the Nigerian constitutional arrangement from 1979 Constitution and later the 1999 Constitution to date, the object of which is enhance democratic governance and prevent abuse of powers by government functionaries.

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[33](1962) All NLR 413.
[34]The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 9.
[35]Alli, Y. O. (n 1).
[36]*Ibid.*
[37]Ibid; see also Nwabueze, B, 'Our Math to Constitutional Democracy' *Law and Practice Journal of the Nigeria Bar Association* (Special Edition) p 11.
[38]Constitution of the Federal Republic of Nigeria 1963 s. 79.
[39] (1971) 1 UILR 20.

5. Interplay between Separation of Power and Principle of Checks and Balance

The separation of powers is fundamentally a doctrine against the concentration of state sovereign powers in a single person or body of persons, since it may lead to tyranny and threat to democratic governance.[40]However, governmental powers and responsibilities in practice are too complex and interrelated to be neatly compartmentalized. They intentionally overlap. As a result, "there is an inherent measure of competition and conflict among the branches of government.[41]For instance, throughout American history, there also has been an ebb and flow of pre-eminence among the governmental branches. Such experiences suggest that where power resides is part of an evolutionary process".[42] Under the American system of the separation of powers, one of the central personalities is the fourth President of the United States, the co-author of the Federalist Papers, the Father of the US Constitution and the writer of the American Bill of Rights, James Madison. He retorted that a 'pure', technical separation of three powers was neither what Montesquieu intended, nor was it practical.[43]

According to Madison,[44]"Montesquieu did not mean that these [branches] ought to have no partial agency in, or no control over, the acts of each other. His meaning...can amount to no more than this, that where the whole power of one [branch] is exercised by the hands that hold the whole power of another, the fundamental principles of a free constitution are subverted. Hence, in reality, there is not a single instance in which the several [branches] of power have been kept absolutely separate and distinct".

Commenting on Madison's position, Omejecopined that implicit in Madison's argument was an interesting challenge to the very doctrine of separation of powers and posed the question, "what will prevent the accumulation of power in the absence of pure separation?" The answer was to be found in a unique feature of the Constitution: the pairing of separated powers with a system of checks and balances. For Madison, "organization of powers answered the great challenge of framing a limited government of separated powers: in the first instance, it enables the government to control the governed... and in the next place, it obliges it to control itself".[45] This system is designed to give each branch fortifications against encroachments by the others. Combining the normative idea of liberty with the institutional preconditions of liberty, the 'Madisonian Model' gave genuine and practical life to the vision of Montesquieu. Hence, despite disagreement as to

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[40]Oyewo, O, (n 11) 49.

[41]Omejec, A. 'Principle of the Separation of Powers and the Constitutional Justice System' Conference of constitutional control bodies of Central Asia "The Role of the Constitutional Court in Safeguarding the Supremacy of the Constitution" Strasbourg, 28-29 October 2015

[42]Separation of Powers . An Overview, National Conference of State Legislatures . NCSL, *at* <http://www.ncsl. org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (n

[43]Omejec (n 44),3.

[44]Madison, James. Federalist No. 47 ("The Particular Structure of the New Government and the Distribution of Power among Its Different Parts"), New York Packet, 30 January 1788, at <http://www.constitution. org/fed/federa47.htm> accessed on 26th October, 2018.

[45] Madison, James. Federalist No. 51 ("The Structure of the Government Must Furnish the Proper Checks and Balances between the Different Departments"), Independent Journal, 6 February 1788, at <http://www.constitution.org/fed/federa51.htm> accessed on 26th October, 2018.

how well it has worked, one characteristic of the checks and balances system cannot be denied: it encourages constant tension and conflict between the branches.[46]

In practice, the Madison's theory presupposes that the legislative branch makes law and the president may check Congress by vetoing bills Congress has passed, preventing them from being enacted. In turn, Congress may enact a law over the President's objection by overriding his veto with a vote of two-thirds of both the House and Senate. The Supreme Court can then check both branches by declaring a law unconstitutional (known as judicial review), but the Supreme Court itself is checked by virtue of the fact the President and Senate appoint and approve, respectively, members of the Courts. Furthermore, both the President and federal judges are subject to impeachment by Congress for 'treason, bribery, or other high crimes and misdemeanors.'[47]

Since, it is not possible to have a watertight/complete compartmentalisation of state powers, the principle of checks and balances is designed to ensure effective administration in governance and preventing an arm of government from discharging the functions of the other arms of government with impunity. Contrary to general beliefs, the doctrine of separation of powers and concept of checks and balances are not entirely alien to Nigeria. As a matter of fact, before their formal adoption and adaptation as constitutional safeguard against tyrannical and abuse of government power, they were in practice in the Old Oyo Empire.

These systems were made up of three main powers, which were vested in Alaafin of Oyo (constitutional monarch), the Oyomesi (kingmakers) and the Ogboni. The Alaafin and his council of chiefs served as the executive who regulated the day to day activities in the kingdom. In this arrangement, the Alafin was not always the dominant figure or wielded autocratic power; he was in fact subject, like all Yoruba Oba to elaborate restraints embedded in the custom (which can justifiably be called the constitution) of the kingdom.[48]He had to submit his decisions in the first place to his council of seven nobilities, the Oyo Mesi, whose principal officer was the chief known as the Basorun.[49]

The Oyomesi served as a check on the Alafin's power in that they could dethrone any unruly king. Alsothe Ogboni served as a check on the Oyomesi's power, and the members of the Oyomesi were usually members and could easily be checked by the Ogboni. This served as an effective system of checks and balances to prevent having a tyrant as a ruler.[50]

The first Nigerian Constitution to contain the theoretical framework for the doctrine of separation of powers was the 1979 Constitution, which also proposed a presidential system of government

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[46]Separation of Powers with Checks and Balances, Bill of Rights Institute, Documents of Freedom: History, Government & Economics through Primary Sources, *at* <https://www.docsoffreedom.org/readings/separation-of-powers-with-checks-and-balances> accessed 22 November, 2018.

[47] Ibid, see also United States of American Constitution Art. II, s. 4.

[48]Smith, R. S, *Kingdoms of The Yoruba.* (London: Methuen & Co. Ltd 1969), p. 56.

[49]Stride G.T. and Ifeka, C, *Peoples and Empires of West Africa.*(Lagos: Thomas Nelson Inc, 1971) p.40.

[50]Alli, Y. O (n 1); Ayittey, G. B.N, *Indigenous African Institutions* (hardsley-on-hudson, ny: transnational publishers, 2006) p 30; Ayittey. G,*The Oyo Empire* (2012) <https://seunfakze.worldpress.com/2012/02/1/the_oyo_empire_by_prof_george_ayittey/ accessed on 11th December, 2018.

tailored after American Constitution. The 1999 Constitution serves to establish the principle in Nigeria as we know it today.

6. Practical Applicability of Separation of Powers in Nigeria

The adaptation of the principle of separation of power has been one of the fundamental features of the Nigerian Constitution. The separation of powers of government is clearly delineated in sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which provide for the legislative, the executive and the judicial powers respectively. The separation is that of functions and functionaries, as enumerated in Chapters V (The Legislature), VI (The Executive) and VII (The Judicature) respectively.[51]The demarcation of powers in each chapter includes the two tier of government i.e. Federal and State. The implication of this is that the functions and functionaries at Federal level are distinct from State levels. The Constitution is also designed to check abuse of power by government functionaries and promote national development in the following instances.

6.1 Power of President to Veto Bills

The President is vested with the constitutional power to either assent or veto a bill passed by the Houses of the National Assembly, although the National Assembly can override a veto of the President by mustering a two-third majority to override the Presidential veto and pass the vetoed bill into law.[52] In the case of *National Assembly v President of the Federal Republic of Nigeria,*[53] the Supreme Court affirmed that a Presidential veto can only be overturned by the votes of two-thirds majority of the whole house and not a quorum, and that there must be a full reconsideration of the vetoed bill before being passed into law.[54]

During the Second Republic, President ShehuS agari vetoed two Bills while exercising this constitutional power – Economic Stabilisation (Temporary Provision) Amendment Bill, 1982 and Legal Aid (Amendment) Bill 1983. President Goodluck Jonathan also vetoed the 1999 Constitution (Amendment) Bill 2015.

6.2 Power of prerogative of mercy

The Presidential power to issue executive orders in some areas is another example of the adaptation of the principle of checks and balances to qualify the constitutional adaptation of the doctrine of separation of power. Such order includes that of the prerogative of mercy or grant of pardon under sections 175 and 212 of the 1999 Constitution for the President and State Governor respectively. These powers clearly amount to a check on the power of the judiciary to impose sentence after a due process of adjudication. This is also the case in the appointment of judges and members of the executive council with the approval of the legislature. Again, when the administration, as a result of the power conferred by the Statute make Bye-Laws, Regulation, Orders and Rules, legislative function is being performed. Likewise, when bodies like Tribunal, Boards and Commission are setup by the executive arm to take disciplinary action against person

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[51]Oyewo (n11), 50.

[52] The Constitution of the federal Republic of Nigeria 1999 (as amended) s 58 (3-5).

[53](2003) 41 WRN 94.

[54] Also in the case of *Agbakoba SAN v The National Assembly & Others* (Unreported) Suit No: FHC/L/CS/941/2010, it was held that without the President's assent the National Assembly cannot validly exercise its power to amend or alter the constitution under section 9 of the 199 C0nstituton (as altered).

within the administration or to take decision affecting the rights and obligations of person generally, they are performing judicial functions.

6.3 Executive and Legislative Relations

Again, members of the legislature who are nominated and appointed into the executive at the State or Federal level are required by the 1999 Constitution to vacate their seat in the legislature, as the Constitution does not permit a person or group of persons to hold offices in more than one arm of the government at the same time.[55] In similar vein, members of the executive or judiciary cannot at the same time, be members of the legislature, or vice versa.

6.4 Legislative Oversight Functions

By virtue of Section 88 of the 1999 Constitution, the National Assembly is empowered to carry out oversight functions over the executive. By so doing, the National Assembly may carry out investigation into conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty of or responsible for executing or administering laws enacted by the National Assembly and disbursing or administering money appropriated by the National Assembly.

The power of the legislature in the area of investigation of the activities of the executive is to expose arbitrariness, abuse of power, corruption and bad governance on the part of the executive and this has been severally deployed into effective use in Nigeria. Few examples will suffice: In October 1979, the issue of ₦2.8billion misappropriated from the accounts of the Nigerian National Petroleum Corporations (NNPC) was exposed by the National Assembly. On January 15, 1980, the House of Representatives decided by Resolution 48 to set up a Special Committee in line with Section 58(1) of the Constitution to investigate the matter. In view of the annual Auditor's Report issued by Messrs Cooper and Lybrant Chartered Accountants.

Apart from this, The National Assembly during the Second Republic investigated the National Electric Power Authority (NEPA), the West Africa Examination Council (WAEC) and the Central Bank of Nigeria (CBN) on the conditions of service of their employee *vis-à-vis* the theft of currencies intended for burning. Also, the National Assembly investigated the activities of the Petroleum Trust Fund Development Fund (PTDF) on the purported mismanagement of money realised by the Fund. Most recently, the 7th National Assembly exposed the corruption in the petroleum sector in the aftermath of the announcement of the increase in the pump price of petrol from ₦65 to ₦151 on 1st January, 2012 under the guise of deregulating the petroleum sector. The aftermath of this led to national strike by the organised labour and eventual reduction of pump price to ₦97 and thereafter to ₦87.

It is also important to mention the fact that the legislature has in fact turned the search light on itself in the past. For instances, the Nigerian Senate impeached Senator Chuba Okadigbo on the account that he used 75 Million Naira to buy Sallah Rams and the same Senate impeached Senator Adolphus Wabara on the account that he and other distinguished Senators received bribe during the debate to pass 2005 Budget/Appropriation Bill. Also, the House of Representative impeached Mrs. Patricia Olubunmi Etteh Speaker of House and her Deputy Alhaji Babangida

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[55] See the case of *Ugba v Suswan*(2014) 14 NWLR (Pt. 1427) 264SC. *Wabara v Nnadede*(2009) 16 NWLR (Pt. 1166), 204.

Nguroje on the account that the duo used the sum of ₦628 Million to renovate their official Quarters. The David Idoko's panel reported that the due process was not followed in the award of the contract to renovate the official quarter of the Speaker and her Deputy.

6.5Ratification and Domestication of Treaty

Section 12(1) of the 1999 Constitution provides that "no treaty between the federation of Nigeria and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly". The implication of this provision goes to show that the President has the duty to negotiate Treaties; however, such treaties cannot have force of law until the National Assembly approves them. The above shows the measure of cooperation between the executive and the legislative in the art of public administration in Nigeria. The truth therefore, is that there is no rigid separation of powers between the executive and the legislature under the Presidential system of government but 'separated institutions' sharing powers in same sphere for the welfare of the people of Nigeria.

6.6 Legislative and Judicial Relations and Principle of Judicial Independence

Judiciary is the third arm of government under Nigerian presidential system of government. By virtue of Section 6 of the Constitution, the judicial power of the federation is vested in the court established for the federation of Nigeria. These Courts include the federal and states courts established from time to time. In order to guarantee judicial independent[56] in the performance of its duties, the Constitution of the Federal Republic of Nigeria 1999 (as amended) devoted a chapter to the composition and qualification of people to be elevated unto the bench.[57]However, there is nothing in the Nigerian Constitution or even other democracies that prevents other arms of government from aping and purporting to exercise judicial functions. For instance, we have seen from the above discussions that both the executive and legislative arms of government perform *quasi-judicial* functions through the establishment of one Commission of Inquiry or the other. What is important for now is to examine whether the judiciary in turn perform the functions of either the legislative or the executive.

It has been severally debated that judges do not make law and *vice versa*. Whichever view adopted, we cannot run away from the fact that the primary function of the court is to interpret the law. In the process of interpretation, the Judges tell us what the law is, should be and has been. For instance, one of the rules in English Common Law imported into the Nigeria public service was that, the public servants hold their appointments at the pleasure of the (sovereign) state as decided in the case of *Dunn v The Queen,*[58] and that they could be dismissed or relieved of their appointments at any time without complying with any rules or regulations. However, in the case of *Shitta Bay v Federal Public Service Commission,*[59] the Supreme Court broken from the aforementioned shackles of imported English feudalism system said that as a watchdog of the citizens, the Public Servants in this case under a Written Constitution has a duty to uphold the provisions of the Constitution (being a creation of the Constitution). The Supreme Court

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[56] The independence of the judiciary is universally accepted in the sense that everyone agrees that there should be no interference with a Judge determining a case. Current Challenges for the Doctrine of the Separation of Powers, Vol. 6 No 1 (QUTLJJ), p.108.

[57] See Chapter IV.

[58](1896) 1 QB 116.

[59] (1981) 1 S C 40.

compelled the Commission to perform its duties and observe the rules and regulation made there under. This decision in a way is like judicial enacting law.

In practice, the principle of separation of powers brings about conflicts, deadlocks and threat of divided and failed government when two arms of government clash intensely over issues that involve the exercise of their powers, particularly when one arm of government, typically the legislature, tries to assert its independence and autonomy over another arm of government, typically the executive. In trying to gain the upper hand in such conflicts, the legislatures tend to resort to threat or use of power of removal of the executive. For instance, sections 143 and 188 of the 1999 Constitution confer on the National Assembly and State Assembly respectively powers to remove the President, Vice-president, Governor and the Deputy Governor from office in the event of a gross misconduct. Similarly, in the performance of its quasi-judicial function, the National Assembly may sometimes act as an Appeal Court vide their Public Petitions Committee to which a citizen can send his petition even after the aggrieved citizens must have exhausted all the possible judicial remedies. By so doing, the legislature may intervene on various issues affecting the welfare of citizens.

Premised on the above analysis of the working of separation of powers in relations with the constitutional checks among the three arms of government in Nigeria, it is safe to conclude that there is separation of powers in the Nigerian Constitution, however, in reality, there are combination or fusion of power between the executive and legislative arms. The truth is that, absence of such combination, the machinery of government will ground into a halt. However, in spite of this overlapping and combination of powers and function, where there is clear and manifest infringement on the separation of power either legislatively or executively, the judiciary as the watchdog of the Constitution is always quick to point it out as objectionable and unconstitutional. In the case of *Liyanage v. The Queen*,[60] the Judicial Committee of the Privy Council pointed out that there existed under the Ceylonese Constitution a tripartite division of powers in the legislature, executive and judiciary and that it would be unconstitutional for judicial functions to be interfered with by the legislature by an Act of Parliament. Also in the case of *Lakanmi& Another v. A.G Western State and others*, the Supreme Court of Nigeria upon reiterating the constitutional basis of the doctrine of separation of powers in Nigeria held that Act No. 45 of 1968 was *ultra vires* since it was nothing short of legislature judgment, an exercise of judicial power.

7. Conclusion

The conclusion to be drawn from this paper is that the Nigerian Constitution has successfully produced a government of 'separated institutions' – sharing power in some spheres rather than one under a rigid separation of powers. The Presidential system of government introduced in Nigeria since 1979, and now being practice has shown that the executive and the judiciary are part of the law-making process, while the legislature performs oversight functions to checkmate executive in projects execution and with concomitant power to control excesses of its members.

In order to enhance national development, it is recommended that the three organs must operate in perfect cooperation for good administration to ensue. This means that once a bill has been properly passed into law, the executive should execute it to the letter; the judiciary on its part

[60](1967) AC 259.

should not unnecessarily enquire into the motives of the legislature or as to the rightness or wrongness in the abstract. The judiciary must allow the executive to execute the law made by the legislature without constituting itself into a clog in the wheel of the executive and thereby turn government to a "government of the judiciary". Rather, the judiciary should watch for two things namely: (i) whether the executive or the legislative have observed the procedure laid down for the discharged of their duties; and (ii) whether the law itself is not *ultra vires* the*grundnorm.*[61] It is also imperative that both executive and legislature should ensure that judicial independence is maintained and no impediment in terms of appointment and finance should be used to sidetrack judicial independent.

In the final analysis, it is observed that the major clog in the wheel of the doctrine of separation of power and principle of checks and balances is the human factor, which cannot be eliminated, as law does not exist in a vacuum but meant to regulate the actions of human beings who sometimes also affect the execution of law. The practicability of checks and balances in modern government will depend on the system of government and who are the people who constitute the government. Checks and balances is more practicable in a presidential system of government than in parliamentary system, where there is fusion of executive and legislative arms in one body. However, the most important thing is that the people who constitute the government should observe the doctrine of separation of power within the context of the concept of checks and balances as antidote to abuse of powers.

[61] See *A.G of Bendel State v A.G. of the Federation & others* (1982) 3 NCLR 1.