THE DOCTRINE OF SEPARATION OF POWERS OVER TIME AND A CASE FOR THE REVIEW OF NIGERIA'S POWER SEPARATION MODEL

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The doctrine of separation of powers is utilised as a device against despotic utilisation of government power by any person or institution. The essay discusses the doctrine's importance, stating that its pure application is neither objective nor is it practicable. The writer discusses the doctrine's models in several polities and the absence of a universal power separation model, the historical development of the doctrine from the mere practice of power separation to the theory of mixed government and the doctrine itself, highlighting that the doctrine constantly aims to preventing the over-concentration of powers. This writer notes that since the doctrine's past was morphable to develop to the present, the present should be morphable enough to assimilate other principles as long as the aim remains achievable. The writer concludes with the doctrine's challenges in Nigeria, making recommendations, germane, to its effective application in Nigeria.

1.0 INTRODUCTION

In every democracy, the major institutions of the State are divided into three arms - the executive, the legislature and the judiciary. However, the presence of the three arms in a democracy is not sufficient, as a democracy is not one stricto sensu, without the independence of those in charge of running these institutions. According to French Philosopher, Baron de Montesquieu, in his book:[1]

> "When the legislative and executive powers are united in the same person or body of magistrates, 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 purport of the doctrine is the guarantee of liberty in any given democratic government and it achieves this by utilising the principle of checks and balances.

2.0 DEFINING THE DOCTRINE OF SEPARATION OF POWER

An attempt to define the doctrine may appear to be one with no consequence due to its definition seemingly inherent in its nomenclature. This is not so, as there is no generally agreed definition, since most writers' definitions stem from a certain angle considered of more significance to them.

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[1] Secondat Baron de, Montesquieu Charles de, *The Spirit of Laws*, (Amherst, NY: Prometheus Books, 2002).

Ikenga K.E. Oraegbunam,[2] in defining the doctrine compared its motive to Adam Smith's theory of division of labour in economics, further noting that the motive is not limited to efficiency but aims at guarding against abuse of authority. The courts have not been shy of discussing the doctrine. The Nigerian Court of Appeal per Salami JCA, explained that the doctrine implies:

> (a) that the same person should not be part of more than one of these three arms or divisions of government.
>
> (b) that one branch should not dominate or control another arm. This is particularly important in the relationship between executive and the courts.
>
> (c) that one branch should not attempt to exercise the function of the other, for example, a President, however powerful, ought not to make laws nor should a legislature make interpretative legislation, if it is in doubt, it should head for the court to seek interpretation.[3]

3.0 EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers has developed gradually over the course of more than a millennium, with the passing of time causing the imperative development of the doctrine. Whilst the terminology known as "separation of powers" can be traced to Charles Baron de Montesquieu,[4] its actual practice has been traced by Western writers to Greece during the period around 358 BC when Aristotle (384-322 BC) mentioned the idea of a mixed government. The attitude of the Western writer in tracing the doctrine to Old Greece has been criticised by Yusuf Ali SAN who noted that the "the famous doctrine or principle of separation of powers is as old as time".[5] The evolution of the practice of separation of powers can be discussed in the light of the old and ancient practice and the modern doctrine of separation of powers.

3.1 The Old and Ancient Practice.

The ancient practice of power separation can be traced to ancient Africa. Example include the old Oyo Empire, where there was power division between the Alaafin, the Oyo mesi and the Ogboni, indicating that power was not concentrated only on the Alaafin.[6]

It can also be traced to the practice in ancient Egypt at around 1298, where although the Pharaoh was taken to be a god, the son of Ra, all the power was not vested solely on him. In ancient Egypt, the Solistes, which consisted majorly of lawyers, exercised control over the natural law as practiced then which was used to rationalise the power of the pharaoh. There were also procedural laws to

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[2] Ikenga K.E Oraegbunam, "Separation of powers and Nigerian Constitutional democracy" (2009) Vol 5-7 *Benin Journal of Public Law*, 26-59.
[3] *Ahmad* v. *Sokoto State House of Assembly* (2002) 44 WRN 52.
[4] Montesquieu, Charles de Secondat, Baron de, 1689-1755. (1973). De l'Esprit des lois. Paris: Garnier.
[5] Yusuf O Ali "The limits of the doctrine of separation of powers in the Constitution of the Federal Republic of Nigeria 1999" available at https://bit.ly/3F58jlZ (accessed 19 June 2021)
[6] *Ibid*.

regulate the judges and the application of substantive laws. The concept of power separation can be particularly noted in ancient Egypt as the pharaoh who was seen as divine, the head of state and government, did not exercise judicial power or legislative power.

Western writers trace the historical development of the practice of separation of powers to ancient Greek philosophers like Plato (427- 347 BC), Aristotle (384-322 BC), and the historian Polybius (205-123 BC) amongst others. Aristotle, in formulating his theories of government, is recorded to have studied about 158 Constitutions of Greek city states. He wrote that:

> "There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; of these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the magisterial or official; and third, the judicial element."[7]

He observed that where there is a mixture between each institutions of the mixed government, an interplay will arise that affects the distinct state functions of deliberative, magisterial, and judicature, which will be on each institution[8]. To him, the answer to the competition between factions like the rich and poor was a "mixed regime" or "polity".

The ancient theory of "mixed constitution", which was later modified into the doctrine of separation of powers, is a mixture and balance of the three forms of constitution which are each based on the number of the ruling class. They are; monarchy, which is the rule by one; aristocracy, which is the rule by few; and democracy, which is the rule by many.

To Aristotle, these three forms of constitution each degenerate into their respective negative form over time depending on the ruling class's motives being either selfless or selfish. Gradually, monarchy can deviate to tyranny, oligarchy becoming a deviant of aristocracy, and democracy degenerating into mob rule. None of these deviant forms is in the interest of the community.

To Polybius, mixed government was the ideal. He believed that the Republic of Rome carried out a mixed government[9] like that conceived by Aristotle, with each of the branches having power to check the powers of the other branches and balance the weakness of the other branches, thereby preventing absolute power from being in one branch. Polybius agreed with Aristotle in the sense that the three forms of constitutions over time degenerate into their respective deviant and negative

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[7] Hilaire Barnett, *Constitutional & Administrative Law*, 12th ed. (Routledge Abingdon Oxon UK: New York, 2017) p. 80.

[8] These functions at modern times correlate thus: deliberative-legislative, magisterial-executive and judicature-judicial function.

[9] Polybius, W. R. Paton, F. W. Walbank, and Christian Habicht, *The Histories*, Volume I-VI (Cambridge: Harvard University Press, 2011).

forms as mentioned to be tyranny, oligarchy, and mob-rule. He posits that they each degenerate into their corrupt forms by a gradual decline which he calls "anacyclosis" or "political revolution".

John Calvin, like Cicero and Polybius, favoured a mixed government and was against political absolutism. It should be noted that majority of the philosophers at this time were living under governmental systems which did not feature power separation, and this made their writings normative and more of theory than practical.

Philosophers like Cicero,[10] Aquinas,[11] Aristotle, Polybius, Plato, Machiavelli[12] are of the opinion that the mixed government is the best form of government and better than any by itself, as in Cicero's word in his De Re Publica, quo nihil possites seprae clarius - "Nothing can be more splendid".

3.2 The Modern Doctrine of Separation of Powers

The doctrine of separation of powers as understood now is traceable to various 17th and 18th century thinkers with credit specifically given to John Locke and Baron de Montesquieu. Montesquieu saw man as having a proclivity towards evil, manifesting itself in selfishness, uncontrollable desire, and the thirst for power. In his opinion, this proclivity can be controlled by the laws and constitution of the State. Montesquieu divided government into three types: the republican (sovereignty resides in the people), monarchical (sovereignty resides in a single person, and usually hereditary with the laws usually fixed and established), and despotic (wherein a person governs according to his whims and caprices with total absence of separation of power).[13] He subdivided Republican government into aristocracy (power residing in the upper echelons or class not in the whole people) and democracy (power residing in the people, with the people ruling either directly or indirectly through representatives). To Montesquieu, democracy is suitable to only small societies.

Montesquieu prescribed that the various forms of distribution of political power should be amongst the legislature, executive, and, judiciary and that they be placed in the hands of different people or entities.[14] He also provides the basis for the concept of checks and balances by stating that the executive power and legislative power should be restrained by each other[15]. To him, the restraint of the executive over the legislature is the power to reject legislations and the restraint of the legislature over the executive is the annual power of the purse for if "the executive power was to determine the raising of public money … liberty would be at an end."

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[10] Marcus T. Cicero, J.G.F. Powell, and J.A. North, *Cicero's Republic* (London: Institute of Classical Studies, 2001)
[11] Thomas Aquinas, *The Summa Theologica* (Westminster, MD: Christian Classics, 1981)
[12] Nicollo Machiavelli, Ninian Hill Thomspon, *Discourses* (New York: BN Publishing, 2005).
[13] Ibid, II, 1.
[14] Charles de Secondat, Baron de Montesquieu, and Thomas Nugent, *Spirit of Laws* (New York: The Colonial Press, 1899), p. 151.
[15] Ibid, p. 160.

The doctrine of separation of powers as prescribed by Montesquieu was impactful in the development of administrative law, constitutions of various States and discussions on government functions, such that Blackstone noted that if the legislative, the executive and the judicial functions were given to one man, there would be an end of personal liberty.[16] His approach was based on decentralisation of power as opposed to its centralisation under the despotic rule. Montesquieu also argued that each institution should only exercise its own power and should be independent of the other. He, as well as other jurists, specified that the independence and separation of the judiciary from the other two organs must be real, not merely apparent.

John Locke in his Second Treatise of Civil Government wrote against the concentration of legislative and executive powers in one institution. He proposed that the legislative and executive powers should be on two different institutions that will have a continuing existence. To him, it is ideal to separate the discontinuous legislative power from the continuous executive power and both from the federative power. This was so that the legislature can act quickly at intervals and not continuously while the executive can constantly be at work so that the legislature will not make laws beneficial to their sole interests. The "continuous executive powers" to him is a combination of all the powers presently called executive and judicial. The "federative powers" are the powers to conduct foreign affairs. To Locke, arresting a person, trying a person, and punishing a person are all part of the single function of executing the law, and he did not consider it worthy of division. Locke also explains the concept of a "mixed government," in which multiple forms of governing – monarchy, oligarchy, and democracy – are simultaneously used[17]. The constitutional history of Britain influenced their development of the doctrine by John Locke and Charles Baron de Montesquieu.

The doctrine has gained universal applause and application, although the practice is rarely ever seen in its pure and strict state. The doctrine has been modified over time to reflect changes in time and place, usually to reflect the distinctiveness of the State where it is being applied. As such, the doctrine's evolution remarkable as one to have withstood time is not one close to the finish line, as the doctrine continues to evolve and adapt to other principles and doctrines for its application to fit the societal demands and social realities of each distinct state while aiding effectiveness of the government.

4.0 THE DOCTRINE OF SEPARATION OF POWERS

In protecting the societal goals, values and ideas of justice, equality, equity, liberty of persons, and sanctity of life and property, western institutional theorists are of the opinion that the exercise of governmental power should be controlled to not be a destructive force destroying values that it was

[16] Commentaries on the Laws of England, Blackstone, 1765.
[17] John Locke and Peter Laslett, *Two Treatises of Government* (New York: Mentor Books, 1965).

intended to promote. Representative government recognises the role of government in any society and that governmental powers must be limited. The practice popular with limiting government power is the doctrine of the separation of powers.

Some of the elements of the doctrine of separation of powers include:

a. That the government should be divided into three arms, branches, or departments: the legislature, the executive, and the judiciary. This element is the assertion of the division of the functionaries, arms, or agencies of government into three: the legislature, the executive, and the judiciary. Although the earliest version of the doctrine was a twofold division of government functions, the 18th century marked the period of the springing up of the threefold division, which has gained popular acceptance as a necessity and element of a constitutional government[18] This popularity is probably due to the recognition that the separate branches will represent varying interests. This element of the doctrine is at the centre of constitutionalism as accepted and preached in the West, forming the antithesis of totalitarianism and tyranny. Hence, to Madison "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny."[19].

b. To each of the three branches, there should be an identifiable function of government which is carried out by them solely and the other arms are not allowed to encroach upon the functions of the any other branch. This is the assertion that there are three specific and identifiable "functions" of government. While the first element endorses the existence of three branches of government, the second element accepts the fiction that there exist three necessary functions to be performed by government. According to this element, government function as exercised can be classified into legislative, executive, or judicial. It goes beyond recognising the three functions to recommending that each of these functions should be placed solely to the appropriate branch.

c. The persons who compose of these three branches of government must be kept separate and distinct i.e., no individual should be allowed to be, at the same time, a member of more than one branch. The basis can be found in the words of James Madison being interpreted that men are not angels, and they will tend to abuse power if left unrestrained. The third element

[18] As far as the actual institutional development is concerned, of course, the basis of the threefold structure had been laid in England by the thirteenth century. See F.W. Maitland, *The Constitutional History of England,* (Cambridge University Press: 1961), p. 20; see also E. Klimowsky, Die englische Gewaltenteilungslehre bis zu Montesquieu (Berlin, 1927)

[19] J. Madison wrote in the Federalist Papers No. 51, published in 1788. Available at https://billofrightsinstitute.org/primary-sources/federalist-no-51 (accessed 20 April 2022)

recommends the three branches of government be composed of separate, distinct, and different groups of people, with no member of a branch overlapping to another branch. To Locke, to leave one man as both lawmaker and judge, was to invite tyranny. This element is one of the distinguishing differences between the pure and strict separation and one of the "liberal separation" models.

d. Each of the arms will act as a check on others, leading to a balance in the scale of power while preventing abuse of power since no single group of people will be able to control the machinery of the State. Finally, where the first to third elements are followed, each branch of the government will act as a check on the others to prevent the exercise of arbitrary power by the others. Furthermore, due to restricted exercise of its function, each branch will be unable to exercise undue influence over the other branches. This element signifies the aim and purpose of the doctrine.

The problems which could accompany the pure doctrine has created a need for modifications as a cure. It should be noted that these problems are not certain to arise in all polities applying the doctrine, but it is one likely to happen due to its having occurred in at least one. Some of the problems include:

a. Where one branch actively exercises checks upon another, it might provoke the other branch to see it as a witch hunt. As such, they will focus more on a power play than carrying out their part of the social contract. This will affect the effectiveness of the government in carrying out its obligations to the public and protecting the lives and properties of the citizenry. A branch can also exercise its power of checking another branch with a view to frustrate the other branch leading to the possibility of a situation of frustration ad infinitum with the citizenry being abandoned for a power play.

b. The theory does not indicate how a branch or the person(s) who wields its authority are to be restrained where they attempt to exercise power arbitrarily or improperly either by encroaching on the functions of another branch or by simply disregarding the instructions of another branch.

c. Though arguable, the doctrine in spelling out the division of functionaries was not realistic to recognise the imbalance of power on the branches. It does not recognise the imbalance of the power of the executive compared to the legislature and the judiciary and the imbalance of the power of the legislature compared to the judiciary. This imbalance of power division has stirred writings and academic discussions on the reality of the independence of the judiciary.

d. The doctrine is linked to a negative approach to meaning and promotion of liberty and freedom, it has been observed to be too concerned with the view of freedom as absence of restraint, rather than with a more positive approach to freedom[20]. Its aim of promoting liberty by preventing the government from encroaching upon individual liberty leads to measures which weaken the government to the point where it is unable to act proactively to provide essentials of an above average social and economic life bringing the problem of bureaucracy and red-tapism into light.

The doctrine is committed to the restraint of governmental powers, which according to theorists can best be achieved by setting up divisions within the government to prevent the concentration of power in the hands of a single group of people. We need to consider that although restraints on government is essential to the maximisation of political liberty, a certain minimum degree of strong government is also necessary for the proactive maximisation of political liberty. It is proposed that the recognition of the need for government action to provide the necessary environment for individual growth and development is complementary to, not incompatible with, the view that restraints upon government are an essential part of a theory of political liberty[21].

4.1 Importance of the Doctrine

The doctrine, from a simple perspective, will be to simply divide power amongst the arms or institutions of government. However, from a technical perspective, its basis is beyond the division of power. Its importance has been discussed in several case law, and by several jurists and legal luminaries in different ways. To Professor Ben Nwabueze, the doctrine is aimed simply to prevent the vesting of power in a single arm and ensure government is not conducted according to pre-determined rules beneficial solely to those in charge[22]. Wade & Phillips[23] in noting the importance of the doctrine made reference to the writing of John Locke[24] thus:

> "It may be too great a 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."

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[20] M.J.C. Vile, "Constitutionalism and the Separation of Powers", 2nd ed. (1967) excerpt gotten from https://oll.libertyfund.org/pages/doctrine-of-the-separation-of-powers (accessed 14 September 2019)
[21] *Ibid.*
[22] "Status and Role of the Legislature in a democratic society**"** A public lecture delivered by Professor Itse Sagay SAN to mark the 47th Birthday of Michael Opeyemi Bamidele, Esq. on the 27th of July, 2010.
[23] E. C. S Wade and G. Godfrey Phillips, *Constitutional and Administrative law*, 9th edition. (Longman: 1977).
[24] Locke John, 1632-1704, *The second treatise of Civil Government and a letter concerning toleration* (Oxford: B. Blackwell,1948).

Therefore, the doctrine's importance lies in the need to curb man's innate desire for power and prevent the possibility of a person having excessive power to the extent that the power corrupts such person to the detriment of the populace.

5.0 THE PRINCIPLE OF CHECKS AND BALANCES

The most popular modification of the theory of separation of powers is the amalgamation of the doctrine with the theory of checks and balances. This theory of checks and balances was used to import the idea of checks to the exercise of power into the doctrine of the separation of powers i.e., each branch having the power to exercise a certain degree of direct control over the other branches. This refers to the authorisation of a branch to play a limited part in the exercise of functions of another branch. The most popular of these powers of checks are:

a. Veto power given to the executive over legislation and over the legislative arm.

b. The power of impeachment of the legislative branch over the executive arm.

c. The power of judicial review given to the judiciary over the two.

The power to "interfere" of a branch was a limited one so as not to adversely affect the idea that a division of functions remained. The pure doctrine of separation of powers was modified by this view that each of the branches could exercise some authority in the ambit and purview of any of the remaining branch(es). This power of interference is not one adverse to the independence of the branches. It does not affect their independence, instead, it only gives a branch the power to watch the others and prevent them whenever they exercise or purport to exercise their functions in a manner contrary to the aim of governance or adverse to the primary aim of the doctrine of separation of powers.

It is the combination of the doctrine of separation of powers with the theory of checks and balances which formed the basis of the United States Constitution. This combination has also been applied in line with some polities' social reality and system of governments, leading to the legislative function being shared whilst other functions are strictly kept separate[25].

It can be rightly noted that the modifications of the pure doctrine of separation of powers has been in two important ways:

a. Combination of the doctrine of separation of powers with the principles of checks and balances: Some of the objections and criticisms against Montesquieu include the positions of

[25] This was popular in eighteenth-century English constitutional system. It was popularly known as "the theory of balanced government", it is a combination of the doctrine of separation of powers with the theory of mixed government to produce a theory where powers and functions were separated partially to fit their societal peculiarity. In this theory or variation, the legislative function was shared while the other functions were kept strictly separate.

some writers that he was against the pure doctrine of separation of powers because he gave each of the branches of government certain powers over each other which amounted to a participation in the exercise of the functions of another branch. As Marshall opined, this proposition will lead to the unwarrantable violations of the pure theory. Contrary to the popular misconceptions, Montesquieu did not give each branch an equal part to play in the exercise of each function of government. He, after setting up a basic division of functions, imposed some control mechanisms upon this fundamental division. This checks and balances has been commended by E. Barendt who explained that the majority of the administrative authorities and agencies in a sense perform the functions of two or three of the branches due to complexities in government. Furthermore, one cannot claim that due to this practice to foster government carrying out its function without time wastage, there is no separation of powers, as that would be the conclusion if we were to use the strict separation logic. In his opinion, the importance of the doctrine is in the result and the aim not in the intensity of separation.

b. Modification of the doctrine of separation to assimilate the practice and system of government to achieve the aim of the doctrine: Another variation and modification of the pure doctrine is that of separation of persons. The pure doctrine demands that the persons who compose of these three branches of government must be kept separate and distinct. It demands the strict and complete separation of the personnel of the three branches of government. This has been modified to a partial separation of persons wherein some people may be members of more than one branch of the government, although a complete identity of personnel in the various branches will be forbidden.

   Such an approach does not necessarily mean that the idea of the separation of powers has been disposed and rejected. In this situation, questions as to the degree and intensity of separation will become important. Questions like: How many people are allowed to be members of more than one branch? Who will they be? What will be their function and authority? What is the intensity of the clash of interest between the branches wherein the personnel will be a part of? This partial separation of persons provided the basis of the parliamentary system of government with the pure doctrine acting as the height for separation of powers. The pure doctrine acting as the height does not mean that any modification or variation suitable to the type of society will cease to be significant simply because it is partial.

Oddly enough, it is rare to come across a state in modern times that practices the pure doctrine without its modification in any of the two ways or any ways outside of the two.

The "doctrine of the separation of powers" from its name seems to be unambiguous and easy to recognise, but this is in contradiction to the reality of the confusion encountered in its definition. The doctrine of separation of powers in its strict and pure form as a sole theory without its combination to other political ideologies and theories is inadequate and unable to provide an adequate basis for an effective, stable political system, especially one in this modern era. Hence, this has resulted in its combination with other political ideas – particularly the theory of mixed government and the theory of checks and balances – to form the complex constitutional theory that applies in different formats, providing the basis of most modern and Western political systems.

6.0 SEPARATION OF POWERS IN VARIOUS POLITIES

The doctrine of separation of powers came to be due to a long period of tinkering, modification, and alteration of various techniques and approaches aimed at achieving the desire of preventing totalitarianism or autocracy. The modification over time was made to be in touch with realities in the society and time, and the modification led to the doctrine of separation of powers which has also been modified into various sub formats which are practiced differently in different states. Different examples include:

6.1 Separation of powers in the United Kingdom

The system as practiced in the United Kingdom is the parliamentary system wherein the arms or branches are clear, but the power separation model is not as straight forward. The doctrine reflects itself therein as power is separated between the executive, the judiciary, and the legislature, but the personnel of each branch are not as separated as the branches.

The legislature is bi-cameral with each sub arm of the legislature having distinct legislative function. The upper house, called the House of Lords, traditionally consists of earls, dukes, viscounts, barons, and bishops. The House of Lords is also part of the judiciary as the court of final appeal. The legislative function of the House of Lords is popularly regarded as close to dormant since although it has power to introduce bills, this power is dormant as majority of the important laws are introduced in the House of Commons. Also, while the House of Lords has the power to delay the passage of bills by the lower house, it does not have the power to veto the bills.

The lower house, also known as the House of Commons, is regulated by majority rule where the majority party makes all the laws and the minority has little voice, hence the general opinion that the majority party in the House of Commons holds all of the power[26]. The House of Commons is the more powerful of the two houses and their power extends to the ability to oust the executive where

[26] "Constitutional Topic: Separation of Powers", available at https://www.usconstitution.net/consttop_sepp.html (accessed 16 March 2021)

the executive has lost the ability to command a majority on an issue of confidence.[27] The lower house elects a speaker who acts as the referee in instances of debate between the majority and the minority. The members in the House of Commons sit for five years or until the monarch dissolves the parliament usually at the Prime Minister's behest and calls for a new election.

The Prime Minister is a member of the executive and a member of the Parliament. The Prime Minister acts in two capacities, as head of government and as the member of the majority in the powerful House of Commons, hence accountable to the house of commons through the "Prime Minister's Questions". The Prime Minister heads the cabinet, which includes the most senior ministers.

The Head of State is the monarch with power to approve all bills, though today, the process is regarded as a mere rubber stamp. Although the monarch is the sovereign, she takes little direct part in the governance of the country. Despite this, the monarch has wide powers called "Royal Prerogatives", which are sometimes delegated to ministers. Some of her powers include the appointment of the Prime Minister from the party with the majority, the issue or withdrawal of passports, declaration of war and deployment of armed forces overseas, the prerogative of mercy, the power to assent and enact laws by giving royal assent to the bills passed by the legislature, and the power to refuse assent, though this has not been done in the 20th and 21st century. The monarch is immune from criminal prosecution unless her permission is obtained. She is also not required to pay income taxes although, she can volunteer to do so. It should be noted that irrespective of the monarch's power, the exercise of the power is limited to the doctrine of parliamentary supremacy which was the subject in the *Case of Proclamations*,[28] where Chief Justice Coke and his fellow judges ruled that the power of the King to create new offences was outlawed and that the King could not, by proclamation, prohibit new buildings in and around London. Hence, the Royal Prerogative could not be extended into areas not previously sanctioned by law. This set out the principle that the King had no power to declare new offences by proclamation. It was however argued that the limit of the monarch's power in line with parliamentary supremacy was not applicable to the monarch's power to levy tax without parliament's consent[29]. An exception was given to the wide power of parliament in *Day v Savadge*[30] where it was held that an Act of Parliament would be invalid and have no force if it were made against "natural equity". However, this exception has been called to question in *British Railways Board v Pickin*[31] where Lord Reid held that that since the 1688 Revolution, neither the law of God nor law of nature and of natural justice could overrule an Act of Parliament.

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[27] This was done to the minority government of Mr. Callaghan on March 1979.
[28] *Case of Proclamations* [1610] EWHC KB J22.
[29] *R* v *Hampden* (1687) 3 State Tr 825.
[30] *Day* v *Savadge* (1614) Hob 85; 80 ER 235.
[31] *British Railways Board* v *Pickin* [1974] AC 765.

In Britain, their power separation model which gives the legislature supreme power goes the extra mile in stating that the judiciary has no power of review over acts of parliament as held in *R v Jordan*.[32]

The House of Lords though functioning as both the legislative and the highest court in the judiciary has its legislative power reduced to little less than dormant in practice as the house of lords merely has delaying power over bills. It should once again be noted that the monarch, though having power to assent and refuse to assent bills, traditionally does not refuse assent to bills passed by the Parliament and the head of government.

This model though significantly different from pure separation model cannot be tagged as imperfect if the primary aims of the doctrine is achieved, which is commendably achieved in Britain where the principle of responsible government makes the totality of government responsible to the parliament. Their model is suitable to their demands as it bridges the gap between the executive and the legislature, making government effectiveness easier to attain and it also achieves the primary aim of the doctrine as it prevents absolute power from being vested in one person.

6.2 The French model of power separation

The political system in France reflects the power separation format between the executive, legislature, and judiciary. The executive is headed by the President and the Government. The President is elected for a five-year term by the people whilst the Government is headed by the Prime Minister who is appointed by the President. Hence, both the President and Prime Minister head the executive branch.

The President does not have veto power over legislation but can ask Parliament to reconsider a bill. The government including the Prime Minister can be revoked by the National Assembly through a censure motion, hence the Prime Minister risks revocation where he does not have the support of the majority of the lower house. The President presides over the Cabinet and has vast emergency.

The legislature comprises of the National Assembly and the Senate. The Senate which is "upper house" has less power than the National Assembly which is called "the lower house". The power balance between the two branches of the legislature is such that the head of the government is appointed from the lower house. The Prime Minister, appointed by the President[33] from the majority party in the National Assembly, has wide powers including power to choose the members of the Government. Essentially, the Prime Minister is the head of the military and the civil service[34]. The Senate consists of Senators who are elected by the various local officials from across the country for

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[32] *R* v *Jordan* [1967] Crim. L.R. 483.

[33] Article 8, Constitution of the Republic of France, completed on the 26 June, 1793, and submitted to the people by the National Convention (Translated from a French copy, direct from Paris.)

[34] *Ibid* Article 20.

a six-year term. The National Assembly consists of Deputies who are elected by the people for a five-year period. The National Assembly has the power to vote and force the Government to resign through passing a motion of censure.[35]

The judiciary in France is independent and is not controlled by or made to answer to any of the two branches. The judiciary is divided into two sub-branches which are the judicial branch and the administrative branch. The two branches have their own independent Courts of Appeal and jurisdiction. The judicial branch deals with criminal law and civil law whilst the administrative branch deals with appeals against executive decisions.

The Constitutional Council examines laws and legislations determining whether they violate the constitution. Laws, after passage but prior to their enactment, can be reviewed by the Constitutional Council. Review which affects laws are requested while those that affect the Constitution are mandatory. The review can be requested by the President, the Prime Minister, the Senate President, the President of the National Assembly, and any of the senators or any of the members of the National Assembly. The Constitutional Council consists of nine members, with three appointed by the Government, three by the National Assembly, and three by the Senate.

From the above, it is clear that this model is distinct from that of Britain. The difference between the two models is one of formality as to their societal differences and peculiarity. Hence none of the two models can be tagged as the best model, and each can only be tagged the best for achieving the primary aim of the doctrine as well as more fitting for their respective societal demands and realities.

6.3 The Mexican Model of Power Separation

The State of Mexico's practice of the doctrine of separation of powers is one of tripartite division into the legislative, executive, and judicial. It is a federation with a high proportion of the law being left to the Mexican states' jurisdiction.

The Mexican legislature, called the Congress, is bi-cameral. Certain items are exclusively for either house while some must be agreed by both houses. A legislation may be introduced by any member of Congress, or the President, but the appointment of the President is subject to confirmation of the Senate.[36]

The head of the Mexican executive is the President who functions as the head of state and government. The President is elected to a single six-year term directly by the people, but the Congress can designate an interim President and call for new elections in the case of disability[37].

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[35] *Ibid* Article 49.

[36] The composition, responsibilities, power and requirements to be a member of the Congress are provided in The Third Title, Chapter II, Article 50 to Article 79 of the Political Constitution of the United Mexican State.

[37] The Third Title, Chapter III of the Political Constitution of the United Mexican States provides for the composition, responsibilities and requirements of the executive arm of the State

The President is held to the will of the Congress as he cannot leave the country without the congress' permission.

The judicial system of Mexico is divided into Federal Courts and Regional Courts. The national courts are divided into four hierarchical parts: the Supreme Court of Justice, Electoral Tribunal, Circuit Courts, and District Courts. The Federal Courts act as Courts of Appeal in two senses; they act as Court of Appeal for State Courts and for themselves according to the hierarchy of national courts. The lower courts are not legally bound by the decisions of superior courts except where special rulings known as *Jurisprudencias*[38] are given[39].

This model of separation reflects the peculiarity of the State of Mexico in the sense of their history which includes its poverty and its past of invasion by outsiders. This is probably why their Constitution has been amended at least 450 times since its enactment in 1919 and why it limits the movement of its President outside the country by requiring Congress' permission. Their uniqueness also reflects in the Constitution providing that the election of the 500 deputies will be on a three-year basis and that they cannot serve for more than one term in succession, probably to aid circulation of power and prevent an individual or group monopolising the legislative office. Also, the courts are given freedom and not required to follow judicial precedents. Rather, they are to decide each case according to its merit so as not to tie a court to a decision which may not be in the pursuit of justice, but this is subject to strict following of rulings called *Jurisprudencias*.

6.4 Separation of powers under the 1787 United States of America Constitution.

In the United States of America, the doctrine of separation of powers is the foundation on which their Constitution is based. The history of the United States of America shows their adherence to ensuring power is not over-concentrated in one arm or individual. America was a colony of Britain until the American Revolution between 1765 and 1783, which they won partly due to the support and assistance from France. The causes of the revolution include the Stamp Act event wherein the British Empire imposed taxes in an attempt to recoup finances after the English war against France. The stamp act purported to tax transactions in the colonies to collect revenue for "protecting the colonies" during the war. Another cause was the Townshend Act event where Great Britain purported to tax goods imported from Britain and the response from the colonies was to boycott the goods which inadvertently led to the Boston massacre. What is clear from their history is that America has always had issues with any decisions or impositions not from the people or from people they see as oppressors.

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[38] "Jurisprudencias" are established when the Supreme Court and the Federal Collegiate Courts issue five consecutive uninterrupted and consistent decisions approved by unanimity of votes of the Magistrate who compose each collegiate court on a point of law.

[39] The Third Title, Chapter IV, Articles 94 to Article 107 of the Political Constitution of the United Mexican States provides for the composition, responsibilities and requirements of the judicial arm in the State .

The United State of America's Constitution has been amended different times and their separation of powers model subsumes their constitutional practice of federalism. Their power separation model devised by the fathers of their Constitution was designed for a primary aim: to prevent the majority from ruling with an iron fist. Hence, they shied away from giving excess power to any branch of the new government. Mr. Justice Black reiterated this in *United States v Lovett*[40] when he noted the danger of the legislature exercising their power with no control to liberty of man, stating that it is to define the powers of the legislature that constitutions are written, and the purpose is that powers left with the legislature be limited and that the remainder be vested in the courts.

Their separation of powers model provides for and recognises a system of power sharing and checking and balancing. Accordingly, despite their articles I[41], II[42] and III[43] providing for the basic and primary power of the legislature, executive, and judiciary respectively,[44] the Constitution gives a particular branch or arm limited power to check and balance the performance of the constitutional role by another arm. Some examples include:

a. The President has power to make treatise[45], execute all laws, and grant presidential pardon[46] which is a check on the judicial power of interpreting laws and imposing liability on basis of the laws made by the legislature. The executive also has the power to appoint judges, ambassadors, public ministers, and other officers whose appointments are not provided for in the Constitution.[47] The Vice President is the President of the Senate. The President can call a session of the legislature or one of the houses in situation of emergences.[48]
b. The Congress has the power to impeach the President and, with the cooperation of the states, can amend the Constitution. The Congress balances with the powers of the President through power of approval of appointments made by the President, power of vote on budget, and the ratification of treaties. Congress also interferes with the exercise of powers by the courts by creating special courts, approving judges' appointments, and passing procedural laws. The President must, from time-to-time, deliver a State of the Union address. Congress also has power to set courts inferior to the Supreme Court, power to set the jurisdiction of the courts, and power to alter the size of the Supreme Court. Congress has power to check itself or rules

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[40] 328 U.S. 303 (1946)
[41] Article I section 1 provides that "All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and House of Representatives".
[42] Article II provides for the executive arm, providing for the office of the President, as well as the responsibilities of and procedure for election into the Office.
[43] Article III provides for the Judicial Arm of the United States.
[44] The legislative branch makes the law, the executive branch executes the law, and the judicial branch interprets the law
[45] Provided that two thirds of the senators around concur.
[46] Article II Section 2 of the United States Constitution.
[47] *Ibid*
[48] *Ibid, at* section 3.

by which it must adhere to – since it is bi-cameral. Accordingly, bills must be passed by both houses of Congress, revenue bills must originate from the House, and the consent of the other house is needed where one wishes to adjourn for more than three days.

c. The judiciary has the power to interpret laws as well as the wide power to rule any law as unconstitutional, null and void and of no effect, and declare any executive act as unconstitutional. Where the legislature attempts to impeach the President, the Chief Justice sits as President of the Senate during such presidential impeachment. The exercise of the power of the judiciary is with the exception that the Supreme Court cannot decide on political questions, so that the court will not interfere with the exercise of powers of the executive branch of the Government.

The Constitution, by making the various branches accountable to others, reduces the possibility of one branch applying constitutional power in illegal ways to become dominant. The people have the final check on the government arms when they exercise their right to vote every two years, six years, and four years when they vote their Representatives, their Senators, and their President, respectively, indirectly being in control of selecting those who constitute the judiciary.

7.0 DOCTRINE OF SEPARATION OF POWERS IN NIGERIA.

Nigeria's history as a colony of Britain and the struggle for independence was for many years, which eventually led to the country being a Republic and gaining independence. From the date of independence till present, Nigeria has had four republics and has practiced more than one system of government[49]. The different systems of government practiced in Nigeria from 1960 till date has reflected different models of the doctrine of separation. The important thing to note in Nigeria's story is that despite the various models of power separation considering its peculiarities and its systems of government, the success of the models in achieving its primary aim has been not as desired.

7.1 Separation of Powers in Nigeria's First Republic

The independence Constitution of 1960 and the 1963 Republic Constitution provided for an obvious but dull separation of powers. The model of power separation under these Constitutions are not as vivid as that under the 1979 Constitution and the 1999 Constitution to be discussed in later pages.

[49] Nigeria is special due to it comprising of more than 250 ethnic groups, three major tribes and various Kingdoms, Empires, Caliphates, Towns, Emirates and Civilisations which were largely autonomous and independent until eventually brought together through a forced marriage to exist in unity. This our division is evident in the political practice of Rotational Presidency wherein the president at a time has to come from a part of the country while the other parts wait till their time, which results in an evident tribal spirit rather than national spirit. Chief Obafemi Awolowo also hinted on this forced marriage thus "…there are no Nigerians in the same sense as there are English, Welsh, or French. The word Nigerian is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not."

The Chapter IV of both the 1960 and 1963 Constitutions established the office of the Governor General and the President, while the Chapters V and VIII provided for the Parliament and the Judiciary, respectively. The 1960 Constitution was promulgated under the control of the colonial masters of the then Nigeria colony while the 1963 Constitution effected our independence from Great Britain effecting a change from a Monarch to a Republican State. The doctrine of separation of powers under the two Constitutions replicated that of the British system which was based on the parliamentary system which was also practiced in Nigeria. The disregard and contempt of the doctrine by the Nigerian state under the 1963 Constitution reached its highlight when the civilian government's Federal Parliament passed the Constitution of Western Nigeria (Amendment law) with intent of reversing a decision of the Privy Council where Chief Akintola was validly removed as premier of Western Nigeria. Under these two Constitutions, for a person to validly hold position in the executive arm, he must first be elected to any legislative house at Federal or Regional level.

7.2 Separation of Powers under Military Juntas in Nigeria[50]

Upon any successful military coup in any state, the coup plotters and performers ensure to suspend some part of the Constitution. Nigeria was no exception in the advent of the military rule in the various interruptions of civilian rule. Some of the suspended parts of the Constitution include the sections or Chapters that reflects the doctrine of separation of powers. The military government combines the legislative and executive powers, exercising it themselves with disregard for the judiciary. Professor Ben Nwabueze[51] noted that under those decrees, no court is to enquire into whether a right so guaranteed has been, is being, or will be likely contravened, leading to detention of thousands without trial, ban of political parties and trade unions, and prohibition of criticisms by any media house. The despotic and totalitarian attitude of the military during their rule is a major affront of the primary aim of the doctrine as this attitude is against the basic tenets of the doctrine.

The Military usurped the power of the legislature, exercised the power with that of the executive, and disregarded the power of the judiciary, making the judiciary a situation of "all bark, no bite" through decrees. Despite this, the judiciary repeatedly challenged the ousting of its jurisdiction, although this had little to no effect at all since these decisions were not given effect by the military. In *Attorney General of Western State & Ors* v *Lakanmi & Ors.,*[52] the Supreme Court pronouncing on the doctrine of separation of powers held thus:

> "We must here revert once again to the separation of powers, which the learned Attorney General himself did not dispute, still represents the structure of our system of government. In

[50] The military juntas referred here are those of 1966 – 1979 and 1983 – 1998.
[51] B. Nwabueze, "Our Match to Constitutional democracy" (1989) Special Edition, Law and practice: Journal of the Nigeria Bar Association, pp. 10-11.
[52] (1971) U.IL.R. 201 (1974) 4 ECSLR 13.

the absence of anything to the contrary, it has to be admitted that the structure of our constitution is based on the separation of powers, the Legislature, the Executive and the Judiciary. Our constitution clearly follows the model of the American constitution. In the distribution of powers, the courts are vested with the exclusive right to determine justifiable controversies between citizens and between citizens and the state".

The Supreme Court in *Governor of Lagos State* v. *Ojukwu*[53] expressed its displeasure with the constant flouting of its order by the executive, stating the independence and equality of the arms.

Despite the good will and fight of the judiciary, the military rule in Nigeria was characterised by an utter disregard of the doctrine or principle of separation of powers via the merger of the legislative and executive functions and powers in one person as well as the frustration of the judiciary by limiting their powers through ouster clauses.

7.3 Separation of Powers under the 1979 Constitution of Nigeria

The Second Republic and the period wherein the 1979 Constitution functioned as the grundnorm provided for a clear separation of power model. Its sections 4, 5 and 6 and Chapters V, VI, VII provided for the legislature, executive, and judicial arm, respectively, clearly stating the functions of each arm thus: the executive is to execute the law made by the legislature, the legislature should make laws while the judiciary interprets the laws, herein providing for the independence of each arm and providing against the usurpation of the functions of one arm by another arm. The Constitution integrated the principles of checks and balances into its power and function separation. The 1979 Constitution's focus was on ensuring that neither the legislature, the executive, nor the judiciary perform the whole or part of the functions or exercise the powers of the other to cause an imbalance in the power scale and over-concentrate power in one person or arm.

7. 3.1 Critique of the Application of Separation of Powers under the 1979 Constitution

Objectively looking at the 1979 Constitution as a legal document, applaud is in order. Its provisions reflected an excellent will and spirit to adhere to the doctrine's primary aim as well as achieving governmental aim. The problem with the 1979 Constitution's model of separation of powers has more connection with the distance between its perfect look, its touch with our social reality, and its adherence and application in reality.

It is not unknown that one of Nigeria's peculiarities is "placing politics over law" which contrasts to some extent to the peculiarities of the USA where we copied this model from. The model lacks a true link with our factual peculiarity which would have been deciphered upon an introspective study of the polity which is almost impossible for the "Big Men" or "powerful men in politics" to do objectively. The lack of touch with our reality affected the doctrine in its effectiveness as it was not

[53] (1986) 1 NWLR (pt 18) 621 at 633 – 634.

strictly followed by the politicians who replaced the doctrine with "politics power play and power tussle", the politicians utterly, in practice, disregarded the doctrine though not as obvious and clear as their military counterparts. Unsurprisingly, the legislative arm of government was not independent of the executive arm during the Second Republic. This was due to the play of politics in favour of the dominant party in the executive, who used their position to use the power of patronage to subdue party members of the legislature, and thereby influencing the appointment of boards, confirmations of appointments, award of contracts, which over time negatively affected the duty of provision of utility, leading to disregard of the citizenry's interest.

Therefore, the 1979 Constitution on paper made a laudable effort to incorporate the doctrine into the Constitution when using standard of other models. But it failed to consider our attitude towards power thus: our desire for power through any means whether it disregards the law or not, our regard of politics-play overdue process and law. The individuals that made up the governmental arms and the politicians contributed immensely to its ineffectiveness.

7.4 Separation of Powers under the 1999 Constitution of Nigeria

After the Military overthrow of the Second Republic by Major General Muhammadu Buhari, military rules were ushered in before the transition into the Fourth Republic and the coming into force of the 1999 Constitution. Despite the close similarities between the 1999 Constitution and the 1979 Constitution, there are some notable innovations, of which none relate to the principle of separation of Powers. Hence, the doctrine of separation of powers under the 1979 Constitution remain unchanged as provided under the 1979 Constitution.

The 1999 Constitution of the Federal Republic of Nigeria enunciates the doctrine of separation of powers as follows:

7.4.1 Legislative powers

The Constitution provides that the legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives[54]. The National Assembly shall have power to make laws for the peace, 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 1 of the Second Schedule to this Constitution[55] as well as the concurrent list[56].

The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say:

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[54] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended in 2011), section 4(1). This section herein provides for a Bi-Cameral Federal legislative arm

[55] *Ibid,* at section 4 (2).

[56] *Ibid*, at section 4(4)(a).

a. Any matter not included in the Exclusive Legislative List set out in Part I of the Second schedule to the constitution.

b. Any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the constitution to the extent prescribed in the second column opposite thereto; and

c. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution[57].

It is clear that the functions or powers of law making are vested in the National Assembly and Houses of Assembly of the states for the Federation and states, respectively. The Constitution goes further to demarcate between what the National Assembly and the state Houses of Assembly can legislate on. These are contained in the Exclusive List which is solely for the National Assembly and Concurrent Legislative Lists which is for both the National and State House of Assembly subject to the principle of covering the field[58]. The state Houses of Assembly have power to legislate on matters not in either of the lists, called Residual Matters.

7.4.2 Executive powers

The 1999 Constitution provides that the executive powers of the Federation shall be vested in the President and may, subject to other provisions of the Constitution and 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.[59] The powers of the executive extends 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.[60]

With respect to the states, the executive powers of each state are, subject to the provision of the Constitution, vested in the Governor of that state and may, subject to the provisions of any law made by the state's 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. The executive powers of the state government also extend to the execution and maintenance

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[57] *Ibid,* at section 4(7).

[58] The principle of covering the field states that where the state House of Assembly legislates on a matter in the concurrent list and the National Assembly legislates on same, where they both provide for the same thing, the Federal law shall apply and the state law shall become inchoate; but where they both provide for different things, the state law will be invalid and inapplicable to the extent of its inconsistency with the Federal law. But where the state House of Assembly legislates on a mater in the Exclusive List, it will be null and void. Note however that only the states House of Assemblies have power to legislate over matters in none of the lists, called Residual Matters. Hence, where the Federal legislature legislates on such matters, it will be held to be null and void and of no force.

[59] CFRN 1999 (as amended in 2011), section 5(1)(a)

[60] I*bid,* at section 5(1)(b).

of the 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.[61]

From the above provisions, one can rightly posit that the executive powers of the Federation and the states are conferred on the President and Governor, respectively, and according to the Constitution, can be delegated to the Vice President, Ministers, or officers in the public service of the Federation and the Deputy Governor, Commissioners of that state, or officers in the public service of the state. Therefore, under the 1999 constitution, like the 1979 constitution, there are unambiguous provisions for separation of powers among the three arms of government viz the legislature, the executive, and the judiciary. Their distinct functions are explicitly spelt out in the Constitution and on no account should one carry out the function of another save as permitted by the Constitution itself.

7.4.3 Judicial powers

The Constitution provides that the judicial powers of the Federation and a state within the Federation shall be vested in the courts to which the section relates, being courts established for the Federation and for the state.[62] The judicial powers vested in accordance with the foregoing provisions of this section extends to all inherent powers and sanctions of a court of law. It also extends to all matters between persons, or between the government or authorities and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[63]

The judiciary as one of the arms of government exercises its power of adjudication and interpretation of the Constitution and laws made by the legislature through courts created by the Constitution and other courts as may be established by the National Assembly or any House of Assembly. The Constitution in spelling out judicial powers does not make it coincide with the function of any other arm of government, providing for a clear separation of powers among the legislature, the executive, and the judiciary.

Despite the obvious separation of powers provided for under the 1999 constitution as explained above, the interdependence amongst the aforementioned arms of government is desirable in order to ensure effective checks and balances. The three arms must relate with each other whilst balancing their duty to discharge their specific constitutional functions and their independence to ensure the successful execution of the provisions of the constitution.

Some of the checks and balances under the Constitution include

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[61] *Ibid,* at section 5(2).
[62] *Ibid,* at sections 6(1) and 6(2).
[63] *Ibid,* at section 6(6).

a. The president, though the Commander-In-Chief of the Armed Forces of the Federation, cannot declare war without the prior approval of the legislature. The legislature and the judiciary must request for security agents from the President for their protection.

b. A Bill must pass through the legislature before final assent by the executive. However, upon the situation where the President, within thirty days after the presentation of the Bill to him, fails to assent or where he withholds assent, the Bill shall be presented again to the National Assembly sitting at a joint meeting and if passed by two-third majority, the Bill shall become law and the assent of the President shall no longer be required.

c. The executive at Federal and state levels must not unilaterally withdraw moneys from the Consolidated Revenue Fund of the Federation or the states without being authorised by the National Assembly and the state Houses of Assembly, where applicable. The Constitution, however, provides that the President and Governors may authorise expenditure in event the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of the financial year.

d. The legislature possesses the power to investigate the conduct and activities of the executive per its responsibility of disbursing or administering moneys appropriated or to be appropriated by the legislature.

e. The approval of the legislative arm, either Federal or state, is also required for the appointment of a Minister, Commissioners, and certain officials to take effect. Some of the nominees will be screened in accordance with the Constitution's provision or any law in force which is constitutional.

In cementing the doctrine of separation of powers, the Constitution provides that once a member of the legislature is appointed a Minister or Commissioner, such person must resign his appointment as a member of the Parliament before the appointment as a Minister or Commissioner can take effect. It is deducible from the provisions of the Constitution that the three arms must exercise a certain degree of control over the government, but this control must not interfere with the independence of any arm, and it should not amount to the arm exercising the whole or an integral part of another's power as conferred by the Constitution.

Despite the Constitution's provisions, we will discover that the reality is one of utter disregard of the doctrine of separation of powers. This disregard for the practice of the doctrine is heightened by the practice of buying of votes, rigging of votes, and election fraud, which make the elected persons believe they do not owe their political office to the populace but the political party and their

godfathers. Consequently, they consider the demand of their political party and godfathers over the needs of the citizenry and the law, which includes the Constitution.

8.0 RECOMMENDATIONS

In reaching the curtain's fall of our discussion, this writer strives to make some recommendations as to the tweaking of the current power separation model into one tailored specifically for Nigeria, instead of one birthed from the copy-cat nature of our legislatures. The recommendations are not exhaustive, but its implementation will act as a forward shove in promoting the ideals of the doctrine as entrenched in the 1999 Constitution and desired by the citizenry.

1. We need to realise that the doctrine of separation of powers has no perfect model, but every state has a model fit for it when considered with the realities of the polity.

2. Upon the Constitution being amended to reflect our state of multi-ethnicity, the power sharing needs to be re-evaluated to give the Judiciary control and absolute power over their remuneration, to cement their independence and not make their remuneration be an instrument of control by the executive.

3. There should be extensive education for the practitioners of the Constitution with their limitation and powers. This, to an extent, will reduce the simmering rancour among the three arms of government.

4. The courts and the judges, in achieving their duty of both interpreting the statutes and checking and balancing the other arms, need to adopt a hybrid of judicial activism and the self- restraint approach. Whilst the judicial activist approach looks to review the activities of the other arms, the self-restraint approach looks to the judiciary to act only when clear statutory or constitutional provisions or have been clearly breached. This hybrid will ensure the judiciary carries out its classical duty of interpretation of laws, while actively checking the excesses of the politicians.

5. We might need to learn from other polities and integrate ideas that can have positive effect in our state. For example, the practice of limiting the tenure of executive members, both elected and appointed, to a single four-year term and limiting the tenure of law makers to a single four-year term, to aid the circulation of power. This will also help in mitigating the specific problem of godfatherism, hereby preventing an individual or group from staying in office for a long term, which usually results in power and office monopoly.

6. The officials of the different arms need to be educated as to their loyalty first being towards the populace, but this will not come to realisation until bribery and buying of votes is no

longer possible. The populace should also be educated on how much power they have, and how elections have consequences. However, and most importantly, the living conditions of citizens should be improved, as most of this vote buying only thrive due to the impoverishment in the country.

7. A distinction between general corruption by civil servants and special corruption by public office holders. There should be a creation of a semi-separate and truly independent anti-corruption agency that is different from the agency in charge of general financial crimes and corruption. In light of this, there should be two anti-corruption agencies, one, subject to the executive arm, taking care of general corruption of civil servants whilst the other semi-separate and completely independent agency, answerable only to the arm not constituting of politicians – i.e., the judiciary, having jurisdiction over corruption of elected and appointed political office holders.

9.0 CONCLUSION

The conclusion requires considerations of some important questions. Is there a superior model of power separation? Is the American model superior to any other State? Is there a perfect model of the doctrine's practice? The answer to these questions depends on your position. Its answer is like the riddle of 9 and 6. The French and the British might deride the idea of a President having no power to make laws, they might consider absurd the thought that judges can render and declare duly passed laws tagged "the will of the people" null and void. The Mexicans might consider as absurd, the longevity of some career American political offices.

Americans might dislike the British practice of majority rule and the absence of a written constitution. Nigerians may fear the French Presidency has the potential to turn tyrannical by the misuse of emergency powers. Nigerians may worry that the Mexican judiciary, without a solid stare decisis system might lead to incoherent judicial policy, leading to uncertainty in interpretations of the law.

Despite the fundamental differences between each of these and all nations, we need to realise that all the nations have distinct political and social traditions that is deeply rooted in their history. Some also have a mischief from their past they hope to cure or prevent that sometimes date back to their history. Despite the distinctions between the practice and models of the polities in the world, some of the countries are prosperous or developing and growing despite their odd peculiarity. We need to realise that each's system and model work in the context of each nation, even if the details could not work in some others. All that is important is that in the doctrine's model as practiced in whatever nation, the primary aim of the doctrine is achieved. Hence, Nigeria needs to withdraw to the drawing board to understand the nation itself and agree with our history as a nation and our oddities

and come up with a better model that absorbs our distinctiveness and realise that unlike our practice concerning legislations, we cannot afford to just apathetically copy other state's model of power separation. We need to recognise the importance of our peculiarity and history in the separation of power model for the doctrine's aims to be maximally achieved.