

Separation of Powers in Baron de Montesquieu: Philosophical Appraisal

Sunny Nzie Agu

Faculty of Communication, Technology, University of Cross Rivers State,
Calabar

Corresponding Author: Sunny Nzie Agu snamassociate@gmail.com

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ABSTRACT

In a democratic system, citizens of a given country vote to elect their representatives who will form a government. Fair and equal treatment is required to be provided for every citizen by the government such as fundamental rights, popular and free participation in governance and so on. However it is quite unfortunate that men, once vested with power, abuses it there by causing despair among citizens, just as it is being portrayed in most African countries. Therefore it is necessary that power becomes a check to power. Having seen the need for such check and balances in power, Baron De Montesquieu in his treatise 'Spirit of Laws' espoused the separation of powers among the three arms of government in a democratic setting to avoid the abuse of powers.

INTRODUCTION

Democracies around the world believe that putting the separation of powers into practice can reduce tyranny and arbitrary rule in government. The three broader powers that governments typically possess are the judicial, executive, and legislative branches. When governmental powers and the government are performed by these three branches separately, it is called separation of powers. Separation of power “is the concept that maintains that three powers of government (executive, legislature, and judiciary) should be separated in role and responsibility and that such a separation will ensure good and just government”. The liberal democracies in the world have the tradition of power sharing among the state institutions. Thus Resende (5), hold that “the concept of separation of power rests on democratic values that all branches of government are bound by the rule of law and defined powers with competencies”.

The contemporary concept of the separation of powers was developed by Montesquieu in 1748. He clarified that while the executive branch of government is responsible for carrying out internal and external policies, the legislative branch makes laws. The third is judicial power, which is used by a different body to interpret the law and restrain the executive branch's power.

Montesquieu relates the liberty of the people with separation of powers as well as stating the importance of this theory in these words:

When the legislative and executive powers are united in
The same person, or in the same body or magistrate, 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... there would be an
end of everything, were the same man or the same body,
whether of the nobles or of the people, to exercise these
three powers, that of enacting laws, that of executing the
public resolutions, and of trying the causes of individuals.

The division of governmental powers among the executive, judicial, and legislative branches guarantees the rights of the people. This structural characteristic of western democracies is reflected in numerous state and federal constitutions. However, as a board principle, theorists find it difficult to define precisely. Many commentators object that the tripartite separation of state powers into legislative, executive and judiciary sometimes traced to Montesquieu's *spirit of Laws* is overly simplistic. It is hard to see how much of a separation could be feasible, and no state adheres to a strict separation of powers along these lines. In fact, there are critics who see a contradiction in the division of powers. The theory is related to the concept of checks and balances, while also mandating the division of state institutions according to their distinct roles.

One could argue that the separation of powers, which permits the legislature's dominance, is maintained by allowing the judiciary to overturn legislation through judicial review or the executive branch's refusal to accept legislation. As an alternative, these mechanisms could be described as a beneficial

check on the legislature's domination, which is made possible by the division of powers. Alternatively, because they permit non-legislative powers to meddle in the legislative branch's work of enacting new laws, such mechanisms may be attacked as breaches of the separation of powers. In a view of this, "to have one institution checking the power of another effectively scrambles the very divisions created by the initial separation" (Little 47).

As a result of these tensions, it has been noticed in a journal article title "The Real Separation in Separation of powers" that some critics reject the significance of the separation of powers, seeing its invocation as "...little more than a baseless dogma" (Magill 6). Consequently there will be an assessment on Montesquieu's doctrine.

Study Problem

To protect liberty and freedom in a society is the fundamental goal of the separation of powers. Should authority be concentrated in the hands of one individual or group of individuals, these individuals are likely to run the government in the interest of their own self-interest. This will come at the expense of the people's interests; as a result, oppression and tyranny will become the norm, plunging the state into an unimaginably dire situation or state of chaos. Thus Lord Acton (Letter to Archbishop Mandell Creighton), opined that "All powers tend to corrupt and absolute power corrupts absolutely". Lack of separation of powers will lead to lack of freedom and liberty.

LITERATURE REVIEW

Political theorists have maintained that it has become the nature of human beings to accumulate powers simply because human beings are always power hungry. It is in a view of this Awolowo (1981:42), in his political theory explained thus: "Now it would appear that all political philosophers are agreed that of all human desires the desire for power is the strongest. In other words, of all the manifestations of the instincts of self, the most powerful is acquisition of power". According to the theory of separation of powers, liberty and freedom are likely to exist when there is this division of powers. Specialization of labor is one of the advantages of the doctrine, according to some political theorists. There is, nevertheless, a school of thought that contends that it is also related to the idea of checks and balances. A system of checks and balances entails a level of reciprocal oversight among the branches of government and, consequently, a level of intervention by one branch into the operations and responsibilities of the other. Thus does this fortify or undermine the value of Montesquieu's separation of powers?

METHODOLOGY

This work will be based on analytical method and expository. These methods will help and assist the research to expose and analyse the subject matter properly.

RESEARCH RESULT AND DISCUSSION

Separation of Powers in Nigeria and Critical Appraisal of Montesquieu's Doctrine

Separation of Powers in Nigeria Under the 1999 Constitution of the Federal Republic of Nigeria One of the Safeguard measures taken by the Constitution of the Federal Republic of Nigeria was to separate Executive, Legislative and the Judicial powers in diverse persons. Section 4, 5, 6 of the constitution of the Federal Republic of Nigeria as amended have given executive powers to the president and Governor of a state; legislative powers to elected legislatures both Federal and State; judicial powers to judges.

The legislature being the first leg of the arrangement of powers must take note not to exceed its constitutional powers. The executive is required to limit itself to its constitutionally guaranteed powers and not intrude in the powers of the branches of government. The judiciary being a pivotal branch of government is indispensable to the efficacious performance of the concept of separation of powers. Its role under the concept is limited to the adjudication and interpretation of the law and must in every moment be free from external control. In the following lines there will be an over view of the powers of the three arms of government in Nigeria.

Legislative Powers

The constitution assigns legislative powers on the National Assembly and the House of Assembly of a state. Section 4(1) of the Constitution of the Federal Republic of Nigeria as amended provides 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".

Furthermore it is pertinent to note that national assembly, though vested with the power to make laws, is required by the constitution to make laws for the order and good governance of the federation. Thus section 4(4) of the constitution of the Federal Republic of Nigeria as amended provides as part of the main powers of the national Assembly.

S4 (4) in addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:

- (a) any matter in the concurrent Legislative List set out in the first column of part 11 of the second schedule to this constitution to the extent prescribed in the second column opposite thereto; and
- (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

Similarly, power has been vested on the House of Assembly of a state to make laws for the good governance and peace in the State in accordance to sections 4(7) (a), (b) and (c) of the constitution of the federal Republic of Nigeria as amended:

SA (7) 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:

- (a) any matter not included in the Exclusive Legislative List set out in part 1 of the second schedule to this constitution.
- (b) any matter included in the concurrent Legislative List set out in the first column of part 11 of the second schedule to this constitution to the extent prescribed in the second column opposite thereof; and
- (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

Furthermore the House of Assembly is as well restricted from creating any kind of law. Thus section 4(9) of the 1999 Constitution of the Federal Republic of Nigeria as amended stipulates that: “notwithstanding the foregoing provisions of this section, the National Assembly of a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect”.

The doctrine of separation of powers cannot be said to exist where a member of the legislature is also a member of the executive or the judiciary. It is in recognition of this that section 147(4) of the constitution provides that: “where a member of the National Assembly or of a House of Assembly is appointed as minister of the Government of the Federation, he shall be deemed to have resigned his membership of the National Assembly or of House of Assembly on his taking the oath of office as minister”.

Executive Powers

The executive occupies a pivotal position in the triple categorization of powers. The provision of section 5(1a, b) (2a, b) of the constitution of the Federal Republic of Nigeria exemplify the utility of the executive branch.

The executive duties of the federal and state government are to be carried out by the president and state governor respectively who may also assign the duties to the officers such as Vice-president, ministers or public officers rather than any member of the other organs of government. Executive powers of the president and state Governor in this sense includes the power to formulate policies and implement them, initiation of legislations, maintenance of law and order, the direction of foreign policy (in the case of the president) and enhancement of economic and social welfare. For instance at the federal level, section 5(1) of the 1999 constitution of the Federal Republic of Nigeria as amended stipulates that:

S5 (1) Subject to the provisions of this constitution, the executive powers of the Federation:

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

- (b) shall extend to the execution and maintenance of this 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.

Judicial Powers

The judicial organ of government is an organ vested with constitutional function of justice management. In a view of this, it is paramount to have the judiciary's authority and freedom protected by numerous sections of the National Constitution.

The judicial powers under the 1999 constitution are not disjointed. Unlike the instance of the executive and legislature, the judicial powers are like in terms of exercise of those powers. Both Federal and state judicial powers work on the same hierarchical arrangement to the extent that a case that was handle by state courts can reach Federal courts when appealed against; there are consequently inter-relations between the state and Federal judicial powers.

Section 6(1) and (2) of the constitution of the Federal Republic of Nigeria assigns the judicial powers of the Federation and a state in the courts recognized for the federation and states individually. These courts consist of the supreme court of Nigeria; the court of Appeal; the Federal High Court of the Federal Capital Territory; High court of a state; the Sharia Court of Appeal of the Federal Capital Territory; a Sharia Court of appeal of a state; the Customary Court of Appeal of the Federal Capital Territory; a Customary Court of Appeal of a State. The judiciary as the third branch of government exercises its authority of settlement and clarification of the constitution and laws enacted by the legislature through the courts.

Nigerian Practice of Checks and Balances

Checks and balances like separation of powers commonly ascribed to Montesquieu is a principle that gives each division some control of the actions of the others. It entails cooperation among the branches. A system of checks and balances reduces the possibility that one branch might completely take over the government.

The principle has been a major element in a constitution's survival, assuring progress in government rather than revolution. Due to a system of checks and balances, the legislature, executive and judicial branches' power overlap, and each branch applies some power over the others. The basic notion of the principle of checks and balances thus, was that no one branch of government should be able to get too far out of control without being put in check by the others.

The principle of checks and balances exists in the Nigerian political system. The principle has been largely reserved by the 1999 constitution of the Federal Republic of Nigeria. In the following lines there will be an overview of how the three arms of government in Nigeria use their powers of checks and balances.

Legislative Checks

1. Removal: the power to remove an elected executive officer is an ultimate weapon the principle of checks and balances gives to the legislature. The power is granted to the legislature to check the abuse of the enormous executive powers. Thus the Governor or Deputy Governor of a state may be removed under Section 188 (2) of the 1999 Constitution of the Federal Republic of Nigeria as amended: "wherever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly, stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified".
2. Law function: the primary function of the legislature is to make laws for the society for the good of the people. Thus, where the executive intends a policy to become law, it does not have the power to execute it except it is ascertained and approved by the National Assembly. Under the Nigerian Constitution, proposals for law come before the National Assembly or a State House of Assembly in the form of Bills. These Bills are either private, public but majority of the public Bills coming before the National Assembly or a State House of Assembly are usually from the executive. When the executive sends a Bill to the necessary Assembly, the Assembly scrutinizes such a Bill before it becomes law. This is important as it will enable the legislature to ascertain whether or not the Bill be beneficial to the people when it eventually becomes law.
3. Appropriation Function: Appropriation is the responsibility of the executive in Nigeria, Section 81(1) and 121(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended stipulates: 81. (1) The president shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year. 121. (1) The Governor shall cause to be prepared and laid before the House of Assembly at any time before the commencement of each financial year estimates of the revenues and expenditure of the state for the next following financial year.

During the appropriation process, ministries and other departments of government are called upon by the legislature to defend their respective budgetary proposals. The relevance of the legislature in this process is assessed in the following words:

The power to pass or reject an appropriation Bill affords the Legislature the opportunity for a thorough sanitary and Criticism of the proposals contained therein. The debate Involved before its passage has its impact on government. Indeed it is the critical quality and effectiveness of such debate that determines the character of a legislative body. (Popoola, Enforcing the principle of Separation of powers).

4. Confirmation Function: The presidential system in Nigeria as in the United State of America grants the president or Governor of a state to operate his office duties both directly or indirectly through the Vice-

president, the Ministers or his lower rank officials. Section 147(1) (2) of the 1999 Constitution of the Federal Republic of Nigeria as amended provides that: 147 (1) there shall be such offices of Ministers of the Government of the Federation as may be established by the President. (2) Any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the senate, be made by the president.

The president only ministers who are to become members of his cabinet; an individual become fully appointed and apt to resume duty after being confirmed by the senate. This indeed will prevent the advent of incompetent people who will be appointed by the president into government duties.

Furthermore under section 271(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended, the president nominates a class of judicial officers on the recommendation of the National Judicial Council. The duty of the senate in the nomination through confirmatory, is compulsory and no such nomination is valid without a confirmation. For instance, under section 271(1) of the 1999 constitution of the Federal Republic of Nigeria as amended: "the appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State".

5. Supervision Function: The legislature is assigned by the people through the Constitution to carry out compulsory enquiry with the view to uncovering corruption, inadequacy in the administration of the laws made by the Assembly. This makes the executive to curtail corruption in the administration of its functions. Furthermore, in section 12 (1) of the 1999 Constitution of the Federal Republic Of Nigeria as amended "the president does not have the unilateral power to give a treaty entered into between the federation and any other country the force of law as the National Assembly shall be the one to enact such a treaty into law". The purpose of this is to forbid the president from engaging into a pact or accord with some other country that is tyrannical in nature and also to forbid the president from surrendering the sovereignty of the nation to some other country.

Executive Check

1. On the Legislative: The National Assembly and a State House of Assembly creates laws for the Federation and state respectively. A Bill that passed the National Assembly or a senate House of Assembly becomes law after the president or Governor might have given his assent to it. Section 58 (4) of the 1999 Constitution of the Federal Republic of Nigeria as amended stipulates: "where a bill is presented to the president for assent, he shall within thirty days thereof signify he assents or that he withholds assent".
2. On the Judiciary: The judiciary has the constitutional power to resolve issues between the executive and legislature and also interpret laws created by the legislature. This does not negate the fact that the judiciary

should be checked by the executive as it has authority to nominate some judicial officers who serves in the first place under the endorsement of the National Judicial Council. In the same vein, the president may ask the senate to withdraw a judicial officer involved in judicial incompetency. Furthermore section 175(1) (a) and 212(1) (a) under the 1999 Constitution of the Federal Republic of Nigeria as amended, provide that the president and the governor may:

175(1) (a) grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;

212 (1) (a) Grant any person concerned with or convicted Of any offence created by any law of a state a pardon, either Free or subject to lawful conditions.

Judicial Check

Judicial Review: the judicial has the authority to review the actions of the other arms of government. Thus judicial Review is characterized as a “Court’s power to review the actions of other branches or levels of government” (Black’s Law Dictionary). Cruel experiences in Nigeria in which persons in offices venture in corruption, abuses, negligence of the rule of law call on urgent need of checks and balances through judicial review, current events in Nigeria shoe that judicial review is appropriately the core of democracy. Without it, the lives and liberty of the people as well as the democratic rights would be endangered.

The judicial review is fittingly the core of democracy and without it, not only the lives and liberty of the people would be endangered, the democratic rights and competencies of one branch of government may be with recklessness, put in jeopardy or rendered ineffectual by another branch. The politics of withdrawal of state Chief Executives in the country between 2003 and 2007 give a clear example. The judiciary thus by its authority to review the works of the legislature pronounced that maximum of the withdrawal by the legislative carried out during that era was unconstitutional. Likewise, the judiciary will perform as a check on the legislature to decree as null and void a law passed by the legislature that does not suit the populace nor undergo the process of law.

Challenges Faced by the Doctrine of Seperation of Powers

The officers of the executive, legislature and judicial branches have devalued the concept of separation of powers due to challenges faced by the doctrine when different branches carry out the operation of checks and balances on each other.

The legislative check has been a problem in present Nigerian governance as it has led the legislature to intrude in the functions of other branches of government thereby causing conflict among other branches. There is an instance where the legislature tried to interfere in the functions of the executive on budgetary issue. let us consider the 2016 budget as a case reference. The disagreement changed when the National Assembly sent the president a budget that included projects not recommended by the executive branch and removed others. This was an

infringement on the executive branch's authority to prepare and present to the National Assembly an estimate of the Federation's revenue and expenditure for the upcoming fiscal year, keeping in mind the provisions of section 81 (1) of the 1999 constitution.

According to section 8 (1), the National Assembly's authority is restricted to passing Appropriations Bills based on properly prepared estimates that the president presents to the assembly. The legislature should reject and approve the executive's estimates of Ministries, Departments, and Agencies rather than assuming and moving forward with allocating funds that the president does not request. The National Assembly is supposed to notify the executive to add a project to the budget if it determines that it is necessary, as opposed to adding the project on its own without consulting the executive.

Therefore, it appears that the legislature was attempting to usurp the executive branch's responsibilities by adding to and omitting from the budget that was submitted to it by the executive. This is evident from the fact that it took the executive's insistence to get details about the additions and omissions it made to the budget before providing them. The incident was perceived as taking over and seizing control of the executive branch, which poses a serious threat to good governance in terms of accountability and service, ultimately putting democracy in jeopardy.

The president, as the head of the executive branch, might not be able to appropriately direct and coordinate implementation if he has no prior knowledge of what the legislature designates for an executive agency, such as a ministry. Second, the legislature may find it difficult to hold the president accountable for his or her actions if funds are given to initiatives that are not included in the president's program, leaving the voters who supported the president's platform, policies, or agenda feeling underwhelmed. In a view of this scenario, it is obvious that the supervision function as a principle of checks and balances carried out by legislature is often unconstitutional and goes against the doctrine of separation of powers. Legislature arm of government, seizing and taking control of duties of executive and judiciary, obstructs the progress political stability and socio-economic development.

Furthermore there were instances whereby the executive check on the legislative was seen as an avenue for the executive to snatch the responsibility of the legislative. For instance it was reported that former "president Olusegun Obasanjo smuggle into the Electoral Bill 2001, passed by the National Assembly and sent to him for his assent, provisions which were not in the Bill when the National Assembly passed it and he (Obasanjo) proceeded to sign it into law" (Haruna, A president and his credibility problem). At the same time, the provisions imported illicitly into the Bill and signed by the president became the law; however it was not passed by the authority of the National Assembly which is enthroned with the constitutional power to pass such a law.

Section 143 of the 1999 constitution of the Federal Republic of Nigeria as amended recognizes that "only the national Assembly or the House of Assembly of a state have the constitutional power to remove a president/ Vice-president or Governor/Deputy Governor from office". According to the constitution, the

officers mentioned above can only be removed from their positions if they are proven to have engaged in egregious misconduct while carrying out their official duties. Nonetheless, accusations have been made since 1999 that the federal executive was in charge of some governors' removal. This was the situation in Anambra State, where Governor Peter Obi, who was elected on the platform of the Progressive Grant Alliance (APGA), was accused of being removed due to President Obasanjo's actions. It was reported, in typical jocular fashion, that Obasanjo had informed Obi not to run for reelection in 2007 if he did not join the PDP, as he would not back a non-PDP candidate. In accordance with Obasanjo's speculations, Mr. Obi was controversially removed from office on November 2, 2006, following seven months in office.

The legislature regularly arises anxiety over the executive trying to interfere on its duties. In a speech to mark the end of the third session of the 7th House in 2014, the speaker of the House of Representatives Aminu Tambuwal accused the executive of interfering into the legislature's area of jurisdiction. Mentioning the lawsuit filed by Mrs. Deziani Alison-Madueke, the Minister of Petroleum Resources, to stop the House Committee on Public Accounts from proceeding with its planned investigation into her alleged spending of ten billion naira for the chattering of private jets, Aminu confirmed that it had never before been known that a government official would try to use the legal system to stop another branch from carrying out its constitutional duty.

The usual democratic practice is that the power of the courts are activated to challenge laws enacted by the legislature. This is the proper manner in which the judiciary is enabled to perform its constitution and duty enacted laws. It is neither usual nor appropriate for the judiciary to be used pre-emptively to stop the legislature from acting in the first place. this is an encroachment on the powers of the legislature and slap in the face of the principle of separation of powers (Uvuakporie, Encroachment, a slap on separation of powers).

In the regime of former president Obasanjo, there were numerous efforts to silence the legislature through regular interference with the leadership of the legislative houses. This was clear in the removal of three senate presidents in three years. In the removal of senators Evan Enwerem, Chuba Okadigbo and Adolphus Wabara as senate presidents, agreement on secret plot and inclusion of the executive was on every occasion noticed. This resulted to an unstable order that featured the National Assembly mainly the senate during Obasanjo's regime. Most senate presidents were either nominated indirectly by the president on the basis of their disposition to comply or to be removed as a consequence of their tendencies to demonstrate their freedom from control and influences of the president. Although the president was opposed by the House of Representative where attempts to remove former speaker Ghali Umar Na'Abba was terminated. This was the unfortunate scenario that occurred on the leadership of any senate

president or speaker that tried to oppose the orders of the executive in Obasanjo's regime.

The senate speakers have also been removed as a result of the legislature's propensity to carry out its constitutional obligations in order to show that it is independent of the executive branch. Eight lawmakers deposed Eugene Odo, the speaker of the Enugu State House of Assembly, in 2015. The speaker who was removed from office, along with fourteen other members of the State House of Assembly, attempted to remove the governor for a number of reasons, including manipulating the 2014 Appropriations Bill. The speaker accused Governor Chime of being the mastermind behind his removal. Thus Odo (speaker basts Enugu), asserted that: 'I am really shocked that the Governor, who is a lawyer, could champion eight people sitting down to remove a speaker when he knows that it requires two thirds. It is a shame to democracy and I am equally ashamed, as I am speaking this'. Due to a lack of institutional and individual freedom from the two other arms of government interfering without cause, the Nigerian judiciary has consistently been mistreated. The executive branch has frequently been charged with meddling in the judicial branch's operations. In fact, there was a case in which Justice Ayo Salami, the former president of the Court of Appeal, was removed formally by the executive branch. It is impossible to exonerate the judiciary because, more often than not, it is found to assist the other branches of government in meddling in its internal affairs. It is on this premise that Justice Samami (Eradicating corruption in the Judiciary), at a lecture in 2015 said:

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

Another constant infringement on the judiciary's authority is the legislature. This is typically done in the course of the legislature's constitutional oversight duties. In addition, the legislature attempts to rein in judges it believes are abusing their power by removing them from office without following the letter or spirit of the constitution.

Appraisal of Montesquieu's Doctrine

The separation of powers theory of Montesquieu is cited as a model. It is seen as a norm that modern states' legal and constitutional frameworks should abide by. It is assumed that having a separation of powers is a desirable goal. When we comply with it, we obtain something worthwhile. The doctrine was embraced in the eighteenth century as a defense against the potential for tyranny

and the misuse of state power. Montesquieu (Book XI p.6), wrote that “without separation of powers, there would be no liberty”.

The French Declaration of the Rights of Man in 1789 went so far as to suggest that “Any society in which the safeguarding of rights is not assured, and the separation of powers is not established, has no constitution”. According to Joseph Dainow (3),

Ever since the Revolution, it has been a primary objective of the French people, in reaction to previous political organization, to prevent and counteract any possibility of tyranny and arbitrariness. The separation of powers: executive, legislative and judiciary provided the broad formula, but primary only as a distribution of functions: there are no checks and balances similar to the American system. Under the Fourth Republic of 1946, supremacy was vested in the National Assembly as the Legislative power. The executive power administered the government but did so as subordinate to the legislative power. For the judiciary the separation of powers meant the independence of the courts and the judges. The fifth Republic of 1958 made important changes in the distribution of authority between the executive and the legislative powers, giving much more authority to the president and making the executive the most important power. The position of the judicial power was not greatly altered in this broad framework.

The present day, theorists argue that the separation of powers is the very “essence of constitutionalism” (Barendt 137). It is for this reason that the 1999 constitution of the Federal Republic of Nigeria as amended splits the powers of governance which consists of the legislature, executive and the judiciary. Montesquieu’s, separation of power is a key to the workings of any democratic state. The doctrine is geared towards efficiency but also more importantly, towards guarding against abuse of authority. The significance of this doctrine transcends the liberty of citizens; it goes so far as the protection of government organs as it prevents an organ from the subjugation of others. Hence in the view of Idowu (An Evaluation of the practice of separation of powers in Nigeria), “the framework of the government established by the constitution is founded on theory of separation of powers. The theory of separation of powers embodied in the constitution, is a clear departure from the system of government under military government”. Furthermore “under military dictatorship, the executive and legislative arms of government are fused in one person or body of persons. The constitution of the Federal Republic of Nigeria 1999 (1999 constitution) however, separates the powers vested in the three arms of government and also enable one organ of government to check another” (Idowu, An Evaluation of the practice of separation of powers in Nigeria). Nonetheless, there are strong objections to Montesquieu's division of powers in modern times, even though it is a hallmark of constitutional democracies. The separation requirement's

strictness and the fact that most African nations do not apply it are discussed in the first line. "If what is required is a complete separation of three mutually exclusive functions carried out by three branches of government completely sealed from each other, then this has never been applied in any modern state" (Mollers 8). In Tanzania for instance,

The constitution of the united Republic of Tanzania provides for the functional mandates of all the main pillars of state but still leave a lot of room for manoeuvre. For instance, the presidency, which heads the executive branch, is vested with perceived powers over both the judiciary, whose head is an appointee of head of state, and the legislature whose speaker is elected from among members of the majority party in parliament (Kibamba, Africa: principle of separation of powers still a joke in Africa).

Consequently,

This put the independence of both the Legislature (articles 62-101) and judiciary (article 108-124) into question. Furthermore, the constitutional court (articles 125-128) which was to have an appellate function on relations between and among the pillars of state, has proved virtually impossible to constitute, let alone execute its functions. In a nutshell, the executive still wields immense powers over the legislature and judiciary. This is an undeniable fact. To add insult to injury, the president is part and parcel of the legislature (Kibamba Africa: principle of separation of powers still a joke in Africa).

It is thus clear that total separation of powers, though stipulated by the constitution has not been practically observed. Secondly "there is a considerable disagreement about which values underpin the doctrine" (Carolan 127). "For some, the purpose of the separation of powers is to curb abuse of power, by preventing its concentration in the hands of one person or body. For others, its purpose is "to protect liberty and the rule of law" (Allan 3)). This confusion and lack of sufficient knowledge about the doctrine has a direct consequence amidst the citizens. This is an avenue for African leaders to stick to power for so many years, under the pretext that the doctrine of separation of power stipulated in their respective constitutions is uniquely aiming at a particular valueless direction. Rather than projecting its real meaning and purpose, the greedy political leaders endeavor to forget a meaning suitable to them. This is the practical example of some African presidents such as Paul Biya of Cameroun, Denis Sassou Nguesso of Republic of Congo, Robert Mugabe of Zimbabwe who stayed in power for more than sixteen years. Thirdly the separation of powers given rise to administrative problems because every branches will suffer from loss of corporation and harmony and leading to inefficiency of the government. Indeed various branches of government tend to

exhibit a sense of understanding and cooperation to achieve aims when they work together. But when they are separated to carry on exclusive work of their branch they become arrogant and refuse to work with other branches of government.

Fourthly with the progress of modern states, the legislature has been reduced to subordinate position thus paving way for the executive supremacy. Thus it is obvious that the doctrine of separation of powers make an erroneous assumption that all the three branches of government are equally. Consequently, according to De Smith (491), the doctrine of separation of powers is an “irrelevant distraction for the English law students and teachers”. As for Robson (16), the doctrine of separation of powers in an “antique and rickety chariot used for the conveyance of fallacious ideas”.

Fifthly the relationship between separation of powers and public liberty is not significant. Liberty of individual largely depends on the psyche of the people. For instance, “the Swiss enjoy a lot of individual liberty although the Swiss individual liberty does not depend upon the separation of powers or on any other political devil of this nature” (Dafe, Separation of powers; constitutional and media perspectives).

In addition Montesquieu originally put forward his doctrine in an era different from the present era. There is need to question its continued relevance. Therefore, it deems necessary to reexamine and reshuffle his doctrine in this modern, complex and sophisticated world. According to Ackerman (129), in his essay titled *Goodbye Montesquieu*, he asserted:

However great he may have been, Montesquieu did not
Have the slightest inkling of political parties, democratic
Politics, modern constitutional designs, contemporary
bureaucratic techniques, and the distinctive ambitions of
the modern regulatory state. And yet we mindlessly follow
him in supposing that all this complexity is best captured
by a Trinitarian separation of power into the legislative,
judicial, and executive.

The division of labour considerations do not exhaust the meaning of the separation of powers. In order to curb abuse of power, it is necessary to supplement division of labor with checks and balances. Thus in the view of Dafe (separation of powers; constitutional and Media perspectives), “it will be seen that although the doctrine represents an ideal which cannot be put into practice absolutely, it does emphasize the need to provide adequate checks and balances with the government system”.

There is need to combine separation with supervision. On this issue, it is useful to recall James Madison’s account of the value of checks and balances within a constitutional separation of powers. Writing in *the federalist papers*, Madison (1999:288), argued that the first for the separation of powers was to make some “division of the government into distinct and separate departments, where each department must have a will of its own”. Thus, the separation of powers necessitates checks and balances to keep one branch of government from

usurping the authority of another and to give each branch the constitutional tools it needs to fend off such usurpation.

Therefore, the National Assembly has the authority to impeach a president who begins to act like a despotic ruler. A court could overturn a number of laws that the National Assembly tries to pass if they are clearly unconstitutional, and so on. The most important finding is that cooperation between multiple government branches is traditionally necessary to accomplish any task in a democratic system of government. "separation of powers means that one of three departments of government must not have the whole of another branch's powers vested in it nor obtain control over another branch. But even if they are separate, they must be connected by a system of checks and balances" (Maidison 1937:237) Madison (1999:288), gave a practical life to the vision of Montesquieu by asserting that: "despite disagreement as to 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. Such conflict, however, the American constitution smiles upon it".

According to Section 4 of Article 2 of the US Constitution, the president has the authority to check and balance the legislature by rejecting bills that the legislature has passed, thereby preventing them from becoming law. With a vote of two thirds of the house and senate, the legislature can then override the president's rejection and enact a law. The Supreme Court can use judicial review to check and balance the other two branches of government by declaring a law to be unconstitutional or illegal. Because the president and the senate, respectively, nominate and approve the court's members, the supreme court is kept in check. Additionally, the legislature has the authority to impeach the president and federal judges for misbehavior, bribery, etc.

However where the problem lies is to know if the principle of check and balances will not pave way for an unhealthy interference from one branch to another with a view of a selfish interest?

Using Nigerian political system as an example, this research work has exposed one of the challenges faced by the doctrine when different branches carry out the operation of checks and balances on each other. The principle of checks and balances in Nigeria hassled one branch of the government to intrude in the function of the other due to selfish interests thereby causing tumult in the political system as well as undermining Montesquieu's doctrine of separation of powers. In the view of Idowu (An Evaluation of the Practice of Separation of Powers in Nigeria), the "practice of the system of checks and balances provided in the constitution, often results in conflicts among the arms of government since the return to democratic rule in May 1999". Furthermore "the potential for conflict is exacerbated by the fact that the leading figures under the new democratic experience were either former military officers who had participated in governance under former military regimes or their close associates" (Idowu, An Evaluation of the Practice of Separation of Powers in Nigeria). And so, "these are men who are not used to subjecting their decisions to public scrutiny and are only familiar with a system of government where laws and policy decisions are formulated and implemented with speed" (Idowu, An Evaluation of the Practice

of Separation of Powers in Nigeria). Thus it is obvious that Nigerian political leaders have not yet grasped the implications as well as the ideal of Montesquieu's doctrine that will be suitable for a good democratic governance.

For the growth of any democratic nation such as Nigeria, various branches of government need to exhibit a sense of corporation to attain progress and success. But it is quite unfortunate that the process is being hijacked by some egoistic individuals or groups of persons. Thus following from Montesquieu's achievements, it is expected in this research work that each arm shall be autonomous within its own sphere. Furthermore, each arm being autonomous are required in this research work to operate an overlapping system of administration. In this system each must carry on in a manner that is complimentary to and not subversive of the other two towards peace and good democratic governance.

In addition, this research work is of the view that there is no separation of powers without the independence of the judiciary. This is such that the independence of the judiciary is of great importance to Montesquieu's doctrine. According to Rabkin (48), "the most fundamental aspect of the separation of powers is that there should be a separation between the judiciary and the other two political branches of government". An independent, impartial and informed judiciary holds a central place in the apprehension of a good, transparent and accountable government. This is necessarily made possible by the provisions that charge the judiciary with the function and responsibility to determine all matters between persons, or between governments.

The judiciary should only be subjected to the law and constitution the judiciary should be impartial and perform its functions without fright. Thus the independence of the judiciary in Nigerian as well as other democratic nations will be of a great value towards the promotion of rule of law and human rights. The judiciary is useful to the substance of the rule of law and democracy. "Judicial independence can be defined as the total freedom from the other two arms (executive and legislature) of government. The purpose of this is to ensure the entrenchment of democracy" (Gbolagunte, An Independent Judicial System in Nigeria).

The judicial system is shielded from the legislature and the executive branch by its independence. It is the foundation of Montesquieu's separation of powers as a result. The following are widely acknowledged as the primary markers of an independent judiciary by proponents of judicial independence: The appointment and removal procedures of judicial officers, the financing of the judiciary, and the degree of institutional and individual freedom from unjustified intervention in the legal system by the legislative and executive branches of government.

For the judiciary to be seen as independent, persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law. Thus, the way in which Judges appointed and promoted are crucial to their independence. They must not be seen as political appointees, but solely rather for their competence and political neutrality. The appointment of top judicial officers is made by the president on the recommendation of the

National Judicial Council subject to the confirmation of the senate at the Federal level.

The National Judicial Council recommends candidates for top judicial positions, and the state governor appoints them. It is argued that the theory of separation of powers is harmed by this procedure. This is the case because, in their capacity as politicians, the governor, the president, and the members of the National Assembly or State House of Assembly may be persuaded to appoint people based on their affiliations with particular political parties or religions, "federal character" without any regard for merit and competence.

The judiciary has a role to play not only in solving fights and but also contributing enormously towards the attainment of socio-political justice, fairness and equity. Strength The judiciary must be strengthened in order for it to fulfill its stabilizing role in establishing a sustainable democracy in the state of Nigeria. This requires the judiciary to be independent on both an institutional and individual level.

In this research work, it has been noticed that Montesquieu's doctrine will enhance corporate governance as an achievement. In the view of Olufemi (Nigeria: Corporate Governance and Baron De Montesquieu),

I trace the root of corporate governance to Baron De Montesquieu. The root meaning of corporate governance is Share. Corporate governance is to ensure that no one Arrogates power to him undeservedly. Good corporate Governance is a culture and climate of consistency, Responsibility, accountancy and effectiveness that is Deployed throughout the organization".

Montesquieu's achievements will be useful by providing a "yardstick against which constitutional proposals can be assessed in order to determine whether or not there will be adequate checks and balances within the governmental system to ensure that individual rights are protected" (Dafe, Separation of powers; Constitutional and Media Perspectives). Montesquieu's separation of powers is a device that will lead to the improvement and wellbeing of Nigerians and citizens of any democratic nations.

CONCLUSIONS AND RECOMMENDATIONS

The government performs a vast range of tasks. It is imperative to assign these responsibilities to particular organs in order to establish accountability for their execution. According to Montesquieu's theory, the government's functions are divided up among distinct organs, allowing each branch to focus only on a particular area of activity. The three branches of government must be arranged so that they are each accountable to different people and carry out different duties within the respective domains of authority. On the other hand, the concentration of the legislative, executive, and judicial branches in the hands of one individual or group of individuals may lead to abuses of power and ultimately to tyranny. Only in an environment where checks and balances are in place can the theory of separation of powers be effectively implemented.

Through this interaction, an overlapping administrative system is operated by each arm, which is autonomous within its own sphere. In the pursuit of peace and sound governance, each must continue in a way that is supportive of, not antagonistic to, the other. Thus Odimegwu(140), assessing Montesquieu's achievement opines:

It must be borne in mind that the ultimate preoccupation of Montesquieu is the political liberty of all. This can only exist if the state is in existence. The end of governments generally is the preservation of the state. The laws are the fundamental instruments that make for this end. If the state shall exist therefore and be preserved in unity, no constituent of the state should live above the law.

Montesquieu's separation of powers is viewed as an ultimate standard of excellence and perfection.

ADVANCED RESEARCH

In writing this article the researcher realizes that there are still many shortcomings in terms of language, writing, and form of presentation considering the limited knowledge and abilities of the researchers themselves. Therefore, for the perfection of the article, the researcher expects constructive criticism and suggestions from various parties.

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