

AN EXPOSITORY OF THE CONCEPTUAL ANALYSIS OF SEPARATION OF POWERS AND ITS EFFECTIVENESS IN NIGERIAN CONSTITUTIONAL DEMOCRACY

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ABSTRACT

Today, all the Constitutional systems in the world might not be opting for the strict separation of powers because that is undesirable and impracticable but implications of this concept can be seen in almost all the countries in its diluted form. It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. The doctrine was popularized by Baron de Montesquieu. It was wholly embraced under the 1999 Constitution of Nigeria and the principles have been imbibed into the legal tradition of Nigeria. The following questions emanate from this: what is the origin of the doctrine of separation of powers? How has the doctrine been used in the Nigeria? What is the position of the doctrine in Nigeria? What is the future of the doctrine of separation of powers especially with the nascent challenges to our democratic practices? Can the principles be made more effective to promote efficiency in governance? These are the questions which this paper seeks to answer and provide workable solutions to.

Keywords: Separation of Power, Executive Powers, Legislative Powers, Judicial Powers, Checks and Balances, Rule of Law

INTRODUCTION

Separation of Powers is the doctrine and practice of dividing the powers of a government among different branches such as judicial, executive and parliament to guard against abuse of authority.¹ A government of separated powers assigns different political and legal powers to the legislative, executive, and judicial branches. The legislative branch has the power to make laws for example, the declaration of what acts are to be regarded as criminal. The executive branch has the authority to administer the law primarily by bringing lawbreakers to trial and to appoint officials and oversees the administration of government responsibilities. The judicial branch has the power to try cases brought to court and to interpret the meaning of laws under which the trials are conducted.

The importance of the theory of separation of powers is towards the enhancement of the review powers and independency of the judiciary. There is no gainsaying the fact that a government of separated powers is less likely to be tyrannical and more likely to follow the rule of law. Separation of powers can also make a political system more democratic. The division of powers also prevents one branch of government from dominating the others or dictating the laws to the public. The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse.

The doctrine of Separation of Powers forms the foundation on which the whole structure of the Constitution is based. It has been accepted and strictly adopted in Nigeria. The Constitution made the theory of separation of powers a fundamental principle of state governance. The Constitution in different sections vested the powers of government in separate organs of government. Section 4 grants powers to the legislature; Section 5 gives executive power to the President; and Section 6 creates an independent judiciary. The National Assembly and State Houses of Assembly are elected separately from the President and Governors, who do not sit

as part of the legislature. The Courts, especially the Supreme Court, can declare the acts of both Legislature and Executive to be unconstitutional. However, in numerous instances, the different organs have not respected this separation. More often than not, the different organs have unlawful “encroached” on the responsibilities of other organs. The Constitution also provides for a vertical separation of powers between the Federal Government and the state governments especially. Thus while federal legislative power is vested by section 4(2), (3) and (4), the state legislative power is conferred by section 4(6) and (7). The adumbration of the contents of respective powers is contained in the second schedule of the Constitution. In the same manner, while the federal executive power is enshrined in section 5(1), that of the state is contained in section 5(2).

Notwithstanding the safeguards the doctrine of separation provides against tyranny, the political actors in Nigeria find it very difficult to apply it rigidly, as expected under the legal provisions of the constitution as well as political practices. Despite the presence of this principle in the constitution, several cases of one among the three bodies violating the doctrine and overlapping its boundaries have been reported, which in turn poses the question to whether the country is indeed following the doctrine of separation of powers as proposed in the constitution or otherwise. Such questions arise from the series of cases on which instead of the judiciary to perform its function without interference, the judiciary is interfered with by other bodies trying to affect the decision of the judiciary to favor their cause. Also apart from that, the constitution itself contains some weaknesses in terms of how the various organs of the government can overlap in some powers or duties and how each can also check the excesses of others. There is a need to determine what is responsible for the general state of affairs.

The aim of this paper is to expose the meaning and origin of this separation doctrine as well as relate our findings to the Nigerian constitutional provisions and harp on the need thereof for the growth of our developing democracy. The paper shall seek to expatiate on the import and impact of the doctrine of separation of powers in Nigeria. Thus, it shall discuss the meaning of the doctrine, its origin, historical development, its main objectives, its place in our Constitution and its application by the Courts. The doctrine is discussed in the context of seeking to contribute towards a debate on whether there is a better mechanism for its practical application. The main objective of the doctrine is to prevent the abuse of power within different spheres of government. In our constitutional democracy public power is subject to

constitutional control. Different spheres of government should act within their boundaries. The courts are the ultimate guardians of our constitution, they are duty bound to protect it whenever it is violated.

THE MEANING OF SEPARATION OF POWERS

“Separation of powers” refers to the idea that the major institutions of state should be functionally independent and that no individual should have powers that span these offices. The principal institutions are usually taken to be the executive, the legislature and the judiciary. The doctrine of separation of powers is based on the acceptance that there are three main categories of government function, that is: Legislative, Executive, and Judicial.ⁱⁱ Corresponding to that there are also three main organs of organs of the government in a state – the Legislature, the Executive and the Judiciary. The doctrine insists that these three powers and functions of government in a free democracy must be kept separate and exercised by separate organs of the state.ⁱⁱⁱ

To most commentators, the doctrine of “the separation of powers” as usually understood is derived from Montesquieu whose elaboration of it was based on a study of Locke’s writings and an imperfect understanding of the eighteenth-century English constitution.^{iv} Montesquieu, a research scholar, conceived the principle of separation of power. He found that concentration of power in one person or group of persons resulted in tyranny. He therefore, felt that the governmental power should be vested in three organs, the legislature, the executive and the judiciary. The principle can be stated as follows:

- (1) Each organ should be independent of the other;
- (2) No one organ should perform functions that belong to the other.^v

The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse. It is generally accepted that there are three main categories of governmental functions – (i) the legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main

organs of the Government in State i.e., legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.^{vi}

In Nigeria, the United States of America and other presidential system, a strict separation of government powers is often a fundamental constitutional principle. In the United Kingdom and other common law jurisdictions, however, the theory of separation has enjoyed much less prominence. In the United Kingdom, the major offices and institutions have evolved to achieve balance between the Crown (and more recently the Government) and Parliament. The system resembles a balance of powers more than a formal separation of the three branches, or what Walter Bagehot called a “fusion of powers” in *The English Constitution*.^{vii}

According to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of any two of the branches. Instead, the independent action of the separate institutions should create a system of checks and balances between them. Globally, the separation of powers has enjoyed very different degrees of implementation. Parliamentary systems of government have usually united legislature and executive for the sake of expediency. By contrast, presidential systems tend to be strictly separated.^{viii}

THE RELEVANCE AND SCOPE OF THE CONCEPT

The doctrine of separation of powers, as opined by numerous scholars, is very rigid in its true sense and according to them; this is one of the reasons of why it is not strictly accepted by a large number of countries in the world.^{ix} The main object of the doctrine, as Montesquieu saw it, is that there should be government of law rather than having willed and whims of an official. Also, another most important feature of this doctrine is that there should be independence of the judiciary. This means that the Judiciary should be free from the other organs of the state and if it is so then justice would be delivered properly. To some legal jurists, the judiciary is

the scale which one can measure the actual development of the state. If the judiciary is not independent then it is the first step towards a tyrannical form of government. Hence, separation of powers plays a vital role in the creation of a fair government. Similarly, fair and proper justice is dispensed by the judiciary, as there is independence of judiciary.

As an institutional doctrine, the theory of the separation of powers has a clearly defined role in helping to structure and direct the distribution and division of institutional power. Proffering a particular vision of institutional order, it ought to act as a guide to those who wish to establish an efficacious system of governance. After all, if an institutional theory is to convincingly support its claims of normative value, it must first fulfil its primary duty of organizing and arranging the allocation of institutional power in that state.

As a theory, the tripartite understanding of the separation of powers has always been notable for its communicative simplicity. The idea of three separate organs with independent powers is easy to explain and to appreciate. The imprecision of this idea did not hinder the global diffusion of the doctrine. Such an “open texture, which enabled people to see in it what they liked, and take from it what they wanted, was no disadvantage to its reception or employment”.^x Democratic government, in modern times, is characterized by separation of powers. There are ‘checks and balances’ within our political system that limit the power of each branch in order to prevent the abuse of power. This system divides the state into three branches – the legislative, executive and judicial branch – and gives each the power to fulfil different tasks. These branches are also known as the ‘organs of government’.^{xi} Tasks are assigned to the different branches and their institutions in such a way that each of them can check the exercise of powers by the others. As a result, no one branch or institution can become so powerful as to control the system completely.

The separation of powers is important because it provides a vital system of ‘checks and balances’^{xii}: Firstly, it ensures that the different branches control each other. This is intended to make them accountable to each other – these are the ‘checks’^{xiii}. Secondly, the separation of powers divides power between the different branches of government – these are the ‘balances’. Balance aims to ensure that no individual or group of people in government is ‘all powerful’. Power is shared and not concentrated in one branch.^{xiv}

Much has been written about the true import or description of the concept or doctrine. In fact, many scholars have lent their voices in the attempt to delimit the seminal significance of this concept in constitutional or administrative law. Malemi posits that:

Separation of powers is the division of powers and functions of government among the three independent and separate arms of government; that is, the legislature, executive and the judiciary, to act as a check and balance on one another and prevent the excess and abuse of powers. Thus, separation of powers is the constitutional doctrine of the division of the powers of government into the three branches of legislative, executive, and judicial powers, each to be exercised by a different group of persons as a means of check and balance in the government one branch of government should not encroach on the domain of another branch of government nor exercise the powers of another branch of government^{xv}

The influence of the doctrine of separation of powers to the Nigerian political culture and system is to a large extent based on the British understanding of it. This is clearly discernible in the various constitutions of the country from 1960 till date. According to two British constitutional scholars, Wade and Phillips^{xvi}, separation of powers may mean three different things:

- (i) that the same persons should not form part of more than one of the three organs of Government, e.g. that Ministers should not sit in the Parliament;
- (ii) that one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that the Ministers should not be responsible to Parliament: and
- (iii) that one organ of the Government should not exercise the functions of another, e.g., Ministers should not have legislative powers.

The Supreme Court of Nigeria aptly captured the principle behind separation of powers *in A.G. Abia & Ors. v. A.G. Federation*^{xvii}, per Belgore JSC where the court held:

The principle behind the concept of separation of powers is that none of the three Arms of Government under the Constitution should encroach into the powers of the other. Each arm – the Executive, Legislative and Judicial – is separate, equal and of coordinate department and no arm can constitutionally take over the functions clearly assigned to the other. Thus, the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction.

In *Lakanmi and Ors, v. Attorney General of Western State*^{xviii} the court recognized the importance of the concept of separation of powers by noting as follows:

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 the absence of anything to the contrary, it has to be admitted that the structure of our constitution is based on 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 the state....

Also in *Samuel L. Ekeocha v. Civil Service Commission, Imo State and Anor.*^{xix}, the court held *inter alia* that in the Presidential System entrenched in our 1979 Constitution, powers are deliberately separated and balanced between the legislature, executive and judiciary. Being normative in nature, the doctrine, in euphemistic parlance, can be understood as being clearly committed to the achievement of political liberty, an essential part of which is the restraint on governmental power, and that this can best be achieved by setting up divisions within the government to prevent the concentration of such power in the hands of a single body of men.^{xx} However, it must be admitted in this regard that the recognition of the need for government

action to provide the necessary environment for individual growth is complementary to, and not incompatible with the view which vehemently reiterates that restraints upon the government are in essential part of a theory.

What the doctrine seeks are checks and balances. Should there be an absence of checks; an organ of government could rise above the constitution and the people. If there is an absence of balance, one side of the ship of nation building could be overloaded while the other side virtually remains empty. The consequence is that the ship capsizes. However, within the separation of powers, there should be coordination.

SEPARATION OF POWERS AND THE 1999 NIGERIAN CONSTITUTION

Nigeria has experienced eleven different constitutions since the 1914 amalgamation by Lord Fredrick Lugard. All the pre-independent constitutions have established the executive and the judiciary as institutions of government in Nigeria's political system. The 1960 independence and the 1963 Republican Constitutions, respectively, by their contents and principles, established the legislature as a recognized institution of government at the central and component units of the nation's federal structure. These two constitutions, however, by the design of the governing system fused executive and legislative powers in a Westminster parliamentary system. However, in the second republic, Nigeria moved from a parliamentary system of government to a presidential system of government tailored after the US Presidential system. The same system was adopted in the 1989 and 1999 Constitution.

The term "separation of powers" appears nowhere in the 1999 Constitution of the Federal Republic of Nigeria (as amended). Nevertheless, the division of federal authority among three distinct but interdependent branches is one of the defining features of the Nigerian governmental system in the fourth republic. Although designed to promote liberty and efficiency, this structure affords ample opportunity for inter-branch conflict.

The 1999 Constitution (as amended) regulates the structures and functions of the principal organs of government and also regulates the relationship between these institutions by setting out the balance of power between them. The Constitution does this by means of the separation of powers between the three branches of government – the legislature, the executive and the judiciary. The Constitution also regulates the relationship between these organs of government and the citizens of Nigeria. In addition to setting out the balance of power between the organs of government, the Constitution also contains provisions guaranteeing fundamental rights of citizens such as equality before the law, property rights, personal liberty and freedom of religion. The Courts are responsible for interpreting the provisions of the Constitution. This function is a very important one.

The Nigeria Supreme Court, expounding the concept of separation of powers in the Nigerian Constitution, in *Ugba v Suswan*^{xxi} stated that:

The Constitution sets up a federal system by dividing powers between the federal and state governments. It establishes a national government divided into three independent branches. The executive branch makes the law, while the judiciary explains the law. There is no document superior to the Constitution in Democratic Governance. It is the heart and soul of the people...

In *A.G. Federation v. Guardian Newspapers Ltd*^{xxii}, per Karibi-Whyte, JSC, it was held thus:

A notable feature of the amended Constitution of 1979 is the distribution of the exercise of governmental function among the three principal and separate departments of the Legislature, the Executive and the Judiciary. The Constitution also prescribed the scope and limits for each department and that within its jurisdiction; the exercise of power is supreme. Accordingly, implicit in the powers so vested, the one was not to interfere in the exercise of the powers of the other, except to the extent to which the constitution confers such power of interference.

This means that all the powers and functions of the three arms of government are clearly delineated in the Constitution. Thus, any action by an Arm, which has not been provided for in the Constitution, would be unconstitutional, unlawful and void. Kalgo, JSC in *Elelu-Habeeb & Anor v. A.G., Federation*^{xxiii} held:

There is no doubt however that under our Constitution, the three arms of Government in both the Federation and States are distinct and separate, and each has its functions and powers clearly set out...

There is absolutely no doubt that the Nigerian Constitution acknowledges that sovereign power belongs to the people of the nation and that government through the Constitution derives all its powers and authority from the people.^{xxiv} In the present 1999 Constitution of the Federal Republic of Nigeria, separation of powers is a fundamental constitutional principle. Relevant sections of the Constitution place each of the basic powers of government in a separate branch. Thus, while sections 4 and 5 deal with the legislative and executive powers respectively, section 6 is concerned with the judicial powers. These provisions are in *pari materia* with those of sections 4, 5 and 6 of 1979 presidential constitution. In the 1999 Nigerian Constitution, there is also a vertical separation of powers between the Federal Government and the state governments especially.

Separation of Powers and the Legislature

Just like the 1979 Constitution, the 1999 Constitution (as amended) created a bicameral legislature at the Federal level^{xxv} (i.e. the National Assembly^{xxvi}), while a unicameral legislature at the state level (i.e. State House of Assembly).^{xxvii} At the Federal level, Legislative action can only be accomplished through joint action of both houses^{xxviii}, while the process is more straightforward at the State Houses of Assembly.^{xxix}

Though not expressly provided for in the constitution, no person may serve in both houses of the National Assembly simultaneously. Nonetheless, the constitution provides that a member of the legislature cannot act in an executive capacity unless he/she has resigned their position in the legislature.^{xxx}

The legislature has the power to legislate on all matters included in the legislative lists.^{xxxii} This omnibus power of the legislature enables the legislature to make laws for the peace, order and good government of all the components of the Nigerian Federation. There are sixty (60) items under the Exclusive Legislative list and thirty-eight items under the concurrent legislative list. The legislative lists in the 1999 Nigerian constitution define the sphere of legislative activities of the federal and state governments. Constitutionally, state governments are subordinate to the Federal Government. The exclusive legislative list contains items directly under the sphere of the federal government. The concurrent legislative list has items that fall within the sphere of both the federal and state level. While the state legislature cannot legislate on any items under the exclusive legislative list, the National Assembly can legislate on items in the two lists. Beside this, any conflicts in the legislations of the state and the National legislature will be resolved in favour of the National Assembly. Section 4(5) of the Constitution states:

If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.

Aside from the law making power, the Constitution also grants the legislature the power to have control over public funds.^{xxxiii} This power of fund appropriation also included scrutiny of the accounts of the government through the Auditor-General, to be appointed by the executive upon ratification by the legislature.^{xxxiiii} The constitution mandates the Auditor-General to submit the report of the audited accounts of the government to the legislature.

This power of the purse is complimented by the oversight power to investigate the execution of laws.^{xxxv} The exercise of this power is to among other things to ‘correct any defects in existing laws; and expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it’. These sections are expedient in order to forestall abuse of power.

The height of this investigative power is the provisions stating the removal procedure of the President and or his deputy, and, Governor and or his deputy.^{xxxvi} These provisions guarantee accountability in the face of immunity provisions in section 308 where heads of the executive branch are shielded from any civil or criminal proceedings.^{xxxvii} The section states:

- (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) this section
 - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
 - (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
 - (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.
- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office.

In a bid to avert proclivity towards an uncontrolled power of legislations, section 4(8) of the Constitution sets a limit to the extensive power of the legislature to make laws. It provides:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Though no longer fashionable in legislations passed by the legislative houses in the fourth republic, the issue of ousting of the jurisdiction of the courts in some subject matters and cases are always been a controversial and litigious issue. For some commentators and jurists, these legislations are an attack on the independence of the judiciary and an overreach or interference of the judicial powers by the legislative arm of government^{xxxvii}. Nonetheless, the Supreme Court of Nigeria through the years has had to deal with these legislations and have held, though unfortunately in our humble opinion, that once the provision of a Decree or Constitution ousting the jurisdiction of the courts on any specific matters are clear and unambiguous, the courts are bound to observe and apply them^{xxxviii}. Even when the ouster has drastic effect on the right of any person, the courts are not entitled to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction.^{xxxix} With the return to democracy, it was hoped that the provision of section 4(8) had ended that controversy and ensured that no legislation aimed at ousting the jurisdiction of the courts would be invalid. This has not been the case the Supreme Court held recently in *Adeyemi-Bero v. L.S.D.P.C.*^{xl} that:

Where a Decree (Act) contains an ouster clause, the non-negotiable path is for effect to be given to the ouster clause and the court will be wise in declining jurisdiction. That is the right way to go in keeping with constitutionalism. (Emphasis ours)

Nonetheless, where a court is faced with a clause ousting its jurisdiction, the court still has the power to examine the ouster clause itself and to determine whether or not the act carried out under it is within the contemplation of the authority conferred by the enabling legislation^{xli}.

Separation of Powers and the Executive

While legislative power domiciles in the legislature as a body, the constitution vests executive powers of the federal and state governments in the individual heads of the executive branches - the President and the Governors, respectively.^{xlii} Nevertheless, the exercise of this power is largely dependent on the laws made by the legislatures. These powers include the execution and maintenance of the Constitution and all laws made by the respective legislatures as well as all matters with respect to which the legislatures have power to make laws.^{xliii}

To prevent executive officers from being inhibited in the performance of their executive functions by fear of civil or criminal litigation during their tenure of office, Section 308 of the 1999 Constitution contains provisions clothing them with immunity from civil or criminal proceedings, arrest, imprisonment and service of court processes.

The persons covered by this immunity are the President, Vice-President, Governor and Deputy Governor. It is also clear that the period covered by this immunity is the period during which he is in office and he is required to perform the functions of the office and during that period only.

In the case of *D.S.P. Alamiyeseigha v. Chief Saturday Yeiwa*,^{xliv} the Court of Appeal stated that the purpose of conferring immunity on the executive is to prevent the executive being inhibited in the performance of his executive functions by fear of civil or criminal litigation arising out of such performance during his tenure of office. In *Tinubu v. I.B.M. Securities Ltd*^{xlv}, the Supreme Court described the provision as policy legislation designed to confer immunity from civil or criminal process on the public officers named in section 308(3) and to insulate them from harassment in their personal matters during the period of their office. However, executive immunity does not preclude judicial review of administrative or executive action pursuant to the exercise of judicial powers vested on our courts by virtue of section 6 of the Constitution.^{xlvi}

Separation of Powers and the Judiciary

Section 5(6) of the Constitution also vests judicial power of the Federation and the states in the courts rather than the office of the heads of the courts. The term “judicial powers” denote the

authority vested in the courts to hear and decide cases and to make binding judgments.^{xlvii} It is the authority which the court exercises in interpreting the law and pronouncing on the competing rights and obligations of disputing parties.^{xlviii}

The Nigerian Constitution specifically invests judicial powers in the Federal and States Courts. Section 6(1) and (2) of the Constitution provides:

1. The judicial powers of the Federation shall be vested in the Courts to which this section relates being Courts established for the Federation.
2. The judicial powers of a state shall be vested in the courts to which this section relates being courts established subject as provided by this Constitution for a State.

By section 6(6)(a) and (b)⁵⁰ the judicial powers vested in the courts also extend to all inherent powers and sanctions of a court of law and to all matters between persons or between government or authority or all actions and proceedings for the determination of any question as to the civil rights and obligations of the person.

CHALLENGES OF APPLICATION AND STRENGTHENING OF THE DOCTRINE IN NIGERIA

One of Montesquieu's key arguments for separation of power was that if the total power of government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive.^{xlix} The system of checks and balances was designed so that no branch of the federal government—legislative, executive, or judicial—is totally independent from the other two. Each branch has the power to "check" or curb the other branches' powers. This keeps the government in "balance."¹

Checks and balance is the principle that each of the branches of government or state has the powers to limit or check the other two branches and this creates a balance between the three separate powers of the state. Checks and balances are designed to maintain the system of separation of powers keeping each branch in its place. This is based on the idea that it is not enough to separate the powers and guarantee their independence but to give the various

branches the constitutional means to defend their own legitimate powers from encroachment of the other branches.

In theory, the balance of power between the legislative and the executive is established by allowing legislative oversight over the government through the process of vote of non-confidence and by granting the chief executive the right to dissolve the parliament^{li}. The judiciary, enhances the check and balance mechanism through the constitutional and judicial review of the law and its implementation. The three branches of government are expected to work with harmony; if one of them abuses its power, the system of checks and balances intervenes.

The Constitution acknowledges the need for the three arms of Government to associate and cooperate with one another to ensure the smooth workings and management of the affairs of the state. It, therefore, creates a connecting link among the three arms through the concept of checks and balances that empowers each arm to limit the powers of the other arms and create a balance of power among the three arms.

Legislative Checks

(a) **Executive and Judicial Powers of the Legislature:** For instance, to enhance its representational status, the Constitution further bestows limited executive, financial, and quasi-judicial powers to the National Assembly. Under Section 88 of the Constitution, the National Assembly is vested with powers to conduct investigations into any or all matters on the Exclusive and Concurrent Legislative Lists of the Constitution; and the conduct of affairs of any person, authority, Ministry or Government Department charged or intended to be charged with the duty of or responsibility for (i) executing or administering laws enacted by the National Assembly, and (ii) disbursing or administering moneys appropriated by the National Assembly. However, the powers so conferred on the National Assembly are exercisable only for the purpose of enabling it to (a) make laws with respect to matters within its legislative competence and correct any defects in existing laws; and (b) expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the administration of funds appropriated by it.^{lii}

In order not to create a conflict between the National Assembly and the Executive, Section 88 limits and restricts the power of the National Assembly to making of findings with which it can affect correction through further legislation. The section preserves the power of prosecution to the Executive. Where the National Assembly is working in harmony with the Executive for the peace, order and good government of the Federation, the National Assembly can pass such findings to the Executive for further investigation and prosecution.

(b) Financial Oversight of the Executive: Section 80(3) and (4) of the 1999 Constitution (as amended) empowers the Legislature to authorize and prescribe the manner of withdrawal of money from the Consolidated Revenue Fund. This power of the purse is the most effective power upon which the legislature exercises vital control on the activities of the executive. Aside from authorisation, the legislature also has the power to monitor the disbursement of the fund in order to ascertain the compliance of the executive to the manner it prescribed for the disbursement. In case of delay in the passing of the appropriation bill for the year, section 82 of the constitution empowers the executive in the following terms:

Authorise the withdrawal of moneys in the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government of the Federation for a period not exceeding six months or until the coming into operation of the Appropriate Act.

This legislative power assigned to the executive is however limited to the contents of the appropriation act of the preceding year.

(c) Treaties and International Agreements: In the operation of governance, it is the Executive that negotiates and draws up bilateral and multilateral agreements and treaties on behalf of the country with other countries and international organisations. However, these agreements are not totally “binding” on Nigeria unless they are ratified by the National Assembly. Section 12(1) of the 1999 Constitution, which provides:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts. Thus, the treaties can be said to be merely “gentlemen” agreements.^{liii} Furthermore, before the treaty can be domesticated, it must be ratified by the majority of both chambers of the National Assembly.^{liv} it is imperative to note that Section 12 of the 1999 Constitution (as amended) does not give the National Assembly any legal role in the ratification of treaties (or treaty making), but rather involves it in the implementation (or domestication) of treaties. There is a distinction between ratification of a treaty, on the one hand, and its implementation (or domestication) on the other. Ratification is the process by which a State (in this case Nigeria) establishes in the international plane its consent to be bound by a treaty. On the other hand, the implementation (or domestication) is the process by which a treaty validly entered into by a State is enacted (or domesticated) as legislation so it can have effect within the domestic plane.

(d) Impeachment of Executive Political Office Holders: Section 143(1) and (2) of the 1999 Constitution (as amended) stipulates that the National Assembly can impeach or remove the President or Vice-President from office. At the state level, it is the State House of Assembly that can impeach or remove a Governor or Deputy Governor.^{lv} These sections alone by virtue of its very existence are supposed to be major deterrent to political misconducts or abuse of office by the Executive.

Since the attainment of independence and specifically after the return to democratic rule, not less than 20 speakers, 10 Deputy Speakers^{lvi}, five Governors, ten deputy Governors and two senate presidents have been impeached. There were also attempts to impeach the Presidents and their Vices too, but so far, none has been impeached yet.^{lvii}

An impeachable offence usually falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or gain.^{lviii}

In the case of *A.G. of the Federation v. Alhaji Abubakar Atiku*^{lix}, Gen. Olusegun Obsaanjo (rtd), the President of Nigeria had declared the office of the Vice-President, Alhaji A. Atiku, vacant due to the fact that the VP left the PDP to ACN (another party). The 1st Respondent was aggrieved and filed a suit against the Appellants and the 2nd - 4th Respondents at the Court of Appeal. He did so under Section 239 of the 1999 Constitution (as amended). The Court of Appeal *suo motu* raised the issue of Atiku's constitutional right to freedom of association. It determined the matter without hearing the parties on this point. The Supreme Court held that, unlike Ministers, the Vice-President couldn't be removed by the President. The process of removal of the President or the Vice-President is provided for in Section 143 of the Constitution, which is through the process of impeachment that is solely the responsibility of the National Assembly according to that section.

Executive Checks

(a) **Executive Assent of Bills:** Under 1999 Constitution, the executive has a measure of control over legislative power to veto legislations.^{lx} Though this power is not absolute, it is an invitation to a review of legislations by the lawmakers.^{lxi}

The president or the governor shares the law making power of the legislature by virtue of the constitutional provision for presidential or governor's assent to bills before they become laws^{lxii}. This however shrinks at the event of presidential or governor refusal in which case the respective legislature can override the said refusal with two-third majority vote at fulfilment of relevant conditions.^{lxiii}

(b) **Executive Orders and Rule-making powers of the Executive:** The presidential power to issue executive orders in some areas is another major exception to the separation of powers. The language of Section 5 of the 1999 Constitution (as amended) defining executive powers of the Federation vests same in the President and his support crew, 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 latter has, for the time being, power to make laws. From the foregoing constitutional executive mandate, an executive order can only be issued to enforce already existing powers, duties and mandates under existing laws; to manage staff and resources of executive agencies for greater economy, efficiency, effectiveness and for the

realisation of high level policy goals.^{lxiv} Therefore, an executive order cannot be used by the executive to create new powers, duties or rights or expand existing ones beyond the mandate given by the legislature.^{lxv}

Instances of previous executive orders will demonstrate this. The Executive Order 5 on support to local content in public procurement was made pursuant to the fulfilment of the domestic preference provision of the Public Procurement Act, 2007.^{lxvi} Thus, there was an existing law, which had made provision for local content, and the executive order merely sharpened and clarified how it will be implemented. Further, executive orders cannot be used to encroach on the province of duties already guaranteed by the Constitution to another arm of government. Any such purported exercise of power under the two scenarios above will be *ultra vires* the executive and as such will be void to the extent of its inconsistency with existing laws and the Constitution. It is pertinent to note that in no part of the Constitution is the term “executive order” used and one could argue that executive orders are unknown to our jurisprudence. However, Nigeria seems to be copying this practice from the American presidential practice since our Constitution is modelled after theirs. It is as such conceded that there is nothing wrong if we adopt the practice in Nigeria.

One of the most recent controversy surrounding Executive Orders is the recently issued Executive Order No. 6 of 2018 by President Muhammadu Buhari. Executive Order No. 6, to the extent that it seeks to restrict dealings in suspicious assets subject to corruption related investigation or inquiries in order to preserve same in accordance with the rule of law and to guarantee and safeguard fundamental human rights is a welcome development. Preservation of the subject matter of corruption, so that it is not dissipated is a good objective of criminal law jurisprudence. To the extent that it urges and encourages the Attorney General of the Federation to take steps through the judicial process to freeze and hold onto assets so that they are not dissipated is quite proactive of the President. Further, the extant practice where the state after investigations, goes *ex-parte* before a judge for a temporary freezing order and thereafter serves the suspect the *ex-parte* order, which invites the person to come and prove that he legally and legitimately acquired the property in question is still good practice. Although there may be arguments of reversing the presumption of innocence, it is still a good practice, which has evolved from assets recovery jurisprudence across the world, especially when the assets far

exceed the legally known sources of income of the suspect. Constitutionally, this can be justified as facts peculiarly within the knowledge of the suspect, being a particular fact, which he has the burden of proving under the fair hearing rules.

The power to determine which assets should be subject to temporary or final confiscation is a judicial power vested in the courts by Section 6 of the Constitution for the determination of the civil rights and obligations of the citizen. This is further reinforced by the provisions of the constitution, which guarantees that in the determination of civil rights and obligations, fair trial by a court or tribunal established by law and constituted in such a manner to secure its independence and impartiality-the fair hearing rule. The constitutional right to property and freedom from expropriation without due process also supports this. Essentially, preservation of assets, subject matter of corruption must be done within the confines of the rule of law, through powers and duties conferred by already existing statutes or through the orders of courts of competent jurisdiction. It cannot be achieved by an executive order as executive orders cannot be the basis for the creation of new rights, duties, powers and mandates. Also, no two cases are the same and in the absence of an enabling law, a schedule in an executive order cannot be the basis for the forfeiture of assets, whether temporary or otherwise. The order for temporary forfeiture or forfeiture pending the determination of the case is to be made on a case-by-case basis, after the court has duly examined the circumstances and the preliminary weighing of the available evidence.

Creating a schedule in an executive order and listing the names of suspects or accused persons whose property the executive order purports to block or freeze is like placing the cart before the horse and as such, is illegal, unconstitutional, null and void and was an audacious attempt by the President using his Attorney-General to usurp judicial powers. For accused persons who were already before the Courts, the Attorney-General knew the appropriate application to bring or file to achieve freezing or blocking. For suspects who had not been charged to court, there are also known legal procedure which the Attorney-General can take to achieve freezing. At present, the legality of the Executive Order 6 is still being challenged in courts and it is left to see what the position of the Supreme Court would be on this matter.

(c) **Pardon and Prerogative of Mercy:** The prerogative of mercy or grant of pardon is a special power granted to the Executive by Constitution in sections 175 and 211 over the final judgments or decisions of the Courts. These powers clearly derogate from the powers of the judiciary to impose sentence after a due process of adjudication.^{lxxvii} The power of pardon is an important component of executive powers, which allows the President to intervene and grant pardon, as a way of “dispensing the mercy of government” in exceptional cases where the legal system fails to deliver a morally or politically acceptable result.^{lxxviii} It exists to protect citizens against possible miscarriage of justice, occasioned by wrongful conviction or excessive punishment. Nonetheless, the power of pardon is virtually unfettered and unchecked by formal constraints in most jurisdictions, thereby rendering it susceptible to abuse.^{lxxix}

Judicial Checks

(a) **Appointment and Constitution of the Courts:** Although the courts are meant to be separate and independent of the Legislature and the Executive, the Executive and Legislature establish the courts under the 1999 Constitution (as amended)^{lxxx}. The appointment of the Chief Justice of the Federation, as well as the appointment of Justices of the Supreme Court, is made by the President on the recommendation of the National Judicial Council, a judicial body with executive functions, subject to the confirmation of the Senate^{lxxxi}. The procedure is the same for the appointment of the President of the Court of Appeal^{lxxxii}. The Senate’s confirmation is however not required for the appointment of other Justices of the Court of Appeal.

The appointment of the Chief Judges of the Federal High Court and High Court of the Federal Capital Territory and Judges of those Courts is the same as that of the Court of Appeal.^{lxxxiii} The procedure is the same for all other courts established by the National Assembly or State House of Assembly, except Election Tribunals that are constituted by the President of the Court of Appeal.

The executive also has power over the removal of judicial members. Nonetheless, the power can only be exercised after the National Judicial Council or State Judicial Council has made a recommendation to the President or Governor on the removal of a judicial officer.^{lxxxiv}

(b) **Judicial Review:** The concept of judicial review has been defined as a courts authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.^{lxxv} This includes the power of the courts to review laws, treaties, policies, or Executive Orders relevant to cases before the courts and nullify (overturn) those that are found unconstitutional.^{lxxvi} The concept is a standard part of British Common Law that became part of the legal process in the Nigerian Legal system.^{lxxvii} Under the 1999 Constitution of Nigeria, the power of judicial review of legislative acts derive principally from the provisions of section 4(8) which states as follows:

Save as otherwise provided by this Constitution, the exercise of legislative Powers by the National Assembly or by a House of Assembly shall be subject to the Jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law that ousts the jurisdiction of a Court of law and of judicial tribunal established by law.

The Constitution further provides:

If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.^{lxxviii}

One of the first cases bothering on the judicial review of the actions of the Executive/Legislature was in the infamous case of *Lakanmi v. AG Western State*^{lxxix}. This case decided over 40 years ago questioned more fundamentally the constitutional basis of military Decrees and Edicts in the country. It was a case in which the Supreme Court saw the Yakubu Gowon administration as a temporary emergency regime which lacked the competence to make laws not justified by the necessity of the circumstances. Lakanmi was a public officer during the Gowon regime. He was allegedly cited for corrupt practices and the Western State Military Government sought to investigate his assets and that of other public officers in 1970. In the process, a Commission of Inquiry was set up. After the probe, the Commission of Inquiry found Lakanmi and others guilty of corruption. It recommended the forfeiture of their assets to the military government. Lakanmi and others were aggrieved by the panel's verdict. They therefore

made an application to an Ibadan High Court for an order of certiorari to quash the order of the tribunal, contending that the Public Officers and other Persons (Investigation of Assets) Edict No 5 of 1967 under which the order was made was invalid because of its inconsistency with the Public Officers (Investigation of Assets) Decree of 1966. The High Court dismissed the motion and held that the Edict was validly made and that since it ousted the jurisdiction of the court, the validity or otherwise of the order could not be challenged. Lakanmi and others' lodged an appeal to the Western State Court of Appeal and it was equally dismissed. In-between the decisions of the High and appellate courts, the Federal Military Government (FMG) promulgated three Decrees obviously in favour of the respondent. In its judgment on April 24, 1970, the Supreme Court led by the then Chief Justice, Sir Adetokunbo Ademola, declared the Decrees and Edicts confiscating such property void.

The Supreme Court, in the *Lankami's* case, took the position that the judiciary, as the guardian of constitutionalism, ensures that the organs of government do not stray into the sphere of each other, and that powers and authority are exercised within prescribed constitutional boundaries. Furthermore, the Court in *Adikwu v. Federal House of Representatives*^{lxxx} recognized the fact that section 4(8) provides for the control of legislative powers by the courts. Also, as per Eso JSC in *Attorney General Bendel State v. Attorney General Federation*^{lxxxi}:

“The powers conferred on the courts by section 4(8) are wider than the inherent powers to interpret the constitutional system such as ours. The express provision of the powers vested in the courts and the mandatory nature of it indicate to my mind an intention on the part of the framers of the Constitution that the Courts should have this power to scrutinize the exercise of legislative power by the National Assembly. The inherent power is provided for in section 6(6)(d) and the *ultra vires* doctrine could be applied in respect of any law which violated section 4(2)(3) but yet, the Constitution stipulated section 4(8). It seems to be one of the many checks and balances contained in our Constitution. It is also unique among written Constitutions.”

The above case establishes that courts have been vested with powers by the Constitution to review legislation and other powers exercised by the legislature.

It should be noted however that the judicial authority can only nullify the offending provisions of a particular statute.^{lxxxii} This principle was applied in the case of *Attorney General of Abia State v Attorney General of Federation*^{lxxxiii} where the issue was whether the National Assembly could enact an Electoral Act that contained provisions stipulating the tenure of local government councils. The Supreme Court held that item II on the exclusive legislative list only empowers the National Assembly to make provision for the procedure for local government elections and therefore the issue of tenure of elected officials became a residual matter under the legislative jurisdiction of the House of Assembly of the State by virtue of section 4(7)(a) of the Constitution. The particular provision was thus struck out of the Act for being unconstitutional.

(c) **Declaring Executive Actions as *Ultra vires*:** Similarly, the courts can review the actions of the executive especially when the acts of the executive are *ultra vires*^{lxxxiv} or unlawful^{lxxxv}. The *ultra vires* principle is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature.^{lxxxvi} The Legislature, more often than not, accord power to ministers, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Legislature. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question: an institution given power by Legislature to adjudicate on employment matters should not take jurisdiction over non-employment matters. Several cases have been decided by the Nigerian courts dealing with review of legislation. For example the case of *Governor of Kaduna State v The House of Assembly, Kaduna State & Anor.*^{lxxxvii}, where the Kaduna State House of Assembly in passing the Local Government Edict (Amendment) law of 1979 had arrogated to itself powers to execute certain aspects of the law. The High Court of Kaduna State held that those portions of the law had flouted the constitutional provisions relating to separation of executive and legislative powers and therefore nullified them.

Similarly, in *Attorney General of Bendel State v. Attorney General of Federation & Ors*^{lxxxviii}, the Supreme Court held that even though the Allocation of Revenue (Federation Account) Act of 1981 had been authenticated in compliance with the Authentication Act, the procedure

adopted by the National Assembly in passing the bill contravened the provisions of the 1979 Constitution and declared it unconstitutional, null and void and of no effect whatsoever.

CHALLENGES TO CHECK AND BALANCES PRINCIPLE

The multitude of checks held by both the Legislature and the Executive, the independent and neutral nature of the Judiciary, alongside the way in which they allow for overcoming a divided government, provide sufficient evidence to suggest that the checks and balance of the 1999 Constitution can be effective in providing “co-operation and compromise” as stressed by the modern-day proponents of the doctrine of separation of power.^{lxxxix}

While the design of the Nigerian Constitution aimed to prevent the centralization of power through separation, it also sought the same objective through diffusion. Thus, most powers granted under the Constitution were not unilateral for any one branch; instead, they overlap. However, the way in which these checks are limited in use in practice, along with the way they can lead to Gridlock or contrarily a lack of scrutiny, displays the way these checks are not necessarily fully effective. Thus, in this way, suggesting that although effective in principle and somewhat in practice, the checks and balances as intended by the 1999 Constitution do not come without limits.

Some of the challenges of a strict practice of the principles of separation of power could be seen from:^{xc}

- (A) **Legislative and Governance Gridlocks:** Generally, gridlock can occur when two legislative houses, or the executive branch and the legislature are controlled by different political parties, or otherwise cannot agree. More oft than not, gridlock is caused by major disagreements between the President (who has powers to veto bills) and the National Assembly. This process of presidential checks on legislative powers has seen to be a major cause of legislative gridlock. In the 8th National Assembly, there were numerous cases of gridlock between the National Assembly and the President on key legislations – budget bills and Electoral Act amendments.^{xci}

Specifically, gridlock threatens the fundamental constitutional doctrines of separation of powers and legislative supremacy. Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary inaction. Gridlock also frustrates the second element of separation of powers: checks and balances. The underlying purpose of this feature is to allow each of the three branches to guard against efforts by the other two to aggrandize power or usurp another branch's authority.^{xcii} The President's main checking power comes through his veto; the judiciary's ability to check stems from judicial review. The National Assembly's check comes through its power to legislate: to set the nation's agenda through policymaking, to override presidential vetoes and judicial statutory interpretations, and to provide meaningful oversight of the executive branch. The National Assembly cannot perform this checking function if it cannot make deliberative decisions. Were one of the other branches deprived of its checking power—imagine a President without the veto or a judiciary without judicial review—the separation of powers problem would be manifest.^{xciii} A legislature unable to legislate presents no less serious a concern.

- (B) Excessive Delegation of Law-making Powers to Executive Bodies:** It's not just that the executive assumes a greater law making responsibility because of gridlock. The National Assembly, itself, often responds to stalemate by pushing substantive decision-making onto newly created bodies. The Federal Inland Revenue Service (Establishment) Act^{xciv} and Central Bank (Establishment) Act^{xcv} enacted by the National Assembly in 2007, represents a useful example. For a variety of reasons, both political and structural, stalemate prevented the National Assembly from making progress in reforming the banking and tax administration of the country. To forestall such gap in the future, the National Assembly donated huge powers to these two agencies to make far-reaching subsidiary instruments. For example, Section 50 of the CBN Act provides that:

The Board shall have power to make and alter rules and regulations for the good order and management of the Bank.

This is quite a nebulous and all-encompassing provision. No form of check on the rules and how such wide-reaching powers can be controlled or maintained. It is more like the National Assembly giving up its legislative guidance role to the Executive body.

- (C) **Increase in Governmental Arbitrariness:** One of the chief purposes of separating powers is to serve “as a powerful check against arbitrary action.”^{xcvi} Jurists have suggested that the separation of powers was intended not merely to require Legislature and the President to act independently of one another, but also to act in a non-arbitrary, public-regarding manner.^{xcvii} Under the 1999 Constitution, there are several constitutional elements that can be understood as ways the Framers of the Constitution to prevent arbitrary governmental decisions, such as bicameralism, confirmation of key appointments, and the fair hearing. In short, avoiding arbitrary action is naturally a constitutional concern.^{xcviii}

When a president nominates an individual to serve on the judiciary or in the executive branch, the primary threat to the person’s confirmation is not rejection by the Senate, but rather the failure by the upper chamber to make any substantive decision. Again, the distinction must be drawn between affirmative rejection of a nominee and the failure to act at all. However, when the Senate fails to take up and decide a nomination, that nominee is a casualty of the failure of checks and balances amongst arms of government, which is becoming more and more pronounced.^{xcix}

Arbitrary inaction is not limited to the judicial and executive branch confirmation process. Sections 59, 80, and 162 of the 1999 Constitution (as amended) grants powers to the Legislature to approve the budget proposal from the Executive arm and forbids any spending unless the approval of the Legislature has been obtained. However, the Executive have always flouted this constitutional provision and incurred expenditure without first obtaining the approval of the National Assembly.

- (D) **Delay in Government Activities:** Under checks and balances, separate branches are empowered to prevent actions by other branches and are induced to share power. Strong checks and balances are an effective way to control politicians but, at the same time, they can impede the government from undertaking new initiatives. For example, the

executive government were constrained in taking decisive actions in the troubled North-East Region of the country due to lack of legislative appropriations for disbursement of funds. This led to the grossly underfunded and poorly run Presidential Initiative on the North East^c. It was until the passage of the North East Development Commission that a proper framework for handling the rehabilitation and development of the region.

- (E) **Independence of the Judiciary:** An essential precondition for the protection of the constitution within the framework of a democracy is that the judge and the judiciary enjoy independence^{ci}: the judiciary can effectively fulfil its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently.^{cii} Judicial independence is dependent upon effective working relationships with all of the other branches of government (executive and legislature). There must be effective interdependent relationships in form and practice within the court as well as with other components of the justice system.^{ciii}

In the early hours of Saturday, 8th October, 2016, Nigerians awoke to reports of the invasion of the houses of several judicial officers by officers of the State Security Service or Directorate of State Services (DSS). In the course of the said invasions, the homes of the judges were searched and some of them arrested. It was also reported that the search led to the discovery of huge sums of money in local and foreign currency. This development naturally attracted immense attention from the public. While some praised the development^{civ}, viewing it as a step in the right direction by the current administration which had always made known its intention to tackle corruption, others condemned the action^{cv} on the grounds that not only did the DSS lack the statutory powers to act as it did, but also that the raids amounted to a denigration of the judiciary as an institution. While the DSS stuck to its narrative that it was compelled to act owing to the failure of the National Judicial Council (NJC), the body saddled with the duty of enforcing discipline in the judiciary, to investigate reported cases of corruption within the judiciary, the NJC itself insisted that it was not subject to the supervision of any authority or individual^{cvi}.

Crucial to judicial independence is the impartial decision making, free of the stain of personal preference, public opinion, or inter-branch pressure which can or some say do influence judicial decisions.^{cvi} Judicial independence concerns the judiciary's freedom from improper control, influence or interference in the decision of cases, and in the governance and management of the judiciary's affairs.

First and foremost, the judicial branch is not a co-equal branch of government unless it has the ability and the authority to manage its internal operations, including the trial courts. By this, we are referring to the concept of “financial autonomy for the judiciary”. This financial autonomy is guaranteed under the Nigerian Constitution under Section 81(3) and Paragraph 21(h) and (i) of Part 1 of the Third Schedule of the 1999 Constitution (as amended).

There is ever present in the body polity of this Country the tendency for those who control the Executive Arm of Government to disregard and disobey the judgments and orders of the courts. The Executive has not only shown their dislike for court orders and judgments. These uncivilized and unlawful conducts constitute some of the greatest obstacles and bottlenecks to the enforcements of judgments and orders made by the court.

The execution or enforcement of a judgment which follows the logical pronouncement of the same by the judge or magistrate must therefore be taken seriously as it is one of the most important aspects of the administration of justice in any society where the rule of law thrives.

CONCLUSION

The fundamental law of the land or the constitution of any state is the underlying principle of governance and politico-legal system of that state. Constitution reflects the moral and political values of the people it governs. Specifically, the constitution of a country seeks to establish its fundamental or basic or apex organs of government and administration, and to describe their

structure, composition, powers and principal functions, to define the inter-relationship of these organs with one another and to regulate their relationship with people. In this notion, the most significant feature of any constitution is the division of power of government among its three institutional components, Legislature, Executive and Judiciary.

The Nigerian Constitution, under the provisions of Sections 4, 5 and 6, separates the powers of the State and distributes them to three separate branches/organs of Government, a fact that reinforces the assertion that Nigeria is a constitutional democracy. Furthermore, in plethora of cases and judgments, the Supreme Court of Nigeria has held that the Nigerian Constitution incorporates the principle and concept of Separation of Powers, stressing the principle behind the concept of Separation of Powers, which is that none of the three arms of Government should encroach into the powers of the others. Each arm – Executive, Legislative and Judicial – is separate, equal and of the coordinate department, and no arm can constitutionally take over the functions clearly assigned to another. Thus, the powers and functions constitutionally entrusted to each arm cannot be encroached upon by another arm.

The main purpose of separation of powers is to prevent the abuse of power by establishing a mechanism of checks and balances among different branches of the government. If the executive increases its influence over the legislature, the judiciary might play a significant role as a part of the checks and balances mechanism and the rule of law. In reviewing the challenges of effective checks and balances under the present Nigerian constitutional set-up, it is useful to recall that the first task 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. But then, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

While the National Assembly obtained its financial autonomy in 2010, state legislatures depend on the executive for the approval of funds. On the one hand, the executive as a single feasible person has a vast leverage over the control of the society through patronages. The heads of the executive do not hesitate to exploit this public perception to bolster their relevance.

Importantly, it is vital to state that the doctrine of separation of power is very much essential to a democratic country for the smooth running of the government to protect the individual liberty and to avoid the confrontation among the legislative, executive and judiciary, the separation of powers in a check and balance form is highly needed so that three organs cannot trespass with the confined area of the other. But in a rigid sense it is impossible and, in a balance, and check form it is quite possible which makes filtration of the arbitrariness of the powers of other as because if any organ gets the three powers in hand definitely it becomes absolute and despotic which does cause the hardship of the individuals in a country and the idea of democratic value and constitutionalism would be jeopardized. With the changing needs of the society, it is important that the reasonable restriction should be upon the executive, legislative and judiciary in a compartment form but not in watertight compartment form.

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- ^{xxiv} Section 14(2)(a) and (b) of the 1999 Constitution (as amended)
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- ^{xxix} Section 100; State Houses of Assembly are unicameral and hence no need for further concurrence of a bill in another chamber.
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- ^{xxxiii} Section 86, *Ibid.*
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