MONTESQUIEU'S DOCTRINE OF SEPARATION OF POWER AND 1999 CONSTITUTION: A COMPARATIVE ANALYSIS.

Kenneth Azubike Nna
Department of Philosophy
Nnamdi Azikiwe University, Awka
zubixnna@yahoo.com
&

Prof. Maduabuchi Dukor
Department of philosophy
Nnamdi Azikiwe University Awka

Abstract
Since 1999, when Nigeria made the transition from military rule to civil rule, pundits and careful observers have attributed the poor implementation of the country's democratic process mainly to the breach of separation of powers. The claim is that so much power is vested on the executive arm of government so much so that the other two arms: the legislature and the judiciary are just used as appendages or mere rubber stamps by the executive. The outcome of this state of affairs is an outright recklessness and abuse of power by the executive. It's widely believed that the lack of progress in the country's political and economic systems is occasioned by this executive usurpation since there is an intrinsic link between politics and the economy. Using the method of philosophical analysis, this study applies Baron de Montesquieu's doctrine of the separation of powers to investigate how this ill in the body of Nigerian polity can be remedied. Montesquieu in his Magnus Opus, The Spirit of laws argues that the best way to overcome the dictatorial leadership of antiquity and promote individual's liberty within the state is by ensuring that the powers to make, execute and interpret the laws do not subsist in one person or group of persons. As such, Montesquieu is the first scholar to formally call for and work out the justifications and consequences of the principle of separation of powers which has become the hallmark of modern liberal democracy. To this end, the study discovered that Nigerian democracy because of the over power exercised by the executive does not cohere with the recommendations of The Spirt of Laws. The study also found that the inability of the legislative and judicial to assert their autonomy from the executive is the reason why Nigeria has not been able to make any headway both politically and economically. Based on this, the study recommends the adoption and adaptation of Montesquieu's principle of separation of powers to Nigeria's political system as prerequisites for peace, political and economic developments in the country.

Introduction.

The guarantee of liberty in any given government to the people is the practice of the theory of separation of powers. This theory according to Gettel implies that, the three functions of government “should be performed by different bodies of persons; each department the legislative, the executive, and judiciary limited to its own sphere of action, and within that sphere should be independent and a suprem.

The theory of separation of powers is predicated on the premise that; if a single group holds all the three powers of the government, they are bound to have unlimited powers. They could prescribe any law arresting say, criminals. Because, they exercise unlimited powers pronounce the criminals guilty without recourse to fair trial. It is through the separation of powers that any given group cannot at the same time prescribe, execute and adjudicate in any case. Otherwise, there will be no justice. That is why, it is only through the combination of all these departments that a government can use force especially in a military rule.

The term “separation of power” originated with Baron de Montesquieu, a French enlightenment writer. Nevertheless, the actual separation of powers amongst different branches of government can be traced to ancient Greece. The framers of the American constitution decided to base the governmental system on this theory of separation of powers whereby the legislative, executive and judiciary branches will be separate from each other. This gave rise to the idea of checks and balances on each other. As a result, no one branch can gain absolute power or abuse the power given to them like in despotic military regimes.

The model of separation of powers was first developed in ancient Greece and gained recognition by the Roman Republic as part of the unmodified constitution of the Roman Republic. In this model, the state is divided into branches. This also, forms the concept of separation of church and state as is the practice in many countries of the world depending on the applicable legal structures and the prevailing views towards the exact roles of religion in the given society.

There is no gainsaying the fact that the famous doctrine or principle of separation of powers is as old as man, the point is, separation of power has been in existence since man came to the society. It is apposite to state that the doctrine of separation of powers was in existence arid strictly observed in this country before the advent of the British. This foregoing position can be demonstrated when a recourse is made to the old Oyo empire, where there were in existence the Alaafin, Oyomesi, the Ogboni among other traditional title holders who took charge of the administration of the said empire. There was a manifest undoubted separation of power between the Alaafin who was the head, the Oyomesi, and the Ogboni, this brought about the necessary checks and balances, so that power is not concentrated in the hands of the Alaafin, which is capable of being misuse or abused.

The point above is that, the principle of separation of powers is not strange to the African society and therefore, the principle cannot be said to be imbibed or imported from the white man but in its formalized theoretical notion it is an imported value into our body of polity.

Montesquieu's Theory of the State

Since the State of Nature, described by most political theorists, including Thomas Hobbes, J. J. Rousseau and John Lock, government has been recognized as an indispensable institution in the quest to safeguard citizens' lives and properties.

Following the evolution of this institution with attendant complexities of societal growth, questions began to rise as to which nature the government should be organized so as to also guarantee the freedom of citizens from oppressive propensities of the institution, especially, from agents of the state. Although debatable, the Greeks in the 5th and the 4th century BC were reputed to be the first people to raise the issue about the kind of government capable of making laws that would reflect the will of the people. Their answer to this question is what is known and practiced today as democracy.

Consequently, by the ethos of democracy, the organization of governments around the world has been modified to root the legitimacy of the State and its laws in the citizen's approval. Also observing the ostensible abuse of political power by state actors, French political philosopher, Baron de Montesquieu in the 18th century advocated that there should exist power distinction in the operational apparatus of the State in order to avoid tyranny. The contention of Montesquieu gave rise to separation of power between the organs of government. Separating the organ that makes the law from the organ that implements it and even so to the organ that reviews the law making and implantation will necessitates checks and balances by the various organs. These ideas according to Ogoloma F. have been adopted in the constitutions of several countries of the world such that the doctrine is almost generally seen today as the cornerstones of the affairs of government (p. 128).

Though the theory of separation of power was clearly formulated and popularized for the first time by Montesquieu in the *Spirit of Laws*, the actual theorization and practice of separation of powers amongst different branches of government can be traced to ancient Greece (p. 132). F. Ogoloma hints on this fact:

> The model of separation of powers was first developed in ancient Greece and gained recognition by the Roman Republic as part of the unmodified constitution of the Roman Republic. In this model, the state is divided into branches, each with separate and independent powers and areas of responsibility in such a way that no branch has more powers than the other branches (p. 143).

As such, the theory did not appear overnight, its origin dates back to legal and political thought of European antiquity. According to Nwabueze, "the significance of this doctrine was based on natural law philosophy traceable back to Plato and Aristotle and later articulated by the 16th and 17th centuries, French Philosopher Jean Bodin and British politician John Locke (p. 67). Given the above assertion, it will be important to trace the philosophical origin of this concept of separation of power, before devoting to Montesquieu's elucidation.

The first attempt to develop the doctrine of separation of power was found in Plato's description of the ideal city, where he gave different descriptions as to who should be the guardian, and who ought to be the judge as designated in his dialogues: *The Republic*, and *The Laws*. As to who will be the guardian(s), Plato asserts: "that as so far as their fitness for guarding is concerned, a noble youth and a well-bred dog are very much alike: meaning that both must be sharp-sighted, quick of foot to pursue the moment they perceive and strong enough to make captures and overcome opposition when necessary"(p. 67), "…To be a good and noble guardian of our city will be by nature

philosophical and spirited and quick and strong"(p. 70). With this, one can rightly say that Plato demands a philosopher king who in his wisdom will also be young enough to face his responsibilities.

For a good judge Plato describes:

> That one must not be young but old, one who has learnt late in life the nature of wickedness, not from taking note of wickedness dwelling in his heart, but having learned to understand wickedness in the heart of others, so that he has knowledge, though not personal experience of how evil it is (p. 116).

Still on the judge, he notes: The virtuous man, not the wicked one makes the wise judge"(p. 122). Here, he goes ethical to inform that one who ought to judge should be one who has learnt what it means to be either good or bad, a man of honesty.

It could be inferred from the above that Plato though not using the concept, 'separation of power' opted for a type of government where the executive and legislature (the guardians) would be different from the judiciary (judges) even though he never mentioned his reasons. Plato appears to make more supportive statement on this idea during his discussion and criticism of oligarchy. According to him: "further, do you think it right that in this constitution, the same men will play many parts?"(p. 307). Also, in *The Laws*, while discussing the success of Spartan leadership Plato made the following observations:

> After that, a man who combined human nature with some of the powers of a god observed that your leadership was still in feverish state, so he blended the obstinacy and vigour of the Spartans with the prudent influence of age by giving the twenty-eight elders the same authority in making the same decision as kings. This is the formulae that turned your kingship into a mixture of right elements which ensured the stability of the rest of the state (p. 95).

Plato's claim in his articulation in the above is very important: separation of powers brings stability to the state. Though he does not elaborate on this but his claim is not quite far from the claim of most modern proponents of the theory who maintain that separation of powers is the bulwark against tyranny.

Plato's successor, Aristotle is another Greek scholar who contributed to the development of the doctrine of the separation of powers or mixed government as it was originally called. In his popular work *"politik*", Aristotle upholds a leadership system that does not strictly border on any particular type of government. He prescribed a system of government that characterizes a mixture of elements of different forms such as tyranny, aristocracy, oligarchy and democracy. He observed what perversions that existed in each form of government as he puts it:

> …of the above-mentioned forms, the perversions are as follows: of kingship, tyranny; of aristocracy, oligarchy; of constitutional government, democracy. For tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in

> view the interest of the wealthy; democracy of the needy: none of them has the common good of all (p.127).

Aristotle's position here is that every form of government has its fault, and therefore, to curtail these prevailing deficiencies, good elements of each of the forms have to be merged together to form a single type of government. However, according to Aristotle, while these elements of the forms emerge to become one, each has to keep an eye on the other to avoid over exercise of power by any of the forms of government as against others, and this informs the idea of checks and balances. According to Aristotle's articulation:

> All states have three elements, and the lawgiver has to regard what is expedient for each state. When they are well-ordered, the state is well- ordered, and as they differ from one another, constitutions differ. What is the first (1) element which deliberates about public affair; secondly(2) which is concerned with the magistrates and determine what they should be, over whom they should exercise their authority, and should be the mode of electing them, and thirdly (3) which has judicial power?(p. 175).

All these in modern terminology correlate with the activities of the legislative (law-making), executive (law-enforcing), and judiciary (law-interpretation), respectively as the functions of government. Aristotle specifically calls them 'the general assembly', 'the public officials', and 'the judiciar (p. 414). He tries to make distinctions between the function and authority of these three arms that make up government (p. 127). His intention on this appears clearer in his treatment of the Athenian Constitution:

> The state is a complex thing presenting a unity of plurality, consisting of specific different dissimilar parts. Firstly, there is a legislative body, the function of which is performed with participation of all freemen. The second element is administrative, or governmental, which is represented by magistracy, having its powers. And thirdly, there are judicial authorities which execute justice (p. 207).

These ideas of Aristotle based on separation of functions of state agencies anticipated, according to scientist R.R. Salimnyazeva, the ideas of philosophers of the new age as to separation of powers within the system of "checks and balances"(p. 8). It is to be noted that while Aristotle identified these basic governmental power functions, he did not necessarily suggest that they are or should be exercised by entirely different branches, neither did he suggests that they are separate power-entities that should be independent of each other as found in modern and contemporary understanding of the separation of powers.

Also, though Aristotle presumably meant well for the state through his proposition, he failed like Plato to give a name to the particular type of government he proposed. In addition, according to V.S. Nersesyants, Aristotle "did not aim to analyse the nature of the interaction of governments, the methods and forms of regulation of their relations, oppositions, balancing their relations etc., which would be important for the doctrine of

power separation"(p. 36). It has to be noted that while Nersesyants, criticism is *ad rem*, Aristotle's achievement, who back in ancient times separated unified government power and singled out corresponding state authorities, must be acknowledged. This Aristotelian contribution served as one of the inspirations for Montesquieu's latter articulation of the doctrine.

Polybius a 12th century historian gave one of the most comprehensive and distinctive contribution on the political stability of a state. In the *Book Six* of his popular book titled "*The Histories"*, he devoted time to account through criticism and suggestions from the Roman constitution, what ought to be the best form of government. While tracing the origin of different constitutions, he observed that his predecessors had distinguished three kind of constitution which he designates as kingship, aristocracy, and democracy. But for him, the classification of constitution should include the attendant degeneration of the above mentioned three constitutions. For him then, there are six classifications of constitution namely; kingship which degenerates to tyranny, aristocracy which degenerates to oligarchy, and democracy which degenerates to mob-rule. As to the best form of constitution, he notes: "…for it is plain that we must regard as the best constitution that which partakes all these three elements (p. 188).

In this regard, though Polybius identified the attendant degeneration of earlier classification as forms of government in them, he still believes that the best constitutions are the three earlier classifications. But he disagreed that any of those earlier classifications can stand alone to make the best constitution. He believes that it is only the agglomeration of elements of the three best constitutions as in kingship, aristocracy, and democracy, can make the best form of government. One of the reasons why one form of government, that is, unmixed constitution produces unstable power, Polybius notes:

> Peculiar to it and inherent in its nature, for just as rust is the natural dissolvent of iron, woodworms and grubs to timber, by which they are destroyed without any external injury, but by that which is engendered in themselves; so in each constitution…because it will always be swiftly perverted into that particular form of evil, there is naturally engendered a particular vice inseparable from it: in kingship, it is absolutism; in aristocracy, it is oligarchy; in democracy lawless ferocity and violence: and to these vicious states, all these forms of government are, as I have said lately shows inevitably transforme (p. 350).

Here Polybius understood what danger it may pose to hand over the affairs of entire state to any particular group of people, whether it is the king, the wise and just, or the many, as all these have a peculiar evil inherent in them which may manifest at any time. Furthermore, he extolled the Lycurgus law as helpful in the governance of a state, he states that:

Lycurgus, as I said saw all these, and accordingly combined together all the excellences and distinctive features of the best constitutions, that no part should become unduly predominant, and be perverted into its kindred vice; and that each power being checked by the others, no one part should turn the scale or decisively out-

balance the others; but that being accurately adjusted and in exact equilibrium, the whole might remain long and steady like a ship sailing close to the wind (p. 355).

Man in the State of Nature

Montesquieu's theory of man in the state of nature is related to his doctrine of the nature of law in such a way that understanding the former, requires and elucidation of the latter. Based on that, this section begins with an elaboration of his theory of law before dovetailing into his notion of man in the state of nature.

In Book I of *The Spirit of the Law*, Montesquieu's presents his teaching on law. According to his documentation, law extends to every corner of the universe, from natural order to human affairs.

> Laws are the necessary relations derived from the nature of things. In this sense all beings have their laws, the Deity has his laws, the material world its laws, the intelligences superior to man have their laws, the beasts their laws, man his laws (p. 11).

On the surface this concept is not far from St. Thomas's eternal, natural and human laws. They also extend from stars to men. The similarity is even more striking if we keep in mind that Montesquieu connects law with reason, not will (p. 19). Yet these similarities are deceptive. St. Thomas's law originates in God, resides in His reason and governs all being for their own good, while Montesquieu's law is a "blind fatality" that extends from "the Deity" to all things, even if he denies its fatalist nature (p. 23). The Deity itself seems under the power of law. It is active but through invariable laws, not miracles. By implication, the first and greatest miracle – creation – could also be a result of blind necessity, dictated by law (p. 55).

Laws "are a fixed and invariable relation" Montesquieu claims. In fact, they are so fixed and so constant, that in material nature "each diversity is uniformity, each change is constancy"(p. 7). Natural world acts perfectly according to these laws. Exceptions concern intelligent beings, who although are also under invariable laws, yet they do not "conform to them *so exactly* as the physical world." The reason for it is that we are finite creatures, "liable to error" and endowed with free will (p. 24). If we were not partially exempted from invariable laws, then all laws relating to humanity would have been the same. In subsequent books he also adds geography, climate, soil, etc. to justify differences in human law.

It is from this background that Montesquieu navigates into his treatment of man in the state of nature. To begin with, he downplays terms like state of nature and law of nature both so prominent in Hobbes's and Locke's thought. He only briefly describes the conditions before the establishment of society. According to him, individuals in the state of nature are endowed with some sense of primordial justice. They exchange benefits and injuries, in other words, they are kind toward those who are kind and retaliate if attacked (p. 43). What can be deduce from this is that there is a part of human nature belonging to the category of "invariable laws" which human beings can hardly challenge.

Furthermore, according to Montesquieu before the founding of civil society, individuals feel weak and timid, and fear one another. Their fear, however, does not lead them to war,

as Hobbes claimed, but to peace, because they feel, first of all, inferior, not equal. Living in peace in pre-societal conditions makes, according to Montesquieu, the first law of nature. The need of nourishment is the second natural law, while the attraction human beings feel for each other, in main part derived from sex, is the third law (p. 45).

These three first laws of nature, resulting from sentiment – according to David Lowenthal – lead to the forth, resulting from reason. Individuals endowed with reason, however brute and primitive in original state, gradually acquire knowledge, and this animates in them "the desire of living in society" (p. 67). Yet, as soon as they found society, "they lose the sense of their weakness; the equality ceases, and then commences the state of war (p. 88). Thus, in the opening of the *Spirit of the Laws,* Book i, which sets out the view of human nature on which the work is premised, Montesquieu presents human beings as naturally timid and non-conflict. As such, it is social dependency and interdependency resulting from entrance into civil society that lead to aggression, distrust and conflict. When, in the subsequent two chapters, Montesquieu describes the stages by which a solitary human being is drawn by his passions first into society, then (and only then) into intestine war, and thereafter into the institution of a state equipped with a system of political and civil right, into wars between states, and into the development of a *ius gentium,* he is sketching a hypothetical history meant to illuminate the logic underlying human experience.

At the foundation of Montesquieu's doctrine of man in the state of nature, is that man is basically peaceful and nonaggressive by nature. Of course, he was perfectly prepared to acknowledge that, in time, men would contract a desire "to subjugate one another," but he insisted that this would not happen until societies had been established and men had begun to speculate, and this desire would initially be restrained by mores of the sort that constitute political and civil right among hunter-gatherers and nomads, which would quickly develop in response to the danger posed. As Montesquieu later makes clear, organized political society—and despotism—come much later and tend to be coeval with the discovery of agriculture, the institution of property in land.

In other words, the state of war that ends the state of nature and coincides with the emergence of society is not properly explained but just mentioned. It seems the notion of the state of war serves Montesquieu only as a pretext to move to the topic of human law which according to him arises from war. Human law consists of "the law of nations," laws on political regime and the civil law. The first category, the law of nations, regulates the relations between "varieties of nations" that inhabit of "so great a planet."[42] War is a means to conquest which in turn aims at preservation, and the law of nations is to regulate this process. Each nation sets rules relating to it, thus the law of nations seems to differ in each case (p. 122). The second category of law is "a politic law." It regulates the relations between "the governors and the governed." Since "no society can subsist without a government," each must have such a law.

What is obvious here is that there are some remarkable differences between Montesquieu's and Hobbes notions of man in the state of nature. In the first place, Montesquieu distinguishes himself from Hobbes in a manner that was destined to become

commonplace in the course of the eighteenth century. Like the author of *Leviathan*, he took man to be a passionate animal endowed with but not in a straightforward fashion governed by reason, and, like him, he had a healthy respect for the role that came to be played in human affairs by fear. But he did not regard fear as the only passion to be reckoned on. Nor did he did think it primordial. There are "laws of nature" rooted in "the constitution of our being," he asserted; and, as Hobbes had suggested, "to know them well, one must consider" the situation of the individual "before the establishment of societies. The laws of nature are those which he would receive in such a state." But, he insists, such a man would not be instinctively aggressive, as Hobbes contended. In the beginning, he would not be sufficiently knowledgeable and speculative to be able to imagine establishing his own dominion. Instead, he would be acutely sensitive to his own weakness, timid, and instinctively inclined to keep the peace and seek nourishment, which would be for him natural laws. He would also be sociable—drawn to his own kind initially by an awareness of reciprocal fear, by "the pleasure that an animal feels at the approach of an animal of its own kind," and by "the charm that the two sexes inspire in one another by their difference"—and "the natural appeal" that human beings make to one another would constitute for him a third law. The knowledge attained in the course of human interaction would constitute yet another bond, "and the desire to live in society" would be for primitive man "a fourth natural law."

Furthermore, unlike Hobbes, Montesquieu rejects a contractual theory of social relations**.** Man, in the state of nature, uniformly seeks society; the social instinct is innate within humanity. While Hobbes saw man's natural state as brutish, Montesquieu saw the social condition of man as preeminent; the state of war only results from the breakdown of the pre-existing social state. Moreover, Montesquieu rejected Hobbes' view of the law as the mere command of the sovereign; law is pre-existent and superordinate to political law.

Human Nature and the Types of Governments

Montesquieu's in enunciating his doctrine of separation powers assumes that there are intrinsic links between human nature, laws and the types of governments that exist in different nations. This is not to say that he is an essentialist or that like the Greeks he believes that human nature, human laws and the types of governments are fabricated by nature. In modern parlance, Montesquieu would be said to be a social constructionist, that is, he holds the position, that human nature, human laws and the corresponding forms of governments produced by these laws, are the products of sociological factors such as environment, geography, whether, religion, etc.

The overall point that Montesquieu seeks to make by way of the hypothetical history he constructed about the state of nature is that nature does, indeed, have a teaching for man, but that this teaching is as complex as the skein of human passions, that its practical dictates differ from one situation to another, and that, in politics, there is no one passion to be reckoned on, no single, all-encompassing imperative to be fulfilled, and no form of government that is always and everywhere superior. In this regard, his outlook was not unlike that evidenced in *The Statesman* by Plato, who acknowledged the existence of a multiplicity of disparate goods, who compared statesmanship with weaving, and who believed that, in lawgiving and in the formulation of public policy, there is no substitute

for prudence.

Hence, Montesquieu may have endorsed a species of universalism when he defined "law, in general," as "human reason, insofar as it governs all the peoples of the earth," but he insisted at that same time on qualifying this claim. To "the political and civil laws of each nation," he attributed a measure of rationality. Despite their disparity, he said, these laws are "nothing other than the particular cases to which this human reason applies itself." In explaining what he had in mind, Montesquieu argued that "reason has a natural" and even "a tyrannical empire" over man. If, he observed, "one resists" reason, "this resistance" itself will nonetheless prove to be the foundation of reason's "triumph." Circumstances will force a reconsideration. "Just a little time," he writes, "and one is forced to return to her side." To reasoning as a process, to trial and error, and to piecemeal reform, he was, in consequence, the greatest of friends, and this is why he thought it possible, on the basis of the "principles" that he had with great effort articulated in his book, to specify the logic or *esprit* evident in laws produced in the course of time by the repeated application of "human reasoning" to "particular cases." But, by the same token, to rationalism left in politics unchecked, unbridled, and unobstructed, he was firmly, even fiercely opposed. It was his aim "to prove" that "the spirit of moderation ought to be that of the legislator (p. 13)". Thus, for Stephen A.:

> Montesquieu was trained in the law, and he had once been a judge. His outlook resembled in certain respects that of the English jurist Sir Edward Coke. Neither was inclined to embrace abstract schemes, but both believed that natural right informs the evolution of the law (p. 24).

Even more distinguishing of Montesquieu's political ideals are the fact they are based on the principle of laws fitting to the general spirit of a particular people. Hence the title of the work is not 'On Laws', for it is not a set structure. Unlike Locke, a favourite for comparison, Montesquieu did not see a universal system off law and government as valid, for what makes a particular system good in one state may have the opposite effect in another. The aptness of a given law depends, for a large part, on its coherence with the characteristics of the people and the place it governs. In book 19, two types of tyranny are described – one real and one of opinion. The latter is specifically felt 'when those who govern establish things that run counter to a nation's way of thinking' – so demonstrating the significance of the work's focus on 'political particularism', as it has been termed (p. 46). The ideal legislator, therefore, cannot simply enforce liberal laws and institutions to change the mores and manners of any particular people, as this would oppose the general spirit – Keega instead, the general spirit must first be prepared for better laws, or fear and insecurity will ensue (p. 597).

There was, however, an obstacle to the sway of what Montesquieu had in mind when he spoke of moderation, and it was exemplified in different ways by Hobbes and Locke. It is "a misfortune attached to the human condition," Montesquieu observes, but one cannot deny the fact:

> Great men who are moderate are rare; and as it is always easier to follow one's strength (*force*) than to arrest it, within the class of superior people, one may

> perhaps with greater facility find people extremely virtuous than men extremely wise. The soul tastes so much delight in dominating other souls; even those who love the good love themselves so strongly that there is no one who is not so unfortunate as to still have reason to doubt his own good intentions: and, in truth, our actions depend on so many things that it is a thousand times easier to do good than to do it well (p. 620).

In this passage, Montesquieu draws attention to the fact that there is something inherently immoderate and perhaps even tyrannical at the heart of all forms of political idealism and public spiritedness. A little later, in the same passage, he spells out the consequences.

> There are, he observed, certain ideas of uniformity, which sometimes lay hold of men of great spirit, such as Charlemagne, and which infallibly strike small spirits, who find in it a species of perfection that they recognize because it is impossible that they not discover it: in public administration the same weights, in commerce the same measures, in the State the same laws, in all parts the same religion (p. 574).

Montesquieu himself doubted whether uniformity was "always without exception *à propos*"; and, by way of posing a rhetorical question, he insisted that "greatness of genius consists more in knowing in what case uniformity is needed and in what case differences are required (p. 567)." In contrast with the champions of enlightened despotism and with those who flatly denied the legitimacy of absolute monarchy, he thought the political and social diversity produced in different lands by the process of trial and error perfectly consistent with the dictates of reason. When he suggested that governments need to be tailored to the dispositions of the peoples for whom they are framed, he added that it would be "a very great accident if the laws of one nation" were "able to suit another."

To explain why this should be so, Montesquieu outlined the overall argument of his work. First, and most important, he contended, one must consider the laws in relation "to the nature and to the principle of the government which is established, or which one wishes to establish," for that there be some such *rapport* is a matter of necessity: "either the laws form this government, as do the political laws, or they maintain it, as do the civil laws." Then, he added that one can also expect the laws to be related quality of the terrain, to the country's situation, to its size; to the species of life adopted by the peoples, whether they be husbandmen, hunters, or herdsmen; it should be related to the degree of liberty that the constitution is able to tolerate, to the religion of the inhabitants, to their inclinations, to the riches they possess, to their number, their commerce, their mores, their manners. Finally, the laws have relations with one another; they have relations with their origin, with the object of the legislator, with the order of things on which they are established. "It is," he concluded, "from all of these perspectives that one must consider the laws (pp. 18-59)." and, of course, that is precisely what he did in his massive tome.

On the whole, for Montesquieu, the criterion of proper government is not, as with Plato, a transcendent idea of good, but rather an empirical sense of social relations. Laws must be

sociologically and culturally relevant for the particular society and cannot be transplanted from one nation to another. Montesquieu explicitly denied that any particular form of government is required by nature; every government is a unique product of its natural and social environment. From this relativistic frame of reference, he sought to prove the impossibility of a universal governmental solution to social problems.

Lord Acton sarcastically suggested that the idea of explaining laws – and by extension, political regime – "by the barometer and the latitude" was to make Montesquieu's praise of England "less injurious to French patriotism." More seriously, he claimed that it served the thinker as a means to reconcile himself with monarchy in France, however odious it was in his time (p. 7). Lowenthal suggests far more serious motivations. According to him, Montesquieu rejects the quest of ancient and medieval thinkers for the best theoretical as well practical regime. There is no such thing as the best order. All depends on particular conditions. Ultimately, this leads to relativism, even if on the surface this concept opposes subjectivity and appears in flair of objectivism (p. 516).

en honourable conduct and its proper rewards. In a functioning monarchy, personal ambition and a sense of honour work together. The monarchy's great strength and the source of its extraordinary stability: whether its citizens act from genuine virtue, a sense of their own worth, a desire to serve their king, or personal ambition, they will be led to act in ways that serve their country. A monarch who rules arbitrarily, or who rewards servility and ignoble conduct instead of genuine honour, severs this connection and corrupts his government.

Nevertheless, Monarchy for Montesquieu has a great advantage over a republic because of its unity of power. But since too hasty decisions could be damaging, laws and legal magistrates should show slow the process down. Monarchy enjoys even greater advantages over despotism – the state is more fixed and steady, and avoid excess, and caprice typical for despotic authority (p. 507). Monarchy is best suitable for medium sized states.

Meaning and Origin of the Concept.

The concept of government that is hinged on the rule of law and democracy and especially the presidential system of government as practiced in Nigeria must consist of the three great arms of government, namely; the executive, the legislature and the judiciary. As Aihe in his book, rightly stated that such division of labor is a condition precedent to the supremacy of the rule of law in any society.

It must be noted that; the doctrine of separation of powers has been developed over the centuries. The evolution of the concept of separation of powers can be traced to the British parliament's gradual assertion of power and resistance to decrees during the 14th century. James Harrington, an English scholar was one of the first modern philosophers to analyze the doctrine of separation of powers. Harrington in his essay "Common wealth of Oceana" (1656), built on the works of earlier philosophers like Aristotle, Plato and Machiavelli, described Utopian political system that included a separation of powers in his Second Treatise on Government (1690), John Locke an English political theorist, gave

the concept of separation of powers more refined treatment. John Locke argued that the legislative and executive powers were conceptually different, but that it was necessary to separate them in government institutions. However, in Locke's conception, Locke's judicial power played no significant role.

The modern idea of the doctrine of separation of powers was vigorously explored in the "Spirit of Laws" (1748) by Baron de Montesquieu a French political writer in his work. He based his exposition on the British constitution of the first part of the 18th century the way he understood it. As a doctrine, it has been interpreted as "where an individual occupies the position of both the executive and the legislature, there is danger of the legislature enacting oppressive laws which the executive will administer to attain its own ends". Montesquieu in the process outlined a three-way division of powers in England amongst the parliament, the king and the courts, even though such a division were not in existence at that time. Montesquieu apparently believed that the stability of the English government was due to this practice of separation of powers despite the fact that he did not use the word "separation".

It must be realized that Plato, Aristotle, Harrington, Locke and Montesquieu and other commentators saw the concept of separation of powers as a way to eliminate the arbitrary powers to check dictatorial tendencies.

A Nigerian renown constitution lawyer, Professor Nwabueze while emphasizing the importance of the principle of separation of powers says:
concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute power is by its very nature arbitrary, capricious and despotic limited government demands therefore, that the organization of government should base on some concept of structure, whereby the functions of law making, execution and adjudication are vested in separate agencies, operating with separate personnel and procedure. We are not prepared, write vile, 'to accept that government can become, on the ground of "efficiency", or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships. By separating the function of execution from that of law making, by insisting that every executive action must, in so far at any rate as it affects an individual, have the authority of some law, and by prescribing a different procedure for law making the arbitrariness of executive action can be effectively checked

Hence, separation of powers is presently understood to mean that, none of the legislative, executive and judicial powers is able to interfere with the others. For example, the judges should be independent of the executive and legislative theory or that the same persons should not hold posts in more than one of the three branches. For example, that one branch of government should not exercise the functions of another. That is, the executive should not make laws which fall within the purview of the legislative.

That be as it may, closely related to this theory is the "doctrine of checks and balances". This doctrine states that, governmental power should be controlled by overlapping

authority within the government and by giving citizens the right to criticize state actions and remove officials from office.

Under Civilian Regime 1960 And 1963

The constitution that were in place during the first republic were the independent constitution of 1960 and the 1963 republican constitution. These constitutions provided for an obvious separation of powers though not as sharp as that of the 1979 constitution. For example, the office of the Governor –General and the President under the 1960 and 1963 constitutions respectively was established pursuant to Chapter IV of both constitutions. Chapter V of the aforementioned constitutions provided for the parliament while Chapter VIII ousts the judicature. The manner of exercising of the executive authority of the President and the executive authority of the Governors were contained in Chapter VI.

It should be noted that, there was no sharp or elaborate separation of powers under those two constitution as mentioned above. The reason for this is not far-fetched, it is axiomatic that the independent constitution was promulgated vide an order in council made by the colonial masters for the colony of Nigeria while the 1963 constitution merely effected a change from monarchy to republicanism. This made a wide difference between the 1979 constitution which was fashioned in line with American constitution and both the independence and republican constitution of the first republic. The two constitution were based on the British model of parliamentary system of government. It should be noted that in the operation of the 1963 constitution the civilian government also displayed its disdain for the principle of separation of powers when the federal parliament, passed the constitution of western Nigeria. [Amendment law] reversing by legislation a privy council judgement which found that chief Akintola had been validly removed as the premier of western Nigeria. This act justifies the fact that, the disregard of the principle is not peculiar to military regimes alone. Under the 1960 and 1963 constitution, members of the executive arm of government must be elected into the respective houses either at the federal or regional level before qualification to hold executive positions. This was a clear departure from the position in the 1979 constitution where provisions were made that an elected legislator that accepted an executive post should relinquish his elective position.

1979 Constitution.

The 1979 constitution which was in operation during the second republic provided for a clear separation of powers. This is contained in section 4, 5, and 6 of Chapter V of the said constitution which established the National Assembly, the composition of the senate, the House of Representatives. President of the senate and so on. While chapter VI provides for the executive arm of government and chapter VII contained the aspect relating to the judicature. This constitution as earlier mentioned provided for distinct and specific functions for each organ of government, unlike the previous constitutions. Here it can be seen that the executive under the 1979 constitution is to execute the law made by the legislature and should not venture into law making. The legislature is to make laws while the judiciary is to adjudicate and interpret the laws made by the legislature. None of the government should dabble the into the arena outside it purview of function. The separation of power enshrined into the 1979 constitution was also given a judicial

interpretation in the case of Attorney General of Bendel v. Attorney General of the Federation and 22 Ors, Where the supreme court held: in my view the legislative powers commence when the bill is introduced in either house of the national assembly and ends when the Bill is submitted to the president for his assent. I hold the view that what the president in assenting to a bill, is performing executive powers within the legislative processes. If, in the process of the exercise of legislative powers by the national assembly, there is such a constitutional defect as to; as to lead loan interpretation to the effect that a bill was not passed according to law, that is, it does not follow the procedure laid down under the constitution for the passing of a bill, then the bill which has passed through such exercise is null and what the president assents to, in exercise of executive powers within the legislative process is a nullity. The supreme court in exercise of its jurisdiction under section 212, when there is a dispute under the section, could adjudicate on the issue. And this constitute the limitation on the sovereignty of the legislation' (p.12).

The whole essence of the doctrine is to give room for checks and balances and by so doing, encourage healthy influence or control by one over the activities of others is accepted. As rightly put by Aihe and Oluyede in their book 15; what the whole idea means is that neither the legislative, executive nor judiciary should exercise the whole or part of another's powers, but does not excludes influence by one over act of another'.

The doctrine of separation of powers under the 1979 constitution was not strictly followed by the politicians in power as well, like their military counterparts. The civilian regime also strove hard to render nugatory the provision of the constitution as rightly pointed by prof. Nwabueze in his book18: where he declared that, the legislative arm of government was not independent of the executive arm during the second republic, that is, October 1979-December 1972. These according to him was sequel to the dominate to the party in power, particularly the president and governor, who by their position and influence, where in a position to use the power of patronage to subdue members of the legislature. This took the form of award of contract appointment to boards and straight forward bribery and cash land allocation, distributorship of scarce commodities, provision of social amenities, like roads, schools, hospitals, pipe born water to the member constituencies. Therefore, the 1979 constitution no doubt made an explicit and elaborate provisions for separation of powers like with united states counterparts which was its model. However, those that operated the constitution as indicated above contributed to its ineffectiveness at that point in time.

Separation Of Powers Under The 1999 Constitution

Consequent upon the controversies surrounding the making of the 1999 constitution, unlike the 1979 constitution which gained overwhelming acceptance of the vast majority of Nigerians. An attempt will be made to look at the 1979 constitution visa vis 1999 constitution in a bid to see if there's any remarkable difference or innovations, especially as regards the provisions of those constitutions that deals with separation of powers. In the same vain, an attempt will be made to examine briefly those provisions under the 1999 constitutions and make necessary comments on them.

Furthermore, an attempt shall be made to succinctly appraise the workability and the effectiveness of the principles of separation of powers as enshrined in the 1999 constitution under this political dispensation.

The 1999 constitution is a replica of the 1979 constitution with the introduction of few new provisions noticeable therein, such as environmental objectives, duties of the citizens, dual citizenship, right to acquire and own immoveable property anywhere in Nigeria.[13] Also, there are provisions for additional qualification of membership of parliaments both at the federal and state level, recall and remuneration and an elaborate provision on political parties.[14] In the aspect of judiciary, there is a creation of the national judicial counsel which see to the appointment and removal of judicial officers among other responsibilities. Apart from the few new provisions and innovations contained in the 1999 constitution, one can state without mincing words that the 1999 constitution is a verbatim reproduction of the 1979 constitution. In view of the forgoing, the provisions of the 1999 constitutions that relate to the principles of separation of powers remains unchanged as we have them under the 1979 constitution.

The Legislative Powers:

Section 4 of the constitution provides as follows: the legislative powers of the federal republic of Nigerian shall be vested in a National Assembly for the Federation, which shall consist of a senate and a house of representative. The National assembly shall have powers to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part one of the second schedule to this constitution. The legislative powers of a state shall be vested in the House of assembly of the state. The House of Assembly of a state shall have powers 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; any matter not included in the exclusive legislative list set out in the part one of the second schedule to this constitution. Any matter included in the concurrent legislative list set out in the first column of part two of the second schedule to this constitution to the extent prescribed in the second column opposite thereto, and any other matter with respect to which it is empowered to make laws in accordance with the provisions of these constitution. In view of the above provisions of the 1999 constitution it is unequivocally stated that, the functions or powers of law making are vested in the national assembly and houses of assembly of the state for the federation and state respectively. However, the constitution also provides for a clear demarcation between the areas which can be legislated upon by the national assembly and the state house of assembly. These are contained in the exclusive and concurrent legislative list.[15] The national has exclusive powers of law making with respect to any matter included in the exclusive legislative list, to the exclusion of the houses of assembly of the state, while both the national assembly and the houses of assembly shall exercise their legislative powers on those matters contained in the concurrent legislative list.

A closer at the legislative list especially the exclusive legislative list reveals that the federal government enjoys overwhelming power to legislate virtually on every subject. This is a clear indication that the federal is dominating at the expense of the state, this

against the principle of federalism.

Those items listed in the exclusive legislative list of the 1999 constitution are now 68 compared to the 1979 constitution with 66 items and in contra distinction with the 1960-1963 constitutions with just 45 items. The argument at this juncture is that some of the matters in the exclusive legislative list ought to be within the competence of the state alone. It is also observed that some items contained in the exclusive legislative list should ordinarily be placed in the concurrent legislative list. It is argued in some quarters that the issues involving borrowing of money by a state, local government, company or any other entity should be placed in the concurrent legislative list; so that both the federal and state governments can legislate on those matters.

In my own view, issues like evidence issued in court contained in item 23, labour, trade unions, industrial relations in item 34 and the local government elections ought to be in the concurrent legislative list instead of the exclusive list. The reason is, why should federal arm of government become an alpha and omega which must have a say on every aspect of life of this country? There should be avenue where our co-existence as a nation should be reviewed so as to pave the way for proper and true federalism.

Executive Powers:
The 1999 constitution provides inter alia as follows: subject to the provision of this constitution, the executive powers of the federation shall be vested in the president and may, subject as aforesaid and to the provisions of any law made by the national assembly, the exercise 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 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, powers to make laws. Subject to provisions to this constitution, the executive powers of the state, shall be vested in the governor of that state, and may subject, subject as aforesaid and to the provisions of any laws made by a house of assembly, be exercised by him either directly or through the deputy governor and commissioners of the government of that sate or officers of public service of the state: and shall extend to the execution and maintenance of this constitution, all laws made by the house of assembly of the state and to all matters with respect to which the house of assembly has for the time being powers to make laws.

In view of the above constitutional provision, it can be rightly said that the powers of the executives neither encompasses law making, nor adjudication but strictly limited or legislature. The executive powers of the federation are conferred on the president and according to the constitution, can be delegated to the vice president, ministers or officers in the public service of the federation. While the state governors shall exercise the executive powers of the state either by himself or through the deputy governor, commissioners or officers in a public service of the state.

Therefore, under the 1999 constitution like the 1979 constitution there is unambiguous provisions for separation of powers among the three arms of government which the

legislature, the executive, arid the judiciary their distinct are explicitly spelt out in the constitution, and on no account should one carry out the function of another save and permitted by the constitution itself.

Judicial Powers:

The constitution makes extensive provisions for the judiciary as, the judicial powers of the federation shall be vested in the court to which this section relates, being courts established for the federation. The judicial powers of a state shall be vested in the court to which this section, being court as established subject as provided by this constitution for a state. The judicial powers vested in accordance with the foregoing provisions of these section shall extend not withstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law; shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligation of that person.[16] The judiciary as the third arm of government exercise its powers of adjudication and interpretation of the constitution and law made by the legislation through the courts created by the constitution and other courts as may be established by the national assembly or any house of assembly. Therefore, the judiciary and courts may be used interchangeably as they imply the same thing. As an addendum to my position that, the function of the three arms of government are distinct, one cannot find in this aspect of the constitution related to judicial powers anything connected with the functions of other two branches pf government. This is an indication that the constitution as it is today though not generally acceptable to populace still made ample provisions for a clear separation of power among the legislature, the executive and the judiciary. And unless reviewed, as the mechanism of that is being set in motion by the constitution of some committees by the president and the national assembly to look into it. The constitution provides as follows: the 1999 constitution will remain in operation as our ground norm in this country despite whatever anomalies that is surrounding its existence. At this juncture, it is important to state that, despite the clear separation of powers provided for under the 1999 constitution, which distinctly made provisions for the respective functions of the three arms of government interdependent among the aforementioned arms of government is desirable in other to ensure checks and balances. As rightly pointed out, no man is an island of himself, the legislature, the executive and judiciary must relate and cross parts in the discharge of their functions, towards ensuring good governance in the interest of the populace that voted them into power and which must reap the dividends of democracy.

In view of the above, there is a need for interaction and control of one arm of assembly not to make laws to oust the jurisdiction of the court. The legislature is also estopped from making any law relating to the criminal offences which have a retrospective effect. In other words, the exercise of their legislative powers are made subject to the jurisdictions of the court of law (p.17). It was in light of the forgoing provision of the constitution that the supreme courts condemned the promulgation of the decree purporting to oust the jurisdiction of the courts during the military regime in the case of Attorney General of Western states v Ors,[18] amongst other authorities to that effect. Definitely such an attitude will be vehemently condemned during the civilian dispensation.

Even though the tree arms have separate powers but there is no water tight compartment in between them. There are areas of the constitution which makes interaction between the three arms inevitable for the successful execution for the continuance of the provisions of the constitution. This is why the president, though the commander-in-chief of the armed forces of the federation cannot declare war without the prior approval of the legislature at the same time legislature, even the judiciary must request for any security agents for their protection from the president. Another area of interest is the money bill which can only emanate from the executives, it must pass through the legislature before final assent by the executive. But if the president within 30 days after the presentation of the bill to him, fails to assent or where he withholds assent then the bill shall again be presented to the national assembly sitting at a joint meeting, and if passed by a two third majority of the members of both of the houses at the joint meeting, the bill shall become law and the assent of the president shall no longer be required.

The purport of the elucidation of the manner and how the three arms of government relate with one another, is to draw the necessary inference that, albeit, the three arms must exercise control over the others. This position as discussed earlier on depicts that, neither the legislature, the executive nor the judiciary should exercise the whole or an integral part of another's powers as conferred upon them by section 4, 5, and 6 of the 1999 constitution. Be that as it may, this does not exclude influence or control by one over the acts of another and ensure the desired checks and balances.

Checks and Balances in the 1999 Constitution

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

> Separation of powers means that one of three departments of government must not have the whole of another branch's powers vested in it nor obtain control over another branch. But even if they are separated, they must be connected by a system of checks and balances (pp. 644-645).

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

branches of government in Nigeria apply their powers of checks and balances will now be made.

The Practice of the Doctrine of Separation of Power in Contemporary Nigeria

A careful reading of the doctrine of separation of powers presented in the previous chapter and this chapter reveals that Nigerian constitutions, especially the 1999 Constitution is a robustic approximation and one can even go as far as saying, improvement of Montesquieu's proposal in the Spirit of the Law. However, if Nigerian constitution is a remarkable attempt to concretize Montesquieu's schematization in a grand norm, so also is the American constitution for Montesquieu is universally acclaimed a major influence on the framers of the constitution. Such remarkable similarities between Nigerian constitution on the principle of separation of powers and Montesquieu's proposal on the one hand, and between the former and American democracy, on the other hand, should not be a surprise to anybody. This as noted already is because American democracy is fundamentally and decidedly influenced by Montesquieu's separation of powers doctrine, and Nigerian democracy is fundamentally an imitation of American democracy. As observed before, Nigeria at independence started with the British Westminster type of parliamentary democracy. It eventually abandoned that and adopted the American presidential system. As such, if Montesquieu influenced the American system, it is only natural that it will influence the Nigerian system as well.

Nevertheless, from the sketchy comparative analysis of the American and Nigerian democracies made in chapter one and the historical review of Nigerian democracy carried out in this chapter it is obvious even to a blind man, that American democracy is everything Nigerian democracy is not, in terms of workability. The basic reason for this is that why the American system makes serious efforts to concretize Montesquieu's proposal in real life, Nigerian doctrine of separation of power exists to a great extent on the papers of the Nigerian constitution. In other words, as lofty as the doctrine appears in theory, in practice it has suffered several setbacks which officers of the executive, legislative and judicial arms of government are responsible for. More often than not, the challenges faced by the doctrine arise when the various organs of government carry out their constitutional function of checks and balances on each other. In appraising these challenges, the researcher will restrict himself to the challenges faced by the doctrine since the return to the fourth republic in 1999.

Conclusion/Suggestions

In conclusion, separation of power provides a basis for the adoption of structure processes and control which protects liberty now and in the future. It guards against broad spectrum of ill like absurd judgements avaricious and ambitious self-serving behavior and inefficient performances of functions. As our new system of government involves new conventions, political practices and events at times needs legal rules. Will need to be devised to protect the liberty of the people and our nascent democracy. The doctrine of separation of powers therefore provides the justification for these measures and helps to determine their nature and scope. Apparently, there is the need to monitor our political system, be vigilant about our liberty and advocate new measures when the liberty is threatened.

The executives and the legislature at federal and state levels are urged to close ranks and work as a team in a bid to meet the aspirations and yarning of the masses. It is by so doing that they will justify the confidence repost on them by the electorate that voted them into power. There must be mutual respect between the executive and the legislature since honor begets honor, one must not make an unwanted incursion into the functions of another but to work together as partners in progress.

It is suggested therefore that; the state should adhere to the theory of separation of powers as is the practice of other democratic states in the world. Taking account of our historical past and the urgent need to modernize where necessary. Any dictatorial tendency should be nipped on the bud. Secondly, it will help to dispense with executive usurpation of powers, checks corruptions of elected officials and manipulation of electoral processes.

It is also suggested that, provisions should be added for a residual legislative list. This will eliminate the conflict between the federal and state government on the area of their legislative competence. Also, more powers should devolve to the state and local government as against the position now.

It is also suggested that in other to practice a true federalism, like what is provide in the first republic, states should have their constitutions but to be made subject to the national constitution.

Also, some of the items contained in the exclusive legislative list referred to in this paper, which ought to be in the concurrent list should be reviewed and put in the concurrent list.

Finally, the independence of the judiciary should be granted at all times. Also the judiciary must be properly funded. The judiciary should attain hundred percent autonomy for all its activities.

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