

SEPARATION OF POWERS IN NIGERIA: AN ANATOMY OF POWER CONVERGENCES AND DIVERGENCES*

Abstract

There are presently in Nigeria disputes and controversies concerning the meeting points of the powers allotted the various organs of government. The executive arm of government today appears to dwarf the other arms of government in the amplitude and plenitude of powers of wields. The legislative and judicial arms of government appear to be at the receiving end of the endless erosion of their powers by a blossoming state bureaucracy or executive expediency. There are however certain salient areas in the interface or interplay of powers where the three arms of government must converge or meet for the orderly regulation or governance of our society. This paper reviewed the hallowed concept of separated powers of government, the meeting points of the powers and their areas of dislocation. It also examined the practice in the Nigerian polity vis-à-vis some other jurisdictions of the powers of government across the three arms of government in Nigeria. Some recommendations that will uplift the law and practice of separated powers in Nigeria were made.

Keywords: *Separation of Powers, Nigeria, Convergences, Divergences*

1. Introduction

‘It may be too great a temptation to human frailty, apt to grasp at power for the same persons who have the power of making laws, to have also in their hands the power to execute them whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantage’.¹ Complementing the above, a French Jurist and Philosopher, Baron De Montesquieu, in explaining the concept of separation of powers opined that:

Political liberty is to be found only when there is no abuse of power. To prevent this abuse, it is necessary from the nature of things that one power should check on another When the legislative executive and judicial powers are united in the same person or body There can be no liberty Again there is no liberty if the judicial power is not separated from the legislative and executive There would be an end of everything if the same person or body, whether of nobles or of the people, were to exercise all three powers²

The focus of this study is to review / appraise the three governmental powers in their interdependence and divergences as they work the tightrope of balancing each other for the good of our society. Since government, in the modern form, must be composed by the three organs, they must be confined to respective spheres of authority through a strict balancing act, through credible checks and balances. Little wonder, John Adams stated that: ‘A legislature, an executive and judiciary comprehended the whole of what is meant by government. It is by balancing each of these powers against the other two,

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¹ John Locke, *Second Treatise on Civil Government*, Chapters 12-13 quoted in Wade & Philips, *Constitutional and Administrative Law*, 9th ed. (Bradley) P. 45.

² Baron De Montesquieu, *Esprit des lois* (Spirit of the Laws) chapter Xi (11) pp.3-6. In the words of Ikenga K.E. Oraegbunam ‘the term separation of powers is an influential concept in modern democracies. It denotes the practice of dividing the powers of a government among different branches thereof. Like the principle of ‘division of labour’ in Adam Smith’s economics, the doctrine of separation of powers is geared towards efficiency but also more importantly towards guarding against abuse of authority’ – See Ikenga Oraegbunam, ‘Separation of Powers and Nigerian Constitutional Democracy’ culled from *Vanguard*, January 19, 2005, www.dawodu.com/oraegbunam/.htm Visited on 15th July, 2016.

that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom reserved in the Constitution³ It therefore, follows that the powers of any government must be divided into three-legislative, executive and judicial. The 1999 Constitution of Nigeria (as amended) upholds this classification or division in Sections 4, 5 and 6. A poser that readily surfaces here is: ‘Does the concept of Separation of Powers admit of total or complete division of powers. It does seem that there can be complete diffusion of powers in any workable government at all. As Ojo opined, ‘A complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another’.⁴

2. Importance of Separated Powers of Government

Much juristic ink has flowed in the quest to find out what the true import or description of the concept or doctrine is all about. 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 government⁵

The Nigeria Supreme Court was expounding this concept when it held in *Ugba v Suswan*⁶ 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...

There is absolutely no doubt that the Nigerian Constitution acknowledge 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.⁷ Powers of government, under the Constitution, in Nigeria is divided into the legislature, the executive, and the judiciary⁸

The concept of separation of powers is amenable to both horizontal and vertical classifications. Horizontally, our focus in this article it denotes how powers of government are shared between the executive, the legislature and the judiciary. While the executive executes and approves the laws made by the legislature, the judiciary interprets the laws. Vertically, it denotes the allocation of powers

³ Quoted by the Judge in *Agbaje V COP* (1969) 1 MNLR 176 at 177.

⁴ See Abiola Ojo, ‘Separation of Powers in a Presidential System of Government’ in *Public Law Journal*, 1981 p. 105.

⁵ Ese Malemi, *Administrative Law* (Lagos, Princeton Publishing Co, 2008) 3rd edition pp. 56-57.

⁶ (2005) 1 WRN 1 at 64 Per Rhodes – Vivour JSC. See also *Gov., Ekiti State* (2015) 6 WRN 120 at 160 – 165. *Asogwa v Chukwu* (2003) 17 WRN 71.

⁷ See S. 14 (2) (a) and (b) of the 1999 Constitution (as amended)

⁸ See Sections 4, 5 and 6 of the 1999 Constitution.

between the federating units or levels of government. This refers to the allocation or sharing of governmental powers between the federal, state and local governments in Nigeria. I am mindful of the criticism that local government councils in Nigeria are mere appendages or vessels of the states^{17a}. They have been labeled ‘glorified agencies’ ‘or errand boys’ of their state governments. A bill to liberate them is currently before the National Assembly and have just (in October / Nov. 2016) passed the Second Reading in the Senate. Let the fate of the 4th July, 2013 of the Senate. Committee Report on Constitution Review not befall this attempt. Autonomy for the councils, while recognizing them as a third tier of government with elected officials and tenure of years is best for us all.

3. Horizontal or Cooperative Separation of Powers

Malemi opined that ‘the whole idea of separation of powers is that:

1. Neither the Legislative, Executive nor Judiciary should encroach on, or exercise the powers of another branch. And, no branch is subject to control by the others within its sphere of power but
2. This does not exclude influence, review or requirement of approval of certain things by one branch of government over the acts of another as a check and balance. Also, it does not prevent the exercise of the power of another branch where it is an exception to the doctrine of separation of powers⁹.

The whole purport or essence of the doctrine of separation of powers is the prevention of autocratic governance or tyrannical rule, despotism and oppression. Thus, Hon. Justice Brandeis captured this essence when in *Myers v. United States*¹⁰ he ruled that ‘the doctrine of separation of powers was adopted ...not to promote efficiency per se but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of government powers among the three departments, to save the people from autocracy’. Okeke had stated that ‘absolute power leads to tyranny. Tyranny is a reflection of the depraved nature of the average man who is generally bad. With absolute power he can be more dangerous than a python, a viper, a lion or a ravenous wolf.... absolute power concentrated on one person is the harbinger of tyranny; tyranny by reason of cause and effect, promotes the burning desires to be absolutely free to do as one please which in turn leads to anarchy’¹¹ Taiwo stated that ‘one of the significant objective achieved by the observance of the doctrine of separation of powers, according to the political theorist, is the prevention of concentration of governmental power in a single body or person’¹² Arising from this quote, the question that begs for an answer or explanation, at this juncture is: Can there ever be a complete or straitjacketed separation of governmental powers (Executive, Legislative or Judicial) in any clime or society? It is practically impossible to have a watertight separation of governmental powers in the sense of absolute non-encroachment in the allowed sphere or domain of powers of each branch¹³. Hence, our question must be answered in the negative since in the words of Malemi, ‘it is not possible that each arm should remain totally independent and supreme in its sphere of authority without some blending or any check

⁹ Ese Maleri op cit. p.56.

¹⁰ (1962) 272 US 52 Earl Warren CJ had in *USA. Bromim* 381 US 437, 443 (1965) opined that ‘the separation of powers under the American Constitution was obviously not instituted with the idea that it would promote government efficiency. It was on the contrary, looked at as a bulwark against tyranny’. See also John Ikongbeh JCA ‘Separation of Powers under the Constitution of Nigeria 1999: A Critical Review of its Application since 29th May, 1999’ in *Nigeria Law Journal*, Vol. 1 No. 1, 2003 p.92.

¹¹ G.N Okeke, *Introduction to Consular Immunities and Privileges, Jurisprudence and Constitutional Law* (Enugu, Nolix Educational Publications (Nig) 2010) p.195

¹² Ademola Adetayo Taiwo, *Separation of powers; A key Principle of Democratic Governance* (Ibadan, Ababa Press Ltd, 2013) p.32.

¹³

and balance. Therefore, separation of powers does not necessarily mean equal balance of power among the three arms of government. To be meaningful, power must create room for overlapping, co-operation and coordination among the arms so that government business will not come to a halt due to rigidity and opposition'. The three arms of government are interrelated and interdependent. They are partners in good government and strict separation of power will hamper the smooth working of government.¹⁴ The interdependence or interconnectivity of the three powers of government cannot be over stressed as powers must be interlinked for there to exist a smooth running of governmental affairs. James Madison had in the Federalist Papers No. 48 advocated that 'Unless these departments be so far connected and blended as to give to each a constitutional control over the other, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained'.

4. Constitutional Checks and Balances--Power Convergences

The significance of checks and balances in the allocation and use of government powers is underscored by the fact of the sharing of powers. Such a system 'allows each of the arms to defend its position in the constitutional framework of government. It works if it is allowed to be flexible. Each arm of government must recognize the limits to which it can go and enforce these limits'¹⁵. There is absolutely no doubt that the 1999 Constitution of Nigeria (as amended) is replete with convergences of government powers shared between the three departments of government. Ojo had this in mind when he wrote that:

The...Constitution conceded in many areas the fusion not only of powers but also of functionaries and functions. The need to integrate the dispersed powers into workable government was realized. While it entrenched separateness it insisted on interdependence, while it provided for autonomy, it deferred to reciprocity. In one's view, the controversy about the doctrine of separation of powers has moved from the desirability or need for it to the technique for control of powers¹⁶.

In view of the above facts, it is constitutionally provided that the President in the exercise of his abundant powers cannot declare War on any other country except with the approval by resolution of both Houses of the National Assembly sitting in a Joint Session. This is the provision of S.5 (4) a of the 1999 Constitution (as amended). It is also provided that except with the prior sanction or approval of the Senate, no member of the Nigerian Armed Forces shall be deployed on combat duties or to fight outside Nigeria¹⁷. Again, under Section 8(1) of the Constitution the National Assembly in conjunction with the Executive can create states and local government areas. Budgeting for or revenue allocation to the created states or local government areas is an executive function. Though states can create local governments constitutionally, the National Assembly must ratify such creations and no additional revenue accrues to the newly created local governments and their names cannot be gazetted without the approval of the National Assembly¹⁸. Under Section 12(1) of the Constitution, no treaty between Nigeria and another country shall have the force of law except to the extent to which any such treaty

¹⁴ Ese Maleni op cit p.56 Justice Jackson of United States Supreme Court opined that it is this doctrine (separation of powers) that 'enjoins upon its branches (of government) of separateness, but interdependence, autonomy but reciprocity' in *Youngtown Sheet and Tube Co.v. Sawyer* (1952)343 US 579-635.

¹⁵ Hon. Justice Crabbe (Supra).p.5

¹⁶ See Abiola Ojo, *Constitutional Law and Military Rule in Nigeria* (1987) p.149. Also quoted in A.A. Borokini 'The Doctrine of Separation of Powers and the 1999 Constitution' in *Journal of Private and Commercial Law*, Faculty of Law, University of Ado-Ekiti, Ado-Ekiti, Ekiti State p. 147.

¹⁷ See S.5 (4)(b) of the 1999 Constitution (as amended).

¹⁸ See *A.G. Lagos State V. A.G. Federation* (2003) 12 NWLR (Part 833)1.

has been enacted into law by the Nationally Assembly. Any treaty not ratified by the National Assembly is void. Nationally, it is the President that negotiates and signs treaties. A few months ago (in September, 2016) President Muhammadu Buhari of Nigeria signed the Paris Climate Agreement on the Environment. It is only when that Agreement is domesticated by the National Assembly enacting the provisions thereof into law that it shall become enforceable within the shores of Nigeria. To this end, S.12 (2) of the Constitution stipulates that ‘The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a Treaty’. In *Abacha v. Fawehinmi*¹⁹, the status of the African Charter on Human and Peoples Rights was in issue before the Supreme Court of Nigeria following the arrest and detention of the Respondent by SSS operatives. Construing S.12 of the Constitution, the Court held in the words of Ejiwunmi JSC that ‘...no matter how beneficial to the country or citizenry an international treaty to which Nigeria has become a signatory may be it remains unenforceable if it is not enacted into the law of the country by the National Assembly’.

A look at S.81 (1) of the Constitution will reveal that the President (Executive) cannot spend or authorize the expenditure of money from the Consolidated Revenue Fund without the approval of the National Assembly. A look at sections 86(1), 147(1)²⁰, 154(1) and 157(1) of the Constitution will reveal or show that the President cannot appoint the Auditor-General of the Federation or Ministers of the Federal Republic, Chairman and Members of federal executive bodies without the prior sanction or ratification of such appointments by the Senate. The removal of some of them may require Senate approbation.

It is true that the President has the power to issue a Proclamation of a State of Emergency provided that such must be lawfully ratified by the National Assembly. In this respect, S.305 (1) and (2) of the Constitution of Nigeria, 1999 (as amended) provides thus:

Subject to the provisions of this Constitution, the President may be instrument published in the Official Gazette of the Government of the Federation issue a Proclamation of a State of Emergency in the Federation or any part thereof. The President shall immediately after the publication transmit a copy of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker as the case may be to consider the situation and decide whether or not to pass a resolution approving the Proclamation.

No one authority or arm of the government can effectively act alone as that will surely rock the boat of stability and usurp due constitutional order or process. The marriage or convergence of this power acts as a restraint, a brake on the arbitrary exercise of power to the detriment of any section of the society. Section 143(1) and (2) of the 1999 Constitution (as amended) stipulates that the National

¹⁹ (2000)FWLR (pt.4)533 See also *R.T.N.A.C.H.P.N.v. M&H.W.U.N* (2008)2 NWLR (pt.1072)575 where the Court of Appeal held the conventions 87 and 98 of the International Labour Organization (ILO) Conventions, having not been enacted into law by the National Assembly, have no force of law in Nigeria and cannot possibly be applied or given effect to in Nigeria. Justice Niki Tobi is of the opinion that S.12 of the Constitution enacts the transformation doctrine as opposed to the incorporation doctrine. Contrast *Commercial and Estates Co. v. Board of Trade* (1925) I.K.B. 271 and *Chung. Chi Chung v. The King* (1939) A.C. 160. *West Band Central. Gold Mining Co. v The King* (1905) 2.K.B 391. He further posited that ‘the transformation doctrine is rather ambitious for a developing country like Nigeria’.

²⁰ See *M.F.C.T. v. S.P.R.D.* (2010) All FWLR (pt. 505). 1706. Tangentially, the case of *A.G. Rivers State A.G. Akwa Ibom State* (2011) NWLR (pt. 579)1023 is again instructive.

Assembly can impeach or remove the President or Vice-President from office²¹. The section alone by virtue of its very existence is a major deterrent to political misconducts or abuse of office by the Executive. In the case of *A.G of the Federation v. Alhaji Abubakar Atiku*²², 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 S.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 had held that, unlike Ministers, the Vice-President cannot be removed by the President. The process of removal of the President or the Vice-President is provided for in S.143 of the Constitution which is through the process of impeachment which is solely the responsibility of the National Assembly according to that section.

The executive arm of government has also been invested with powers to appoint key officials of the judicial arm of government in Nigeria. This is a measure of leverage and control. It checks the excesses of the judicial arm when they know that they can be axed or removed from office by the executive arm of government. The recent swoop on Judges and Justices in Nigeria by the DSS (an arm or organ of the Executive) and the revelations²³ made thus far is a pointer in this regards. Section 231 of the 1999 Constitution (as amended) provides that the appointment of the Chief Justice of Nigeria and the Justices of the Supreme Court of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate. It is again noteworthy that S.238 of our Constitution stipulates that the President shall appoint the President and other Justices of the Court of Appeal which appointments shall be ratified/ confirmed by the Senate. Similarly, the Chief Judge and Judges of the Federal High Court²⁴, Chief Judge and Judges of FCT High Court²⁵, Grand Kadis and Kadis of Sharia Court of Appeal²⁶, and the President and Judges of Customary Courts of the Appeal²⁷ shall all be appointed by the Executive (President or Governor) subject only to Senate approval or confirmation.

4. Constitutional Accommodation--Power Divergences

Among the ubiquitous powers of the legislature in Nigeria is the investigative function. It uses this power to admonish, advise or otherwise investigate the actions, conduct and functioning of arms or departments of the executive arm of government. S. 88(1) of the 1999 Constitution stipulates that each

²¹ There has been unsuccessful attempts to impeach the President in Nigeria. For example, on 13th August, 2002 the House of Representatives passed a resolution demanding the resignation of the President Olusegun Obasanjo within 14 days. He was alleged to have unilaterally amended the Revenue Allocation Formula, made extra budgetary expenditure on the National Identify Card. System Scheme, the National Stadium Project and purchase of Houses for members of the Executive. He also paid N21 billion to Justus Berger without National Assembly approval and the massacres of innocent citizens in Odi, Zaki Biam, Gbaji, Vasse and Ampiiim. Set the piece 'Impeachment Saga' Times Magazine, vol. 11, No. 25 of (2) September 2002.

²² (2007) 10 NWLR (pt. 1041)1. In other crimes, the insistence of the President on Mr. Magu as EFCC boss, grant of bailant funds to States unilaterally, swoop or raid on judges disobedience to court order, may be considers impeachable misconducts offences.

²³ On October, 8th 2016 he homes of Hon. Justices Sylvester N. Nglwuta, John Inyang Okoro, A.F.A Ademola, and others were raided by the Department of State Service (DSS) and according to the DSS recovered about N360 million. See <http://www.vanguard.com/2016/10/anti-corruption-condram-DSS-recovers-over-n360-m-3-judges-jomes/> accessed on 12th Feb. 2017 at 2.45pm

²⁴ See S.250, CFRN; 1999 (as amended)

²⁵ S.256, CFRN; 1999 (as amended)

²⁶ S.261, CFRN; 1999 (as amended)

²⁷ S.266, CFRN; 1999 (as amended)

of the two Houses of the National Assembly has the right to direct or cause to be directed an investigation into: Any matter or thing with respect to which it has power to make laws; 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 or to be appropriated by the National Assembly. Subsection (2) restricts the exercise of the power by the National Assembly for the purposes only of enabling it to (a) Make laws with respect to any matter 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 disbursement or administration of funds appropriated by it²⁸. The power enables the legislature to insist on the executive properly executing all made laws. It is not a usurpation of executive function or responsibility but a modest check to see that there exist proper execution of laws and the due and orderly governance of the society. Many Ministries, Agencies and Departments of government, both at the Federal and States level, have been investigated pursuant to this power²⁹.

Further in our consideration of constitutional accommodation of power divergences which aid societal smooth governance, Sections 58 and 59 of the 1999 Constitution must be highlighted. They represent an 'extra-cautious approach where the intention of the constitution-makers is both to serve some check on the legislature's law-making power and at the same time usher cooperation between the legislature and the executive'³⁰. Section 58 makes it compulsory that bills passed by both Houses of the National Assembly must be assented to by the President to become law except where the contrary is expressly provided. The President must signify his assent or refusal to assent within 30 days of the bills' presentation to him. However, of importance is the further stipulation in S. 58(5) that 'Where the President withholds his assent and the bill is again passed by each House by two-third majority, the bill shall become law and the assent of the President shall not be required' For example, in *National Assembly v. The President of Nigeria*³¹, the Court of Appeal refused to accept what the National Assembly did in merely passing a motion of veto to override 'the President's decline of assent as not meeting the requirement of S.58(5)'. It held that 'Under section 58(5) of the Constitution, in order to override the veto of the 1st Respondent each of the two Houses of the National Assembly has to pass the bill again. The language used by S.58 (5) is 'and the bill is again passed by each House'. This means that the bill must go through the same process it had previously gone through when it was first passed...It means the repetition of the earlier process.³² What informed the above judicial decision is the imperative that 'the opinion of the executive on any Bill is to be given due weight because its

²⁸ In the case of *El-Rufai v. The House of Representatives* (2003) FWLR (pt. 173)162, based upon S.88 (2), the Court of Appeal held that the power and duty of investigation constitutionally conferred on the legislature cannot extend to investigation of an alleged defamatory statements made by the Plaintiff in the matter. See also Order XVIII Rule 184 of the Standing Orders of the House of Representatives. See Saleh Mohammed; 'Separation of Powers in Nigeria; A Myth or Reality' in *Current Law Journal*, Dept. of Property and Commercial Law Faculty of Law, University of Jos, Plateau State p. 173.

²⁹ The problem with this is that 'the recommendations of the various investigative committees concerning critical areas of the Nigerian economy set up by the legislature are not being implemented by the executive' See Leon Usigbe' Jonathan's Democracy Day Symposium and Matters Arising'. The Nigerian Tribune Thursday 7th June, 2012 p.41. See Ibraheem Ojo Tajudeen 'Towards a Friction-free Relationship between the Executive and the Legislature' in NAU Awka *Journal of Public and Private Law* vol.5. September 2013 p.271.

³⁰ Asari Young op.cit.p.23. S.59(1)-(4) repeats the averments or provisions of S.58 but differ in the sense that it must be with respect to money or appropriation bills See Section 59(1)-(5) of the 1999 Constitution (as amended).

³¹ (2003)9 NWLR (pt.824)104 at 150.

³² Per Oguntade JCA (as he then was).

officials have to deal with the situation directly. This procedure also introduces a second thought on the Bill in any case of disagreement between the legislature and the executive³³. Suffice it to state that in spite of this power, the executive does not become a law-making organ or body. The legislature retains their absolute power of law-making. Veto grants confidence to the executive which makes the reversionary power effective and meaningful. Such a veto is not absolute. It would be too great a grasp of power, conceivably bringing governance to a standstill, produce confrontation between the legislature and the executive and raise questions of superiority between the two arms of government³⁴.

The truth is that any attempt to invoke the oversight power puts the legislature in competition against the executive. As noted by Tajudeen³⁵, ‘Legislators often lack the political incentives to carry out this responsibility. Other activities such as policy issues, constituency service or seeking re-election are frequently higher on legislator’s agenda while oversight is perceived of as boring. Politicians are more concerned with retaining their seats and amassing wealth than performing any function of government. The least thing a politician wants to do is to engage in activity that challenges the policies and actions of their own party’s government.... There is no better time than now to monitor government businesses and our Commonwealth for probity, fidelity and above all efficiency without being adversarial. The lawmakers must at all times invoke every necessary legislative instrument necessary for its work. Oversight remains a veritable weapon’³⁶.

It is noteworthy that most times the President’s power of veto does not stop or forestall abuses of power by the legislature. Rather, sometimes it exacerbates it. In the opinion of Udombana:

Presidential veto power, in essence really does not always serve as an effective check on the legislative abuse of power. On the one hand, it may in cases where it is overridden only succeed in putting a question mark on the propriety of such law on the minds of the people. On the other hand, the fact that it can be overridden may suggest an effort to ensure that the final say comes from the more diverse group of representatives of the people. Importantly, the legislature’s power to override the President’s veto is a two pronged accountability device. Firstly, it provides conceptual and practical safeguard against absolutism of executive power of veto. Secondly, it in turn checkmates abuse of legislative exercise of the power by the more demanding requirements of fresh passage by two-third majority. Since so far the actual exercise and threat of exercise of Presidential veto has not resulted in the development of any determinable yardstick for the exercise of such power, the Constitution should be amended to specify the ground(s) upon which the power can be exercised so that its deployment would truly serve to check public service unaccountability rather than serve to heighten it³⁷.

To straighten our practices of separation of power, the criteria in the USA and the United Kingdom for the exercise of veto power by the Executive over the laws of the legislature may be helpful. The American President can veto legislation ‘he believes, in its core provisions, so fundamentally negated

³³ Asari Young op. cit.p.23

³⁴ Asari Young op.cit.p.24

³⁵ Ibraheem Ojo Tajudeen, ‘Towards a Friction-free Relationship between the Executive and Legislature’ in Nnamdi Azikiwe University, Awka Journal of Public and Private Law vol.5 September, 2013 pp.270 – 271.

³⁶ Op. Cit

³⁷ Ngozi J. Udombana, ‘Critical Examination of Accountability Mechanisms on the Legislature’ in the Calabar Law Journal vol.16,2013 – 15 pp.23-51 particularly at 29

the constitution that he cannot with a straight face declare its constitutional merits outweigh its flaws³⁸. Legislations must conform to serve the policies and political interests of the President if he must not veto it. Again, the content of legislation must not be found objectionable by the President³⁹.

In the United Kingdom the Queen may veto an enactment

- (a) Seeking to amend the Constitution that provides, directly or indirectly, for the circumvention or curtailment of the discretionary power conferred upon the Prime Minister by the Constitution.
- (b) Providing, directly or indirectly, for varying, changing or increasing the powers of the Central Provident fund. Fund Board to invest the money belonging to the central provident Fund.
- (c) Providing, directly or indirectly, for the borrowing of money, the giving of any guarantee or the raising of any loan by the Government, if in the opinion of the Prime Minister, the bill is likely to draw on the reserves of the Government which were not accommodated by the Government during its current term of office etc.⁴⁰

Section 4(8) of the 1999 Constitution provides that ‘the National Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal otherwise the courts shall declare such laws null and void’. It cannot be gainsaid that in all democratic societies such as ours, ‘the judiciary plays a crucial role in fostering the rule of law’. This is possibly why Justice Arthur Vanderbilt wrote that: ‘...It is in the court and not in the legislature that our citizens primarily feel the keen cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcoming of every other branch of government, but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society’⁴¹. It is incontrovertible that the judiciary is the weakest arm of government vis-a-vis the other two arms of government—the executive and legislature. Maybe that was why Hamilton lamented that: ‘The judiciary....has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL but merely judgment and must ultimately depend upon the aid of the executive arm even for the efficiency of its judgments’⁴². The main preoccupation of the doctrine of separation of powers on this issue is that judicial institutions or our courts must be independent of the other arms of government. It must have both political, institutional and financial autonomy and independence. The Executive and the Legislature must never invade the province of the Judiciary⁴³. None of the other arms must pronounce judgments or influence the judgment of the courts or have the ability to override the judgments of the court as delivered or rendered. On the issue of accommodation, Asari Young asserts and I wholeheartedly agree that ‘it is the State House of Assembly that has been given the power to create inferior courts like the Magistrates courts’⁴⁴. Separation of powers as a system of checks and balances implies checks on the judiciary in order to avoid arbitrariness in judicial functions⁴⁵.

³⁸ See J.B.Gilmour ‘Institutional and Individual Influences on the President’s Veto’ (2002)64 J. vol.198 at 202, 212 and 216. R.A Cass and PL Strauss, ‘The Presidential Signing Statement Controversy’ (2007)16 *Wm & Mary Bill Rights Journal*, 11 at 25.

³⁹ Contrast the US case of *Field v. Clark*, 143 U.S.649 – 669(1892) which held that with respect to constitutional rules the President has a duty to refuse to sign bills enacted in violation of such rules.

⁴⁰ See Epiphany Azinge ‘Executive Assent and Veto’ in Azinge and S.Ofuani (eds), *Nigerian Legislative Process* (Lagos, NIALS, 2012)321.

⁴¹ See ‘The Challenge of Law Reform’ (Princeton, University Press, 1955).pp.4-5 quoted in C. Osim Ndifon op. cit. p.3.

⁴² Alexander Hamilton, *The Federalist Papers*, No. 78. Also quoted in Asari Young op. cit. p. 25.

⁴³ Contrast the raid of the DSS on the 7 Judges being presently investigated for corrupt practices in Oct. 2016.

⁴⁴ See S.6 (4) a of the 1999 constitution (as amended).

⁴⁵ Asari Young op. cit. p. 26

This discussion will not be complete without adverting our minds to the issue of supremacy of the courts over the acts or actions of the National Assembly as it seems. This is a fallacy and not true. One may be tempted to state that the courts are superior to the legislature here for being given the power/authority to mollify or void the laws of the latter. The correct view in my mind is that the right of ‘declaration by the court as to the validity of a statute made by the National Assembly is not a show of its power but the function assigned to it by the Constitution..... By declaring any law unconstitutional, the judiciary is not reprimanding or stopping the legislature either from passing unconstitutional laws in the future, but it is only serving as a guide to point out the illegality in the law made⁴⁶.

Further, we must appreciate the concept of judicial review as arising from the inherent checks and balances that the concept of separation of powers entails. ‘Under the doctrine of checks and balances, the judiciary is vested with the power to keep a check on the executive and legislature. This has given rise to Judicial Review through which the judiciary curtails any form of executive or legislative excesses or other form of abuse of power. Judicial review is undertaken through interpretation of the constitution and laws made by the legislature and implemented by the executive⁴⁷. Predicated on S.4(8), the issue of judicial review simply refers to the authority of the court both to review the constitutionality or validity of legislative acts and to disregard, or direct the disregard of acts that are unconstitutional or violate applicable statutes⁴⁸.

5. Reform Projections

Permit me to recommend to our courts and judges that on issues bordering on interpretation of constitutional or statutory provisions dealing with separation of powers, a hybrid of both the aggressive judicial activist approach and the self-restraint approach should be adopted. Whereas the aggressive judicial activist approach seeks ways and means to involve the courts in various acts of the legislative and executive arms to government with a view to reviewing their activities, the self-restraint approach admonishes the judiciary to step in only when clear statutory or constitutional provisions or stipulations have been expressly and clearly breached or violated. The purposive approach⁴⁹ here will be to review all legislative and executive actions not supported by legal rules, regulations or the constitution. To this end, I recommend and endorse the statement of Pats Acholonu JCA (as he then was) in *Asogwa v. Chukwu* that

In the United States of America, these schools of thought have been reduced to what is described as judicial self-restraint and the preferred freedom concept. Justices like Chief Justice Burger...believe that judicial review should be reduced to the barest minimum as it is described as ‘a lethal instrument’ to be used only in clear cut cases where agencies of national or state government patently foil the constitution. On the other hand, Brennan and Marshall felt that having regards to the provisions of the Bill of Rights, and particularly, the First Amendment, the court ought to play more activist role. These acronyms do not in the least denote either abnegation of courts responsibility or unnecessary intrusion rather, they are based on the concept and premise of what is good for the nation⁵⁰

⁴⁶ *ibid.* G. Marshall had opined that ‘where constitutional law places restrictions on legislative power, a duty to declare the law seems to imply a duty to declare when such restrictions have been violated, whether by the legislature or by anyone else’ See, also Asari Young *op. cit.* pp.26 - 27

⁴⁷ Ngozi J. Udombana *op. cit.*p.36. Judicial Review have been seen as ‘an appropriate judicial function, since the law is the judge’s stock-in-trade, the field in which they are professionally expert. But they are not independent decision makers and have no business to act as such. They have in all probability no expertise in the subject matter of the decisions they are reviewing. They are authors of legality, no more, no less’, - T. Bingham, *The Rule of Law* (London Penguin Books, 2010)p.61

⁴⁸ *ibid*

⁴⁹ See the dictum of Lord Griffiths in *Pepper (Inspector of Taxes v. Hart)* (1993) 1 All E.R. 42 at p.50- ‘the courts must adopt a purposive approach which seeks to give effect to the true purpose of legislation’

⁵⁰ *ibid* p. 98

Further, if we agree that what our Constitution has provided for is ‘separate institution sharing powers together’⁵¹, then there is an urgent need for an Act to clearly clarify or specify the powers allocated to each arm or organ. Areas of reciprocity must also be delineated in such legislation. Where the organs of government must maintain their separate or independent identities should also be legislated upon to avoid friction and clashes/conflicts of interests. After all ‘modern government should be a cooperative, coordinated effort and not a tug-of-war between the principal organs of the government ...’⁵². Again, those who are entrusted with heading or controlling the organs of government should blend the principles of checks and balances into the practice of separation of powers. Practitioners should at all times seek proper knowledge of the two doctrines for a better practice of democracy in Nigeria. We agree that ‘the infusion of the principle of checks and balances (will) allow peaceful interference of exercise of powers without allowing one organ to exercise superior powers over another. The two doctrines, separation of powers and checks and balances, are cherished by all the democratic nations of the world for their ability to forestall dictatorship, tyranny and obnoxious regime at the expense of innocent citizens’⁵³.

Many people have supported Alexander Hamilton in seeing the judiciary as the weakest arm of government. To him, ‘The judiciarywill always be the least dangerous to the political rights of the (people)...The Judiciary,...has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL, but merely judgment and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment’⁵⁴. While urging the judiciary to rise up to the fullest exercise of its power of judicial review as donated to it under Section 4(8) of the Constitution, this least dangerous arm must through the sagacity and forthrightness of its decisions particularly respecting conflicts between the organs of government ensure that there is separateness and interdependence as well as reciprocity and cooperation among the three arms of government.

6. Conclusion

This article has looked at the meaning of the concept ‘Separation of Powers’ in our constitutional domain. It analyzed the sharing or allocation/distribution of governmental powers amongst the Executive, Legislature and Judiciary. This article reviewed the areas of power differences or divergences among them. Those areas where they must cooperate were also highlighted in the review. Reform projections were also made on the ways of advancing the utility of this concept. We agreed that; ‘Montesquieu did not at all advocate that there shall be no influence by the Legislature and the Executive over each other’s act, but that neither should exercise the whole power of the other. The whole idea behind the doctrine is to ensure that no one single organ or single person should hold the other organs and indeed the society to ransom. The doctrine, which is based on democratic principles, is the antithesis of tyranny, despotism and totalitarianism’⁵⁵. We further analyzed or discussed the areas of confluence of powers amongst the three departments of government as well as their areas of power dislocations and divergences. This article found that in all true democratic systems of government round the globe, the three departments or arms of government cannot be in separate or watertight compartments but must interface, cooperate and mingle in such a manner that governance is enhanced and enabled.

⁵¹ A.A Borokini, The Doctrine of Separation of Powers and the 1999 Constitutions, *Journal of Private & Commercial Law* vol.1, 2008 p.146 quoting Fred Agbaje, The Doctrine of Separation of Powers (Unpublished L.M Seminar Paper (1992)p.9, submitted to the Faculty of Law, Obafemi Awolowo University, Ile-Ife.

⁵² Constitution Drafting Committee Report volume 1, 1976 p. XXXII

⁵³ A.A Taiwo *ibid* p. 30.

⁵⁴ Alexander Hamiton, *The Federalist Papers* No. 78

⁵⁵ Niki Tobi, *The Exercise of Legislative Powers in Nigeria* (Lagos, NIALS, 2002)p.4