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SEPARATION OF POWERS AND THE CONSTITUTIONAL BASIS OF THE COURT OF APPEAL JUDGMENT IN HON. JUSTICE NGANJIWA V. FEDERAL REPUBLIC OF NIGERIA – A CRITIQUE

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Abstract.

This research paper examined the concept of Separation of Powers as enshrined in Sections 4, 5, and 6 of the 1999 Constitution of the Federal Republic of Nigeria tracing the nature, scope, and history of the doctrine and its development in different climes across the globe, as well as the rationale for its emergence and adoption by democratic States the world over. Using the doctrinal research methodology which entails the gathering, evaluation, and analysis of information within the context of the issue under examination, the paper revealed that while the central idea of the concept is the need to separate the three major branches of government to avoid an abuse of power or excessive concentration which could engender anarchy or totalitarianism, it is equally critical that each branch should act as a check on the others to ensure liberty. It was however discovered that with particular reference to the Nigerian legal system, there appears to exist a paradox regarding the existence and operation of the National Judicial Council (NJC) which tends to insulate Judicial Officers from executive supervision. It was further revealed that this unfortunate scenario which critics perceive as a ploy by the NJC to surreptitiously grant immunity to Judicial Officers through the back door recently found judicial validation via the Court of Appeal decision in the case of Hon. Justice Nganjiwa v. The Federal Republic of Nigeria wherein the Court held that a Judicial Officer cannot be arrested and prosecuted by the law enforcement agencies except and until he has first been investigated and indicted by the NJC and subsequently relieved of his position as such. The findings then showed that this posture of the NJC and the Court of Appeal obviously tends towards the French 'non-interference' model of the Separation of Powers and so defeats the essence of checks and balances. It was recommended inter alia that: the legislature should via urgent legislative action resolve this apparent constitutional logjam arising from Sections 4, 5, 6, 143, and 308 by clearly defining the scope of mandate of the NJC; and that the NJC should restore public confidence in the institution and by extension, the Judiciary by ensuring efficiency in the discharge of its duty of disciplining erring Judicial Officers with a view to aligning its existence with the rationale behind the constitutional doctrine of Separation of Powers.

Introduction

The principle of Separation of Powers or *trias politica*, a term coined by a French political thinker Montesquieu, is a model for the governance of the state. This same principle is applied in non-political realms under the term separation of duties. Montesquieu proposed division of political power among an Executive, a Legislature, and a Judiciary. Under this model, each branch has separate and independent powers and areas of responsibility. However, each branch is also able to place limits on the power exerted by the other branches. The doctrine of Separation of Powers therefore emerged as a response to the need for the protection of the liberty of the people and the prevention of any manipulation of the people by

functionaries of government. Hence, the call for specialization and prevention of abuse of the process of government.

Historically, these prevalent observations existing in the 17th Century England had prompted John Locke to first express the view in his book "The Second Treatise on Civil Government".[1] Here, Locke postulated that it was more convenient to confer legislative and executive powers on different organs of government. According to him, this is because, while the executive must constantly be at work to see to the execution of the laws made by the legislature the latter need not act continually. He further stated that it will be unwise, if the law maker were left to execute the law, as they may, out of human frailty make laws exempting themselves from observance or obedience of the law.

It was this view as propounded by Locke that was later built upon and expounded by Montesquieu wherein in his book "The Spirit of the Laws", he stated that:-

> "Political liberty is to be found only where there is no abuse of power … to prevent this abuse, it is necessary from the nature of things that one power should be a check on another. When the legislative and executive 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 will be an end to all things if the same person or body, whether of nobles or of the people were to exercise all these powers".[2]

From the above, it is crystal clear that Montesquieu was concerned with the sustainability of the society through liberty and as such limited his idea to the fact that, for there to be liberty which will guarantee a sustainable society, the three arms or organs of government charged with the responsibility of administering the affairs of the state must be separated both in body and in functions with a touch of check on each other to avoid any over-stepping its endowed powers or functions by law. This led to what is now known as checks and balances.

The advent of Checks and Balances

The phrase 'checks and balances' was originally coined by Montesquieu. As such, when employing a system of checks and balances for governmental action to be processed, it must pass through a so-called Montesquieuan gauntlet. In a system of government with competing sovereigns such as a multi-branch government or a federal system, 'checks' refers to the ability, right, and responsibility of each power to monitor the activities of the other(s) while 'balances' refers to the ability of each entity to use its authority to limit the powers of the others, whether in general scope or in particular cases. Keeping each independent entity within its prescribed powers can be a delicate process. Public support, tradition, and well-balanced tactical positions do help maintain such systems. Checks and balances therefore ensure that no one branch is too powerful.

The essential difference between the Separation of Powers as developed in Common Law theory and in France for instance was that in the former, the checks and balances inherent in the mixed constitution and in Montesquieu's analysis were incorporated into the doctrine. In France, on the other hand, the judges were regarded as sources themselves of tyranny and not liberty as in England, and the hostility of Jean-

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[1] See Ujo, A. A., *Understanding Administrative Law in Nigeria*, Kaduna: Awyaotu Enterprises & Publishers, 2002, 31.

[2] Baron de Montesquieu, *The Spirit of the Laws*, Charles de Secondat, 1748.

Jacques Rousseau to any check or limit on the popular will, combined to establish the 'non-interference' model of the Separation of Powers.

In the United States of America, the framers of the U.S. constitution are believed to have included the best features of many concepts including the new concept of Separation of Powers. The concept is also prominent in the state governments of the United States; as former colonies of Britain, the founding fathers felt that the American States had suffered an abuse of the broad power of the Monarchy. As a remedy, the American constitution limits the powers of the Federal Government through several means, but in particular by dividing up the power of the government among the three competing branches of the government. Each branch checks the actions of the others and balances their powers in some way.

The independence of the executive and legislative branches is partly maintained by the fact that they are separately elected, and are held directly accountable to the public. There are also judicial prohibitions against certain types of interference in each other's affairs. Judicial independence is maintained by life appointments, with voluntary retirement, and a high threshold for removal by the legislature. Recently however, accusations of judicial activism have been leveled against some judges as well as abuse of the power of interpretation of law.

The system of checks and balances is also self-reinforcing. Potential abuse of power is deterred and the legitimacy and sustainability of any power grab is undermined by the ability of the other two branches to take corrective action. This is intended to reduce opportunities for tyranny and to increase the general stability of the government.

Research methodology

The research method adopted for this study is the doctrinal or conceptual legal research approach. This type of research typically provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and predicts future developments. It is drawn from the latin word '*doctrina*' which loosely means 'to instruct', 'a lesson', or 'a precept'. This research method involves the review of cases, statutes, rules, incidents, etc. and appears to have a significant influence on modern legal scholarship, thus dominating recent legal research design.

The form of the doctrinal research method is typically that the legal researcher takes one or a series of legal propositions as a starting point and focuses on the research objective around which
he structures the work. This conventional legal research therefore usually takes place in the law library wherein the researcher locates authoritative decisions, applicable legislation, and any secondary discussion based on literature. Armed with this foundation, the researcher then reads and analyses the materials, formulates a conclusion, and writes the study results. The doctrinal methodology therefore involves a review of literature, a historical analysis using various sources, a content analysis involving policy documents and legislation, and a discourse analysis.

Doctrinal legal research ranges between straightforward descriptions of new laws, with some incidental interpretative comments on the one hand, and innovative theory building otherwise called systematization on the other.[3] Consequently, several approaches fit into this legal doctrine and all those approaches can be defended to some extent as long as one adopts a pluralist approach.

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[3] Hoeche, M. V. "Methodology of Comparative Legal Research", in Gillespie, J. and Nicholson, P. (eds.) *Law and Development and the Global Discourses of Legal Transfers,* Cambridge, Cambridge University Press, 2012, 273-295.

Theoretical Framework

The theoretical framework for this study is the Marxist approach to the Sociological Theory of Law. The greatest practical contribution of various sociological theories has been field-work in examining the interaction between law and its social milieu. It has been abundantly demonstrated by sociological theorists that laws play a significant and creative role in society, and such a dynamic function presupposes the existence of ideals, even unavowed, to provide directing force. On one hand, the transcendental idealism of the past advocated by the natural law theorists suffered a blow at the hands of positivism from which it could never hope to recover. Positivism on the other hand in turn faltered in the face of the problems that confronted it, making the rise of the sociological approach a desirable synthesis between the two by restoring ideals in a way that could satisfy and give life to the exacting positivist discipline.

The Economic approach of Karl Marx is regarded as a variant of the historical approach in so far as it has sought to unfold a pattern of evolution, but it also concerns the part which law has played and is playing in society and as such remains sociological.[4] Law to Marx is an instrument of domination. The state therefore reflects an essentially unequal state of affairs. Thus, the depiction of it as a just and fair institution is to Marx, a distorted ideology. In reality, it is an instrument of government policy.[5] To Marxists, the word law carries a strong pejorative connotation, and is associated in their minds with everything unjust and oppressive. Consequently, law to them will not serve as a watch-dog on the government thereby setting the stage for a rule by law rather than a rule of law as demonstrated by the Court of Appeal decision in the case under evaluation. How far an effective safeguard against an abuse of government power will be evolved remains to be seen.

Karl Marx views the notion of Marxist law from the following perspective; "law, morality, and religion are to the proletariat so many bourgeois prejudices, behind which they lurk in ambush just as many other bourgeois interests".[6] Unfortunately, the state that rises to maintain order within society perpetuates the ensuing conflict as a dominant class wielding power over classes with less power. Thus, Lenin explains: "The State is an organ of class domination, an organ of oppression of one class by another; its aim is the creation of 'order' which legalizes and perpetuates this oppression by moderating the collisions between the classes".[7] Lenin's approach like that of Marx can therefore be described as an economic approach to the sociological theory of law.

In the Marxist view of law, the bourgeoisie and the proletariat are the two classes involved in the struggle for power. Societies that allow the bourgeoisie to make moral decisions and formulate laws are therefore unjust societies. When those adhering to a specific ideology arbitrarily determine a system of laws, laws will be created that are prejudiced against those with opposing views. In such a society, freedom disappears, as each citizen is held hostage by the arbitrary laws of the state designed to preserve the political and economic interests of the authorities such as the Judiciary and all Judicial Officers, in this case represented by the National Judicial Council (NJC).

The implication of the above view is that the sociological understanding of the society led Marx to pronounce that the desired system should be a communist society based on rational planning, cooperative

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[4] Dias, R. W. M., *Jurisprudence*, (5th ed.), London: Butterworths, 1985, 395.
[5] Lenin, V. I., *Law is a Political measure, It is Politics*: *Collected Works* (4th ed.) New York: International Publishers, 1916, 106.
[6] Marx, K. & Engels, F., *Collected Works, 40 Vols.,* (6th edn.) New York, International Publishers, 1976, 494-5.
[7] Lenin, V. I., *The State and Revolution,* New York, International Publishers, 1932, 9.

production, and equality of distribution and most importantly, liberated from all forms of political and bureaucratic hierarchy. Marxist theorists recognize that economic production is the substructure of societal relations. They figured that law must be studied along that line, in relation to other factual situations and ideological inclinations.[8]

Review of the Concept of Separation of Powers

The doctrine of Separation of Powers in a nutshell, posits that all organs of government, namely, the executive, the legislative and the judiciary, should be kept separate and distinct from each other. This is to suppress the fear that if not, the political liberty of the citizenry will be jeopardized. The political liberty of the subjects therefore, is the ultimate goal as succinctly put by one of the proponents of this principle, **"….The political liberty of the subjects is the tranquility of mind arising from the confidence each person has of his own safety"**.[9]

It cannot be over-emphasized that this doctrine of Separation of Powers has been made part of the organic law of most democratic countries. In the United States for instance, the doctrine has been enshrined in their Constitution and their courts have similarly given currency to it as demonstrated in ***Kilbourn v. Thompson***[10] wherein the United States Supreme Court declared that all powers of government are divided into executive, legislative and judicial powers and that this is essential for the smooth working of the system.

One of the greatest problems faced by African nations is the lack of clear Separation of Powers between the executive, the legislature and the judiciary. This is one of the core sources of poor governance, corruption and political instability in various nations.

The doctrine of Separation of Powers is now universally accepted as an important pillar of democratic governance and the rule of law. The doctrine is rooted in the understanding that the primary responsibility of formulating national development programs and implementing laws lies with the Executive, while law-making is the responsibility of the legislature or parliament. On the other hand, the interpretation of the laws and arbitration of disputes is the responsibility of the judiciary. In this respect, the three arms of government act to check on the excesses of each other and to maintain the balance of power.

We recognize that this doctrine of Separation of Powers does not in itself mean that a country is democratic. This is because experience has shown that it is possible for a country to have the three arms of government, without necessarily qualifying as a democracy. For example, in Africa, especially during the past decade, over-concentration of power in the executive seriously undermined the operations of the other organs of government. The situation may have been considered necessary or even beneficial, but for the long term it caused far-reaching distortion of governance.

It is therefore necessary to have a political commitment to respect and uphold the doctrine of Separation of Powers. It must also be noted that the independence of the three arms of government does not imply total isolation from each other. The various government organs must work together to effectively deliver services to the public. Therefore, collaboration and co-operation should not always be seen as a compromise of their mandate. Though constitutionally mandated to operate independently in the

[8] Nnabue, U.S.F., *Understanding Jurisprudence and Legal Theory*, Owerri, Bon Publications, 2009, 43.
[9] See Baron de Montesquieu, *The Spirit of Laws*, *Supra*.
[10] (1881) 103 US 168 19. Ed 377.

discharge of their various functions, the three arms of government are necessarily inter-dependent as part of one whole, which is the government.

In Nigeria, the principle has been incorporated into our Constitution[11] as evidenced under *Sections 4, 5* and *6* which provides for the legislative, executive and judicial powers respectively. Nigerian courts under the auspices of the judiciary have on their own given impetus to this doctrine in recent times. Hence the principle has been numerously adumbrated in various decided cases.

In ***Lakanmi and Anor v. A. G. Western State and Ors***[12], the Supreme Court per Ademola CJN observed that:

> " …The structure of our constitution is based on the separation of powers…the legislative, the executive and the judiciary. Our constitution clearly follows the model of the American Constitution."

It is pertinent to say that the reason for which the writers of these constitutions separated these powers of government was to prevent the danger inherent in giving excessive powers for special legislative acts which could take away the life, liberty or property of certain persons simply because the legislature thinks them guilty of conducts which deserve punishment.

Despite the foregoing, it must be noted that this principle of Separation of Powers does not entail a total detachment of these various organs from each other. In fact, for proper administration of affairs of the state, the various organs, must of necessity, co-operate with each other. Thus the general opinion that "the three organs must operate in perfect co-operation for good administration to ensue."[13] For instance, though the judicial powers vested in the courts is to interpret laws made by legislature and also to adjudicate on disputes arising therefrom, sometimes the judges in the process of interpreting and adjudicating do make laws. This is popularly known as judge-made laws. This does not derogate from the principle of Separation of Powers as most often such judge-made laws are essential to give life and meaning to the laws made by the legislature.

There is therefore nothing like a total separation of the three organs of government. It is perhaps seemingly to this end that Montesquieu in his postulation states that to prevent abuse, it is necessary from the nature of things that one power should be a check on another. What this simply means is that from time to time, there may be overlapping of functions, so as to check the excesses of each branch.

It must be borne in mind that this doctrine of separation of powers as practiced in Nigeria, which is obviously tailored towards the practice in America is slightly, different from what is obtainable in England and most commonwealth jurisdictions. In England this doctrine is restricted to the judiciary, as a fusion of powers is evident between the executive and legislative arms.

Separation of Power has not been a prominent part of the political thought of the United Kingdom since the eighteenth century. There, the Executive is drawn from the legislature, and is subordinate to it. Since the Executive is drawn from the leadership of the dominant party in parliament, party discipline often

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[11] See the **1999 Constitution of the Federal Republic of Nigeria**. Note also previous Constitutions before the present one which had similar provisions.
[12] (1971) I U.I.L.R 2001, 218.
[13] Oluyede, P. A., *Nigeria Administrative Law*, Ibadan: University Press, 1988, 44.

results in a de-facto situation of Executive control of the Legislature, although in reality, members of parliament can reject their leadership and vote against them.

The House of Lords is the highest court of appeal for civil matters in the United Kingdom and for criminal matters in England, Wales and Northern Ireland. These appeals are heard by Lords of Appeal in Ordinary otherwise known as "Law Lords" who, in effect, are a committee of the House of Lords. This means that the highest court of appeal is part of the House of Lords and thus, part of the legislature. At times, various Home Secretaries have taken decisions, which in other countries are judicial, such as the release, or continued detention, of prisoners. Thus, it can be seen that in the United Kingdom, the three 'powers' are not separated, but are entwined. However, this has never threatened British civil government.

In contrast, many countries which have adopted Separation of Powers suffered from instability sometimes by way of *coup d'etat*, military dictatorship, etc. This has been the case in Nigeria for instance. Some observers believe that no obvious case exists in which such instability was prevented by the Separation of Powers.

Thus, in Britain, the Queen as head of the Executive is also head of the Judiciary and is an integral part of the Legislature. Similarly the Lord Chancellor as head of the Judiciary also presides over the House of Lords which is the legislative organ, and is also a Minister in the executive arm. All these instances leave much to be desired in the British system of government as against a true Separation of Powers where members of one organ ought to be different from members of other organs as propounded by Locke and Montesquieu.

In summary, one cannot but agree that this doctrine of Separation of Powers is fundamental to both Constitutional and Administrative law as it lays down clear cut rules and procedures which the various organs of government must adhere to in the performance of their duties.

Essential elements of the doctrine of Separation of Powers

A major problem in an approach to the literature on the doctrine of the Separation of Powers is that few writers define exactly what they mean by the doctrine, what its essential elements are, and how it relates to other ideas. Thus, the discussions about its origin are often confused because the exact nature of the claims being made for one thinker or another are not measured against any clear definition. Some kind of preliminary analysis of the doctrine and its elements is therefore necessary before we step into the vast mass of material that history presents to us.

The process of definition of a "**pure doctrine**" of the Separation of Powers will of necessity have an arbitrary quality, and no doubt other opinions can be put forward as to what constitutes the "essential doctrine" on the one hand, and what are modifications of, and deviations from it, on the other. However, no value judgment is intended in putting forward a particular definition, except to say that it is considered the most useful formulation for the purposes we have in mind. It is labelled the "pure doctrine" simply to indicate that it represents a coherent, interrelated set of ideas, with the complicating factors of related theories removed.

An initial problem in any attempt to make a clear statement of the theory of Separation of Powers is the ambiguity which attaches to the word "power" in the literature. It has been used to mean the possession of the ability through force or persuasion to attain certain ends, the legal authority to do certain acts, the "functions" of legislating, executing, or judging, the agencies or branches of government, or the persons who compose these agencies.

A "pure doctrine" of the Separation of Powers might be formulated in the following ways: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must then be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.[14]

Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check on the others and no single group of people will be able to control the machinery of the state. It is this stark, extreme doctrine we shall then label the "pure doctrine" and other aspects of the thought of individual writers will be seen as modifications of, or deviations from it.

It is true of course that the doctrine has rarely been held in this extreme form, and even more rarely been put into practice, but it does represent a "bench mark", or an "ideal-type" which will enable us to observe the changing development of the historical doctrine, with all its ramifications and modifications, by referring to this constant "pure doctrine".

The first element of the doctrine is the assertion of a division of the "**agencies**" of government into three categories: the **legislature**, the **executive**, and the **judiciary**. The earliest versions of the doctrine were, in fact, based upon a two-fold division of government, or at any rate upon a two-fold division of government functions, but since the mid eighteenth century, the three-fold division has been generally accepted as the basic necessity for a constitutional government. This does not derogate from the fact that as far as the actual institutional development is concerned, of course, the basis of the three-fold structure had been laid in England by the thirteenth century.[15]

The second element in the doctrine is the assertion that there are three specific "**functions**" of government. Unlike the first element which recommends that there should be three branches of government, this second part of the doctrine asserts a sociological truth or "law", that there are in all government situations three necessary functions to be performed, whether or not they are in fact all performed by one person or group, or whether there is a division of these functions among two or more agencies of government. All government acts, it is claimed, can be classified as an exercise of the **legislative**, **executive**, or **judicial** functions. The recommendation then follows that each of these functions should be entrusted solely to the appropriate or "proper" branch of government.

The third element in the doctrine, and the one which sets the Separation of Powers theorists apart from those who subscribe to the general themes set out above but are not themselves advocates of the Separation of Powers, is what, for want of a better phrase may be described as the "**Separation of Persons**". This is the recommendation that the three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership. The idea here is that the separation of the agencies and functions is not enough, but that these functions must be separated into ***distinct hands*** if freedom is to be assured. This is the most dramatic characteristic of the pure doctrine, and is often in a loose way equated with the Separation of Powers.

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[14] Vile, M.J.C., *Constitutionalism and the Separation of Powers* (2nd edition), Oxford and London: Clarendon Press, 1967.
[15] Maitland, F.W., *The Constitutional History of England*, Originally Published, Cambridge: Cambridge University Press, 1908, Reprinted, 2013 by The Lawbook Exchange, Ltd, p.20.

The fourth and final element in the doctrine is the idea that if the recommendations with regard to the agencies, functions, and persons are followed, then each branch of the government will act as a "**check**" to the exercise of arbitrary power by the others, and that each branch, because it is restricted to the exercise of its own function will be unable to exercise an undue control or influence over the others. Thus, there will be a check to the exercise of power of government over "the people" because attempts by one branch to exercise an undue degree of power will be bound to fail.

While they do not actively exercise checks upon each other, for to do so would be to "interfere" in the functions of another branch, nevertheless, the mere existence of several autonomous decision-taking bodies with specific functions is considered to be a sufficient brake upon the concentration of power.

The pure doctrine as we have described it therefore embodies what has been termed a "negative" approach to the checking of the power of the agencies of government. The inadequacy of the controls which this negative approach to the checking of arbitrary rule provides, leads one to the adaptation of other ideas to complement the doctrine of the Separation of Powers and in so doing, to modify it. The most important of these modifications lies in the amalgamation of the doctrine with the theory of mixed government, or with its later form, the theory of ***checks and balances***. From an analytical point of view, the main consideration here is that these theories were used to import the idea of a set of checks to the existence of power into the doctrine of Separation of Powers.

The implication then is that each branch was given the power to exercise a degree of direct control over the others by authorizing it to play a part, albeit only a limited part, in the exercise of the other's functions. Thus, the executive branch was given a **veto** power or right of **approval** over legislation, while the legislature has the power of **impeachment**. The important point is that this power to "interfere" is only a limited one, so that the basic idea of a division of functions remains, only modified by the view that each of the branches could exercise some authority in the field of all three functions. This is the amalgam of the doctrine of the Separation of Powers with the theory of checks and balances which formed the basis of the United States constitution for instance.

Related to this and to its predecessor in time, is an amalgam of the doctrine of the Separation of Powers with the theory of mixed government to produce a partial separation of functions. That is to say that one function, the legislative, was to be shared, but other functions were to be kept strictly separate. This was a basic element in eighteenth century English constitutionalism, the theory of balanced government. These modifications of the doctrine have of course been much more influential than the doctrine in its pure form.

This idea of a partial separation of functions is an important one, for it does not cease to be significant simply because it is partial. A similar modification of the pure doctrine can be seen in the area of the separation of persons via the introduction of a partial separation of persons. The degree of separation therefore becomes important. The answer given to this in the mid nineteenth century provided the basis of the parliamentary system of government.

Two further concepts are worthy of mention which have not featured to any great extent in the literature on the Separation of Powers, but whose relation to the doctrine is of great importance. The first, an extremely ancient concept, is the idea of ***procedure*** as a check to the exercise of power. The belief that "due process" is an essential part of constitutional government is of great antiquity, and it runs parallel with ideas of mixed government and the Separation of Powers, but has relatively rarely been explicitly linked with those ideas and made an integral part of those theories.

The second notion, a much more modern one, is the idea of ***process*** in government. This term, although used in different ways, indicates an awareness that government and politics do not consist in the automatic

separation of formal procedures, but that there is a whole complex of activities around these procedures which determine the exact way in which they will be operated, sometimes in fact bringing about through the medium of the procedure exactly the reverse of what the procedure was intended to achieve.

The concern of political studies with the role which political parties and groups play in the processes of government makes it impossible presently to discuss a theory like that of Separation of Powers purely in terms of the more formal, legal institutions of government.

The Judgment of the Court of Appeal in *Hon. Justice Nganjiwa v. Federal Republic of Nigeria*: A critique.

From the foregoing evaluation, there is no doubt that the theory of Separation of Powers is domiciled in the 1999 Constitution of the Federal Republic of Nigeria providing for each of the three arms of government, to wit: Executive, Legislature, and Judiciary some degree of protection from interferences by the other arms while equally ensuring checks and balances in the Montesquieuan model. Curiously however, on the 11th day of December 2017, the Court of Appeal in ***Hon. Justice Hyeladzira Anita Nganjiwa v. Federal Republic of Nigeria***[16] per Obaseki Adejumo, JCA who delivered the lead judgment appeared to have stood the law on its head when it stated that by the doctrine of Separation of Powers in the 1999 Constitution, the Economic and Financial Crimes Commission (EFCC) lacks powers to investigate or prosecute serving Judicial Officers except such officers have first been dismissed or retired by the National Judicial Council (NJC), and consequently acquitted the Judge.

Not a few scholars have criticized this landmark judgment concerning the exclusive power of the National Judicial Council to look into matters pertaining to the discipline of serving Judicial Officers. In interpreting *Section 158* of the Nigerian Constitution, the Court held that a Judicial Officer cannot be arrested and arraigned before a court of law where the complaint against him bothers on an infraction of his oath of office and that in such circumstances, such a Judge must first be found wanting by the NJC and removed as a Judge, before he can be hauled before a court to face criminal prosecution.

In justifying its position, the Court of Appeal considered that the doctrine of Separation of Powers necessitates that the Judicial arm of government be guaranteed independence and that as the National Judicial Council is designed as a mechanism to insulate the judiciary from outside influence, it must be allowed to carry out its constitutional duties without interference. The Court specifically made the following pronouncements inter alia:

> "Whenever a breach of judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the Judicial Officer, and if found to be so, such Judicial Officer shall face disciplinary action and the NJC may recommend the removal of such a Judicial Officer to the appropriate authority which is either the President in the case of a Federal Judicial Officer or the Governor of the State in the case of a State Judicial Officer, and / or take other actions appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the Constitution, then the relevant law enforcement agent or agency is at liberty to make the said Judicial Officer face the wrath of the law."

The Court while reversing the judgment of the lower court and acquitting the embattled Judge of the Federal High Court then went ahead to state that:

[16] (2017) LPELR – 43391 (CA).

> "Any act done by the law enforcement agency in violation of the above is tantamount to denying the NJC its powers to discipline Judges in accordance with the provisions of *Section 153(1)* and Paragraph 21 Part 1 of the Third Schedule to the 1999 Nigerian Constitution (as amended) respectively. Whenever there is an allegation of official misconduct against a Judicial Officer and the above stated process is not adhered to, it amounts to jumping the gun and *ipso facto*, a direct violation of the constitution. Recourse to the National Judicial Council is a condition precedent as clearly set out by the Constitution, and any attempt by any agency of government to by-pass the Council will amount to failure to observe a condition precedent thereby leading to flagrant violation of the constitution."

Quite understandably, the judgment has attracted diverse and clearly opposing reactions and comments from Nigerians, particularly lawyers and jurists. While some on one side of the divide see it as a welcome development that is sure to strengthen the observance of democratic principles in Nigeria, others including the Economic and Financial Crimes Commission (EFCC) have criticized the Court for what they see as a bid to confer immunity on Judges. For clarity of presentation and better understanding of the issues, the argument of each side to this legal tussle will be taken separately to avoid muddling up the issues.

For those in support of the decision of the Court of Appeal herein, the crux of their argument is that Nigeria operates a democratic system of government which anywhere in the world places emphasis on Separation of Powers among the three arms of government which are independent of each other. Of these, the Judiciary enjoys primacy of importance when it comes to the issue of autonomy and independence as a Judiciary which is not free from political interference will bring about the demise of the nation. World over, one of the widely accepted means of guaranteeing such independence to the Judiciary lies in the establishment of a Judicial Council.

In an article on the same subject[17], the Law School of the University of Chicago had stated as follows:

> "Judicial Councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of Judges from the partisan political process while ensuring some level of accountability. Judicial Councils lie somewhere in between the polar extremes of letting Judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline. The motivating concern for adoption of Councils was ensuring independence of the Judiciary after periods of undemocratic rule. To entrench Judicial Independence therefore, most countries enshrined the Judicial Council in their constitutions."

Despite its laudable advantages, the article however found out that there is little relationship between Judicial Councils and quality of governance.

In the Nigerian scenario, viewed against this background, it would be apposite to say that where the allegations made against the Judges arise from or pertain to their office as Judges, then the practical implication would be that the Constitution requires any infraction by the said Judges to be first investigated and resolved by the National Judicial Council and possibly remove from them the toga and aura of Judges before they can be arrested and arraigned. Viewed from this simplistic perspective, the

[17] Garoupa, N., & Ginsburg, T., 'Guarding the Guardians: Judicial Councils and Judicial Independence', *American Journal of Comparative Law*, *University of Chicago Law & Economics, Online Working Paper* No.444; *University of Chicago Public Law Working Paper* No. 250; *Centre on Law and Globalization Research Paper* No. 09-05, 2008, Revised-2009.

alternative scenario then derogates from the independence of the Judiciary which the establishment of the NJC is designed to guarantee.

The advocates of this point of view insist that all that is required is that the NJC be allowed to carry out its duties first before Judges are brought before a court of law to face criminal prosecution. They argue that the judgment does not in any way bar such criminal prosecutions. Indeed, the Court itself made it clear that the NJC would have no role to play if the offence alleged against a Judge is not one that has to do with the violation of his oath of office.[18] This exception recognized by the Court of Appeal in the Nganjiwa case is to the effect that judges who commit crimes outside the scope of their duties may be arrested and prosecuted by any of the law enforcement agencies without recourse to the NJC. Indeed, according to Femi Falana, the judgment appears to have glossed over the several decisions of the Supreme Court which have prohibited administrative or executive bodies from usurping the exclusive powers of the courts by trying public officers accused of committing criminal offences.[19]

The question that however arises is: What if the Chief Justice of Nigeria himself, who is the presiding officer and Chairman of the NJC is the accused person? This scenario arose more recently, and in line with this argument, the Chief Justice of Nigeria, Hon. Justice Walter Onnoghen admitted guilt to the Code of Conduct Investigations and tried to excuse it by pleading mistake when he stated that a Standard Chartered Bank Account declared by him in 2016 for the first time was actually opened sometime in 2011. Going by a strict interpretation of *Section 15* of the Code of Conduct Act, it ought to have been declared at least four years before in 2012 and on the strength of this, the Code of Conduct Bureau (CCB) and Attorney General filed charges against him in January, 2019 as well as an Application for him to resign from his office.

In response to this charge, the advocates of this view have further relied on *Section 3* of the Code of Conduct Bureau and Tribunal Act, Chapter C15, Laws of the Federation of Nigeria 2004 which provides as follows:

> The functions of the Bureau shall be to –
>
> Receive assets declaration by public officers in accordance with the provisions of this Act; Examine the assets declarations and ensure that they comply with the requirements of this Act and of any laws for the time being in force; Take and retain custody of such assets declarations; and Receive complaints about non-compliance with or breach of this Act and where the Bureau considers it necessary to do so, refer such complaints to the Code of Conduct Tribunal established by *Section 20* of this Act in accordance with the provisions of *Sections 20* to *25* of this Act;
>
> **Provided that where the person concerned makes a written admission of such breach or non-compliance, no reference to the Tribunal shall be necessary.**

Clearly, the power of the Bureau to refer a person under investigation to the Tribunal for trial is subject to the Proviso. Viewed from this perspective, once the person under investigation makes a written admission of the breach or non-compliance of which he is accused, the Bureau no longer has power to refer the matter to the Tribunal, the use of the word 'shall' being mandatory. Indeed, according to Prof. Nwabueze, with particular reference to the CJN, the principle that no one is above the law is "limited by

[18] Babalola, A.A., 'Arrest and Prosecution of Serving Judges: The Role of the National Judicial Council', [2017], Vanguardonline, https://www.vanguardngr.com , accessed, 2nd May, 2018.
[19] Falana, F., 'It is Baseless to Link CJN's Trial With Election', [2019], Punchonline, https://punchng.com , accessed, 24th January, 2019.

inevitable exceptions" as the heads of the three arms of government – President, Senate President, and the Chief Justice of Nigeria must be treated with respect so as not to desecrate their offices and thereby hurt the nation in the process.

In furtherance of this posture, Nwabueze opines that the attempt at arraignment of the CJN before the Code of Conduct Tribunal is an affront not only to the doctrine of the Separation of Powers, but to the office of the CJN and the whole country. According to him, it is misconceived to regard and treat the head of the third arm of our government in the same manner and in all respects as an ordinary citizen is treated, all in the name of the principle that all citizens are equal before the law, and that nobody is above the law. To him, while no exemption is claimed for the CJN, the way and manner of enforcing the law should accord due respect and decorum for the dignity attached to the office.

Critics of the Court of Appeal judgment on the other hand have insisted that the judgment seeks to confer immunity on Judges contrary to the provisions of *Section 308* of the 1999 Nigerian Constitution which limits immunity to the President, Vice-President, Governors, and Deputy Governors. In fact, the judgment is clearly isolationistic for the Judiciary. It implies that the Court has diplomatically designed additional immunity clauses for the Judiciary, on a par with the President, Vice President, Governors, and their Deputies. Little wonder the Legislature, particularly at the federal level has severally moved Motions to accord same to themselves starting with their principal officers, though pirouetting. This therefore leaves the helpless masses as the only losers without any immunity and so any misconduct pitilessly takes them straight to the prison.

Upon a critical examination and evaluation of *Sections 153, 158(1), 160*, and Paragraph 21 of Part One of the Third Schedule however, none of these provisions allows for the creation of the procedure set down by the Court of Appeal in the judgment under reference. Indeed, the Court of Appeal engaged in making the law, as opposed to merely expounding the law. It further stated that any dissatisfied person may first apply to a court for judicial review on the decision of the NJC. In other words, unless the NJC says so, or is overruled by a court of law, a Judicial Officer cannot be arrested or prosecuted for taking bribes or any other acts of indiscretion or misconduct including crimes.

Incidentally, the Court of Appeal failed to put into consideration a scenario where a particular act by a judicial officer amounts to both a criminal offence and gross misconduct at the same time, the practical implication of which ought to be that while the NJC assumes jurisdiction to investigate and address the gross misconduct, the police or the EFCC should concurrently investigate and prosecute on the criminal aspects. Emphatically, the same act could simultaneously amount to both a misconduct and a crime, and distinguishably, the former only breaches professional ethics unlike crimes which are offences against the state.

By way of summary then, the judgment of the Court of Appeal in the said case can be summed up thus:

- The judgment goes against the principle of checks and balances, which underpins the principle of Separation of Powers.
- The Court by the judgment created a procedure that is outside the Constitution or indeed any other law.
- The judgment goes against the settled principle of law that one set of facts can give rise to multiple causes of action.

There is no doubt that the accusations against Hon. Justice Nganjiwa relate to Judicial Misconduct and /or misbehavior under the Revised Code of Conduct for Judicial Officers. But the same alleged misconducts also constitute offences against the state under the Criminal Law. The idea that the offence

against the state has to await the outcome of the disciplinary proceedings of the NJC therefore does not have any statutory or legal backing whatsoever. It needs to be made clear at this juncture that Hon. Justice Nganjiwa was not being prosecuted for breaching the Code of Conduct of Judicial Officers or any other administrative regulation. In the matter before the Court, he was accused of committing an offence under the Criminal Law of Lagos State.[20]

For clarity of understanding, *Section 82* of the Criminal Law of Lagos[21] State provides that:

> "Any public official who: (a) enriches himself so as to have a significant increase in his assets that cannot reasonably explain the increase in relation to his lawful income; (b) retires, resigns, or is dismissed from service and cannot reasonably explain the increase in relation to his lawful income; or (c) after leaving office, begins to derive economic benefits from favours he had conferred on third party or parties while in office, is guilty of a felony and is liable to imprisonment for seven years."

Also, *Rule 10(1)(iii)* of the Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria provides that:

> "a Judge shall not give or take and shall not encourage or condone the giving or taking of any benefit, advantage, bribe, however disguised for anything done or to be done in discharge of a judicial duty."

Imperatively, all the advocates of Separation of Powers have one object in common: that concentration of powers in a single authority is tantamount to a political blunder and will inevitably open the floodgate for tyranny and oppression, accentuating the assertion that absolute power corrupts absolutely according to Lord Acton, a British historian of the late nineteenth and early twentieth centuries. Thus, the objective is stringently to restrain power in government circles and not for protectionist tendencies. Arising from this philosophy for example, in the 1999 Constitution of the Federal Republic of Nigeria, the Executive is involved in the appointment and removal of Judges.[22] Similarly, the President assents to Bills passed by the National Assembly[23], while the Legislature on the other hand confirms appointments made by the President[24], in addition to ultimately performing the role of the custodian of the Federation Account as its authorization for expenditure is sacrosanct.[25]

Interestingly, while the Court of Appeal theoretically emphasized the doctrine of Separation of Powers, it curiously ridiculed same in reality by the purport of its verdict which clearly contradicted the ultimate goals of the principle. The verdict pragmatically footnotes that Judicial Officers are now sacred cows, and will only be charged if and when it pleases their colleagues. The Court equally went astray, forgetting that by the judgment, the NJC which is an arm of the Judiciary has effusively usurped the powers of the Executive to investigate crimes. It preemptively boils down to the fact that allegations against judicial officers may no longer see the light irrespective of the weight of evidence available as the power of investigation is purportedly vested in their colleagues unlike in other developed countries where serving Judges had been severally arrested by security agencies and made to face the law as other citizens.

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[20] Odude, F., 'Appeal Court Sought to Make New Law in Decision on Justice Nganjiwa', *FinancialNigeria* https://www.financialnigeria.com , accessed, 5th May, 2018.
[21] 2015.
[22] *Sections 292 and 231.*
[23] *Section 58(3).*
[24] *Section 147.*
[25] *Sections 80 and 81.*

By the existing constitutional arrangement, it is submitted that Judicial Officers are not immune to criminal prosecution except while on official duties. A Judicial Officer who commits a criminal offence can be arrested outside the court premises as official duties are strictly limited to juristic obligations which bribery, treasury-looting, murder, and other crimes are not part of. At the moment, immunity from criminal prosecution is provided for by *Section 308* of the 1999 Constitution and covers only the government officials listed therein going by the *ejusdem generis* principle. Even while the said immunity lasts, *Section 143* of the same constitution unequivocally enables the Legislature pursuant to the principle of Checks and Balances, to investigate the Executive officials covered by the clause and if culpable, impeach them in lieu of prosecution.

Furthermore, *Section 98* of the Criminal Code[26] unambiguously prohibits "official corruption" by public officials, including inviting or receiving bribes, property, or benefits for a favour in the discharge of official duties, and pegged the punishment at seven years imprisonment if the official is found guilty of the alleged act. The classification contemplated by the Code there clearly includes Judicial Officers and the condition precedent is commission or omission of deeds that are listed therein, and no more. The posture of the Court of Appeal which designates Judicial Officers as untouchables except by their colleagues in the profession is a mockery of the theory of Separation of Powers as advocated by Montesquieu and must not get the nod of the Supreme Court.[27]

Regarding the charges against the CJN, the Chairman of the Presidential Advisory Committee Against Corruption, Prof. Itse Sagay reacted by insisting that the Court of Appeal decision in the Nganjiwa case is both unconstitutional and illegal. He described same as an illicit attempt by some Justices of the Court of Appeal to give themselves immunity contrary to the provisions of the Constitution. In examining the judgment, the learned legal icon insists that the Nganjiwa case is a judgment limited to a judge who was acting as a judicial officer, who was hearing a case and in the process was found guilty of misconduct in the hearing of that case.

The CJN's case must of necessity be distinguished from the case of Hon. Justice Nganjiwa. While the case involving the CJN has nothing to do with a case in court nor did the infraction occur in the course of his duty, it is something common to all public officers before they take an office. That alone is a major distinction. Besides, by the very logic of the powers of the NJC, cases arising out of a breach of the Code of Conduct Bureau and Tribunal Act and the Code of Conduct provision in the Constitution cannot come before the NJC. The simple reason is because, if the NJC first decides the matter before the defendant is arraigned in court or at the Tribunal, finds him liable, and goes ahead to remove him from his office as a Judge, automatically he ceases to be a Judicial Officer as well as a Public Officer and cannot be tried as a Public Officer before the Code of Conduct Tribunal.

The implication is that the extant provisions of the Constitution and the Code of Conduct Bureau and Tribunal Act would be rendered nugatory by a prior NJC involvement. Indisputably, the Nganjiwa judgment contradicts the clear provisions of the Code of Conduct Tribunal's jurisdiction over public officers, including the Chief Justice of Nigeria.[28] Filling an Assets Declaration Form is totally outside the ambit of a judicial officer's work and applies to all public officers. Failure to do so is equally not a mere instance of official misconduct in court whilst exercising his authority as a Judge in a case before him as contemplated by the Court of Appeal in the case under reference.

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[26] Cap. C 38, Laws of the Federation of Nigeria, 2004.
[27] Umegboro, C., 'Judges' Purported Immunity and Separation of Powers', [2018] *Sunnewsonline*, https://www.sunnewsonline.com , accessed, 2nd May, 2018.
[28] See 5th Schedule, Part One 1999 Constitution.

Conclusion and Recommendations

In conclusion, while it is conceded that the independence of the Judiciary signifies a lack of interference with its process, procedures, monies, and the discipline of its members, it cannot however extend to curtailing the powers of the state to prosecute for offences against it. That will defeat the checks and balances component of the doctrine of Separation of Powers.

The establishment and guarantee of independence to the National Judicial Council by *Sections 153* and *158,* and *160* of the 1999 Constitution has clearly pitched the Council, and by extension the Judiciary against the Executive, particularly law enforcement officers such as the Police, the Economic and Financial Crimes Commission (EFCC), and Department of State Services (DSS) in view of the combined effect of a careful reading of *Sections 4, 5, 6, 143,* and *308* of the same constitution, juxtaposed against the backdrop of *Section 98* of the Criminal Code, and particularly *Section 82* of the Criminal Law of Lagos State in this case. This disposition which is on all fours with the French 'non-interference' model of the Separation of Powers is alien to our legal system which is tailored towards the American model.

The Nigerian National Assembly is challenged by this judgment that clearly tends towards judicial rascality and must rise to the occasion by urgently resolving this legislative cum judicial logjam via legislative action to obviate the apparent confusion and attendant difficulty posed by the perceived conflict in the purport of these provisions of the law as interpreted by the Court of Appeal.

The National Judicial Council is equally enjoined to rise up to the challenge before it, thrown up by critics of this Court of Appeal decision who particularly refer to what they perceive as the slow pace of its disciplinary procedure of Judges as well as apparent ambivalence and / or indifference to the feelings of the public as a reason to doubt its efficiency in the discharge of its duties. Dutiful discharge of its responsibility in that regard will serve to strengthen democracy and the Separation of Powers in the manner envisaged by the constitution and interpreted by the Court in the judgment under reference.

Finally, the Supreme Court as the last hope of the common man has been called upon to urgently nip this ugly legal squabble that has created a divergence of purpose within our *corpus juris* in the bud to protect and preserve the confidence in, and integrity of the Judiciary now that the EFCC has appealed against the controversial judgment by asking the apex court to "apply the law without discrimination or favour even when a Judge is involved".