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A COMPARATIVE ANALYSIS OF THE DOCTRINE OF SEPARATION OF POWERS UNDER THE 1999 NIGERIA CONSTITUTION AND THE SHARIAH LEGAL SYSTEM

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Abstract

Separation of Powers is a basic political/philosophical doctrine that, in brief, states that when the legislative, executive and judicial functions and powers are in the hands of the same person or agency, tyranny exists. The study compared and contrasted the nature and attributes of the concept of "Separation of Powers" under the 1999 Constitution of Nigeria and the Islamic Constitutional law and the extent to which the two political systems guarantee the concept with a view to appraising the extent of their operations and identify areas that need reform. The methodology adopted included the primary source such as existing laws, the Constitution and judicial decisions while secondary source included books, journals, conference proceedings, official publications and gazettes. The findings of the study show that although the 1999 Constitution of Nigeria and Islamic Constitutional law started on different premises with regard to separation of power the concept is fully identifiable under both Constitutional systems. It is recommended that a bicameral legislature at the federal level where in the Supreme Council for Islamic Affairs and Christian Association of Nigeria sitting on part-time basis while members voting on the platforms of registered parties sit on full time. At the state level, the house of assembly should comprise of the representatives of the religious bodies and the elected representatives of political parties.

Keywords: **Constitution,Constitutional system, Seperation of power, Islamic Constitutional law**

1. Introduction

The Rule of Law and the Roles of the Executive, the Legislature and the Judiciary in a democracy have been referred to as checks and balances. The great scholar Ben Nwabueze writing in 1998 in examining the picture in his own continent where he rightly posited, Presidential tyranny had acquired a frightful reality which had earned for the system a rather pejorative appellation. African Presidentialism, defined checks and balances as: concept in the relationship between the executive and the

legislature whereby the political organs with a view to the balancing of powers are able to check one another in the exercise of their respective functions.[1]

Since the time of the definition given by that scholar, not until recently, the picture which had been presented by the Executive, especially in Nigeria, had only gone worse, Militarism, which entered into our body politics in 1966, only gave the country a respite in 1979, the year of the first Presidential Constitution.

The doctrine of separation of powers advocates the independent exercise of these three governmental or Constitutional functions, by different bodies or persons, without interference or control or domination, by one of the other or others[2]. Separation of powers is, thus interpreted as a principle of checks and balances. This Constitutional modus operandi or mechanisms explains how the three arms of government interrelate with each other with the ultimate of maintaining checks and balances on each other. It is a regulatory mechanism[3].

Crabble, a Commissioner in the office of the Ghanaian attorney general asserted that the principle of separation of powers does not essentially mean antagonistic political division, but rather "collective responsibility" of top functionaries of governments. He went further to say that "if the doctrine of separation of powers is understood to mean that, the separate arms of government could not have partial control over some parts of the other, there would be difficulties. The doctrine of separation of powers, according to the learned Jurist, is thus a sharing of the powers of government. It is a system of checks and balances which allows each of the arms to defend its position in the Constitutional framework of government[4].

On the true meaning of the principle, the Ghanaian legal luminary said "if the doctrine is understood to mean that the whole of the powers of the legislature, executive and the whole of the powers of the judiciary are not possessed nor exercise by the same person of authority, then there is merit in the blending of certain functions of each of those arms"[5].

According to Oputa, the concept of separation of powers arose from the need to ensure the restraint of governmental lawlessness and thus maintain the civil rights and liberties conferred on them by the Constitution[6].

Adediran in his view posited that the pre theory of separation of powers centers on the principle that the three powers of the state: legislative, executive and judiciary

1 Eso K. JSC (rtd), 'The Rule of Law: The Roles of the Executive, The legislature and the Judiciary in a Democracy,(2000) the New Millennium Jurist Journal of the law Society, Unilorin 5th Edition) 8.

2 Sagay I.E., 'The Doctrine of separation of Power-Highlights for the Third Republic' (The 1991 Annual Conference of Nigerian Bar Association, Owerri) 1.

3 Adaramoye Kayode, 'Separation of Powers and the 1991 Constitution Law', *The Comet Newspaper* (25 December 2000) 25.

4 Vincent Crable, 'The Doctrine of the Separation of Powers and the Purposeful Approach to the Interpretation of Legislation' *The Guardian Newspaper* (22 December 2000) 3

5 ibid 3.

6 Sagay (n 2) 3.

should not be exercised by a single person or a body or persons. This, according to him, is to prevent political tyranny, since power corrupts and absolutely power corrupts absolutely[7].

2. What is the history of the evolution of the doctrine of separation of powers; or as it is usually 'referred to check is and balances'?

The basic norm is power which is often wrongly associated with greatness. But democracy has realized as the immortal Band of Straiford-on-Avon had done centuries ago, that power is usually abused, and when so abused, it is done to the changing of the common man[8].

The separation of powers embodies a different philosophy of balancing power between different bodies so that no power centre can act without the operation of the others and with each serving as checks on others. No legal machinery can deal with the extreme case of overwhelming political and however much we may try, this possibility is unlikely[9].

A theory of separation of powers has been recognized since at least the time of Aristotle. There are several different meanings of the concept of separation of powers. For example the classical doctrine favoured by Aristotle would divide power according to class interest, these comprising monarchy, aristocracy and democracy. This version of the separation of power is partly reflected in the British Institutions of monarchy. House of Lords and House of Commons, and was a powerful influence upon the 1688 revolution.

In 1690, the English man John Locke wrote in his ***Second Treatise in Civil Government:*** it may be too great a temptation to human frailty 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 obedient to the laws they make an the law, both in its making and execution, to their own private advantage.

The doctrine of the separation of powers was developed further by the French Jurist, Montesquieu, who based his exposition on the British Constitution of the early 18th century as he understood it. His division of powers did not closely correspond except in name with the classification which has become traditional. For although he followed the usual meanings of legislative and judicial powers, but executive power however, he meant only the power of executing matters falling within the law of

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7 Adeniran M.O, 'Separation of Power under the 1999 Constitution: A myth of Reality?' Paper presented at (Biennial Law week of NBA Ilorin Branch 2000) 6.

8 Eso (n 1) 8.

9 Alder John, *The Separation of Powers: Constitutional and Administrative Law*(2nd edn, Macmillan Professor Master 1991) 55.

nations, that is, making war and peace, sending and receiving ambassadors, establishing order, preventing invasion[10]. He stated the essence of the doctrine thus:

> *When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, the subject would be exposed to arbitrary control, for the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying causes of individuals.*[11]

3. The Theory of Separation of Power under the 1999 Constitution of Nigeria

The theory of separation of powers has always been recognized in the various Nigeria Constitutions. Even under the parliamentary system, it was recognized to a certain extent. It became more prominent under the Presidential Constitution of 1979[12].

The 1999 Constitution of Nigeria enshrines the separation of powers as an underlining principle of the Nigeria government system by vesting legislative power of the Federal Government in the National Assembly. The appropriate section of the Constitution provides that:

> *The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representative.*[13]

With regards to the executive powers of the government, these are vested in the President of the Federal Republic of Nigeria. According to the Constitution: "*subject to the provisions of this Constitution, the executive powers of the Federation:-*

a. *shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by Him either directly or through the Vice-President*

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10 Wade and Bradley (1985) *Constitutional and Administrative Law* (10th edn, Longman Publication Group Ltd.1985) 51.

11 The above statement emphasized that within a system of government based upon law, the judicial function should be exercised by a body separate from legislature and executive, Montesquieu did not, it may be surmised, mean that legislature and executive ought to have no influence or control over the acts of each other, but only that neither should exercise the whole power of the other[11].
It is an irony of history that the doctrine of separation of powers was neither in operation in the 18th century English Constitution system which was the source of Montesquieu's inspiration nor was it adopted in his home land France at that time. Indeed even today in both countries, the executive and legislative functions are largely in the hand of the same group of people[11]. It was in the USA that the doctrine was fully embraced for the first time. The concept of the separation of powers is even more crucial to the survival of the modern state that it was, in the days of Montesquieu.

12 Adeniran (n 7) 8

13 S. 4