

## The Doctrine of Separation of Powers And The Illusion of ‘Separateness’: Core Legal Dilemmas Under Nigeria’s Constitutional Democracy

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### ABSTRACT

This Paper examines the doctrine of Separation of powers and its complicatedness as regards its practice in Nigeria’s Constitutional democracy. Drawing from historical insights and Nigeria’s constitutional model, and the of the practice in Nigeria’s constitutional democracy, this Paper makes the case that given that the doctrine has been heavily eroded so much so that instead of ‘separation’ what obtains practically speaking is nothing but ‘fusion’ particularly as it relates to the Executive and the Legislature, the doctrine operates in more of a dilemmatic situation. This Paper however offers a flicker of hope by pointing to the fact that all hope does not appear lost, as the Judiciary still maintains some level of ‘separateness’, except that only time will tell as to how much this lasts.

### INTRODUCTION

One important feature of every modern Constitution is the separation of powers amongst the different organs or branches of government. Not only does the doctrine serve as a guide to the proper organization of powers and government, as well as it being the most effective embodiment of the spirit underlying it<sup>1</sup>, its design further founded on the existential fear that to concentrate powers in just one branch, person, or group of persons is tantamount to laying the bed for abuse of power, arbitrariness, and tyranny. From its humble origin to contemporary times, the doctrine has had very significant influence over the running of governmental affairs, and has no doubt help put in check the morbid desires of Men of ill will.

However, in lieu of rapid political development of the 21<sup>st</sup> century that has seen the shattering of age long held dogmas, its relevance as the touch-bearer of contemporary constitutional governance has come under severe attack.

Right from independence, successive political dispensations in Nigeria have engineered different constitutions, all providing for the doctrine of separation of powers<sup>2</sup>. The latest is the Constitution of the Federal Republic of Nigeria, 1999<sup>3</sup>. Notwithstanding the clear separation of powers under all of these documents, the reality is that power rather than being ‘separated’ has not only enjoyed an appearance of ‘fusion’, but most pathetically has

<sup>2</sup> From 1954 when a new era of Self-government emerged, the Nigerian State has engineered seven federal constitutions namely the 1954 Constitution, the 1960 Independence Constitution, the 1963 Republication Constitution, the 1979 Constitution, the 1989 Constitution, the 1995 Constitution, and the 1999 Constitution. It is worth stating that both the 1989 and the 1995 Constitution were inchoate documents, and never became fully fledged constitutions. For an extensive overview on the trajectory of Nigerian Constitutions, see generally A. Gboyega, ‘The Making of the Nigerian Constitution’, in O. Oyediran (Ed.), *Nigerian Government & Politics under Military Rule*, (Lagos: Friends Foundation Publishers Ltd., 1988).

<sup>3</sup>This Constitution is more notoriously referred to as Decree No.24 of 1999, as the last act of Military law-making by the administration if General Abdulsalami Abubakar.

<sup>1</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers*, (Indianapolis: Liberty Funds Inc., 2nd edn., 1998).

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been personalised by the Executive arm in a manner that has seen it emerged as the Peoples’ lone image of government. This has largely been the scenario at the three levels of government. It is against this background that a fast-maturing notion today is one that views the doctrine as a relic of a constitutional past and nothing more than a matter for academic posturing. The argument is that current realities does not in any way depict powers being separated and as such there should be a shift that will see countries fashion how best to get the best out of what the reality presents, rather than labouring with a doctrine that has past its prime. In order to thematically address these issues as well as deepen the ongoing conversation, the Paper will begin by examining the doctrine in an historical context, then proceed to engage the its seeming decline under Nigeria’s Constitutional framework, with a view to seeing to how constitutional experience can be the better for it.

### DOCTRINE OF SEPARATION OF POWERS: AN HISTORICAL INSIGHT

The Doctrine of separation of powers articulates that each arm of government is distinct, independent, and not seen as exercising the powers of the others<sup>4</sup>. It has also been describes as meaning that one organ should not control or interfere with the work of another<sup>5</sup>. The separation of the legislative, executive, and judiciary powers is a key principle in most democratic constitutions<sup>6</sup>. Different arguments have been pushed concerning the allocation of governmental powers following this doctrine. The approach of the functionalist is to argue that most constitutional do not say enough about the distribution of powers amongst different branches of government<sup>7</sup>.

The early origin of the doctrine dates back to the 4<sup>th</sup> century B.C. when Aristotle, in his treatise

‘Politics’, advocated for three agencies of government the general assembly, the public officials, and the judiciary, to be the structure of the State<sup>8</sup>. Aristotle tried to make distinctions between the function and authority of these three arms that make up government<sup>9</sup>. After the fall of the Roman Empire, and with Europe divided into several nation-states, most of the power of the state was domiciled in tyrannical monarchs, except for the English society where the Parliament had emerged. Following the development under English constitutional rule, John Locke developed the idea of the three arms of government which he gave the titles Executive, Legislature, and Judiciary<sup>10</sup>. According to Locke, the English

<sup>8</sup> Aristotle, *Politics*, (Indianapolis: Hackett Publishing Co., Translated by C.D.C Reeve 1998).

<sup>9</sup> *Ibid*; After Aristotle’s ground work, James Harrington an English scholar espoused the doctrine in his work, ‘Common Wealth of Oceana’, (1656), which romanticized a utopian political system built on the separation of powers.

<sup>10</sup> J. Locke, *Treatise of Civil Government* 366 – 367, 1690, (Cambridge: Cambridge University Press, Peter Laslett ed., 1988); Based on Locke’s theory, the state of nature as a community had a law of nature that every member had to observe and one that everyone could enforce. He said, “The Execution of the Law of Nature is in that State, put into every Man’s hands, whereby everyone has a right to punish the transgressors of that Law to such a degree, as may hinder its violation. According to Locke, given the ineffectiveness of the law of nature, Men decided to cede their executive power (the same that they had wielded in the state of nature), to government to secure a more orderly and consistent execution of the laws. This encompasses the idea of the Social Contract Theory. He argues that given that laws are bound to remain in eternal execution, there is a need also for a power continuously in existence to ensure the execution of the laws that are made. Locke feels that these cannot be the responsibility of the Legislature, because were it to be so, they would not only make the laws to suit their whims and caprices that will wilfully exempt themselves from the performance of those laws which will ultimately breed arbitrariness. According to him therefore, “It is not necessary, nor so much as convenient, that the legislative should be always in being. But absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made”. He therefore advocated for the Executive as separate from the Legislature. He then ended by saying that given that the people had to donate their executive powers from the state of nature to form government, the responsibility of annulling the same government lies with them. Thus, according to him, where, “he

<sup>4</sup> A. Hamilton, J. Madison, and J. Jay, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federation Convention September 17, 1787*, (J & A McLean, 1788).

<sup>5</sup> A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, (Longman, 13<sup>th</sup> edn., 2003), 84.

<sup>6</sup> K. Fuchs and F. Herold, ‘The Costs and Benefits of a Separation of Powers: An Incomplete Contracts Approach’, (2011), 13 (1), *American Law and Economics Review*, 131 – 167.

<sup>7</sup> P. L. Strauss, ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’, (1984), 84, *Columbia Law Review*, 573 – 597.

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thinker and another of the foremost evangelists of the doctrine of separation of powers, to secure the gains the liberty power must not be seen as concentrated in on one man, but in separate hands or institutions<sup>11</sup>. Locke was of the view that the greatest danger to democratic rule would be to situate all powers in the hands of the legislature as they may remove themselves from the purview of the law, with the evil that it makes the citizens subject to the arbitrariness and whimsical idiosyncrasies of men of evil intentions<sup>12</sup>. However, a stoic opponent of the doctrine is Thomas Hobbes, who in his vitriolic denouncement of the doctrine argued that governmental powers were indivisible and inseparable<sup>13</sup>.

In the long history of constitutional thoughts, the opinion of other leading constitutionalists has also helped shaped an understanding of the doctrine of separation of powers and guided the outpouring of fresh thinking. In this wise, the Federalist evidently stand tall. The trio of Alexander Hamilton, James Madison, and Thomas Jefferson, as men equipped with extraordinary foresight, vision, and faith in the development of the rights of men over that of their rulers, combined uncommon theoretical insight with critical thinking that saw them produce new understanding of political power and the institution of government among the people<sup>14</sup>. According to them, “*If Men were Angels, no government would be necessary, and if Angels were to govern men, neither external nor*

*internal controls on government would be necessary*”<sup>15</sup>. Continuing they said, “*In framing a government which is to be administered by men over men, the great difficulty lies in this – You must first enable the government to control the governed, and in the next place oblige it to control itself*”<sup>16</sup>. They then concluded that, “*For one, a dependence on the people is the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions*”<sup>17</sup>.

In their views, which spanned a wide range there were however aspects of divergence. James Madison for instance was of the view that self-interest was an inevitable force in check-mating the political behaviour of leaders<sup>18</sup>. Extending this argument, he said, “*as there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence*”<sup>19</sup>. He then goes ahead to add that the “*aim of every political constitution is, or ought to be, first to obtain for ruler men who possess the most wisdom to discern, the most virtue to pursue, and the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous while they continue to hold public trust*”<sup>20</sup>. Thus, though Madison agreed with Locke that where power is domiciled in just one branch of government, tyrannical rule is the result<sup>21</sup>, he was also of the opinion that such men may just possess certain inherent qualities that may be enough to keep them in check.

However, his fellow Federalists compatriots disagreed with him, saying self-interestall by

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who has the Supreme Executive Power, neglects and abandons that charge, so that the Laws already made can no longer be put in execution.”, the people can dissolve the same. He also spoke of the executive power of the magistrate where he said, “It is the duty of the civil magistrate, by the impartial execution of equal laws, to”.

<sup>11</sup>*Ibid*; See also A. Appodarai, *The Substance of Politics*, (New Delhi: Oxford University Press, 2003).

<sup>12</sup>*Ibid*; In his words he said, “*It may be too great a temptation of human frailty for the same persons who have the power of making laws to have also in them the power to execute them, whereby they may exempt themselves from obedience to the laws they make and suit of the laws, both in its making and execution, to their own private advantage and thereby come to have distinct interest from the rest of the community contrary to the end of society and government...*”.

<sup>13</sup> T. Hobbes, *Leviathan 1651*, (Cambridge: Cambridge University Press, Richard Tuck Ed., 1996).

<sup>14</sup> C.D. Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention*, (Little Brown, 1986).

<sup>15</sup> J. Madison, *Federalist Papers No. 51*, (1788).

<sup>16</sup>*Ibid*.

<sup>17</sup>*Ibid*.

<sup>18</sup>*Ibid*.

<sup>19</sup>*Ibid*.

<sup>20</sup>J. Madison, *Federalist Papers, No. 57*, (1788).

<sup>21</sup> In making this point, he opined as follows, “*The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system*”. See J. Madison, *The Federalist, No. 47*, (Clinton Rossiter ed., 1961).

itself, is not enough. For instance, in the words of Hamilton he said, “*The supposition of universal venality in human nature, is little less an error in political reasoning than the supposition of universal rectitude*”<sup>22</sup>. Thomas Jefferson however appear to radically depart from the position of his fellow intellectuals. Expressing rather iconoclastic thoughts, he was of the opinion that, “*turbulence is productive of good, it prevents the degeneracy of government, and nourishes a general attention to the public affairs. I hold that a little rebellion now and then, is a good thing*”<sup>23</sup>. The sum of the thoughts of these outstanding constitutional intellectuals, who bestrode their generation as colossuses, is that the only security against a gradual concentration of powers in one hand lies in granting unto the three arms of government the constitutional means to resist the encroachment of others<sup>24</sup>. In this wise, constitutional safeguard are designed in a manner that the defence provided for intent and purposes, is commensurate to the danger of attack, such that reckless ambition in one arm is countered effectively by potent checks in the other<sup>25</sup>.

Following the works of the French Political theorist and philosopher, Baron de Montesquieu separation of powers gained momentum as a major pillar of Dicey’s Rule of Law<sup>26</sup>, particularly one that will serve as a bulwark against the centralization of power in the hands of a single individual, group, or institution<sup>27</sup>. According to Montesquieu, who distastefully resented the idea of absolutism, he argued that where powers are fused the consequences are condemned to be dire<sup>28</sup>. Montesquieu’s postulations is rooted in

the twin idea of rule of law and liberty as resistance against the tyrannically governments that were the order of the day in the Continental Europe<sup>29</sup>. However, for Montesquieu executive power was power to execute all laws except the exercise of judicial powers<sup>30</sup>. This was a position radically different from Locke’s argument that executive power and judicial powers were historically combined as one. The same sentiment was shared by the English thinker, Blackstone who equally postulated that

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*body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals”*. He then went ahead to say that, “*Constant experience shows us that every man invested with power is likely to abuse it and carry his authority as far as it will go. 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...*” See U. Otobasi, ‘The Legislative Arm in the Third Tier of Government Framework: Functions and Inter Relations’, in O. Tony, (ed.), *Key Issues In Local Government and Development: A Nigerian Perspective*, (Enugu: Praise House Publishers, 2011). However, Montesquieu notion of separation of powers has been heavily criticised. See L. Claus, ‘Montesquieu’s Mistakes and the True Meaning of Separation of Powers’, (2005), 25, *Oxford Journal of Legal Studies*, 419.

<sup>29</sup> From the rule of Alexander, the great down to Napoleon Bonaparte, the rise of tyranny was a part of the political order in early medieval Europe. See A. Moses, ‘Separation of Powers in the Local Government: The Legislative Experience’, in O. Tony (ed.), *Key Issues in Local Government and Development: The Nigerian Perspective*, (Enugu: Praise House Publishers, 2011).

<sup>30</sup> Montesquieu cited structural reasons for why the judicial should be separate from the executive. For example, he pointed out that in monarchic states, the prince was the prosecutor who punished. If the same prince also judged the case, the prince “*would be both judge and party,*” and that clearly would be improper.

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<sup>22</sup> A. Hamilton, *The Federalist Papers*, No.76

<sup>23</sup> See Letter to Madison, Jan. 30, 1787, in *The Portable Thomas Jefferson* 416-410 (M. Peterson ed. 1975)

<sup>24</sup> J. Madison, *supra*, n. 15.

<sup>25</sup> *Ibid.*

<sup>26</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan Publishers, 10<sup>th</sup>Edn., 1959), 424.

<sup>27</sup> Baron de Montesquieu, *The Spirit of Laws*, (Frank Neuman ed., Encyclopedia Britannica edn., 1952) (1748). Edition published in Paris in 1877, 11.6. The title of the chapter is ‘De la constitution d’ Angleterre’; See also Baron de Montesquieu, *The Spirit of Laws*, (Cambridge: Cambridge University Press, Anne M. Cohler et al. eds., 1989).

<sup>28</sup> *Ibid*; Montesquieu expressed this thinking in the following words, “*When the legislative and executive powers are united in the same person, or in the same*

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executive power was the power to execute laws.<sup>31</sup> He added that, “*executive powers of the laws are lodged in a single person (in England); they have all the advantages of strength and dispatch*”<sup>32</sup>. This position had been hinged on the fact that the concept of liberty had by that time come to enjoy a pride of place under English Constitutional framework, a development that was helped greatly by the inspiration that came from two leading human rights documents of that time, the English Bill of Rights, 1686 and the Magna Carta, 1215<sup>33</sup>. The influence of these two landmark documents pushed for a system in which the powers of the English Monarch which was hitherto absolute and unchallengeable would be limited, and a

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<sup>31</sup> In echoing Montesquieu thoughts, Sir William Blackstone noted as follow, “*In all tyrannical government the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and whenever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of dispenser of justice, with all the quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislature and executive authority are in distinct hands, the former will take care not to entrust the later with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject*”. He further added, “*In this distinct and separate existence of the judicial power, in a particular body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be in some degree separated from both the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only in their own opinions, and not by any fundamental principles of law, which, though legislatures may depart from, yet the judges are bound to observe. Were it joined with executive, this union might soon be an over balance for the legislative...*”. See William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press, 1<sup>st</sup> ed, 1765), 259-260.

<sup>32</sup> *Ibid.*

<sup>33</sup> English Constitutional history credits both the Bill of Rights and the Magna Carta with shaping the development of constitutional rights in the British Empire and the gradual dismantling of the quiet authoritarianism of age-long Monarch that had ruled with a fiat.

part exercised by the English Parliament<sup>34</sup>. Thus, with the birth of the Crown and Parliament as two organs of the then English Constitutional structure, Montesquieu through his postulations advocated an inclusion of the Judiciary, to be the third leg of the tripod.

In most modern governments, power in this regard is of three species vested in distinct branches of government i.e. the Legislature which makes the law, the Executive which executes the law, and the Judiciary which interprets the law<sup>35</sup>. Where this departmentalisation is properly in place, the argument is that government will run smoothly<sup>36</sup>. From its early practice, it is now for instance a landmark feature of the US Constitution<sup>37</sup>, and has emerged as an important part of the general understanding of the doctrine of constitutionalism<sup>38</sup>. The doctrine advocates that each organ of government is independent<sup>39</sup>, masterly annulling the possibility of powers being concentrated in just one body or the hands of a single person<sup>40</sup>, as a way of protecting liberty<sup>41</sup>, and guaranteeing the security of the

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<sup>34</sup> As a matter of fact, this era saw the quick rise of the corollary doctrine of ‘Parliamentary Supremacy’, in which for the first time, the powers of the Crown was questioned and the authority of the Parliament to make any law, amend any law, or even repeal any law, was seen as final.

<sup>35</sup> For an extensive read, see generally O. Abifarin, *Essays on Constitutional and Administrative Law under the 1999 Constitution*, (Kaduna: Mofolayomi Press, 2000), 5; K.M. Mowe, *Constitutional Law in Nigeria*, (Lagos: Malthouse Press Ltd, 2008), 23.

<sup>36</sup> N. Barber, ‘Prelude to the Separation of Powers’, (2001), 60, *Cambridge Law Journal*, 59.

<sup>37</sup> G. Casper, ‘An Essay in Separation of Powers: Some Early Versions and Practices’, (1989), 30, *William and Mary Law Review*, 211; L. Lessig and C.R. Sunstein, ‘The President and the Administration’, (1994), 93, *Columbia Law Review*, 1.

<sup>38</sup> J. Waldron, ‘Constitutionalism: A Skeptical View’, in T. Christiano and J. Christman (Eds.), *Contemporary Debates in Political Philosophy*, (2009), 270 – 273; E. Carolan, *The New Separation of Powers: A Theory of the Modern State*, (Oxford: Oxford University Press, 2009), 18.

<sup>39</sup> J. Alder, *Constitutional and Administrative Law*, (London: Macmillan Publishers, 7<sup>th</sup> Edn., 2009), 143.

<sup>40</sup> A. A. Taiwo, *Separation of powers: A Key Principle of Democratic Governance*, (Ibadan: Ababa Press Ltd., 2013), 32.

<sup>41</sup> T. R. S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, (Oxford: Oxford University Press, 1994), 3.

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state<sup>42</sup>. For example, in modern constitutional democracies, the independence of the judiciary is a signpost of the maturity of democratic rule<sup>43</sup>. The generally acceptable understanding of Separation of powers is one that sees it more as the sharing of powers amongst the organs of government to the end that in the exercise of these powers, one acts as a watching on the other ensuring that such power is properly deployed in line with the Constitution which donates the power.

### SEPARATION OF POWERS – NIGERIA’S CONSTITUTIONAL MODEL

The Doctrine of Separation of powers is part of the heart and soul of Nigeria’s 1999 Constitution. Under the Constitution, Separation of powers is both horizontal and vertical. As regards the horizontal separation of powers, the framers of this organic law carefully departmentalised the governmental powers into three branches, namely - the Legislature provided for in Section 4 of the Constitution<sup>44</sup>, the Executive in Section 5 of the

same document<sup>45</sup>, and the Judiciary in Section 6 of the fundamental law<sup>46</sup>, in a manner that the separateness envisaged is clear and distinct. This is established under Part II of the Constitution, under the broad heading of ‘Powers of the Federal Republic of Nigeria’<sup>47</sup>. These provisions i.e. Sections 4, 5, and 6 are so carefully worded to protect these powers. For instance, the powers of the Legislature to makes laws for the order and good governance of Nigeria has been reaffirmed in the leading Supreme Court’s decision in *Attorney General of Bendel State v. Attorney General of the Federation*<sup>48</sup>.

It is along these clear demarcations that each these branches have carried out its core mandate in the development of Nigeria’s constitutional democracy, and to reaffirmed the constitutionality of the doctrine, the courts have

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*which it is empowered to make laws in accordance with the provisions of this Constitution*”. See Section 4 (1) (2) (3) & (4), Constitution of the Federal Republic of Nigeria, 1999.

<sup>45</sup> On this, the Constitution provides that, “*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 and Ministers of the Government of the Federation or officers in the public service of the Federation; and (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws*”.

<sup>46</sup> For the powers in this regard, see Section 6 (1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that, “*The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation. The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State*”. See additionally Section 6 (3), (4), (5), & (6) of the same Constitution. Note that the notion of constitutionalising judicial powers is rooted in the need to resolve complex disputes resulting from the application of the laws. See H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 3<sup>rd</sup> Ed., L. Green Ed., 2012).

<sup>47</sup> See also Chapter V which deals extensively with the Legislature, Chapter VI, which spells out several other powers of the Executive, and Chapter VII which contains more information on Judicial powers of the State.

<sup>48</sup> (1981), 10 SC 1 at 198.

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<sup>42</sup> D.J. Levinson and R.H. Pildes, ‘Separation of Parties, Not Powers’, (2006), 119, Harvard Law Review, 2311.

<sup>43</sup> J.K. Nyerere, *Freedom and Unity*, (Dar es Salaam: Oxford University Press, 1967), 131; According to a Nigerian Scholar Ogoloma, “*One condition of liberty is the separation of the legislature from the executive and the existence of an independent and impartial judiciary*”. See F. Ogoloma, ‘The Theory of Separation of Powers in Nigeria: An Assessment’, (2012), 6 (3), *African Research Review*.

<sup>44</sup> In this wise, 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 Representatives. The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution. The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States. In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say - (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and (b) any other matter with respect to*

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not shied away from making far-reaching pronouncements on its role. It was to this end that again in *Attorney General of Bendel State v. Attorney General of the Federation*<sup>49</sup>, the Supreme Court this time per Eso J.S.C., speaking of separation of powers said;

*Now it is time that the legislature, especially in a country like ours which has accepted the doctrine of separation of powers and which has got that doctrine embodied in constitution, is a master of its own household.*

The same still referring to the doctrine opined in *Unongo v. Aper Aku*<sup>50</sup>, that;

*The Constitution of the Federal Republic of Nigeria 1979 which is hereinafter referred to as the Constitution is very unique compared with the previous Constitution in that the executive, the legislature and the judiciary are each established as a separate organ of Government. There is what can be termed a cold calculated rigidity in this separation as shown in sections 4, 5 & 6 of the Constitution which established the legislative and the executive and the judicature respectively.*

There is also vertical separation of powers, in which powers is devolved amongst three tiers of government, namely the Federal, State, and Local Governments<sup>51</sup>. The notion of both horizontal and vertical separation of powers is well captured in the opinion of the Supreme Court of Nigeria per Rhodes - Vivour J.S.C., in *Ugba v Suswan*<sup>52</sup>, where the Court said;

*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*<sup>53</sup>.

### SEPARATION OF POWERS AND THE AGE OF ‘FUSION’ AS AGAINST ‘SEPARATENESS’ – NIGERIA IN PERSPECTIVE

Notwithstanding the departmentalisation of the powers of the three branches under the 1999

Constitution, the operation of the document as a whole has rather betrayed a situation in which all three branches have their powers and responsibilities overlapping, in a manner that one cannot conclusively perform its constitutional function without the approval of one or the other two. This of course is rooted in the idea of checks and balances, in which each of the branches are deemed to serve as a check on the other. Scholars have opined that this framework as it can be found under American constitutional practice originally has its roots in British idea of a ‘mixed regime’, in which the Crown, the Lords, and the Commons were co-opted together so as to serve as a check on each other<sup>54</sup>. However, this later gave way to the current system in which functions were separated<sup>55</sup>.

However, notwithstanding the truism in this statement, it is important to establish that beyond the myth of ‘Checks and Balances’, in which one branch is made to take the posture of a ‘watching dog’ sniffing at every footstep of the others, the current reality is one that clearly establishes the fact that the way and manner modern governments are designed, is such that the hitherto historical delineation of powers that have so ensured the meteoric rise of this doctrine have become significantly blurred, and are gradually being obliterated. Infact, it has been argued that in reality, the usefulness of separation of powers is consequent upon how willing each branch of government is ready to serve as a check on the other<sup>56</sup>.

Thus, in most constitutional frameworks today, the existing designed and distribution of governmental powers is one that points more to ‘Fusion of Powers’, than ‘Separation of Powers’. This is particularly in the Constitutional Framework of most countries that attained self-government in the second half of the 20<sup>th</sup> Century, which Nigeria been our own case-study. This reason for this does not appear to be far-fetched. Notwithstanding the deep postulations of the triumvirate of John Locke, Baron De Montesquieu, and A.V. Dicey, as well as the rich disputation of the Federalist intellectuals on the dangerousness of powers been concentrated in one branch or hand, the

<sup>49</sup> (1982), 2 NCLR 509.

<sup>50</sup> (1983), 2 SC NLR 332 at 361.

<sup>51</sup> This idea of devolution of powers can be gleaned from the provisions of Sections 2 & 3, Constitution of the Federal Republic of Nigeria, 1999.

<sup>52</sup> (2005) 1 WRN 1 at 64.

<sup>53</sup> *Ibid.*

<sup>54</sup> S.G. Calabresi, M. E. Berghausen, and S.

Albertson, ‘The Rise and Fall of Separation of Powers’, (2012), 106 (2), *Northwestern University Law Review*, 527 – 550.

<sup>55</sup> *Ibid.*

<sup>56</sup> A.Appodarai, *supra*, n.11.

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dynamism of late 20<sup>th</sup> Century and early 21<sup>st</sup> Century political governance has clearly shown that it would be virtually impossible, if not suicidal for just one branch of government to labour under the illusion that it can carry out its functions, all by itself, without sharing powers with one or the other two, and succeed. Across the length and breadth of the global constitutional landscape, the fusion of powers continues to gain pace in geometric proportions, while the decline of separation of powers continues in a free fall. Interestingly, two branches that are the most caught in this marriage of convenience are the Legislature and the Executive, both of whom are today the arrow-heads of most governments, and both of whom are now consistently called upon to ‘cooperate’, ‘join hands’, and ‘complement’ each-other to ensure the smooth running of the State and avoid unnecessary shutdowns in government.

In driving home this point, effort would be made to examine three (3) important areas in which this ‘cooperation’ has become somewhat institutionalised under the Nigerian Constitution. Suffice to say that exactly the same system operates in most, if not all constitutional democracies. The first is the framework dealing with *spending powers* under the Constitution. In this respect, the Constitution provides that, “*The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year*”<sup>57</sup>. This is one side of the framework dealing with ‘power of the purse’. Putting in place the other side of the coin, the same constitution proceeds to then give power to the Legislature to approve the budget proposal<sup>58</sup>, forbids any spending unless the approval of the Legislature has been

obtained<sup>59</sup>, extends the same to every other spending that would be made by the Executive<sup>60</sup>, and generally put overall fiscal responsibility in a sort of Siamese twins relationship involving the Executive and Legislature<sup>61</sup>. In further of this constitutional power, it has been argued that by reason of the Fiscal Responsibility Act, the National Assembly is empowered to not only approve the budgetary estimate presented by the Executive but to alter same as it may deem necessary under the circumstances<sup>62</sup>.

The Legislature also performs oversight functions whereby it supervises ministries, departments, and agencies of the Executive branch towards ensuring that approved budgetary estimates adequately adhere to as well as the execution of its legislations<sup>63</sup>. This framework is what oils the wheel of governance year in year out, particularly given the heavy dependence on government spending in Nigeria. The consequence therefore is that whenever the appropriation process is mismanaged courtesy of unabating disagreements between the Legislature and Executive, the result is always highly consequential, especially in regards of how much it asphyxiates the product sector given the inability of the Executive to spend and stimulate the economy.

The second is the framework dealing with *appointment powers* under the same

<sup>57</sup> Section 81 (1), Constitution of the Federal Republic of Nigeria, 1999. See additional provisions in Section 81 (2) (3) & (4). See the provision in Section 82 where the Constitution makes provision for emergencies and empowers the President to make spending in that regard with Legislature approval, with further backing granted such ‘urgent’ and ‘unforeseen’ situations in Section 83 (1) & (2). These provisions can also be read alongside with the provisions of Section 61 (1) of the Constitution.

<sup>58</sup> Section 59 (1) (2) (3) (4) & (5), Constitution of the Federal Republic of Nigeria, 1999.

<sup>59</sup> Section 80 (1) & (2), Constitution of the Federal Republic of Nigeria, 1999.

<sup>60</sup> Section 80 (3), Constitution of the Federal Republic of Nigeria, 1999.

<sup>61</sup> See Section 162 (2), Constitution of the Federal Republic of Nigeria 1999 which provides that, “*The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density*”.

<sup>62</sup> A.O.Ekpu and P.I. Iweoha, ‘Powers of the Executive and Legislature in Budget Making Process in Nigeria: An Overview’, (2017), 57, *Journal of Law, Policy, and Globalization*, 48.

<sup>63</sup> A.T. Shehu, ‘The Oversight Powers of the Legislature in Nigeria’, in *Law, Politics and Development, The Challenges of an Emerging Mega-City: Essays in Honour of Babatunde Raji Fashola, SAN*, (Nigerian Bar Association, Ikeja Branch 2012), 64.



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Constitution. In this wise, the Constitution provides for a plethora of appointments, with majority of them required to go through a rigorous process involving the approval or confirmation of the Upper Chamber of the Nigerian National Assembly, which is the Senate. Leading the pack is the appointment of Ministers to assist the President in executing the functions of his office. The Constitution provides that, “Any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President”<sup>64</sup>. In like manner, the Constitution goes further to prepare a long-list of strategic offices of the State that where appointments cannot be complete without the signature of the Senate. These includes, Code of Conduct Bureau, Council of State, Federal Character Commission, Federal Civil Service Commission, Federal Judicial Service Commission, Independent National Electoral Commission, National Defence Council, National Economic Council, National Judicial Council, National Population Commission, National Security Council, Nigeria Police Council, Police Service Commission, and Revenue Mobilisation Allocation and Fiscal Commission<sup>65</sup>. Also, in appointing any person to Office as Chief Justice of Nigeria, as well as Justices of the Supreme Court the Constitution mandates that such appointments are approved by the Senate<sup>66</sup>. A similar requirement is prescribed for appointment to Office of President of the Court of Appeal<sup>67</sup>, Office of Chief Judge of the Federal High Court<sup>68</sup>, Office of Chief Judge of the Hight Court of the Federal Capital Territory (FCT)<sup>69</sup>, Office of the Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory (FCT)<sup>70</sup>, Office of the

<sup>64</sup>Section 147 (2), Constitution of the Federal Republic of Nigeria, 1999.

<sup>65</sup>Section 153 (1), (a – n), & Section 154 (1) (2) & (3), Constitution of the Federal Republic of Nigeria, 1999.

<sup>66</sup>Section 231 (1) & (2), Constitution of the Federal Republic of Nigeria, 1999.

<sup>67</sup>Section 238 (1), Constitution of the Federal Republic of Nigeria, 1999.

<sup>68</sup>Section 250 (1), Constitution of the Federal Republic of Nigeria, 1999.

<sup>69</sup>Section 256 (1), Constitution of the Federal Republic of Nigeria, 1999.

<sup>70</sup>Section 261 (1), Constitution of the Federal Republic of Nigeria, 1999.

President of the Customary Court of Appeal of the Federal Capital Territory<sup>71</sup>.

The third is that which deals with the use of *military and emergency powers* under the Constitution. Depicting how power is fused here, the Constitution provides that the President is forbidden from declaring a State of War on another country without an approval based on a resolution of both Houses of the National Assembly in a joint session<sup>72</sup>.

In the same manner, he can also not deploy the Armed Forces of the Federation on combat duties in or outside the country, except by the approval of the National Assembly<sup>73</sup>. The Constitution then goes ahead to provide for further fusion of powers as regards the general operational use of the Armed Forces<sup>74</sup>. The President cannot equally declare a State of Emergency unless such is ratified by the National Assembly<sup>75</sup>.

Even as the examples above simply represents just two key areas of Executive-Legislative fusion of powers, the reality in practice is that this fusion operates in nearly every sphere of governance. Even in areas where the Constitution has not demanded this sort of marriage, what obtains is a situation where both branches of government most especially, literarily have to work hand in hands at all times for the survival of the state. This reality itself is rooted in the prescribed mode for accessing power in a Democracy. Under a democracy, governmental power can only be attained

<sup>71</sup>Section 266 (1), Constitution of the Federal Republic of Nigeria, 1999.

<sup>72</sup>Section 5 (4) (a), Constitution of the Federal Republic of Nigeria, 1999.

<sup>73</sup>Section 5 (4) (b), Constitution of the Federal Republic of Nigeria, 1999.

<sup>74</sup>See Section 217 and 218, Constitution of the Federal Public of Nigeria, 1999. Here, the provisions of Section 217 (2) (c) is instructive. It provides that the Armed Forces shall be for the purpose of, “*suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly*”. See equally Section 218 (4), which states that, “*The National Assembly shall have power to make laws for the regulation of - (a) the powers exercisable by the President as Commander-in-Chief of the Armed Forces of the Federation; and (b) the appointment, promotion and disciplinary control of members of the armed forces of the Federation*”.

<sup>75</sup>Section 305 (1) (2) & (3), Constitution of the Federal Republic of Nigeria, 1999.

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through periodic elections, where political parties are allowed to sponsor candidates<sup>76</sup>. This has seen political parties evolve over time as dominant forces on the road to power. Given their eminent position, their goal most often is less the Constitution, but how to grab political power and retain the same no matter whose ox is gored. The experience in Nigeria is such that the moment a political party is declared victorious at the polls and assumes power, it literally produces the leadership of both the Executive and the two houses of the Federal Legislature<sup>77</sup>, something seen as a form of entitlement<sup>78</sup>. It was only in the year 2013 that a crack appeared in the wall of this long-established convention when the then Speaker of the House of Representatives, Rt.Hon. Aminu Waziri Tambuwal defected from the ruling Peoples’ Democratic Party (PDP) to the opposition All Progressives’ Congress (APC) and remained in Office till the end of his term as a as the Head of a branch of government from an opposition party, effectively dismantling the political equation<sup>79</sup>.

Clearly, where the leadership of these two germane branches are from the same political family, to expect the operation of separation of powers is nothing but an ‘illusion’, with the likelihood being that none will act as a check on the other. Rather power will be so fused and carefully managed in-house, with the sole aim of ensuring that their party remains in power for as long as possible.

Scholars have argued that the prolonged years of Military rule in which Executive and Legislature power was fused did help encourage this kind of system, particularly given the fact that most of the members of the current political class are themselves products of military rule<sup>80</sup>. It was under this atmosphere that the PDP for instance was able to maintain its grip on power as Nigeria’s ruling party for a whopping 16 years, before it was dislodged following the victory of the APC at the 2015 General Elections.

The reality is that most of those who wield powers in the three branches of government come from the same political party, which in most cases betrays the fact that they share the same political interest and agenda. Thus, what you largely find is a situation in which majorly the leadership of the Legislature and the Executive instead of serving as checks on each other are rather working in cohort to feather the nest of their political party and ensure that their party remains in power. From the foregoing, it can be convincingly argued that though the Nigerian Constitution advocates separation of powers between the Executive and the Legislature, what obtains in practice is a far cry from this and its application gives more of an impression of fusion than separateness.

It is even worse at the State level, where separation of powers is totally non-existent with most Legislative houses being in the pocket of the Executive usually personified by Governors who see themselves as ‘*Constituted Authorities*’<sup>81</sup>. In most of these States, the two

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<sup>76</sup>The Nigerian Constitution provides that.....

<sup>77</sup>In addition, even as the party who won the polls produces key Legislative office such as the President of the Senate and the Speaker of the House of Representatives, it is also entitled to produce the Senate Majority Leader and the House Majority Leader, while the party who is the runner up is rewarded with the positions of Senate Minority Leader and House Minority Leader. It was only in the year 2013 that a crack appeared in the wall of this long-established

<sup>78</sup>The same is the norm in nearly all other democratic countries with a leading example being the United States of America where the winning party after producing the President is most likely to produce the Speaker of the House of Representatives.

<sup>79</sup>The same scenario has since been re-enacted when on June 2015, Senator Bukola Saraki teamed up with the opposition PDP to emerge as the Senate President, having by his side a Deputy Senate President from the opposition.

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<sup>80</sup> O. Fagbadebo and S. Francis, ‘Power Relations Amongst Institutions of Government in Nigeria’s Presidential System of Government: Issues and Contentions’, (2016), 7 (7), *International Journal of Politics and Good Governance*, 7.

<sup>81</sup> A perfect area of connivance between the State Governors and State Houses of Assembly is in the area of Local Government elections which has never seen the light of the day. The State Legislature simply rubber-stamps Caretaker Committees who hold office for donkey years and who are nothing but stooges of the Governor. For more insight and an abundance of academic discussions on the politics and under-hand tactics of State Governors that have stifled the autonomy and democratic administration of Local Governments in Nigeria, see generally K. Olufemi, ‘Leadership in Administration: A Nigerian Local Government Outlook’, in *Institutional Administration: A Contemporary Local Government Perspective from Nigeria*, (Ikeja: Malthouse Press

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branches of government practically live at the behest of the Executive, a phenomenon that is carefully designed before the government even comes into being. For example, most of the State Governors have been rumoured as the ones who personally pick candidates to run for elections into the Legislative houses such that once they succeed at the polls that are beholden to him as a sort of kingmaker. In the same manner, the appointment of persons to judicial offices at the state level is widely known to be a matter of political strategizing and positioning in which the Executive exerts unrestrained influence. This is all in an revolving rentier system in which public office is generally deployed to facilitate private interest<sup>82</sup>.

### CONCLUDING REMARKS

The reality under contemporary constitutional practice is that the doctrine of separation of powers is past its prime and has far outlived its earlier eminence. The good news however is that there appears to be one out of the three branches whose power and the exercise thereof, can still be said to be separate both in terms of constitutional text and practice. This Paper refers to the judicial branch. Even though the independence of the judiciary is more of a new concept in most developing countries given that the then colonial powers were not interested in

its development as such<sup>83</sup>, under the constitutional framework of most countries today the only branch that appears separate is the Judiciary, which somehow has been able to wean itself from the life-support of politics. For example, in Nigeria’s recent constitutional history the Judiciary in bearing its fangs had nullified key elections in which Governors had been fraudulently elected only for them to be removed from office<sup>84</sup>. Also, the courts have been active in reviewing the actions of executive and administrative bodies towards determining the true delineation of rights, duties, and obligations imposed by law<sup>85</sup>.

However, this separateness does not appear total. While on the one hand, Scholars have argued that the Judiciary itself has somehow been intruding into the powers of other branches of government<sup>86</sup>, on the other hand even the independence of the Judiciary from time to time, has become suspect given the infiltration of rabid politicians into the hallowed temple of justice. Nigeria’s constitutional practice remains trapped and is no exception in this perplexing situation. Nonetheless this Paper concludes that the Judiciary is still far from the fusion addressed above. Interestingly, this separateness of the Judiciary has been most illuminated by the illicit romance between the Executive and the Legislature, that has really helped advanced its stand-alone posture. This separateness must be commended and it is also something that has continued to gain the attention of Scholars in this regard. Supporting this position, the eminent Scholar Phillip Kurland in his brilliant work ‘*The Rise of Fall of Separation of Powers*’, did opine that this

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Ltd., 2000), 49; O. Oyediran, ‘Local Government as a Third Tier of Government in Nigeria: The 1976 Local Government Reforms and After’, in J. Elaigwu, and R. Akindele, (Eds), *Foundations of Nigerian Federalism, 1960-1995*, (Jos: Institute of Governance and Social Research, 2001), 194 – 211; J.A.A. Ayoade, ‘The Development of Democratic Local Government in Nigeria’, in *Local Government in Nigeria and the United States: Learning from Comparison*, (Ile-Ife: Local Government Publication Series, 1995), 19 – 20; B. Kehinde, ‘Absence of Legislative Arm in Local Government Dire to Grassroot Democracy’, (2012), 6 (10), *Legislative Digest*, 1 – 3; K. Asaju, ‘Local Government Autonomy in Nigeria: Politics and Challenges of the 1999 Constitution’, (2010), 1 (1), *International Journal of Advanced Legal Studies and Governance*, 98 – 113; C. J. Nwanegbo and P. Chikendu, ‘Local Government Autonomy under true Federalism in Nigeria’, (2005), 1 (1), *American Journal of International Politics and Development Studies*, 177 – 189.

<sup>82</sup> O. Eme and N. Anyadike, ‘Ruling Parties and Democratic Consolidation: The Case of People’s Democratic Party (1999 - 2009)’, (2012), 1 (1), *Review of Public Administration and Management*, 107 - 124.

<sup>83</sup> Y. Vyas, ‘The Independence of the Judiciary: A Third World Perspective’, (1992), 11 (6), *Third World Legal Studies*, 131.

<sup>84</sup> In this wise, Governors Rotimi Ameachi, Kayode Fayemi, Olusegun Mimiko, Adams Oshiomole, were key beneficiaries amongst other. See the following stand out cases, *Peter Obi v. Independent National Electoral Commission (INEC)*, (2007) LPELR - SC 123/2007; *Mimiko v. Independent National Electoral Commission (INEC)*, (2012) 7 NWLR (Pt. 1300), 538; *Oshiomole v. Independent National Electoral Commission (INEC)*, (2011) 18 NWLR (Pt. 1279), 493.

<sup>85</sup> J.O. Agbana, ‘An Appraisal of the Doctrine of Natural Justice’, (2006), 2, *Fountain Quarterly Law Journal*, 156.

<sup>86</sup> A.O. Nwafor, ‘The Lesotho Constitution and Doctrine of Separation of Powers: Reflections on the Judicial Attitude’, (2013), 6 (1), *African Journal of Legal Studies*, 49 – 68.

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stature of the Judicial branch derives majorly from the collapse of the doctrine and its failure to live up to its foundational objectives<sup>87</sup>. The Learned Scholar while closing his thoughts also called to remembrance the vigilance of the Judiciary which has made it the only bastion of

hope for the people against the combined tyranny of the Executive and Legislature, but then warned that one can only hope that the Judiciary will continue to have the strength and will power, not to go the way of all flesh<sup>88</sup>.

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<sup>87</sup> P.B. Kurland, ‘The Rise and Fall of the Doctrine of Separation of Powers’, (1986), 85, *Michigan Law Review*, 611.

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<sup>88</sup> *Ibid.*