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AN APPRAISAL OF SEPARATION OF POWER IN THE 21ST CENTURY NIGERIA WITH REFERENCE TO MONTESQUIEU'S THEORY.

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ABSTRACT

Political freedom and liberty is today a mirage in the governance of Nigeria as a nation. This is so because the adopted theory of separation of power is only on the theory and not in strict application. Knowing this, the paper examines the theory of separation of power by Montesquieu so as to appreciate the true picture of separation of power. It further makes an appraisal of separation of power in the 21st century Nigeria. The paper argues that from practical instances, the theory of separation of power as adopted by Nigerian constitution is only on lip service and not in application. In practice, we witness centralization of power in one arm of government in Nigeria. The paper concludes by calling the Nigeria's leaders to the spirit of the constitution.

INTRODUCTION

Separation of power is a principle of government whereby there is a division of power among the key organs of government. This principle was well developed by Charles Baron De Montesquieu in his book, "The Spirit of the Law." In it, he maintained that for there to be a political liberty and freedom there must be separation of power among the key organs of government.

However, Nigeria as a democratic nation is among the many nations that adopted this principle of separation of power among the organs of government. It is therefore ironical that in application, Nigeria has not efficiently applied this principle in her governance as a nation. The lack of proper integration of this principle in the governance of Nigeria is an indication that either the true picture of principle of separation of power is unknown to the leaders of Nigeria as a nation or the theory is only adopted on lips service.

Importantly, to make a proper appraisal of separation of power in the 21th century Nigeria, we will look at the theory of separation of power by Montesquieu so as to see how far Nigeria as a nation has adopted and applied this principle to the governance of her nation.

CHARLES BARON DE MONTESQUIEU (1689-1755).

Charles Baron De Montesquieu was a French social commentator, Judge, historian and political philosopher who became famous for his theory of separation of power. His theory has been adopted by many constitutions in the world. Hence, Montesquieu has been regarded as the



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champion of liberty and political freedom in British colonies and in most North American countries. His book, 'The Spirit of law' was his first attempt to survey human society and studies the interrelationship between various organs of government. It was well received in Great Britain and in many American colonies and influenced the founding Fathers of the United States in drafting the U.S constitution.

He lived from 18th January 1689- 10 February, 1755. He was born in the Southwest France. His father was a soldier with a long noble ancestry. His mother died when Charles was seven years old. After the death of his mother, Charles was sent to the Catholic Collage of Juilly, a prominent school for the children of French nobility, where he remained from 1700 to 1711. His father died in 1713 and he became a ward of his uncle. Interestingly, Montesquieu became a counselor of Bordeaux parliament in 1714, and married a year after to a protestant, Jeanne de Lartigue, who eventually bore him three children.

Montesquieu's early life occurred at a time of significant governmental change. England had declared itself a constitutional monarchy in the wake of its glorious Revolution. Within this time, there was a shift in the early modern age that resulted in the rise of absolute monarchy. At that time, it was a new kind of political regime that overcame customary limitations and started encroaching in liberties. It was a situation that can best be called the Western version of despotism.

Interestingly, Montesquieu withdrew from the practice of law to devote to study and writing. He achieved literary success with the publication of his 1721 Persian letters. In 1722, he went to Paris and entered court circles with the help of Duke of Berwick whom he has known when Duke was a military governor at Bordeaux. His work, the 'the spirit of law' which was published in 1748 rose to influence the political thought in Europe and America. In France, the book, "The Spirit of Law" met with unfriendly reception from both the supporters and opponents of the regime.

Montesquieu was also regarded in the British colonies in North America as champion of liberty. He was the most frequently quoted authority on government and politics in colonial pre-revolutionary British and America and cited more by American founders than any other source except for the Bible.

MONTESQUIEU'S THEORY OF SEPARATION OF POWER

Montesquieu stands out for his love for political freedom. He showed his outright dislike for despotism. Besides, he considered the absolute monarchy a looming threat for liberty in France

Montesquieu started from a gloomy view of human nature in which he saw man as exhibiting a general tendency towards evil, a tendency that manifests itself in selfishness, pride, envy and seeking after power. He noted that man though a rational animal is led by his desires into inordinate acts. He observed that in the realm of politics, constant experience shows that every man invested with power is apt to abuse it and to carry out his authority as far as it will go.



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However, he noted that this tendency towards the abuse of power can be moderated by the constitution of the government and by laws.

Consequent upon this, Montesquieu commenced his work with a description of three different types of government, their nature and their principles.

Montesquieu began by defining three types of government: Republican, Monarchical, and despotic government. In the Republican, he noted that the people are possessed of the supreme power; in the monarchy, a single person governs by fixed and established laws while in a despotic government, a single person directs everything by his own will and caprice. Montesquieu further noted that the Republican government can be subdivided into Aristocracy and Democracy. The former being a state in which the supreme power is in the hands of a particular set of people not as in a democracy that has government controlled by the people. He condemned despotic government since it does not guarantee checks and balance to the power of the Prince, and there is no limitation to safeguard the individual. He noted that the idea of separation of power in any form is foreign to despotic government. In Aristocracy also, though it be moderate government, the legislative and executive authority are in the same hands. This is not the case according to Montesquieu in a democratic government where there is separation of power among the arms of government.

Interestingly, favoring democratic system of government, Montesquieu in 1748 published the tripartite division of government functions in a recognizably modern form of legislative, executive and judiciary. These three organs for him are the sources of government powers. To legislate is to make the law; to execute is to put the law into effect while the judiciary power is the announcing what the law is by the settlement of disputes. Montesquieu considered separation of power among the arms of government as checks and balances system. For him, separation of power among legislative, executive and judiciary entails a type of government whose powers are not centralized. For this reason, Montesquieu argued that each organ should only exercise its functions because he considered it a necessary condition for liberty and political freedom.

Montesquieu observed that when the legislative powers and executive are united in the same person, or in the same body of Magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner. To stay away from despotism, it is necessary for these limits, which is, the division of power.

On the issue of the Judiciary, Montesquieu noted that there will be no liberty if the judiciary 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. Again, if the executive power is joined with the legislator, the judge might behave with violence and oppression. Hence, Montesquieu advocated for independent judiciary in order to ensure liberty and real justice. He advocated the need for specific limit for



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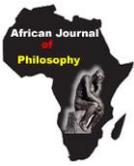
each power. He noted that if it is not so, there would be an end to everything, where the same man or the same body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolution and of trying the causes of individuals.

Montesquieu also noted that there should be mutual relations among these powers of government. For Montesquieu, the best way to guarantee political freedom is by mutual relation that exists among the arms of government. Hence, he advocates that each branch should have power to limit or check the excesses of the other two which will in turn create a balance among the three separate branches of government in the state. The check among the organs of government according to Montesquieu helps the other branches from becoming supreme. In this way, the three branches keep helping each other to secure political liberty by averting concentration of power.

APPLICATION OF SEPARATION OF POWER IN THE 21ST CENTURY NIGERIA.

Nigeria as a sovereign nation is one of the many countries that adopted the principle of separation of power among the arms of government in the governance of her nation. However, from observation, the theory is only in adoption and not in application. In the present 1999 amended constitution of the Federal Republic of Nigeria, separation of power is a fundamental constitutional principle. Relevant sections of the constitution place each of the basic powers of the government in a separate branch. While section 4 and 5 of the constitution deal with the legislative and the executive powers respectively, section 6 is concerned with the judicial power. Importantly too, in the constitution, there is also provision for separation of power between the Federal government and the state government. While the federal legislative power is vested by sections 4(2), (3) and (4), the state legislative power is conferred by section 4(6) and (7) of the 1999 constitution of Federal Republic of Nigeria as amended.

Notably, however, while the constitution of the federal Republic of Nigeria made provision for separation of power among the arms of government, the theory of separation of power is not totally applicable in the governance of Nigeria as encapsulated in Montesquieu's theory of separation of power. In application, there is no complete and total separation of powers in Nigerian governance. Practical instances abound where the president and the governors as the executive arm of government arrogate to themselves judicial and legislative functions. Remarkably, it is important to note that there are constitutional evidences in the Nigerian constitution where the executive is allowed some judicial and legislative prerogatives. For instance, the president or the governor shares also in the law-making powers of the legislature by the virtue of the constitutional provision for presidential or governor's assent to bills before they become laws. Evidence of this is contained in sections 58(1) and 100(1) of the 1999 constitution of the Federal Republic of Nigeria as amended. Again, there is a constitutional provision for the president to issue executive orders like, prerogative of mercy or grant of pardon as contained in section 175 of the 1999 constitution of the Federal Republic of Nigeria. Similar, there is also such provision for the state governors as contained in section 211 of the



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1999 constitution of the Federal Republic of Nigeria. Furthermore, it is also the constitutional right of the executive to appoint judges though with the approval of the legislature.

However, regardless of these constitutional instances, the application of separation of power in the Nigerian administration is grossly abused. Firstly, the above constitutional instances limit the true application of separation of power in the governance of Nigerian nation. While it can be said that the Nigerian constitution is anchored on moderate separation of power, however, its application also in 21st century Nigeria has been a near mirage.

It is evidently clear that governance of Nigeria is today centralized in the executive; the president. He controls without restriction the legislative and the judiciary organs of government. There are instances where the president as against his jurisdiction has violated the rulings of competent court orders. Often most laws are enacted and forced on the people with the knowledge and approval of the legislative body which has the prerogative to make laws. It is also evidently clear that the judicial organ of government in Nigeria is a collapsed body. It is no longer the last hope for the common man. It has been hijacked by the highest bidders. The theory of checks and balances for which separation of power among the organs of government is instituted is not in practice in the Nigerian governance. Ironically, one who becomes president of Nigeria becomes automatically the head and decision maker of other organs of government.

CONCLUSION

Nigeria is a sovereign nation that has since after her independence is still struggling to discover and define herself as a nation. As a nation, Nigeria has a system of governance that is one of the best systems of government notable in the world. But however, in application, one will see that Nigeria is only playing lip service in her adopted system of government. Separation of power among the arms of government is enshrined in the Nigerian constitution. But even the manner of adoption does not represent Montesquieu' theory of separation of power. For Montesquieu, power should not be concentrated in one hand for political liberty and freedom. Unfortunately, in Nigeria we see that the federal executive power has hijacked power and indirectly decides everything that happens in the governance of the nation. He ensures that he loyalists are majorly elected in the legislative arm of government so that he can have total control of them. He appoints judges and influences the decision of the approval of judges by the legislature. Hence, there is absence of liberty and political freedom in Nigeria. Therefore, for Nigerians to enjoy true political freedom, the leaders should ensure that there is independence among the arms of government.



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