SEPARATION OF POWERS AND ITS APPLICATION IN EMERGENCY SITUATION UNDER NIGERIA'S DEMOCRACY

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Abstract

Separation of powers doctrine occupies position of importance in all constitutional democracies. It entails some form of division of functions among three distinct branches of government-the executive, legislature and the judiciary. Entrenchment of the doctrine prevents abuse of power, concentration of power in one person or body and efficiency of government. However, the eighteenth century conception of the doctrine as exemplified by Montesquieu and others of the classic tripartite separation of powers is now archaic and anachronistic, giving room to the constructive system of checks and balances among the three branches of government. The United States of America and Nigeriaare examples with express provision of the doctrine. In the case of Nigeria, the doctrine has been expressed and recognized in its constitutional developments starting from the Independence Constitution to the extant one-although more in theory than practice. The doctrine globally is challenged by emergency times as the current Covid 19 pandemic. The paper therefore, assesse the doctrine of separation of powers and its application to Nigeria's democracy using doctrinal method. The paper found that separation of powers allows each branch of government to perform its primary or core functions, while also performing an oversight functions on the other branches without encroaching on their core functions. Furthermore, that adherence to the doctrine guarantees the liberty of the citizens and efficient government, although, modern emergency like the Covid 19 is a major challenge. The paper therefore, recommended stringent checks on this to preserve the age long doctrine and constitutional democracy.

Keywords- Separation of Powers, Application, Nigeria, Democracy

1.0 Introduction

The doctrine of separation of powers entail the delineation of governmental powers to institutions and functionaries of government in such a manner that each circuit of governmental powers namely legislative, executive and judiciary are administered by separate and distinct individuals.[1]In other words, the legislative arm is empowered to make, amend or even repeal laws; the executive arm executes the constitution (laws, formulate policies and maintain law and order; and the judicial arm is vested in court of law duly established or recognized by the constitution to interpret the law.

The core essence of the doctrine is for safeguard against over concentration of powers in an organ which may lead to abuse of power.[2] Furthermore, the doctrine constitutes checks and balances on the use of these powers by the three organs of government.[3] In practice, however, each organ is constitutionally barred from encroaching on the boundaries of another organ.[4]

This principle of the law has ancient origin as it is traced as far back as 300 years before Christ.[5] In England, the doctrine has been traced to the reign of Edward 1.[6] However, the doctrine gained more attention from the work of James Harrington, who

[1]A. A. Babalola, "Relevance of Separation of Powers and its application to Nigeria" (lecture at NBA Ado Ekiti
Law Week 5 July 2019)
[2]A. A. Babalola, (ibid)
[3]Ibid.
[4]C.O. Ajah, *Topical Issues in administrative Law in Nigeria* (Enugu ACENA Publishers 2019) 18
[5]A. A. Babalola op.cit, page 1
[6]Ibid.

utilized the ideas of great philosophers like Aristotle, Plato, Machiavelli and John Lock.[7]

The Modern idea of the doctrine of separation of powers is accredited to the French jurist, Baron Montesquieu.[8]Montesquieu based his observation of the doctrine on the British Constitution of the 18th century as he understood it. He outlined a three division of powers in England among the parliament, the King and the Courts, which though did not *defacto* exist at that time, but which he believed was necessary for stability of the government.[9]

The implication of Montesquieu exposition is that within a system of government based upon law, the judicial function should be exercised by a body separate from legislature and executive and that neither should exercise the whole power of the other.[10] While this may be true to some extent in some constitutional democracy like the United States of America (USA), where separation of powers was clearly expressed,[11]same cannot be said of some other constitutions including the United Kingdom, where Montesquieu drew his observation from. In Britain, the Queen, though governs through ministers in exercising executive functions, but those ministers are members of parliament and responsible to it. This system with its emphatic link between Parliament and the executive ran contrary to Montesquieu's doctrine.[12]

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[7]C.O. Ajah, op.cit page18
[8]E.C.S. Wade and AW Bradley, *Constitutional and Administrative Law* 10th ed (London Longman 1985) 50
[9] C.O. Ajah op.cit page 18
[10] E.C.S. Wade & A.W. Bradley op.cit page 51
[11]Senate and House of Representatives-art. 1
12 See the US Constitution of 1778
[13] E.C.S Wade & A.W. Bradley op.cit 51

In the USA, the constitution vests legislative powers in Congress (Senate and House of Representatives-art. 1), executive powers in the President (art.2), and judicial power in the Supreme Court and such other federal courts as might be established by Congress. Under this system, the President and his cabinet do not sit in Congress to initiate bills, but can veto legislation passed by Congress, though the veto may be overridden by a two-thirds vote in each House of Congress. The President has power to nominate judges of the Supreme Court, but the Senate must confirm the appointment and may refuse to do so. The President is not directly responsible for his conduct of affairs. The President does not hold his office at the pleasure of the Congress, but can be impeached at the hands of the Senate for 'treason', 'bribery', or other high crimes and misdemeanours.[13]

Flowing from the above, there is no complete separation of powers between the executive, legislative and judicial functions; rather there is a constructive and an elaborate system of checks and balances which enable control and influence to be exercised by each branch upon others.[14] This appears to be the situation in Nigeria as well.

Montesquieu's separation of powers doctrine perhaps did not envisage emergency situation such as the recent global pandemic coronavirus (Covid 19).[15] Under such situation even highly

[14]See article 2(4) of the US Constitution
[15]Wade & Bradley(n. 8) 52
[16]Coronavirus was reported sometime on the 31st of December, 2019 at Wuhan, China, when clusters of pneumonia
cases of unknown etiology where found and continued to escalate exponentially within and beyond Wuhan,
spreading to all over 34 regions in China and soon become globally pandemic with high fatality ratio and highly

constitutional democracy like the US known for the practice of the doctrine could hardly be said to have fully observed it during the period.

Most governments' executives during the period declared a national state of disaster and make regulations under it. It allows the creation of 'something like a state of emergency,' but without the safeguard of parliamentary oversight.[16] This appears contrary to the postulations of Montesquieu as the executive arm of government seem to exercise both the executive and legislative powers, instead of them being exercised by distinct and separate arm as posited by him.

In Nigeria currently, the CFRN 1999 as amended Constitution recognizes separation of powers, but not exactly as posited by Montesquieu. This paper aims at critically assessing the doctrine of separation of powers and it application in Nigeria. This paper adopted a doctrinal research method and set out to achieve its objectives by adopting the following structure: Concept of the doctrine of separation of powers, separation of powers under some constitutions, separation of powers under the Nigeria's constitution, challenges of the doctrine under emergency situation, findings, recommendations and conclusion.

2.0 Concept of the Doctrine of Separation of Powers

The functional definition and essence of separation of powers seem to be elegantly captured by Black Law dictionary, when it defines the doctrine of separation of powers as:

transmissible

[16] Lukeman Abdulrauf, "Nigeria's Emergency (Legal) Response to Covid 19: A Worthy Sacrifice for Public Health?"<https://verfassungsblog.de> accessed 16 November 2020

The division of governmental authority into three branches of government-legislative, executive and judicial, each with specified duties on which neither of the other branches can encroach: a constitutional doctrine of checks and balances designed to protect the people against tyranny.[17]

According to Babalola, the doctrine of separation of powers is a model for the governance of a state not only helping to divide the government of a state into branches each with separate, distinct and independent powers and areas of responsibility, but also ensuring that the powers of one branch are not in conflict with the other branches.[18] In essence, the division of responsibilities into distinct branches limits any one branch exercising the core functions of another.[19] The purpose of this arrangement is not only to avoid neither friction nor efficiency, but to preclude the exercise of arbitrary power and save the people from autocracy.[20]

From the foregoing, the doctrine of separation of powers though admits a variety of meanings, but three meanings are most apparent:

1. That the same persons should not form part of more than one of the three organs of government, for example that the ministers should not sit in parliament;

[17]Bryan A Garner, *Black's Law Dictionary* 9th ed. (Dallas Texas Thomson Reuters 2009) 1487
[18]Babalola op. cit
[19]Ibid
[20] Black's Law, op. cit page 1487 quoting Justice Louis Brandeis in Re Roscoe Pound, "The Development of Constitutional Guarantees of Liberty" 94 (1957)

2. That one organ of government should not control or interfere with the work of another, for example that the judiciary should be independent of the executive;
3. That one organ of government should not exercise the functions of another, for example that the ministers should not have legislative powers.[21]

However, complete separation of powers in modern democracy is near impossible. As posited by Bagehot, what is feasible is 'the close union, the nearly complete fusion, of the legislative and executive powers.'[22] Though Amery disagreed with this, maintaining that no matter how closely related the 'Executive' and 'Parliament' may be, they still maintained their separate and independent entities in the performance of their core functions though 'engaging in critical discussion and examination on the other.'[23]
These all supported the view that there is no complete separation of powers neither in theory nor practice anywhere.[24]

Historically, as posited by Babalola, the seeds of the doctrine could be traced far back as 300 years before Christ.[25]In England, Maitland traced the doctrine to the reign of Edward 1, thus: 'In Edward's day all becomes definite, there is the parliament of the three estates, there is the King's Crown, and there are the well-known Courts of Law.'[26]

[21] E.C.S. Wade & A.W. Bradley op. cit
[22] A. Bagehot, *The English Constitution* cited in Wade & Bradley op. cit 53
[23] L.S. Amery, *Thoughts on the Constitution* cited in Wade & Bradley ibid 53
[24] E.C.S Wade & A.W Bradley ibid 53
[25] A.A Babalola, op. cit
[26]ibid

Another historian Viscount Henry Bolinbroke, whose concentration was on the necessary balances of powers within a Constitution. He argued that the protection of liberty and security within the State depended upon achieving and maintaining some equilibrium with the Crown, Parliament and the people. According to him:

> Since the division of powers and these different privileges constitute and maintain our government. It follows that the confusion of them tends to destroy it. The proposition is therefore, true; that in a Constitution like ours, the safety of the whole depends on the balances of the parts.[27]

However, James Harrington was one of the modern philosophers to analyze the doctrine; he built upon the works of earlier philosophers like Aristotle, Plato and Machiavelli.[28]His writing however, was on a purely utopian political system that included a separation of powers, since he wrote at the time the British parliament was gradually asserting power and resisting the royal decrees.[29] He therefore, could not have based it on the situation at hand.

Other notable proponents of the doctrine include, English political theorist, John Lock, who wrote at about 1689 and gave the doctrine a more refined treatment in his Second Treatise on Government:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power

[27]Viscount Henry Bolinbroke, *Remarks on the History of England*(Cambridge: CUP, 1908) 20, 80-83
[28]James Harrington, *The Commonwealth of Oceana*(London: Becket and T. Cadell, 1656)
[29] C.O. Ajah, op. cit 17

> of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantage.[30]

His argument was that the legislative powers being conceptually different from the executive should be separated from the executive in government institutions. Regrettably, he failed to recognize the judicial powers as a distinct branch of government that needed separation.[31]

Interestingly, the modern idea of separation of powers was explored more profoundly by the French political writer, Baron Montesquieu in his book, *De L'Esprit des Lois*in (1748). He based his study on the British Constitution of the first part of the 18th Century as he understood and 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…Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were 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 were it joined to the executive however, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body,

[30]Ibid; Locke on Separation of Powers and the Dissolution of Government< Plato.standford.edu/entruss/locke/political> accessed 22/10/2020
[31] C.O. Ajah, op. cit 17

> whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.[32]

What this means is that within a system of government based upon law, the judicial function should be exercised by a body separate from legislature and executive. Although, it does not in any way implies 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.[33]

Montesquieu's concept of 'separation of powers' has been described as idealistic and unattainable in modern democracy.[34] One, the perceived stringency of the separation requirement of the three mutually exclusive functions carried out by three branches of government hermetically sealed from each other has never been instantiated in any modern state.[35] As rightly observed by Pierce, 'if powers truly were separated so that each branch of government could exercise only a discrete set of powers to the exclusion of the other branches, the nation would be

[32]*De L'Esprit des Lois*, Book X1, ch.6
[33] E.C.S Wade and A.W. Bradley, op. cit 51
[34]Aileen Kavanagh, "The Constitutional Separation of Powers," <www.law.ox.au.uk oxlaw> accessed 27/10/2020
[35] MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford: Oxford University Press, 1967) 97; E. Carolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford: Oxford University Press, 2009) 18

ungovernable'.[36] For effective governance, some 'intermixture' of functions therefore is both necessary and desirable.[37]

Secondly, if the Montesquieu's concept were to be accepted in modern democracy, would it not undermine a system of checks and balances? Checks and balances involve a degree of mutual supervision between the branches of government, which of course, permits a degree of interference by one branch into the functions and tasks of the other.[38] As Marshall posited, it is unclear from Montesquieu conception of the doctrine of separation of powers whether the scheme of checks and balances 'is part of, or a departure from it'.[39]

Thirdly, the classic tripartite separation of powers articulated by Montesquieu in the 18th century is not only archaic, but anachronistic in the modern state, as it failed to recognize the fourth estate or branch of government, 'administrative agencies[40]'. Administrative agencies combine adjudicatory, rule-making, and executive functions. They have been excluded by separation of powers traditionalists.[41]

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[36]R Pierce, "Separation of Powers and the Limits of Independence", *Williams & May Law Review* 30 (1989), 365.
[37]ECarolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford: Oxford University Press,
2009) 32
[38]Ibid
[39]G Marshall, *Constitutional Theory*, (Oxford, Clarendon Press, 1971), 103; C Munro, *Studies in Constitutional*
Law 2nd ed. (Oxford, Oxford University Press, 2005) 307
[40] Kavanagh, (n. 34)
[41] Marshall, (n.39) 118; A Vermeule, "Optimal Abuse of Power"109 *Northwestern University*
Law Review (2015) 673 at 680

Constitutional writers seem to herald the United States of America (USA) as an archetypal 'separation of powers system.'[42] This is because in the United States of America (USA) constitution of 1787 the separation of powers was clearly expressed. The framers of the constitution vested each primary constitutional function in a distinct organ.[43] The United States of America (USA) constitution vests legislative powers in Congress, consisting of the Senate and a House of Representatives, executive power in the President, and judicial power in the Supreme Court and such other federal courts as might be established by Congress. Under that system, the President holds office for a fixed term of four years and is separately elected: he may therefore be of a different party from that which has a majority in either or both Houses of Congress. His powers like those of Congress, are declared by the constitution.[44] Heads of the chief departments of state, who are known as the Cabinet are individually responsible to the President and not to Congress. Furthermore, neither the President nor members of his Cabinet can sit or vote in Congress. The President, though may recommend legislation in his messages through Congress, cannot compel it to pay heed to his recommendations. Also, the President may veto legislation passed by Congress, but can be overridden by a two- thirds vote in each House of Congress. More so, the Judges once appointed are independent both of Congress and the President, although they may be removed by impeachment. In the historic case of *Marbury v Madison,*[45]Chief Justice Marshall

[42] R Albert, "The Fusion of Presidentialism and Parliamentarism, The American Journal of Comparative Law
(2009), 531 at 562
[43] Wade and Bradley, (n.8) 51
[44]Ibid
[45] (1803) 1 Cranch 137

declared that the Supreme Court of America has the power to declare both the acts of the legislature and the acts of the President to be unconstitutional.[46]

However, even in the USA, there is not a complete separation of powers between the executive, legislative and judicial functions exercised in complete isolation from the others as contemplated by Montesquieu.[47]

Montesquieu was concerned about a unified authority under one single rule, which may likely result in tyranny and potential abuse of power, therefore, his proposition to divide power amongst distinct organs of government, so as to ensure that no single body was omnipotent, while simultaneously allowing them to check and sanction each other when that was required.[48]

Curbing abuse of power and preventing its concentration now appears the primary purpose of the separation of powers.[49]

Checks, it has been argued are the very essence of the separation of powers.[50] Checks and balances are required by the separation of powers in order to prevent one branch of government usurping another and to provide each branch with the necessary constitutional means 'to resist such usurpation and prevent it occurring. Thus it helps to ensure that each branch does not

[46]Ibid
[47] E.C.S Wade and A. W. Bradley op.cit 52
[48] A. Kavanagh, op. cit 229
[49] R Albert, "Presidential Values in Parliamentary Democracy (2009)," *International Journal of Constitutional Law* (2010), 207
[50] A. Kavanagh, op. cit 34

overstep its role in the constitutional scheme.[51] The House of Lords give vent to this in *Jackson v Attorney General*[52]when it held thus, 'the delicate balance between the various institutions…is maintained to a large degree by the mutual respect which each institution has for the other'. However, as argued by Kavanagh, this feature in the separation of powers is not peculiar to the United Kingdom but a general feature in any constitutional system based on the separation of powers.[53]

For separation of powers doctrine to be effective, all the institutions need to exercise some self-restraint when appropriate by keeping within their own jurisdiction and ensuring that they do not trespass into the jurisdiction of another institution. Furthermore, they should restrain from criticizing the decisions of the other branches, if doing so would undermine the ability of that branch to do its job well.[54]

Before examining the application of the doctrine of separation of powers to Nigeria, it would be pertinent to consider its application in two or more other jurisdictions.

3.0 Separation of powers in some other jurisdictions

It may not be possible in a paper of this magnitude to delve into detail analysis of the doctrine of separation of powers in other jurisdictions or constitutions, a brief description of how the doctrine has fared in two or three may suffice under this sub-head to provide us material to discuss its application in Nigeria

[51]Ibid, 234.
[52] (2005) WLR 733.
[53]A. Kavanagh, op cit 236.
[54]Ibid.

subsequently. In this regard, the paper choses, France, Australia and Sri Lanka, which shall be considered seriatim.

1. France

In France, the doctrine operates quite differently from the American version. For instance, the ordinary courts in France do not have the jurisdiction to review the legality of acts of the legislature or executive.[55] Inplace of the courts, the *Conseil d' Etat*, which structurally is part of the executive is the one conferred with jurisdiction over administrative agencies and its officials. They exercised their jurisdiction independently of thee political arm of the executive.[56]

2. Australia

In Australia, the concept of separation of powers is derived from the Blackstonian separation of powers theory and not the Federalist separation of powers theory.[57] Australian democracy is based on responsible government and the Westminster parliamentary system.[58] Australia does not have a complete separation of powers because some of the roles of the parliament, the executive and the judiciary overlap.[59] The High Court Judges, the Prime Minister and Ministers are officially appointed by the

[55]E.C.S Wade and A. W. Bradley op.cit 52

[56]See LN Brown and JF Garner, *French Administrative Law,* 28-31 cited in Wade and Bradley, op. cit 52

[57]J. R. Alvey, "The Separation of Powers in Australia: Issues for the States" (Master's thesis Faculty of
Business, Queensland University of Technology 2005)

[58] Ibid

[59] H. Patapan, "Separation of Powers in Australia", 1999 *Australian Journal of Political Science* 34Issue 3
391-407

Governor-General, who is part of the Parliament and the Executive.[60]

3. Sri Lanka

In Sri Lanka, there is no exclusive separation of governmental functions in its constitution.[61] Under the Sri Lanka Constitution, members of the Cabinet are also members of the House of Representatives/Senate. However, judicial officers are neither members of legislature nor Executive. Therefore, it is only the judiciary functions that appear separated from the other arms of government.[62] However, under Article 107 of the Constitution, the Judges of the Supreme Court can be removed by the Parliament as they exercise considerable control over the Judiciary.[63]

4.0 Separation of Powers and its Application in Nigeria

Nigeria has passed through different constitutional developments starting from the colonial era to the current stage, therefore, it would be pertinent to examine the application of the doctrine during these phases i.e. the colonial, independence, military and civilian democracy (both during the 1979 and 1999) constitutions.

4.1 Colonial Era

[60]ibid

[61] I. Kalanthar, "Separation of Powers in Srilanka"https://www.academia.edu accessed 9 November 2020.

[62]Ibid

[63]G. Knaul, "Separation of Powers in Sri Lanka", *Asian Human Rights Commission*<www.scoop.co.nz>
accessed 9 November 2020

The colonial era constitutional development in Nigeria covers the Clifford Constitution of 1922, the Richardson Constitution of 1946, the Macpherson Constitution of 1951 and the Lyttleton's Constitution of 1954. During these Constitutional developments, the doctrine of separation of powers was almost non- existent. For instance, under the Clifford Constitution of 1922, the Governor exercised executive power and legislative powers over the Northern protectorate. Furthermore, quite a number of the legislative council members were appointed and so could not provide the needed checks on the Governor –General. At most, the legislative council serves merely as advisory council to the Governor on matters referred to them.[64] There was no provision for the judicial arm. There was no major change in the others- Richardson, Macpherson and Littleton constitutions, except for decentralization of the executive powers and creation of the legislative councils at the provincial levels.[65]

4.2 Independence Constitution Era

The Independence Constitution of Nigeria came into force on 1st October, 1960.[66] Under the Independence Constitution, separation of powers to some extent can be seen from the clear provisions of the Constitution towards this end. For instance, Chapter 1V of the Independence Constitution provides for executive powers exercisable by the Governor-General, Chapter V, provided for the legislative organs of government, though it allowed the Queen to be a member of parliament, while Chapter

[64]NA Inegbedion and JO Odion, *Constitutional Law in Nigeria* (2nd ed.Benin City Ambik Press 2011) 21

[65]Ibid

[66]See Nigeria (Constitution) Order-in-Council 1960, enacted by her Majesty, the Queen of England on the 12th of September, 1960

VII provided for the judicial organ of Government.[67] It should be observed that the 1960 Constitution allow a fusion of the executive and legislative organ in a way, but there was a distinct separation of powers of the judiciary organs.[68]

4.3 The Republican Constitution Era

The Republican Constitution removed the last vestiges of colonial rule like the offices of the Governor-General, the Governors of the Regions, who were appointees of the Queen, and the superior status enjoyed by the judicial Committee of the Privy Council over the Nigerian Supreme Court.[69] The Constitution was premised on the doctrine of separation of powers between the three organs of government as was rightly held by Ademola CJN in *Lakanmi & Ors v AG of Western Region*[70]thus:

We must here revert again to the separation of powers, which the learned A.G Himself did not dispute is still the structure of Government based on the separation of powers. The legislature, executive and the judiciary our constitution clearly follows the model of the American constitution. In the distribution of powers, they are vested with the exclusive rights to determine justiciable controversies between citizens and the state.[71]

However, what was practiced by Nigeria in the Republican Constitution was the Parliamentary as opposed to the Presidential system which the American operates. Unlike in America, the Prime Minister, a member of the executive was equally a member of the legislature. Thus what was practiced by Nigeria under the

[67] N.A. Inegbedion & A. Odion op. cit 55
[68] *Alhaji Hon D. S. Adegbenro v Hon Akintola* (1962) 1 All NLR 465.
[69]N.A. Inegbedion & A. Odion op. cit 33
[70](1971) 1, UILR 201 at 216
[71]Ibid

1963 Constitution cannot be said to be a complete separation of powers as postulated by Montesquieu. The close interlinking of the executive and the legislature creates room for possible influence or interference of one organ in the functions of the other.[72] The much that can be said of the 1963 Republican Constitution is that it creates opportunity for checks and balances. By section 38 of that constitution, the Parliament served as a check on the President by screening the appointees of the President to be appointed Justices of the Supreme Court. Secondly, though the President under section 101 has power of prerogative of mercy, but by section 116, Parliament conferred such jurisdiction on the Supreme Court to give advice to the President on such exercise.[73]

4.4 Military Rule Era

Origin of Military Rule in Nigeria can be traced to January 1966.[74] It has been posited that the military rule in Nigeria span for more than two-third of Nigeria's independence existence.[75]During which peoples' liberty and fundamental rights were trampled underfoot. Whenever the military strikes, the first legislative act is always in the form of constitution suspension and modification decree.[76]By virtue of the decree, Parliament was dissolved and it powers and functions fused with the executive powers/functions, which were vested on the Supreme Military Council (SMC). This fusion of both legislative and executive

[72]N.A Inegbedion & A. Odion op. cit 57
[73]Ibid
[74]C.O. Ajah op. cit 22
[75]C.O. Ajah op. cit 22
[76]In 1966, the Military Government promulgated the Constitution (Suspension and Modification) Decree 1966,
otherwise known as Decree No.1, which suspended and modified the 1963 Constitution

functions and powers is repeated in every military regime.[77] The two organs functions and powers were exercised by the Head of State and Commander –in Chief of the Armed Forces.[78] The only separate organ was that of the judiciary, even then by Decree No. 45 of 1968, the Military Government sought to add judiciary powers to its executive and legislative powers, but it was resisted.[79] However, in *Adamolekun v Council of University of Ibadan,*[80]the Court held that Decree No.1 of 1966 ousted the jurisdiction of the courts on question relating to the validity of a Decree.[81] Judicial pronouncements as it relate to separation of judicial powers under military rule appears inconsistent.[82]

4.5 Civilian Rule under the 1979 and 1999 Constitutions

Both the 1979 and 1999 Constitutions provided for a presidential system of government with clear division of the three powers among the branches of government. Since the two constitutions

[77] See Decree No.1 of 1966 and 1984

[78] N.A. Inegbedion & A. Odion (n. 64) 65. The Head of State was assisted or only advised by the SMC.

[79] See *Lakanmi case* (supra). Sadly enough, the unrelenting Military Regime in Decree No. 28 of 1970 overruled this decision

[80](1968) NMLR 253 contrast that with *Garba v Federal Civil Service Commission* (1988) 1 NWLR (Part 71) 449, where the Supreme Court held that the act of the Federal Military Government in dismissing Applicant from work while his matter challenging his unlawful interdiction was still pending amounted to an interference with its judicial functions. However, in *Yusufu v Egbe* (1987) (part 86) 341, the same Supreme Court held that an ouster clause if effectively incorporated into a Decree will succeed in denying the Court's Jurisdiction.

[81]N.A. Inegbedion & A. Odion op. cit 66

[82] N.A. Inegbedion & A. Odion op. cit 66

provided for the presidential system of government with clear provisions for separation of powers, we shall adopt one of them in examining the doctrine of separation of powers and its application to Nigeria. Therefore, focus shall be on the constitution of Federal Republic of Nigeria 1999 (as amended), but recourse shall be made to the 1979 Constitution where appropriate.

Under the 1999 Constitution, separation of powers is recognized: while section 4 vests the legislative powers of the Federation on the National and State Houses of Assembly, sections 5 and 6 vest the executive and judicial powers of the Federation on the President and Governors and the Courts established by the Constitution, respectively.[83] Thus, any branch or officer that goes beyond its or his powers will usually have such action set aside by a court at the suit of a proper party who is aggrieved.[84]This was so held by Ogundaro JCA in *Ekpenikhio v Egbadon*,[85]thus:
A cardinal principle of our Federal Constitution of 1960, 1963 and 1979 is the separation of powers of the Executive, the Legislature and the Judiciary, but the Judiciary has added responsibility as a guardian and protector of the Constitution. Therefore, whenever the Executive or the legislature arms of government exceed their constitutional powers, the judiciary on a proper application to it, will curb the exercise of such excessive power and declare it a nullity.

[83] C.O. Ajah op. cit 20
[84]Ibid, 26
[85] (1993) 7 NWLR (Pt. 308) 468 CA

The basis for this system of checks and balances is to enhance the smooth administration of government and not to cripple it.[86] Thus in the case of *House of Assembly Bendel State v AG Bendel State*,[87]the Court held that though the courts have been given wide powers under section 4(8) of the 1979 Constitution, the intention is not to authorize the judiciary to interfere with the legislative exercise of the powers of legislature or the procedure to be followed in such exercise at any stage of the proceedings of the legislature.

Furthermore, in *Anago-Amanze v Federal Electoral Commission*[88] the court held that a State House of Assembly can only exercise such powers as have been given to it by the Constitution, that although the State House of Assembly has power to confirm or ratify the appointment of a Commissioner, but it would amount to usurpation of the functions of the Governor for the House of Assembly to pass motions or resolutions urging the Governor to revoke the appointment of a Commissioner whose appointment has already been confirmed by the House of Assembly.

However, though the Nigerian Constitutions starting from the 1960, 1963, 1979 and 1999 recognize the doctrine of separation of powers, but not in the idealistic form postulated by Montesquieu. A close examination for instance, of the CFRN of 1999 (as amended) shows rather a fusion of powers of sort[89]. Under section 4 (8) of the CFRN 1999 (as amended) as amended,

[86]See *Orhionmwon Local Government Council v Ogieva* (1993) 4 NWLR 161 CA
[87] (1984)5 NCLR 161 CA
[88](1985) 6 NCLR 638 HC
[89]Ajah (n.31) 28

the exercise of the legislative powers of both the National Assembly and a State Assembly are made subject to the jurisdiction of the court of law and of a judicial tribunal. The implication of this is that the National Assembly or a House of Assembly cannot enact a law that ousts the jurisdiction of a court of law or judicial tribunal established by law.[90] Thus, the judiciary does not only act as a check on the powers of the legislature, but also position itself as the custodian of the rule of law.[91]

Another instance of a fusion of powers can be seen in Section 46 (3) of the 1999 Constitution, which empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for the purpose of enforcement of fundamental rights. Law making traditionally comes within the functions of the Legislature, the provision therefore, makes the Judiciary a 'promulgator' instead of an 'interpreter.'[92]

Furthermore, under Section 175 and 212 of the 1999 Constitution, the President or the Governor as the case may be, is empowered to pardon convicted persons or to exercise his prerogative of mercy, by remitting, blotting out or extinguishing a convict's sentence imposed by the Judiciary. However, by virtue of section 292 of the same Constitution, the President together with the Senate or a Governor together with a House of Assembly may remove a judicial officer for stated misconduct. Also, section 315 of same Constitution allows the President or a Governor to modify an existing law.

[90]Ibid, 29.
[91]Ibid. see also the case of *Inakoju v Adeleke* (2007) 4 NWLR (pt. 1025) 423.
[92]Ajah (n.31) 29

From the few instances demonstrated, Nigeria's application of the doctrine of separation of power is not in the context of complete separation of functions as posited by Montesquieu, but rather that which is underpinned by checks and balances as held in the US *Jackson'scase*[93] and as expressed by Kavanagh.[94]However, the basis or rationale for the doctrine as expressed by Montesquieu still holds today. Awolowo, seemed to capture the Nigeria's application of the doctrine and the rationale more vividly:

Under our Constitution the three organs of government are separate and Distinct both in respect of the functions which they perform, and of functionaries who are entrusted with the performance of those functions. In other words, under our constitution, no government functionary belongs to more than one organ, and none performs the functions of more than one organ. This is one of the three well known forms of separation of powers, and functionally the neatest of them all… own form of separation of powers is fashioned after the American system. The ideal of this system is the provision of effective checks and balances in the government structure itself. By adoption of this form, absolutism or oligarchy of any kind is outlawed; true democracy is entrenched and manifestly seen to be entrenched in the constitution. In other words, each of the three is obligated to keep within and guard its bounds of authority… But does this all mean that each must operate in a watertight compartment regardless of consideration for each of the other two?... Whilst the judiciary must be detached and independent from the other two organs and be manifestly seen to be so, the legislature and the executive must work in close and harmonious collaboration with each other, if the welfare of the people is to be truly and

[93] Op cit 51.
[94]Op cit 52.

effectively served…It is quite clear that the objective of the legislature and the executive one and the same-to promote and serve the best interests of the people. If they work at cross purposes or refuse to cooperate and collaborate with each other, the interests of the people would be seriously endangered. This point is reinforced on the ground of plain commonsense. When two persons or agencies are charged with joint responsibility to achieve a common objective, the two of them must constantly seek a consensus or, in the event of disagreement, one of the two must be allowed to have the last say.

If each of the two, in the absence of consensus, claims the right of last say then, the common objective will either be unattainable, or be very slow of attainment.[95]

Despite, the express provisions of separation of powers in the emerging Constitutions of Nigeria since independence, the country has not been able to achieve sustainable democracy. Babalola has attributed this to either lack of the masses and electorates not being strong enough or united enough or either lack of courage or enlightenment, to cause the three arms of government to adhere to the doctrine of separation of powers.[96]From the analysis of Awolowo, the judiciary independence is very important, but in practice, how independent is judiciary there, a brief examination of this is therefore, relevant.

[95]O Awolowo, "Separation of powers among the three arms of government" Voice of Courage cited by Ajah (n. 31)
22.
[96]A.A. Babalola, ibid

4.6 How independent is our judiciary

The Judiciary is that branch of the State which adjudicates upon conflicts between state institutions and between individuals.[97] The judiciary is independent of both legislature and the executive for sustenance of democracy.[98]This independence ensures not only constitutionalism, but also guards against tyranny, despotism, dictatorship and totalitarianism.[99] Commenting further on the importance of judicial independence, Blackstone posited thus: '…judiciary is a body of men, nominated indeed, but not removable at pleasure by the Crown and consists one main preservative of the public liberty which cannot subsist long in any state unless the administration of justice be in some degree separated both from the legislative and from the executive power.[100]

When there is any infraction by Judges, they are to first of all be investigated by the National Judicial Council (NJC) and not any other body or authority. [101] The essence of the independence of the judiciary as enshrined in the doctrine of separation of powers implies that the judiciary should be independent of the two other Arms of Government, the Executive and the Legislature. In other words our Judges at all levels from the Magistrates to the Justices of the Appellate Courts should be able to deliver their judgments in all matters before them without fear or favour.[102]

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[97]Ibid
[98]Ibid.
[99]Ibid.
[100] W Blackstone, *Commentaries on the laws of England 1765-69, (*Chicago UP 17) 50 cited in Babalola, (n. 1)
[101]A.A. Babalola, ibid
[102]Ibid.

Regrettably, in Nigeria, the independence of the judiciary as enshrined in the doctrine of separation of powers is challenged by the following among others:

1. Poor remuneration-the Judiciary officers are poorly remunerated. This includes Magistrates, Judges both from High Courts and Appellate Courts. For instance, the total emolument of Judges of the Supreme Court is N10, 899,284.00 while that of his counterpart in England is £257, 121 which as equivalent to N128, 560,500 that is less than 10%.[103]
2. Uncertainty of tenure- Honourable Justice, Taslim, Olawale Elias, the then Chief Justice of Nigeria, Hon. Justice Adewale Thompson and Hon. Justice Emmanuel Ayoola were removed by the Military through Radio announcements without a hearing.[104] Recently, the former Chief Justice of Nigeria, Onnoghen was removed in an unfair trial by Code of Conduct Tribunal of the Buhari administration.[105]
3. Invasion of Judges Houses by Directorate of State Services (DSS) at midnight- in the early hours of Saturday, 8th October, 2016, Nigerians awoke to reports of the invasion of the houses of several judicial officers by officers of the State Security Service or Directorate of State Services. In the course of the said invasions, the homes of the Judges were searched and some of them arrested.[106] Ironically, in our constitutional democracy, the DSS lack the statutory powers to act as it did

[103] A.A Babalola, ibid The conversion rate used was based on the exchange rate in 2019

[104]A.A Babalola, ibid

[105] The Guardian Newspaper, "NJC removes Onnoghen from Membership list"<https://m.guardian.ng> accessed 26 November, 2020

[106]A.A Babalola, ibid

and the raids amounted to a denigration of the judiciary as an institution.

4. Lack of financial autonomy-the judiciary arm of government like the State Houses of Assembly lack financial autonomy and this affect their independence as required by the doctrine of separation of powers. The primary goal of separation of powers is to enable the three arms of government to be functionally independent of each other. However, in Nigeria, State Courts (Judiciary) and the State Legislature have over the years relied on the Executive for funding. This, as rightly observed by Onireti, is clearly 'antithetical to the doctrine of separation of powers under the Constitution.'[107] Section 120 (3) of the 1999 Constitution states: No moneys shall be withdrawn from any public fund of the State, other than the Consolidated Revenue Fund of the State, unless the issue of those moneys has been authorized by a law of the House of Assemblyof the State.

Also, section 121 (3) provides:

> Any amount standing to the credit of the judiciary in the Consolidated
> Revenue Fund of thee State shall be paid directly to the heads of thee
> courts concerned.[108]

[107] A. Onireti, " Nigeria: Analyzing the Presidential Order on the Implementation of Financial Autonomy for
State Legislature and Judiciary 2020-Implications for the Rule of law and independence of the
Judiciary<https://www.researchgate.net> accessed 26 November 2020
[108]Section 121(3) 0f the CFRN 1999 Constitution, cap 14 LFN 2004

Despite this provision, State's judiciary in Nigeria have continued to be financially dependent on the Executive making them pander to the whims and caprices of the executive. The implication of this is that Judges of the State High Courts may not be impartial especially in cases where Executive has a vested interest.[109]

The remedy intended by the recent signing of the Executive Order No.10 of 2020 by the President of Nigeria for the implementation of financial autonomy of State legislature and State Judiciary was frustrated by the State Governors.[110]

5.0 Separation of Powers in Times of Emergency

Emergency situation has been taken care of in most countries constitutions. In Nigeria, it is provided for in section 305 of the 1999 Constitution. However, section 305 (3) limits such situation(s) where a President can issue proclamation of emergency to when there is war, imminent danger of invasion or involvement in a state of war, actual breakdown of public order and public safety in the Federation or any part thereof that requires extra ordinary measures to restore peace and security and where there is clear and present danger of an actual breakdown of public order and public safety requiring extra ordinary measures to avert.

Even at that the President or Governor of a State still requires under section 305 (4) a resolution supported by 2/3 majority of the National Assembly or a State House of assembly as the case may be.

[109] A. Onitire, ibid
[110] Ibid

However, the situation presented during the recent outbreak of coronavirus, called Covid 19, may not have been contemplated by the framers of the Constitutions. Coronavirus was reported sometime on the 31st of December, 2019, when clusters of pneumonia cases of unknown etiology where found at Wuhan, China and continued escalating exponentially within and beyond Wuhan to other countries. By 30th of January, 2020, it has become a global pandemic with high fatality ratio and highly transmissible.[111]

Arising from this, governments across the globe took drastic measures ranging from partial to complete lock down of their territories for a period ranging from 3-6 months depending on the severity of spread and fatality.

During the period also some governments led by its executive declared a national state of emergency or state of disaster and make regulations under it without the safeguard of parliamentary oversight as required under the doctrine of separation of powers.

In the US, for instance, Governor Charlie Baker of the State of Massachusetts issued an Executive Order M.A.H.B. 45987 in March 2020 and was signed into law on April 3, 2020 after being codified by the legislature. The Order putatively allows proceedings subject to the State's open meeting law, such as zoning, planning and selectmen meetings, to be conducted remotely. Though this law makes good policy sense in light of the

[111] M. A. Shereen, "COVID-19 infection: Origin, transmission, and characteristics of human coronaviruses, *Journal of Advanced Research* (Vol. 24 July 2020)91-98

pandemic, but posed an obvious question of separation of powers.[112]

Some Executives have abused the emergency powers like the Hungarian Prime Minister Orban, who has used it to govern by executive decree for an indefinite period. Critics argue that the new law has transforms Hungary into a "Koronadiktatura" (koronadictatorship).[113]

In Israel, there were attempts to use the Covid 19 to limit the Operability of courts and shut down the Kenesset.[114]

In Nigeria, the Executive has called upon the emergency powers to deal with Covid 19 without however, having declared a state of emergency in line with its constitutional provisions in section 305 of the 1999 Constitution. This is actually dangerous as the legislature is denied its constitutional oversight functions for checks to prevent abuse.[115] Though this kind of emergency situation may not have been contemplated, but measures are now required to forestall negating the good intention of separation of powers in our democracy.

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[112]Nicholas P. Shapiro, "Covid-19 Has Resulted in some Awkward Separation of Powers Issues"<https://www.piercetwood> accessed 27 November 2020

[113]"Will the Law just enacted bring Koronadikatatura to Hungary" <https://hungaraspectum.org> accessed 26 November 2020

[114]N. Mordochay and Y/ R. Israel: Coronavirus, Interbranch conflict and Dynamic Judicial Review" https://verfassumgsblog.de/constitutionalcrisis-in-Israel-coronavirus-inter branch-conflict-anddynamic-judicialreview> accessed 26 November 2020

[115] see section 305 (4), (5) & (6)

6.0 Findings

1. Separation of powers doctrine allows each branch of government to perform its primary or core functions, even though it may sometimes perform other functions at the periphery. in other words, it allows for checks and balances. In modern state or democracy, the classic tripartite separation of powers articulated in the eighteenth century is archaic and anachronistic as it did not accommodate the modern checks and balances.[116]
2. The purpose of the doctrine is to curb abuse of power, partly by preventing its concentration in the hands of one person or body; protect liberty and the rule of law; and ensures efficiency in government, through the matching of tasks to those bodies best suited to execute them.[117]
3. Most countries constitutions enshrined the doctrine in the provisions of their constitutions including the US and Nigeria.
4. Nigeria though has the doctrine of separation of powers enshrined in all its constitutions since independence in 1960 has not been able to achieve sustainable democracy even with its Presidential system with true federal structure.[118]
5. Separation of powers doctrine is currently challenged by emergency situation like the Covid 19, where some

[116] A. Kavanagh, ibid

[117]N Barker, "Prelude to the Separation of Powers" *Cambridge Law Journal* (59 2001)1 cited by Kavanagh, (n.33)
223

[118] A.A Babalola, ibid

countries Executives have capitalized on to undermine the doctrine.[119]

7.0 Recommendations/Conclusion

Separation of Powers doctrine/principle is a necessary tool for checks and balance of powers/functions of government. It ensures that each of the branches of government has the powers to limit or check the other two branches, which help creates a balance between the three Separate powers of the state. To preserve this time long doctrine, we recommend the following:

1. There should be stringent provisions in the Constitutions of democratic countries to ensure that these powers are not only provided but that there should be a constitutional means for the branches to defend their own legitimate powers from encroachment by the other branches.
2. In the case of Nigeria, there should be continuous sensitization of the masses that the constitutional provision is meant as safeguards for their liberty. The National and State Houses of Assembly who are true representatives of the people should champion the cause for the implementation of section 120(3) and 121(3) of the 1999 Constitution, to ensure true independence of both the legislature and Judiciary.
3. Furthermore, the National Assembly may consider amending further section 305 (3) of the 1999 Constitution to include a pandemic such as Covid 19 and also section 305 (6) should be made clear when such power on emergency exercised by the President could lapsed.

[119] L. Abdulrauf, "Nigeria's Emergency (legal) Response to Covid 19: A Worthy Sacrifice for Public Health?
https://verfassungsblog.de accessed 26 November 2020

In conclusion, this paper has attempted assessing the doctrine of separation of powers, its meaning, history, provisions in some constitutions, application in Nigeria, its challenge during emergency, findings and recommendations and we will like to conclude with the words of Ikenga Oraegbunam that 'a government of separated powers is less likely to be tyrannical and more likely to follow the rule of law. A separation of power can also make a political system more democratic. A division of powers also prevents one branch of government from dominating the others or dictating the laws to the public'.[120]

[120]I. Oraegbunam, "Separation of Powers and Nigerian Constitutional Democracy" *Vanguard Newspapers* (19 January 2005)< https// scholar.google > accessed 28 November 2020