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Constitutionalism at the Local Government Level in Nigeria

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This paper looked into the operations of the Local Government system in Nigeria vis-à-vis basic constitutional concepts and practices. Because of the misapprehension and misapplication of the doctrine of Separation of Powers, the concept was discussed in some details through the political epochs in Nigeria. Such other doctrines as Checks and Balances, Rule of Law, Contract Theory, Sovereignty and Constitutionalism were also revisited. In doing these, the authors researched and reviewed various literatures on the subject, including Constitutions, Statutes, Decrees, Bye-Laws and Case Law which were generously cited. They found as a common practice and, thus, reached the conclusion that the concepts were either not observed or were wantonly breached at this level of government in Nigeria. They therefore recommended that this continuing challenge should be addressed in order to bring administration at this level into alignment with the State and Federal tiers in order to engender good governance.

Keywords: Constitutionalism, Federalism (Federation), Presidentialism (Presidential System), Parliamentarism (Parliamentary System), Militarism (Military Regime).

INTRODUCTION

At no other level, rung or tier of government is the concept and operation of separation of powers more confused, submerged or subverted than at the local government level. This may not be of deliberate intendment as the various histories of local government (evolution) attest. When natives gather and contrive their own methods of self-government, what are uppermost in their minds are social cohesion, security, peace, development and prosperity.

Once these are guaranteed, the form of government in place is of secondary consideration. That is why today, a modern State like Switzerland still organizes most of their local administration through Street or Town hall meetings, where every male adult participates, or is entitled to participate. That is their local parliament. They elect (a) committee(s) to carry on the day to day business which reports back to the large gathering that meets on a Sunday morning at agreed intervals.

Most modern States, however, elect their local councils for prescribed terms. These councils then meet to elect their own day-to-day managers, for example, Chairmen and Supervisory Councillors, if the parliamentary system is adopted. Still, some other States organize their Councils in a presidential manner, whereof the chairman and his vice are elected separately from the Councillors. While the chairman heads the executive branch, the councillors elect from amongst themselves a leader (speaker) to head the legislative branch. Even with this arrangement, in some States (like Germany) a Mayor maybe elected directly and differently from the Councillors, yet he heads the Council as a whole, combining all powers (as in Southern and particularly Eastern Germany Councils).

Nigeria is probably the leading example of Countries that have experimented with most, if not all of the systems of governance at the local government level; parliamentary, presidential, monarchical, oligarchical, dictatorship (yes, sole administratorship), etc.

In all these cases, what is happening is the interplay of the concept and operation of separation of powers, checks and balances, rule of law, and other constitutional doctrines, varying according to the structure, composition, form and organization of the local government system in each country. Therefore, to properly understand the working of the councils, how their elected and appointed officers and officials are composed, and the powers they wield, and how they operate, it is proper to look into the concepts themselves. Accordingly,

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this paper deals in some details with these doctrines which are now universal constitutional concepts.

What are these differences and how do they relate to the doctrines and practices of the Rule of Law and Constitutionalism? How do both impinge on governance, especially at the local government level? Were both doctrines observed at this level prior to 1976? Are they being practiced now? These are the broad objects of this enquiry, the overall objectives being to further the search for a better local government system, the frontiers of rule of law and the practice of constitutionalism within the context of Nigerian federalism.

SEPARATION OF POWERS

Historically, the doctrine of Separation of Powers dates back to the 17th century. Before then, however, there was an Athenian called Draco, an intelligentsia with extensive powers. He was requested to codify the Athenian Laws, which were unwritten at that time. Draco codified the laws and made every offence punishable by a death sentence. That is the origin of the famous *"*Draconian Laws*"*.[1] Later on, Aristotle, a Greek philosopher recognized the essence of good governance and opined that good governance can only exist if the powers (of government) are separated. In the 17th century, an English Philosopher named John Locke (1639- 1704) observed the administrative system in England and said that:[2]

> It may be too great a temptation to human frailty apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law both in its making and execution to their own private advantage.

In his conclusion, he stated that it would be better and more convenient to confer legislative, administrative and adjudicatory powers on separate bodies (organs). Baron Louis de Montesquieu (1689-1758) is known for his effort at popularizing the doctrine of Separation of Powers. He posited that:

> Political liberty is to be found only when there is no abuse of power. Experience shows that every man invested with power will abuse it by carrying it 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 legislature, executive and judicial powers are united in the same person or body…. There can be no liberty …. Again, there is no liberty if the judicial power is not separated from the legislative and executive … There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.[3]

Montesquieu proposed the following as the best methods of curbing the arbitrary use and exercise of power:

- To divide the powers of government into various organs to avoid the arbitrary use of it.
- To use one organ against the other, legally checkmating the excesses of each other.

CONCEPTUAL CLARIFICATION

Separation of powers is one of the major techniques designed to provide the necessary limitations on governmental powers. It is more obvious in the constitutions of countries that operate constitutional democracy and even more discernible with written constitutions.

It is a *watchdog* doctrine as well as a check principle used in government.[4] Concentration of governmental powers in the hands of one individual leads to dictatorship whereas separation of powers is decentralization of governmental powers amongst the various arms of government.[5]

Separation of powers is, therefore, the limiting and restraining as well as the distribution of government powers among the Legislature, Executive and Judiciary. Separation of powers is also the separation of their duties and functions in line with the character of the people and their constitution.[6]

According to the Dictionary of Politics,[7] separation of powers is the doctrine that political power should be divided among several bodies as a precaution against tyranny, opposed to absolute sovereignty of the Crown, Parliament, or any other body. Separation of powers was a 1eading idea in medieval Europe under the name of the two swords (see medieval political theory). Most thinkers agreed that power should be shared between the State and the Church. But no convincing argument was produced for the supremacy of one over the other.

Those who argued that the State was superior to the Church faced the fact that divine authority was supposed to be conferred on Kings at their coronation, and that religious authorities claimed the power to excommunicate Kings (as happened to King John of England). Those who argued that the Church was superior to the State had to explain away Jesus' command to "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's". Thus, there was *de facto* separation of powers in medieval Europe.

The idea was revived in the seventeenth century in response to renewed claims of divine right and absolute sovereignty. Locke distinguished the executive, legislative and federative (relating to foreign affairs) powers, although he did not intend them to be regarded as separate.

He had in mind the British arrangement where the executive was (at least partly) drawn from the legislature and answerable to it. Montesquieu developed this into a full-blown theory of the separation of the legislative, executive, and judicial powers (based, it is often said, on a misreading of contemporary British politics). From here it passed to the US Constitution and found justification in the Federalist Papers. The checks and balances of US government involve both the vertical separation of powers among the executive (the Presidency), the legislature (the two Houses of Congress, themselves arranged to check and balance one another), and the judicial (the federal courts) and a horizontal separation between the federal government and the states.

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1 The Role of the Executive, Legislature and the Judiciary in a Democracy by Hon. Justice KayodeEso, *Nigeria Law and Practice Journal* Vol. 3 No.2, 2-3.
2 John Locke, *Second Treatise of Civil Government*, Chapter 12-13.
3 Montesquieu, Espirit Des Lois, Book XI, 1784, Ch. 6.
4 Osy E. Nwaebo, *Critical constitutional issues in Nigeria* (1988).
5 Ben O. Nwabueze, *The Presidential Constitution Of Nigeria* Lagos, C. Hurst & C.O. (1982) 54.
6 Ibid
7 McLean I: *Oxford Concise Dictionary of Politics*, Oxford University Press, 1996, 448.

Defenders of separation of powers insist that it is needed against tyranny, including the tyranny of the majority. Its opponents argue that sovereignty must lie somewhere, and that it is better, and arguably more democratic, to ensure that it always lies with the same body (such as Parliament).

The existence of government is often said to be an evil. A necessary evil, an evil that no society can afford to ignore or cast aside. Granted this irony, the attempt has always been how to minimize the evil exertions, and ensure the maximum utilization of the benefits of the State. In other words, State exists for the welfare of the citizens, and this accords with the Bentham theory of the State, pouring the "greatest happiness of the greatest number*"* which he also described as the essence of law and government.[8]

The doctrine of Separation of Powers has since become a principle of democratic governance. The doctrine enjoins that the functions of government be exercised by different organs so as not to concentrate the functions in one particular agency. It is widely accepted that the government has three distinct obligations to carry out, namely legislative, the executive (or administrative) and judicial functions. These three basic duties of government correspond with the three main organs of government, which is the legislative, executive and the judiciary.

According to the theory, different persons or body of persons must handle powers of these three organs of government. Therefore, the legislature should carry out the legislative functions, the executive powers should be exercised by the executive arm and this cannot be exercised by the legislative or judiciary and the judiciary should perform the judicial functions which shall not be exercised by the legislature and the executive. Consequently, the 1999 Constitution of the Federal Republic of Nigeria has, in sections 4, 5 and 6, apportioned the powers of the federation to the three arms of government. By so doing, the constitution has instituted the hallowed doctrine of separation of powers.[9]

However, it is pertinent to note that the exercise of these powers is not without some checks and balances; the legislative arm checks the executive through motions, bills and over-sight functions. It also has power of impeachment against the executive. The courts are empowered to review governmental actions as well as check the exercise of the legislature to ensure that they are in conformity with the provisions of the constitution. There are also constitutional ways by which the Judiciary is checked by the Executive and the Legislature.

CONSTITUTIONAL FRAMEWORK OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers as developed by Montesquieu and others was taken by the fathers of the American Constitution, as can be seen from the following provisions:

Article 1 s (1) provides that:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[10]

Article 2 s (1) provides that the Executive power shall be vested in the President of the United States.

Article 3 s (1) vests the judicial powers in the Judiciary-Supreme Court and all Courts which Congress may form

The doctrine of separation of powers has since been incorporated in the various Constitutions of Nigeria.[11] It is well known that the Nigerian Constitution was largely modeled after the American constitution. Consequently the 1979 and 1999 Constitutions demarcate these three powers amongst the three main arms of government, viz Legislative, Executive and Judiciary, which are codified under Sections, 4, 5 and6 of the Constitution of the Federal Republic of Nigeria, respectively.

In *Liyanage v. The Queen*,[12] the Judicial Committee of the Privy Council (JCPC), which was Nigeria's highest appellate court as at then, held that under the Ceylonese (now Sri-Lankan) constitution, there existed a tripartite division of powers i.e. the Legislative, Executive and Judiciary.

In *Lakanmi & Anor v. Attorney General Western State and Anor*,[13] the plaintiff/applicants brought an application before the Western State High Court for an order of certiorari to squash an order made in 1967 by Mr. Justice Somolu in his capacity as chairman of the tribunal of inquiry into the assets of public officers of the Western State. The order was to the effect that Mr. E.O Lakanmi, his daughter Kikelomo Ola and all others who may be holding properties on behalf of, or in trust for any of them, shall not dispose of, or otherwise deal with any of the said properties of whatever nature (lands, houses, etc.) whether in their names or in any other names or aliases, until the Military Governor of the Western State of Nigeria shall otherwise direct.

Mr. Lakanmi and his daughter were also prevented by the order from operating their individual bank accounts without the consent of the Military or only to the extent that the State Military Governor shall in writing permit.

The application was dismissed by the High Court, which held, *inter alia*, that the order was not *ultra vires.* The plaintiffs/applicants appealed to the Western State Court of Appeal and while the appeal was pending, the Federal Military Government issued three (3) successive Decrees, viz:

1. The Investigation of Assets (Public Officers and Other Persons) Decree no. 37 of 1968;
2. The Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree no 42 of 1968; and
3. The Forfeiture of Assets etc. (Validation) Decree no. 45 of 1968.

These decrees applied throughout the Federation and one of their objects and intents was to validate the order made initially on Lakanmi's asset. The Western State Court of Appeal dismissed the plaintiffs/applicants appeal. Consequent upon these, they appealed to the Supreme Court. The appellants' counsel, Chief Rotimi Williams**,** argued amongst others that the effect of Decree no. 45 of 1968 was a usurpation of judicial

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8 Jeremy Benthan (1748 – 1832): *An Introduction to the Principles of Morals and Legislation*.

9 Per Karibi Whyte JSC in *Attorney General of the Federation v. Guardian Newspaper Ltd;* See also *Ekpenkhio v Egbadon* (1993) 7, NWLR, Pt. 308, 717 at 744. Per Ogundare, JCA.

10 Areticle 1, Section 1, Article 2, Section1, Article 3, Section 1, of the United States of America Constitution, deal with the three organs of government, the Legislature, Executive and Judiciary, respectively.

11 S. S. 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria, 1999.(as amended). Similar provisions were also in the 1979 Constitution.

12 (1967) AC 259.

13 (1971) 1 UILR 201.

power as it deprived the appellant of their properties without compensation by a legislative act.

The Supreme Court entertained the appeal, quashed the Order of the Assets Tribunal and held *inter alia* that Decree no. 45 of 1968 was nothing short of legislative judgment, an exercise of judicial power, and that it is *ultra vires* and invalid. It therefore declared both Edict no. 5 of 1967 under which the orders were made against the appellant, and Decree no. 45 of 1968 ultra vires, null and void.

This decision of the Supreme Court of Nigeria gave practical expression to the doctrine of Separation of Powers in the Nigerian legal system.

APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS IN NIGERIA

For a better understanding of Nigeria post military and present democratic experience, and also how the doctrine of separation of powers operates today, it will be pertinent to look a little backwards into the recent past.

The present 1999 Constitution, like that of 1979 was patterned after the American Constitution. Therefore, a few constitutional imperatives stand out, namely:

1) Constitutionalism should be the main and permanent feature in our system;
2) Federalism - federal system of government – is both the structure of our State and system of its government;
3) There is clear distribution of power between the Federal and the State Governments;
4) Presidentialism is our form of Government;
5) The Doctrine of separation of powers is entrenched in our Constitution; and
6) The institution of Checks and balances is inherent in the Constitution.

IN THE FIRST REPUBLIC

(Parliamentary System: Fusion of Powers)

Owing to the intentions of our colonial masters, and the disposition of our political leaders, of the time, the parliamentary system of government, which was (and is still) practiced in the UK, was adopted in Nigeria at independence in 1960.

Under that system, the doctrine of separation of power was not holistic, though there were some form of separation of duties and functions, like the separation of the offices of the Head of State and the Head of Government, within the executive branch.

It should be earnestly pointed out that the doctrine as practiced under parliamentary system is different from its application in a presidential system. There is ample fusion of powers in the parliamentary system which contrasts with the American presidential system. Nigeria has practiced both systems. Under the parliamentary system adopted for the new independent Nigerian State, the National Executive Council was drawn from the membership of the Legislature. Sir Abubakar Tafawa Balewa who was the then Prime Minister, was first elected into the Legislature before emerging as the Head of Government. This also applied to the other members of the executive, i.e., the Cabinet. Same was replicated at the regional level.

This extent of fusion was in accordance with parliamentarism, and was entrenched in the Independence Constitution, a tradition that was maintained under the 1963 Republican Constitution.[14] The only form of clear separation of power that existed in the parliamentary system, was as regards the judiciary.

UNDER THE 1963 REPUBLICAN CONSTITUTION

Under the 1963 Republican Constitution, there also existed a fusion of powers between the Legislature and Executive. S 87 of the 1963 Constitution, provided that:

87(1) There shall be a Prime Minister of the Federation who shall be appointed by the President.

87(2) Whenever the President has occasion to appoint a Prime Minister, he shall appoint a member of the House of Representatives who appears to him,likely to command the support of the majority of the members of the House.

As it turned out, the intricacies of parliamentary government did not work very well for Nigeria, neither did it make much contributions to the constitutional development of the Country. Provision for two heads in a Country, namely Head of Government and Colonial Head, (or the head of State), was a fertile ground for a fierce and prodigious politics which did not augur well for Nigeria's constitutional development.

Thus, there was not much to argue about, when Nigerians were presented with the choice of a presidential system of government against the parliamentary type. The popular opinion of Nigerians was the enthronement of a system in which the use of governmental powers would be checked, so as to guarantee individual liberty.[15]Accordingly, Nigerians rooted for a government established by the constitution in which functions and organs of government would be distinctively separated and also checked.

In 1964, Nigeria witnessed a general strike, following the hotly disputed general elections of the same year. This created a doubt in the President as to the legitimacy of the Prime Minister's claim of majority control so as to return to power. The conundrum shook the foundations of Nigeria's political structure. There was also a general dissatisfaction with the 1963 Census, which led to the case of *the AG of Eastern State v. AG of the Federation* of Nigeria.[16] In the statement of claim, the AG (Eastern State) alleged *inter alia* that the manner in which the census had been conducted was unconstitutional, *ultra vires*, illegal and, thus, null and void.

The grounds were that the Prime Minister had wrongly assumed jurisdiction, through the allegedly unauthorized setting up of a census board responsible to him alone, thereby going against the Statistics Act.[17] The crux of the Supreme Court's decision was that the plaintiffs had failed to prove that any of the legal rights that are vested in Eastern Nigeria had been violated. After this ruling, the reaction of the country occasioned house burning, mass looting, and a general state of chaos. These developments exacerbated insecurity and

[14] See Chapter VI of the 1963 Constitution.
[15] See the views of Nigerians as contained in the book titled *The Great Debate.*
[16] (1964) S.C. 231 & 232.
[17] Cap. 193, *Laws of the Federation of Nigeria and Lagos*.

national instability. Consequently, in the night of 15th January, 1966, the army struck.

UNDER THE MILITARY REGIME OF 1966 - 75

After the Army struck that night, a meeting was called the next day, between the Armed forces and the remaining members of the civilian cabinet. An attempt was made to reconstitute the cabinet. But it didn't work. What followed this failure was a complete but quiet *coup d' etat* by the Armed Forces. Legislative effect was given to this in the Constitution (Suspension and Modification) Decree no. 1 of 1966.[18]

LAW MAKING UNDER THE MILITARY

Decree no. 1 of 1966 abolished among other institutions, the Federal Parliament and the Regional Legislatures. S 3 of the Decree, provided that the Federal Military Government shall have the power to make laws for the peace, order and good government of Nigeria or any part thereof on any matter. The newly appointed Regional Military Governors could only legislate on matters in the concurrent list and this had to be with the prior consent of the Federal Military government. Laws made by the Federal Military Government were known as Decrees, while those at the Regional (later State) level were called Edicts. Decrees prevailed over Edicts wherever there were conflicts and inconsistencies.

EXECUTIVE POWERS UNDER THE MILITARY

S 7 of Decree no. 1 vested in the Head of the Federal Military Government, the executive authority of the Federation. The Head of the Federal Military Government may delegate to the Military Governor of a Region, executive functions falling within that Region. The Decree recognized division of powers between the executive and the law making body (the Supreme Military Council, SMC) at the Federal level, but the Military Governors in the various Regions were expressly described as the "Government".[19]

Fortunately, in the Civil Service, no changes were effected by the Military.[20] Little but remarkable changes were made in the Nigerian police. The existing local authority police forces were merged with the Nigerian police force and creation of others were prohibited.[21]It is apposite to state here albeit in passing, that there is currently (2011) a renewed agitation for State Police.In 1966, for a brief period, the "federal structure" of the Country was replaced with a "unitary one"[22] the Federation was renamed the "Republic of Nigeria".

An important initiative, which impinged on the constitutional development of Nigeria was the States Creation vide a Decree.[23] Twelve states were created in the Federation, and Lagos was made the seat of the Federal Government. S 1 (3) provided for a Military Governor for each state. The ingenious swiftness of this exercise, coming three days before Ojukwu's attempted secession of the former Eastern Region, weakened Ojukwu's action, which was, in any case, illegal and unconstitutional.

The consequence of these initial actions is that both the structure of the Country and its system of government (federalism) as well as the concept of separation of powers had been seriously eroded by the military.

JUDICIAL POWERS UNDER THE MILITARY

Judges were now appointed by the Supreme Military Council. Under the 1960 Constitution, the Judicial Service Commission exercised powers over the appointment of Judges, and so on. This was different under the 1963 Constitution, which empowered Parliament and the Regional Legislatures to establish new courts, etc. All these were suspended. The Supreme Courts no longer had jurisdiction to determine disputes among the Regions (now States) or between a State and the Federal Government.[24]

Although the provisions for the qualification of judges were left unaltered, the Military Government followed the example of Ghana[25] where ten years post call experience was required for the High Courts, twelve years for the Court of Appeal, and fifteen years for the Supreme Court.

In *Ogunlesi and others v. AGF*,[26]two Decrees of the Federal Military Government were challenged as being *ultra vires* the Federal Government. The Lagos High Court wasted no time in upholding the unlimited legislative competence of the Federal Military Government, asserting that Decrees can override the provisions of the Constitution. In *Ademolekun v. The Council of the University of Ibadan*,[27] the Supreme Court conceded that it could not question the power of the Federal Military Government in making a Decree, but rightly held that the courts have jurisdiction to declare an Edict void if it is inconsistent with a Decree or the Constitution.

On the other hand, in the case of *State v. Nwoga and Okoye*[28] the Learned Judge held that the basic law in Nigeria was still the 1963 Constitution. A similar attitude was shown by Sowemimo J., in the case of *Jackson V. Gowon and ors*,[29] where the judge, after referring to the case of *Doherty v. Balewa*,[30] which was decided under the previous constitution, held that:

> …. If it is proved in this case before me that S 22 of the Constitution of the Federation of 1963 will be violated by these proceedings and tribunal of inquiry, then one would be bound to declare that such a provision is invalid and unconstitutional"[31]

The climax of this line of cases and decisions as demonstrated by the Supreme Court was in the famous case of *Lakanmi and Kikelomo Ola v. AG Western Stare &ors*.[32] where, as has already been discussed, the court declared a Decree of the Federal Government invalid. This was the final decision which provoked the Federal Military Government into promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree[33] which effectively affirmed that the 15th January 1966 coup and also that of 29th July of 1966 were revolutions, which changed the Country's legal order.

18 Decree No. 1 of 1966 S. 3 (2)(b).
19 *Ibid*. However, the Head of State also Headed the SMC.
20 Note However, the effect of the 12-State Structure on the Civil Service.
21 Constitution (Suspension and Modification) Decree No 1 of 1966, Schedule 2. S 105.
22 Constitution (Suspension and Modification) Decree No 5 of 1966.
23 States (Creation and Transitional Provisions) Decree No 14, 1967.
24 Schedule to Decree No 1 of 1966.
25 S. 115(3) (a), (b), (c), of the Constitution of the Republic of Ghana, 1969.
26 (1970) LD/28/69 (unreported),
27 (1967) SS 378.
28 (1966) Suit no. E/341/66.
29 Nigerian Bar Journal Vol. viii, (1967) 87.
30 (1961) 1 ANLR, 604.
31 See Particularly, Page. 91 of the *Judgment in Doherty v. Balewa.*
32 (1971) 1 UILR 201.
33 Decree No. 28 of 1970.

Conclusively, the lesson to be drawn from this group of cases and their likes that are not herein mentioned is that, under the military, there was no clear cut separation of powers between the executive and the legislature, and also no clear distribution of powers between the Federal and State Governments. The judiciary was however, allowed a bit of independence.

SEPARATION OF POWERS IN THE SECOND REPUBLIC

Not surprisingly, the very first section of the 1979 Constitution declared the constitution as being the supreme law of the country and that all its provisions had a binding force throughout the federation and that if any law was inconsistent with it, the constitution would prevail and that other law would be void to the extent of the inconsistency. This was largely because of the Decrees and Edicts of the prior military regime.

The principle of constitutional supremacy was illustrated in the case of *AG Bendel State v. AG of the Federation & ors*.[34]In this case, an Act[35] of the National Assembly was nullified on the grounds that the Assembly did not follow the laid down procedure in the constitution before passing the Act. See also the case of *Garba v. FCSC*[36] where the Supreme Court (per Nnaemeka Agu, JSC) dismissed the action of a federal permanent secretary as executive lawlessness and an interference with the Court's duty.

The most prominent distinguishing feature of the 1979 Constitution was the adoption of the presidential system as opposed to the parliamentary system which was hitherto in practice since independence. The sub-committee of the Constitution Drafting Committee rejected the system of separating the Head of State from the Head of Government, and also the plural executive of the cabinet system in which government rests with a cabinet of ministers headed by the Prime Minister. It was the view of the committee that separation of the head of state from head of government involved a division between real and formal authority.[37]

It was further argued that the division of the two offices is meaningless and "un-African" because Africans believe that no one is contented with the position of being a mere figurehead. So many arguments were adduced in favor of executive presidency. It was vigorously canvassed that if there is only one head, (executive president), Nigeria would move faster towards a stable and developed country. It was further argued that the plural executive under the parliamentary system fails to provide a focal point of loyalty, which would facilitate national unity and integration, while the single executive has the merits of unity, energy and dispatch. Energy in the executive is a leading factor in the definition of good governance. Also, a single executive makes it easy to pinpoint responsibility and apportion blame to a particular person, unlike the parliamentary system where there is doubt because of the plural executive cabinet. At the end of the robust debate, the presidential system was adopted and the constitution adapted to meet the wishes and aspirations of Nigerians.

More importantly (and relevantly), is the remarkable feature of the 1979 constitution, which was the express recognition of and provision for separation of powers, with the legislative, the executive and judicial powers of the Federation carefully separated. This feature stands out in contrast to the provisions under the 1960 and 1963 Constitutions.[38]

MILITARY REGIMES (1984 TO 1999)

On the night of December 31st 1983**,** the Armed Forces took over the administration of government from the civilian government. The spokesman for the new administration was Brig. Sani Abacha. He announced to Nigerians the following morning that the Armed Forces found it inevitable to re- enter government. They claimed that they took over power to salvage Nigeria from its economic decline. With regards to the institution of separation of powers, it was clear that while there was fusion between the executive and legislature, the judiciary was left alone.

Karibi Whyte J.S.C in the celeberated case of *AG Federation v. Guardian Newspaper Ltd*,[39] captured the separate position and the sanctity of the judiciary under the military.

Accordingly, the erstwhile tripartite division of powers in the constitution into the legislative, executive and judiciary did not exist. What was left now was the division of the exercise of powers between the Federal Military Government which exercized both legislative and executive powers on one hand and the Judiciary on the other.

The resilience of the judiciary is a remarkable feature of our constitutional development, especially its survival under several successive revolutions. Even the provisions of Decree no. 28 of 1970, in all its sweeping assertion of the revolutionary nature of the military government, failed to abrogate the separate vesting of the exercise of judicial powers of the constitution in the courts.

It is a well acknowledged saying that the court is the last hope of the common man. Where the court fails to provide this hope, civil liberty would be forlorn. It may however be accepted that the Courts have on few occasions allowed themselves to be influenced by the other two organs, especially the Executive, thus compromising their independence.

SEPARATION OF POWERS UNDER THE 1999 CONSTITUTION

The 1999 Constitution, like that of 1979, is fashioned after the American Constitution, with provisions for separation of powers. The constitution demarcates governmental functions amongst the three arms of government- the legislature, the executive and the judiciary.

In *Oyegbemi v. AG Federation*,[40] the court observed that in a country with a written constitution, that establishes a tripartite allocation of powers to the legislature, executive and the judiciary, as co- ordinate organs of government, the judiciary has the role of determining the validity of the functions of other organs.

In *Ume-Ezeoke v. Makarfi*,[41] there was a general understanding that the constitution agrees with, and guarantees the basic propositions of the doctrine of separation of powers, which is provided for under S 4, 5 & 6.

[34] (1981) NCLR 21 and also, Tony Momoh's Case.
[35] Revenue Allocation Act, 1981.
[36] 36.(1988)I NWLR Pt. 79 at 447.
[37] CDC Report, 1976 vol. pg (xxix).
[38] Sections 4.5 & 6 of the 1999 Constitution deal with the Legislature, Executive and Judiciary, respectively. By S. 81 and 87 of the 1960 and 1963 Constitutions, the Prime Minister and Ministers of the Federation were Appointed from Members of Parliament.
[39] (2001) FWLR, 32.
[40] (1982) 2 FNR 192 at 206.
[41] (1982) FNR 133 at 120.

Karibi Whyte, JSC in the Supreme Court case of *A.G of the Federation v. Guardian Newspapers Ltd*,[42] laid out the separating features provided in the constitution, thus:

> The constitution has established this doctrine of vesting the legislative powers of the Federation in the National Assembly, S 4(1). And for the states, in the Houses of Assembly of the State, S 4(2). Each is limited to the subject matters prescribed in the Legislative lists (S 4 (2), (3), (5)). The executive powers are vested for the federation in the President and for the states in the governors. The exercise of the judicial powers of the constitution is vested in named courts, both in respect of the federation and of the states, S6 (5) 6 (a) (d).[43]

S4 (1) states 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.

S 5 (1) states that:

> Subject of the provisions of this constitution, the executive powers of the Federation- (a) shall be vested in the President and may be exercised by him either directly, or through the Vice President and Ministers of the government of the Federation....

In the same vein, S6 (1) 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 above notwithstanding, it is pertinent to note that in Nigeria, the three branches are not completely sealed off from one another. There is no complete and total separation of powers. They have tried to maintain a balance, which is the desirable practice universally. This was well articulated as far back as 1775 by John Adams when he said that: [44]

> … it is by balancing each of these against the other two, that the effort in human nature towards tyranny can alone be checked and restrained…

See also the case of *Youngstown Sheet & Tube Co v. Sawyer*[45] where Justice Jackson admonished that what is required is separateness with interdependence, and autonomy with reciprocity.[46]

Although, nowhere in the constitution was the term "separation of power" mentioned in describing the manner in which governmental powers are shared among the three arms of government, and also from the plethora of cases so farcited, it is clear that the doctrine is a prominent feature and practice of our constitutional democracy.

In *Military Governor of Lagos State v. Ojukwu*,[47]where Chief Ojukwu laid claim over an"abandoned property"and the Lagos State Government was resisting him, Obaseki, JSC held that:

> In the era where the rule of law operates, the rule of self- help by force is abandoned once a dispute has arisen between a person and the government or authority and the dispute has been brought before the court, thereby invoking the judicial powers of the state. It is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course. The action the Lagos State Government took can have no other interpretation than the show of the intention to preempt the decision of the court. The courts expect the utmost respect of the law from the government itself, which rules by the law

Similarly, in *Sofekun v. Akinyemi*,[48]Fatai Williams, CJN opined that:

> The jurisdiction and authority of the courts of this country cannot be usurped by either the executive or legislative branch of the federal or state government under any pretext whatsoever.

It is therefore apparent that the exercise of powers by the executive must be subjected to the jurisdiction of the courts as provided under S 4(8) of the 1999 Constitution.

THE INSTITUTION OF CHECKS AND BALANCES UNDER THE 1999 CONSTITUTION

In legal theory, separation of powers, connotes as a general rule, that no one arm of government is to interfere in the affairs of the other. But in practice, there has been a corollary development, which is the institution of checks and balances. This is also constitutionally provided, for the purpose of the three arms of government checking the excesses of one another. A few instances illustrate this point.

(a) S 4 (8) of the Constitution provides that the exercise of the legislative powers by both the National Assembly and a State Assembly *shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law*. This connotes judicial review of legislative action and makes the courts supervisors of legislative powers as well as guardians of the constitution, More relevantly, it serves as a serious check on any perceived or real excesses of the legislature. Also the second limb of the subsection that *the National Assembly or House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law* completes the circle of an effective check on the power of the legislature and also positions the judiciary as the custodian of the rule law.

(b) S 88 to 89 and 128 to 129 of the Constitution empower the National Assembly and the State House of Assembly, respectively, to carry out certain investigations on the official activities of any *person, authority, minister or government department.* This is

[42] Supra, 55.
[43] *Ibid.*
[44] Cited in *Agbaje v. COP Western State* (1969)1 MNLR 176 at 177.
[45] (1952) 343 us 579, 635.
[46] See also *Alhaji Bello v. M.B. Sani* (1982) 3 NCLR 831, *Akeredolu v. Akinemi* (1986) NWLR, pt. 25.
[47] (1986) SCWJ 277.
[48] Decided in 2nd May 1980, 2000; FWLR (pt 30) 2000.

a serious check on the executive. The legislature has also been given the powers to procure evidence and issue a warrant for the arrest of a defaulter and even impose a fine on him. In Senate of the *National Assembly & Ors .v. Tony Momoh*[49] the Court of Appeal held that the provisions of S. 83 of the 1979 Constitution did not amount to an infraction of the powers of the judiciary and the executive. It was therefore a healthy "check" by the legislature.

(c) S. 143 and 188, give the National and State Houses of Assembly, respectively, the power to initiate, carry out and conclude the impeachment proceedings of the President or Vice- President, the Governor or Deputy Governor. Even though a panel to be appointed by the Chief Justice of Nigeria, or the Chief Judge of a State, as the case may be, to carry out certain investigations, such a panel will still submit its report to the Legislature. Worst still, subsection (10) of both sections ousts the jurisdiction of the courts to inquire into the outcome of the impeachment proceeding. These sections are meant to act as serious checks on executive lawlessness and misconducts.

(d) The executive may refuse to assent to a bill passed by the National Assembly, which serves as a check on the National Assembly, although this executive veto can be over ridden with 2/3 majority vote of members.[50] The court on the other hand, can declare unconstitutional a bill sponsored by the Executive and duly passed by the National Assembly, particularly if the law is seen to be ultra vires the constitution as demonstrated in *AG Bendel v. AGF*[51] where the Supreme Court declared as unconstitutional the appropriate Bill of 1981, same not having fulfilled the constitutional requirements.

(e) S 175 and 212, of the Constitution, empower the president and the governor, as the case maybe, to pardon convicted persons or to exercise prerogative of mercy, by remitting, blotting out or extinguishing a sentence impose by the Court. These provisions constitute a fusion of executive and judicial powers, and in same ways, a check by the executive on judicial functions.

(f) S.174 and S.211 empower the Attorney General of the Federation and Attorney General of a State, respectively, to stop criminal proceedings. This is not only a fusion of judicial and executive powers, but also in some ways, an executive check on judicial functions.

(g) The Appropriation Bill, which is an executive estimate of its income and expenditure usually undergoes serious legislative scrutiny before being passed into law.

It is opined that these checks are against absolute powers, which would lead to abuse, and negate the spirit behind the doctrine of separation of powers, which is to protect the liberty of the citizens and the society against tyranny and anarchy.

It should however be pointed out that unnecessary and over bearing checks could equally lead to unhealthy rivalry, stalemate and possible anarchy

I. Relevance of the Rule of Law

The relevance of rule of law derives from its meaning which, summarily, is that everything – the government and the governed; inter-personal and inter-governmental relationships; and the law itself, its process and procedures – must all be in accordance with the Law. Society different from animal kingdom, is governed by law, else might would rule. The life of a man outside the Society, according to Thomas Hobbes, *is poor, nasty, brutish, solitary and short*. What protects man from these vices is the law. Yet even within the society, tyranny might reign if man, nor law, were to rule. That is why the old philosopher, Aristotle, wrote[52] that the "rule of law is preferable to that of an individual." Even under theocracies and Monarchies, where the Kings reigned, they still recognised that besides divine strictures, that law ruled. Writing in the 13th Century, Henry de Bracton said that the whole world was governed by law which is either divine or human; that the King ought not to be under man, but under God and the law. Charles I, in 1649, refused to submit to the jurisdiction of the Court, arguing that he as King, was God's anointed and there was no court on earth that could try him!

In an essay concerning the *True Origin, Extent and End of Civil Government*,[53] John Locke wrote that:

> Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power created in it, and not to be subject to the inconstant, unknown, arbitrary will of another man.

The element (or principles) of supremacy of the law, equality before the law, regularity (or constancy) of the law, and its impartiality were all present in Locke's thesis.

II. Constitutionalism

Constitutionalism basically refers to the process of governance and the institutions of government on the basis of a constitution, drawn up by the sovereign people, which creates the government, gives it power and prescribes the mode of exercising those powers, of altering it, and of punishing its breach. The concept follows the "Contract Theory" "Popular Sovereignty" and "Sovereignty," principles, which developed from people's resistance to the absolutism of monarchism and theocracy, that were enforced by the divine rule of Kings.

III. Contract Theory

The contract theory[54] seeks to explain the origin of society, and government, and set out the respective authority and responsibility of government and individuals under their contractual obligations. Contract theorists regard the human race as having lived in a State of nature prior to the organization of civil society. Once a "body politic" has been

[49] (1982) 1 FNLR 307.
[50] S. 58(5) and S. 100 (5) for the National and State Houses of Assembly, respectively.
[51] Supra, 7.
[52] Politics Vol II, Chap 16 (Jowitt's Translation), Davis ed., 1916, 139.
[53] (1960), Section 22.
[54] See the American Political Dictionary, 6th ed. 7.

created through a contract or compact among the people, a government is then founded and empowered through a second contract or constitution concluded between the people and the government. The nature of the relationship established by the governmental contract varies in these theories: from the individualism of John Locke's popular sovereignty and limited government to the totalitarianism of Thomas Hobbe's Leviathan.

The social contract theory was developed by various political philosophers during the middle ages as an intellectual challenge to the existing absolutism of the divine rights of Kings. Progressively the new doctrine gained adherents and the absolute power of the monarchs began to be curtailed. However, its full flowering emerged during the "Age of Enlightenment", and thenceforward. Its main exponents were John Locke, Jean Jacques Rousseau and James Harrington. Although theories of social contract are no longer fashionable, the great ideas they fostered remain integral part of modern democratic theories and practices.

IV. Popular Sovereignty

Popular Sovereignty[55] on the other hand, refers to the natural rights concept that ultimate political authority rests with the people and can be exercized to create, alter, or abolish government. In practice popular sovereignty is ordinarily exercised through elections and representative institutions. Popular sovereignty was enunciated by the natural rights philosophers in their attack on governmental absolutism.

The concept that the people possess supreme political power is implicit in modern Sovereign State and their Constitutions. Popular sovereignty in modern times is practiced, particularly by the American people, when they are writing or revising charters or amending their constitutions.

V. Sovereignty

To complete this synopsis, sovereignty[56] itself must be explained. It means the claim[57] to be the ultimate political authority, subject to no higher power as regards the making and enforcing of political decisions. In the international system, sovereignty is the claim by the State to full self-government. The mutual recognition of claims to sovereignty is the basis of interactional society. It serves as the basis for exchanges of recognition on the basis of legal equality; diplomacy and international law. The doctrine of sovereignty developed as part of the transformation of the medieval system in Europe into the modern state system.

It should be added that the early absolutist implications of sovereignty as developed by philosophers like Jean Bodin and Thomas Hobbes, which were to justify the power and position of the Kings and which built the myth that the Monarch had supreme powers, gave way in time to the new concept of popular sovereignty as developed by Jean Jacques Rousseau and John Locke. Sovereignty nevertheless remains significant especially in international relations, but this also has been modified as there cannot be absolute sovereignty having regard to treaties, international law and international organizations to which sovereign states subscribe.

These therefore are the planks and subsets of constitutionalism, which today is better practiced and advanced under written constitutions. Indeed, Thomas Paine had in 1776 written that:

> One of the vilest that can be set up… Government without a constitution is power without a right, for the want of a constitution in England to restrain and regulate the wild impulse of power, many of the Laws are irrational and tyrannical and the administration of them vague and problematical.[58]

The leading exponent of constitutionalism in contemporary Nigeria is Prof. Ben Nwabueze who has prolifically codified and analyzed Nigeria's constitutions and made many suggestions in his many books on the subject.[59]

CONCLUSION

Constitutional Concepts and Constitutionalism at the Local Government Level

These are some constitutional concepts/political doctrines that impinge on the local government system. Some cardinal principles of the doctrine of the Rule of Law are that the Law itself must be supreme, regular, certain, just and reasonably justifiable in a democratic society.[60] Section 7 of the Constitution of the Federal Republic of Nigeria, 1999, provides for the Local Government system. This is a departure from the 1960 and 1963 Constitutions which left the system entirely to the regions.

However, in doing so, the 1999 Constitution states that: the System of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall subject to Section 8 of the Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.[61]

Thus, Laws made by the State, pursuant to this constitutional power delegated directly to them, (to make laws for local government) are recognized over and above Acts of the National Assembly[62]even though the National Assembly is mandated to make laws for the peace, order and good governance of the (whole) federation.[63]

However, as it has turned out in practice, the various States Houses of Assembly have made Local Government Laws that lack the essential characteristics of regularity, certainly, justness and reasonableness. The various laws made by the Houses of Assembly may be in consonance with federalism as posited by Prof. Adebayo Adedeji[64] but they delimit the principles of rule of law and derogate from the concept and practice of constitutionalism. Many Local Government laws are made and amended so frequently that the operators themselves find it difficult to understand and enforce or comply with them.[65]

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55 *Ibid*

56 *Ibid*

57 See also Oxford Concise Dictionary of Politics Iain McLean, Ed. 1996, 464.

58 In Commonsense. 1776.

59 See Bibliography.

60 Prof. A. V. Dicey of the Oxford University, England, is regarded as a foremost exponent of this doctrine, expounded in his Book: *Law of the Constitution*, 1885, which followed the earlier writings of Aristotle and Henry Bracton in the 13th Century.

61 Similar provisions are contained in S.7 of the 1979 Constitution, and even more in the (unpromulagated) Constitutions of 1989 and 1995.

62 See A. G. Abia v. AGF (2002), 3 SCNJ 158.

63 S.4 of the Constitution.

64 Renewal of the Search for Systems of Local Governance that can serve the Common Good. Published in People – Centred Democracy in Nigeria, Ed. Heinemann, 2009. 7.

65 For example the *Edo State Local Government Law, 2000* was amended 6 times in 6 years, changing the rules while persons had been elected into office.

The Constitution empowers the State to provide functions for local government in addition to the functions specifically enumerated in the 4th schedule to the Constitution. Items that are not included in the exclusive and concurrent legislative lists are regarded as the *residual list*, over which the State may legislate. Out of these, the State may relinquish some (or aspects thereof) to local governments and withdraw same at will. Thus, what is a local government function today may not be so tomorrow, and also, an entirely new responsibility may be imposed on the local government without notice.[66] Similarly, what is a local government function in one State may not be so in another or other States.[67] Once again, this may accord with federalism, but it discords with constitutionalism.

It is however in the constitutionally provided areas of establishment, structure, composition, finance and functions of local government that the differences, dissonance and confusion are of concern. These are some of the reasons why the Federal Government in 1975 entered into the field and produced the "Reformed" or "Unified Local Government System" of 1976.[68]

This paper has dealt in some details with various constitutional concepts, especially Separation of Powers. The proper grasp of their intendment, it is hoped, will enable a further proper assessment of their observance and/or application at the local government level. Taken separately, it is possible and indeed easy to identify the limitations and pitfalls of their practices at this level of government. For example, Separation of Powers is forced into serious contradictions in two broad areas, namely:

(i) Where the local government practices parliamentary principle under a presidential framework; and
(ii) Where the unelected Council heads appoint or constitute themselves into Native Courts for adjudicatory purposes. The emirate Council are good examples of this practice.

Fusion of powers inherent in these practices also derogate from the institution of checks and balances, and rule of law. Similarly, sovereignty and/or popular sovereignty which belongs to the people is limited by the very undemocratic nature of the appointment to and composition, operation and functions of the Councils.

Taken together, therefore, these concepts can be said to be more breached than observed in practice. These, cumulatively circumscribe constitutionalism at the local government level and retain this subject as a continuing challenge to good governance in Nigeria, especially at the local government level. The superintendents or operators of Nigeria's Statecraft must, therefore, as a matter of deliberate measure, revisit the issue of Constitutionalism at the local government level in order to bring governance at that level into alignment with the other tiers, with the overall aim of engendering good governance and the advancement of Nigeria as a modern democracy.

[66] Examples are the payment of primary school teacher's salary and maintenance of main markets which were often imposed on local government.
[67] Out-door adverts, Bill Boards, Car Stickers, etc, which are regulated differently and variously across the Country.
[68] Guidelines to the Unified Local Government system, 1976. Government Press, Lagos.