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Essays in Constitutional Law Of Nigeria

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R. S. Bhalla

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ESSAYS IN CONSTITUTIONAL LAW OF NIGERIA

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To Sudha and Karan

PREFACE

In this short book of essay form on constitutional law of Nigeria, I hope to provide students with the explanation of fundamental constitutional principles as enshrined in the Constitution of Nigeria, 1979. I have dealt with constitutional principles both from jurisprudential point of view and from the functional aspect as they are practised in running the govenment. Constitution is a vast subject but it has some very distinct principles. It is these principles that are the subject matter of this book. I think that these explanations of constitutional principles will help the students of constitutional law to get a handle on the subject.

There are a few textbooks on the constitutional Law of Nigeria to acquaint the students with the Constitution of Nigeria but this present text will serve as a supplement to their knowledge in the theoretical aspect of the constitutional law. Most of these essays have already been published in law journals and their reproduction in the book form is made for easy access to the students.

These essays were written before the military take over on December 31, 1983. Most of the provisions of the Constitution of Nigeria, 1979 have since been suspended. The Constitution provisions dealt with here may not be strictly applicable in the present system of decrees and edicts, but the jurisprudential aspect of constitutional principles dealt in the book will always be useful for understanding of the working of government. For example, the rule of law is a principle that no government can ignore because it is through the rule of law governments establish social wellbeing for the society as a whole. Similarly directive principles of state policy, whether written or unwritten, always form the basis of public policy of government. The independence of judiciary is necessary to establish rule of law irrespective of any type of government. Federal structure of Nigeria is still the same as before the change over to military rule though the exigencies of time have brought changes in the power structure of the government. Similarly the doctrine of separation of powers has been taken out of its doctrinainare mould to suit the needs of the working of the government.

I am grateful to Dr. R.J.P. Parkers, formerly Ag. Head, Department of Political Science, University of Jos, for generous help and criticism of various essays.

R. S. B.

Contents

FEDERAL STRUCTURE OF THE CONSTITUTION OF NIGERIA

For forms of government let fools contest,
That which is best administered is best.
Pope

MAN is a political animal, said Aristole. As such his main concern is with the creation of order in society. Through interactions and associations with his fellow men in various types of social activities, there are formed certain patterns of behaviour that are essential for life in a highly organised society. These formal patterns of co-operation and interaction establish a form of order that society requires to create legal and political order. In the words of Barth:

> There can hardly be any doubt thatall social structures, large and small, permanent or transitory, have ... some kind of order. Wherever life has meaning, a society is founded among men. The realisation and fulfilment of meaning exceeds purely subjective and personal limits; it affects and involves one's fellow man. And since it is a society contructive force, it necessarily institutes an order... All public and private associations, regardless of the purpose for which they may have been established, find an order suitable to their interests and intentions.[1]

The concept of order can be used in a variety of ways to achieve different goals, to relate to different human activities. But all forms of order have certain elements in common that are used for structuring different types of societies. These elements are unity and consensus, sanctions in the broad sense of the term, and authority and its hierarchy.[2] The interaction of these elements vary differently in different forms of political structures and each form finds its own justification and legitimation. For example, federalism finds its justification in that it brings people of a state directly in touch with the government by allowing regions with diverse cultural, religious, and ethnic groups voluntarily to form a government to act upon their general problems. As Awa states:

1. Hans Barth. *The Idea of Order: Contribution to a Philosophy of Politics,* trans. by E.W. Hankamer and W.M. Nowell (Dordrecht: Reidel. 1960) p. 173

2. R. Young, *American Law and Politics: The Creation of Public Order* (New York: Harper & Row, 1967).

> In all federations, a sense of individuality and separateness flows mainly from the cultural matters (language, religion, etc.) and those constitute the principal reasons for a desire on the part of the units to be organised into a federal and not a unitary system of government.[3]

The alternative in many cases, would be a national unity by force of arms, if it comes at all. Thus in the creation of political order, the methods vary and the functions of government are carried out by a variety of political forms. One finds that everywhere different types of political structures are, thus, framed out of the elements stated above on some offered justification. Well over half the human mass of the world today lives under governments that with some justification, however slight, describe themselves as federalism.[4] Yet though the institution may thrive and more federal systems be added to the number every decade, the definition of federalism continues to be a matter of controversy.

Going back to the ancient Greek tradition of the league of city-states, one finds the idea of some sort of federation. In the seventeenth century one finds the Dutch Confederacy. The idea re-emerged with great vitality in the American Constitution of 1787, though in a far more centralised form, characterised by the Federalist Papers as a mixture of federal and national government. The United States is to be credited with first developing the modern concept of a federal form of government. This new form of federalism has found many imitators and admirers.

Federalism is a political system that divides power between the central government, which in certain matters is independent of the regional or state governments and has authority over the entire country, and a series of state or regional governments with certain areas of independence from the central government and which collectively cover the entire territory. In a true federal system of the two levels of government that rule the same land and people, each level has atleast one area of action in which it is theoretically autonomous and enjoys a guarantee, usually constitutionally, of that autonomy.[5] It provides for a common government for common purposes, generally called the federal or central or national

3. E.O. Awa, *Issues in Federalism* (Benin City: Ethiope Publishing Corporation, 1976) *p. 109*
4. W.H. Riker, *Federalism: Origin, Operation, and Significance* (Boston: Little Brown, 1964) *p. 1*

5. *Id. pp. 11—13.*

government. The aim is to have a common policy vis-a-vis the rest of the world. The federal scheme also provides for the continuance of the government of the several states, in the federation, preserving for them, against the world and against the federal government, control of most matters of internal policy. The most important aspect of a federal system, then, is the distribution of power and authority between the federal government on the one hand, and the state government on the other. The federal system, thus, espoused a democratic theory for controlling the government and for ordering society. In either case, the government acting within its allotted sphere is not subordinate to the other. In a federal system both central and state government act directly on the people.

The Constitution of Nigeria establishes a federal system of government. The very first three sections, section 1, section 2, section 3 of the Constitution of Nigeria declare that Nigeria shall be a Federal Republic and consist of neneteen states. Therefore, "states" as such are constitutionally recognised units and are not mere convenient administrative divisions. Nor is the Nigerian federation a league of states, united in a loose relationship: nor are the agencies of the federation driving power from it. There is no formal surrender of state rights and no formal grant of constitutional rights by the federation to the states as in the case of U.S.A. The federation is not a federation of enumerated powers, granted by the states, nor are the states in Nigeria creations of the federation. The states are created by an Act in 1976 and recognised as such by the Constitution. The Constitution of Nigeria contains the constitution both of the federation and of the states, comprising the Federal Republic. The one is not subordinate to the other in its own field, the authority of one is co-ordinate with that of the other. The dual polity with a federal government at the centre and the states at the periphery, each endowed with powers of its own to be exercised in the field assigned to it by the Constitution, formed the very structure of the system of government under the Constitution of Nigeria.

Federalism is a dividing of powers spatially as well as functionally. The legal relationship between the states themselves and the federal government is prescribed in the Constitution, though the

6. *Constitution of Nigeria, 1979* Section 66 (Hereinafter all sections refer to the Constitution of Nigeria. 1979).

7. Section 44.

nature of this relationship is subject to constant change through political and administrative actions. Under the constitutional formula certain categories of legal powers are delegated to the federal government, and states are prevented from taking certain kind of actions. The nature of representation in the Senate and the House of Representatives at the centre reflect the federal character. Moreover, the authority of the federal government or of the state government in specific areas may not be exclusive and duality of control over policy may lead to the development of joint programmes. Thus, the Constitution limits or controls the manner in which power is used by the federal government and state governments.

Nigerian federalism is sustained by several political institutions. The National Assembly is a representative body consisting of a senate and a House of Representatives. The unit of representation in the Senate is of course the state, but it is the population of the state, not the governmental organisation. Representation in the House of Representatives is also based on the population of the State. This concept of representation, both in the Senate and the House of Representatives, establishes an institutional relationship between government and the people. The President is a product of votes rendered state by state, and the national judiciary interprets the Constitution in ways that preserve the federal arrangement, as by separating state rights from national rights. On the other hand, the states though not sovereign are not mere sub-divisions of the federal government. The federal government has authority to govern the people directly in regard to many matters of domestic as well as foreign policy, and the authority of the federal government comes from "the people" of Nigeria and not from the individual states as separate political entities. All the states have the same constitutional rights, the same ratio of representation in the House of Representatives[6] and the same number of representatives in the Senate,[7] the same right to participate in federal elections, and the same amount of control over the structure of their own government. The Nigerian states are not sovereign in the same degree as independent nations who have been recognised by other nations and who belong to the international state system. Sovereignty developed as a legal-political concept in the sixteenth century, in the period of growing nationalism, and described the power of a monarch, or sovereign, to carry on relations with other rulers and, internally to govern his country. Power was theoretically undivided because it rested in a single, indivisible ruler, but in a modern national state power is dispersed throughout the governmental system and it is not easy or especially useful to locate its ultimate repository. The mediaeval notion of sovereignty as a 'indivisible entity' does not fit in the complex realities of federalism.

When the makers of the Constitution of Nigeria framed the Constitution, they created a system of government based on existing institutions with a few variations to cure or curb the ills of past experience. A member of the Constitution Assembly, keeping in view the past mistakes, stated:

> It is really very clear right from the beginning, or if one reads through the Constitution, even as a lay man, one can discover that the Constitution makers have been very much aware of the trouble the country has been in and the historical experience we had. The fact that we have to undergo all these problems in our life history and the fact that we have to start again as a nation have guided them and I must say that they, as a result, have come out with this Constitution.[8]

In 1979 the Nigerians were well acquainted with legislature, executive, and judicial organs of the government and had an idea of popular elections under the 1963 Constitution. What was noval in the 1979 Constitution was the introduction of Presidential system of government and the order of allocating the system of powers. The values and concepts of government the framers put forth were also familiar.

Perhaps because it was more than simply compatible with Nigerian values, the new Constitution soon became a symbol of political virtues, political rhetoric, widespread prosperity, national expansion, and accompanied heavy burst of enthusiasm for civil government after thirteen years of military rule, all contributed to a wellnigh universal feeling that the Constitution contains a close guarded secret of prosperity.

The framers of the Constitution wanted a strong national government, able to cope with all serious economic and political problems because they were apprehensive about abuse of power as under the 1963 Constitution. Thus, the core of the problem was to establish a government that would able, as Madison stated "to control one part of the society from invading the rights of another, and at the same time sufficiently controled itself, from setting up an interest adverse to that of the whole society."[9] This problem, of course, is as old as society itself, and the solution of the framers was to establish an intricate means of distributing political power. As Madison explained.

8. *Proceedings of the Constituent Assembly,* p. 62 part I.

9. Quoted in T. Mason, *Free Government in the Making,* New York: Oxford University Press, 1965). p. 172.

> Ambition must be made to counter ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary... A dependence on the people is, no doubt, the primary control; but experience has taught mankind the necessity of auxiliary precaution.[10]

Federalism is a means of obliging government to control itself. It provides for a limited government. The constitution is an instrument of limited government and limited government is provided through the principles of separation of powers and distribution of powers. And to set at rest all later questioning of what that distribution really is, it is written into the Constitution. This distribution of power firmly established in a written constitution is the distinctive feature of federalism. The sharing of different kinds of authority among public officials, and sharing of power between federal and state governments contribute towards limited and Constitutional government. This combination of separating, sharing, and prohibiting power can most fruitfully be analysed under the heading of federalism. Federalism requires a geographical distribution of power among states and national government. The distribution of power among federal officials is made the basis of functions.

By establishing a government based on shared power, the framers achieved what Mason[11] has called "institutionalised tension." Alexander Hamilton describes the sharing of power as the characteristic of federalism and advocates that the "vibrations of power are the genius of our government."[12] Tensions and vibrations of power connote a dynamic rather than a static system. But sometimes tensions and vibrations in the relation between the states and federal government become a source of continuing conflict and controversy. As at present the existence of a federal police force and the absence of state police forces has become a point of controversy in Nigerian political system.[13] There is a clear underlying tension among competing levels of government though national leaders often speak of co-operation about federal-state relations.

11. A.T. Mason. *The Supreme Court: Palladium of Freedom,* (Ann Arbor, Michigan: University of Michigan Press, 1962) p. 8.

12. Quoted in Mason, *Id.* p. 8.

13. *Daily Sketch,* (June 1, 1981).

On a strictly legal basis the states are equal, for all the states have the same relative power in enacting legislation and in handling local problems. But this legal equality of the states is more apparent than their economic equality, for there are greater variations between the states in such figures as annual income, wealth produced, and extent of physical resources. These variations not only affect the ability of the states to support governmental services, but also influence the pattern of relations with the federal government. The differing resources of the state may be balanced in part through programmes sponsored by the federal government. The disparity of wealth among the units within the federation means that equality of opportunity varies from state to state. To those who view extensive economic and social planning on a national scale as necessary or desirable, the federal system may present a serious obstacle. Financially and administratively, there is costly duplication of effort. However, no one supposes that the states are equal in influence in respect of wealth, population, area, and certain other aspects. The rationale of federalism is that it protects diversity of interests within regional units while allowing a national political system to develop. On the other hand, the territorial civil war in Nigeria, touched off in 1967 by Biafra's secession from the central government is a remainder that the tensions within a federal system distrupt the whole structure and, second, a federal system does not guarantee political stability.

Federalism encourages greater participation by citizens in the political process since the federal structure prevails at all levels of government – central, states, local, and even along the organisation of political parties:[14] As Action states:

> By multiplying centres of government and discussion it promotes the diffusion of political knowledge and the maintenance of healthy and independent opinion. It is the protectorate of minorities, and the consecration of self-government.[15]

The citizen has a voice in ruling himself but his power is limited because he shares it with a vast number of his fellow citizens. Since federalism lays a political system which is a representative government, the popular will is expressed through elected representatives and appointed officials. Citizen's views on policy issues are usually expressed through representatives rather than directly and they are bound by the resulting decisions. By frequent elections the voters choose the principle legislative and executive officers of government. A citizen's formal role in the governmental process is normally limited to participating in the selection of

representatives, although he can influence in many other ways the decisions his representative will make. The Constitution also provides, however, one instrument of direct democracy whereby governmental decisions are immediately made by the people as a whole rather than by the representatives as under section 8(b). This initiative is a means by which a specified number of people propose a constitutional amendment and compel a popular vote on its adoption. Again under federalism significant decisions are made by state and local governments. Local problems can be handled at the grass-roots level by the people who are most intimately associated with them. Certain governmental plans and devices can be tested at the state level, and proving worthwhile, can be adopted at the national level. State and local governments can thus serve as testing grounds for politicians and administrators who will eventually assume responsibility with the national government. Whereas federalism allows more levels of government, more points of access to the government, this often leads to delay and indecision. Again one can also argue that under the federal system, local and parochial interests have often been able to frustrate efforts to solve national problems. In a federal system since federal government collects almost all the taxes, it can also be argued that the federal system has often left states unable to pay for local services.

In a federal system the constitution fixes the broad outlines of the distribution of power between the federal government and the state government. Both the federal and the state governments derive their power from the constitution, and thus are independent within their own sphere of action. In either case, the governments acting within their allotted spheres are not subordinate to the others. Both federal and state governments act directly on the people. It is sometimes mistakenly understood by this that the two levels of government are of co-equal power. This is far from being the case. Section 4(5) of the Constitution states:

> If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.

Again section 5(2)(b) states:

> [The] executive powers [of the state] shall be so exercised as not to impede or prejudice the exercise of the executive powers of the Federation or to endanger the continuance of a federal government in Nigeria.

15. Acton, *Freedom in Antiquity,* in *Constitutional Law Cases and Other Problems* ed. by P.A. Freund, M. DeWolfe Howe, A.E. Sutherland, E.J. Brown, (Boston: Little Brown & Co., 1961) p. 119

Both these sections of the Constitution establish the legal framework within which Nigerian federalism is to operate. Section 4(5) does not mean that the federal government may pass any law and make it the supreme law of the land; but it does mean that if the federal government does have the power to pass a law, it will negate the state law on the same subject. And significantly, such a conflict between the federal laws and state laws is to be decided not by the state or federal courts but by the national organs, the Supreme Court,[16] which authoritatively and ultimately interprets the extent of the government power. Moreover, these two sections provide for the federal supremacy over the states.

The supremacy of the federal government is expressed in its bearing full responsibility for peace, order, and good government in any part of the federation.[17] The Constitution charges the federal government with certain specific responsibilities in its relation with the states as component parts of the national union. The federal government is, however, the final judge in its own responsibilities with respect to the states. The federal government is charged with protecting each state when there is an actual breakdown of public order and public safety or there is a clear and present danger of an actual breakdown of public order and public safety or there is an occurrence of imminent danger or the occurrence of any disaster or natural calamity.[18]

The Nigerian Constitution indicates a federal texture by providing for distribution of legislative powers between the centre and the states.[19] There are two lists of legislative powers, one for the centre known as "Exclusive Legislative List" and the other both for the states and centre known as "Concurrent Legislative List." Under the concurrent list there are two headings, one providing for the extent of the power of the centre and another providing for the extent of the power of the states. Since both the extent of the centre and of the state is separated, one can conclude that there is a second exclusive legislative list for the centre within the concurrent list. Whereas in this list the centre shares power with the states, in the first exclusive legislative list,[20] the centre does not share power with the states. The residuary power of legislation is given to

16. Section 212(1).
17. Section 4(2).
18. Section 265.
19. Schedule 2.
20. Schedule 2, part 1.

states[21] as under the U.S. Constitution. Under the legislative lists subjects have been precisely formulated so as to lead to a minimum of controversy and litigation. This is unlike the American Constitution where the subjects have been dealt in such general terms that the amount of litigation is immense. The National Assembly can only invade the legislative field of the states on the ground of maintaining and securing of public safety and public order subject to conditions under section 11. Further, the National Assembly has a right of way in legislation[22] in the case of inconsistency between laws made by the National Assembly and the state House of Assembly. These features show the balance in favour of strengthening the federation as against the states. This is to be attributed to the past experience in Nigeria during its First Republic when the weak centre produced its downfall.[23]

The entire scheme of distribution of powers undoubtedly displays a strong tendency towards a high degree of centralisation. This led a member in the Constituent Assembly to remark: I, regret to say that there is very little that is federal in it.[24] Looking through the distribution of power, one cannot fail to observe the extreme concentration of power in the federal government. But this is the product of realism and genuine understanding, keeping in view the past history where the weak central government became the cause of the failure of the federal government in the country. Deviation from the strictly federal pattern as in U.S.A. does not mean the breach of federal principles since one must remember the different ways the federal structure originated in the U.S. and in Nigeria. There is no strictly rigid federal system set as a pattern for all to copy as Wheare[25] maintains, nor any sanctity attached to any particular form of federalism. Under federalism, there are many gateway of ideas and actions so that there fate is seldom settled by a single arbiter. Federalism allows for a variety of responses on matters for which there is no vast enduring majority, but on which opinions justifiably differ and fluctuate.

General changes in social, political and economic conditions in the world have created a necessity for strong centre in federal

21. Section 4(7)(a).
22. Section 4(5).
23. B.O. Nwabueze, *Constitutionalism in the Emergent States* (Rutherford: Fairleigh Dickinson University Press, 1973) p. 111
24. *Proceedings, op. cit.*, 72, para 123 p. 1
25. K.C. Wheare, *Federal Government*, (London: Oxford University Press, 1963) pp. 35–36

systems. Industrialisation and urbanisation, the enormous pressure of political upheaval in the world and world wars have began to transform federal systems leading them towards greater centralisation. Some state and social functions, such as social welfare and economic regulations, have had to be transferred to the federal government for the development of a centralised machinery for the promotion of a welfare state. The enormous burdens of defense and foreign policy have further strengthened central power. The federal systems have become more centralised and top-heavy. However, it can be stated that the adjustment of the older schemes of federal organisation to the necessity of industrialism and the nuclear age involved nothing more than change in the concept of federalism. Necessities of time and life cannot be sacrificed at the alter of immutable and sacred principles; the principles cannot be salvaged by repeated and excessive resort to the past; they must stand on their own present merit. No doctrine can stand on its own feet unless it serves the needs of society. The present is the only reality.

The basic principle of federalism is that the legislative and the executive authority is partitioned between the federal and the states not by any law to be made by the federal government but by the constitution itself. To set at rest all later questioning of what this distribution really is, it is written into the constitution. This distribution of power firmly established in a written constitution is the distinctive feature of federalism. Though in such an assigned field the balance may be tilted towards the centre, this does not form the essence of federalism. The chief mark of federalism lies in the division of the legislative and the executive authority between the federation and the states by the constitution. This is the principle embodied in the Nigerian Constitution. Federalism is a principle of co-ordination, reconciliation between two divergent tendencies, the widening range of common interest and the need for local autonomy. The federal government by virture of its position, is called upon to co-ordinate the activities of the various state governments in the interest of uniformity without which there is the risk of fissiparous tendencies growing unchecked. Moreover this trend of tilting balance of power in favour of the centre is not only peculiar to Nigeria. War, economic depression, planning, the growth of the idea of welfarism, etc. all these have promoted the increase of federal powers in the U.S.A., Australia, Canada. Hathorn, Penniman, and Ferber state :

> Centralisation of power in the national government is a political fact of life almost everywhere in the world. The concept of "co-operative federalism" in the United States at least

keeps many facets of this trend within the boundaries of the historic distribution of powers principle.[26]

Nevertheless a careful reading of the items over which the states have been given jurisdiction makes it clear that the states have not been reduced to a mere appendage in the scheme of division of powers, on the contrary, they have at their disposal substantial power covering a large area to meet their local needs which enable them to function as effective units of the sovereign power which they share with the federation.

The Nigerian Constitution is impressed with two major representative systems, the British and the American. The judicial writs mentioned in section 42 are copies of old English writs and shall be modified and adjusted in the context of Nigerian conditions under the rules for regulating the practice and procedure in the courts. The very name of these writs in the Nigerian Constitution carry with them the characteristics they had acquired in British constitutional history. From the American Constitution it has not only borrowed the federal structure but the idea of federalism and the presidential system of government having previously tried the British system of government. From the American Constitution is drawn the inspiration for widespread judicial review of laws, governmental actions and fundamental rights guaranteed by the Constitution. The American "due process" clause has been formally disclaimed under section 32 that state: in accordance with a procedure permitted by law; though it survived under a different nomenclature with a different context, "reasonably necessary" under section 30, or "resonably justified" under section 41. But the federal American tradition of distrust of a too powerful centre has not been accepted at all as stated earlier. There are other influeces found in the Nigerian Constitution that can be traced to the Indian Constitution that incorporated the Directive Principles of State Policy. Though the whole idea of such principles can be traced to the Rights of Man and Citizens proclaimed by revolutionary France and the Declaration of Indepence by the American Colonies.

It is noticeable that the Constitution of Nigeria used the word federation in many sections as a feature of the Nigerian Constitution. This deliberation of the use of the word federation seems intentional so as to stress the federal structure while at the same time showing the country as one nation. The framers of the Constitution wanted to stress the idea expressed in the preamble in each part of

26. G.B. Hathorn, H.R. Penniman, M.F. Ferber, *Government and Politics in the United States,* (New York: D. Van Nostrand Co., 1966) p 47

the Constitution: To live in unity and harmony as one indivisible and indissoluble Sovereign Nation.

A unique feature of the Nigerian Constitution is that it lays down the federal feature not only for the government of Nigeria but for the political parties as well. National political parties are organised along federal lines. Thus, it is not only the structure of the government, but the whole political process is federalised. A member of the Constituent Assembly, while commenting on the federal structure of political parties, stated:

> The condition stipulated... for organising future political parties on National basis with equitable representation of various states participating at the higher level of executive of any political party, is a realistic approach to unite the people of this country on common political forums. There will definitely be a general mobilisation of public opinions towards social, cultural, economic and political revival and inter-actions which will generate greater understanding among the various ethnic groups; increased mutual co-operation, understanding and trust among party members in different parts of the country; and thereby foster true spirit of National Unity, progress, stability and prosperity.[27]

The Constitution of Nigeria lays down an elaborate system of controls of political parties.[28] All types of sectional interests are barred in forming political parties.[29] Their aims and objectives are clearly stated to conform to Chapter 2 of the Constitution.[30] Their financial resources, constitution, and rules governing their conduct are strictly laid down in the Constitution. All types of military postures[31] by political parties that can create obnoxious climate and establish ochlocracy are prohibited. Secular character, national unity, and the democratic ideals are stressed as features of the Nigerian political parties. The whole political party system is subject to strict watch, control, and scrutiny by a central body, the Federal Electoral Commission, (FEDECO).[32]

The Constitution makers realised that political parties are indispensable vehicle of parliamentary democracy. However, their experience with the sactional nature of political parties during the

27. *Proceedings, op. cit.*, p. 771, para 1522.
28. Sections 201—209.
29. Section 202(b) & (e).
30. Section 204.
31. Section 207.
32. Section 205—206.

First Republic,[33] which had led to its down-fall, served as their main guide in introducing controls and limitations into political parties. Political parties provided for under the Constitution must be federal or national in character. The Constitution makers thought that this would alley the fears of the common man and his dread of a repetition of past events. As one member of the Constituent Assembly, while echoing the fears of the common man, stated:

> I have heard a lot of the same ordinary men say they wished the army would never leave power in this country. Why are they saying so? These sentiments have their origin from the same source. The common man in this country, the farmer, the small trader, a person who does not aspire or has the slightest hope of sitting in the seats hon. Members are sitting today, is mortally afraid of party politics. The tyranny of party politics is a fact of life which we should all recognise. As a matter of fact, it is my personal feeling that all the Premiers of the Regions which we had then happened to be the leaders of their political parties, and they were in truth dictators in this country. All of them without any exception were involved in this, and I fear that with the return of political parties in this country, the same trend of events is going to take place.[34]

This is a very proper innovation in political arena when the country is made up of various tribes and religions which differ in historical origin and social customs. This is, most probably, the only way to bring different communities into one united fold by arrangement if not by attitude of mind, which with the passage of time might become a habit. But to lay down political objectives for political parties is a tricky business since every party can drive and interpret different conclusions from these objectives. But to let them draw their own objectives will help them into the understanding and depths of their motives, resources, and the public reaction to their ideals. One member of the Constituent Assembly expressed similar opinion when he stated:

> I think they have gone out of their way to make such provisions which to me, are just better left for the political parties to use for their own campaign activities.[35]

The Nigerian Constitution does not profess any particular type of political creed though a member of the Constituent Assembly described it as an "elitist Constitution"[36] thereby implying it as capitalist oriented. The Constitution does not commit itself either to socialist pattern of society or to capitalist structure of society.

33. Nwabueze, *op. cit.*, ch. 5.
34. *Proceedings, op. cit.*, p. 603, para 1185.
35. *Id.* p. 766, para 1512.
36. *Id.* p. 76, para 131.

The idea of 'isms' is avoided throughout the Constitution. Those who wish to use the Constitution for any particular ideology or 'isms' or political creed or faith may do well remember that any approach over this vital issue is to be made within the constitutional frame-work itself. Even chapter 2, sections 13—22, relating to Fundamental Objectives and Directive Principles of State Policy does not express any favour for any 'isms;' they only express the idea of a welfare state. There is nothing in this chapter that could not be taken or adopted in any modern state as the universal principles to meet the progressive and welfare subsistence needs of any nation.

The Nigerian Constitution adopts a secular policy.[37] A secular state does not mean a state without a religion. It simply means that there is no official religion; it means non-adoption and non-support of any religion; and that everybody is free to worship the way he likes. It does not disallow anybody from having a religion or not having one. In fact, it follows along the pattern of the freedom of the individual. Thus secularism does not suggest that in a secular state religion does not exist or that the constitution is indifferent to religion.[38] As one member of the Constituent Assembly remarked:

> There is no doubt that we all want a secular state, and when we talk of a secular state we are not suggesting that religion does not exist. That is not the point. All we are saying is that the states cannot say that this is a Christian state or a Moslem state or a pagan state or whatever you want to call it.[39]

The state that does not have an official religion, can treat one religion in exactly the same way as any other religion. In this way, the state is neither hindering nor encouraging any religion in the society. Thus, the Constitution of Nigeria is not anti-religious. The Preamble to the Constitution, in fact, is spelt out in the name of God. However, a machinery for working political institutions has naturally to be constitutionally neutral in a community where there are many religions. Sutherland wrote:

> The idea that in a popular controlled polity, religious orthodoxy should be entirely dissociated from governmental authority.[40]

37. Section 10.
38. Sections 17(3)(b) & 10(3).
39. *Proceedings, op. cit.,* p. 60, para 100.
40. A.E. Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas,* (Cambridge (Mass): Harvard University Press, 1963) p 265.

Right to freedom of thought, conscience, and religion is guaranteed under the Constitution.[41] All persons are equally entitled to freedom of conscience and the right to profess, practice, and propogate religion. No doubt this freedom is subject to public order, public morality, public safety, public health, in the interest of defence, or for the purpose of protecting the rights and freedom of other persons.[42] A part of this religious freedom under the Constitution includes freedom for every religious denomination to establish and maintain institutions for religious purposes, to manage its own affairs in matters of religion. But no person attending any place of education shall be required to receive religious instructions or to take part in or attend any religious ceremony or observance if such instructions, ceremony, or observance relate to a religion other than his own or a religion not approved by his parents or guardian,[43] for an individual has his right to join whatever religious group he chooses and to change his religion his belief as he wishes.

This signifies a federal approach to education and religion that tends to regard religion as the private affair of individuals rather than that it should be meddled within public policy. Federalism, in a country of different religions, demands a restrained and responsible use of the Constitution. An intemperate and irresponsible use of the Constitution breaks up the climate and texture of federalism. Litigation on such matters will dissipate the dynamism of social, economic, and political progress.

A constitutional lawyer versed in American federal arrangents might be disposed to criticise Nigerian federal structure as detrimental to the principles of federalism. But such a disposition would be a misreading of the facts. A large part of the explanation for the difference in design can be found in the circumstances of the origin of federalism. As a result of this difference, that is, American federal origin being in a union of states, these states still enjoy certain privileges that one finds missing in Nigerian states. The Nigerian Constitution stresses the role of the federal government in the strongest terms by ascribing single citizenship unlike American Constitution where confusion exists on this point. Again the Nigerian Constitution provides for a Nigerian Police Force[44] and makes it clear that no other police force shall be established for the

41. Section 35.
42. Section 41.
43. Section 10(2).
44. Section 194.

federation or any part of it. This centralised arrangement of the police force is of utmost constitutional importance in that it helps to protect the federal government from challenge by force. It would be unthinkable for a state to stage a coup d'etat by locking up opposition to the government. A member of the Constituent Assembly expressed similar ideas when he stated:

> People have talked about state police and local government police. Well, this pressure has been on for many years and it was resisted not because it was a bad proposal as such but because we are not very mature politically in this country. Once you give them an instrument — some of the politicians — they will misuse it, and because of that, we thought that the police should remain a federal police force. It is quite easy to misuse state police or local government police but with the federal government police it will not be so easy.[45]

Centralisation of police should result in the even enforcement of laws. If federal government has no control over police force, it may find it difficult to secure compliance with its regulations and its orders in the face of serious hostility or resistence. The case of Little Rock in U.S.A. is in point, where the federal troops had to be assigned to keep order when a federal court decision on school desegregation was not obeyed. The Nigerian Constitution provides for unified judiciary which facilitates the smooth transaction of judicial administrative business.[46] The Constitution commands the states to give enforcement to judicial decisions of any other state. If every state clinges to its own forms and persistently refuses to enforce the decisions of other courts of the country established under the Constitution that do not have exactly the same requirement, there would be great confusion, loss of time, and inconvenience. Thus full faith and credit shall be given to all judicial decisions of the federation and the states in all parts of Nigeria, the execution of all decisions or orders delivered or passed. These features cut across the basic texture of federalism as found in America. But these features can be justified with respect to reasons relating to social, political variations between different federal structures found in various parts of the world. The federal concept has indeed undergone profound changes although there never was, perhaps, a logically comprehensive and satisfactory definition of federalism at any time.

In constitutional jurisprudence sovereignty is said to be indivisible between the federation and the component units. Thus the uni-

45. *Proceedings, op. cit.*, 272–273, para 524–525.
46. Section 251.

ty of citizenship, one federal police force, unified judiciary cannot be regarded as basically contrary to the federal idea. It makes no more sense to allocate sovereignty to both the federation and the state governments than it does to allocate it to either level thereby unitarising the federal government. The most sensible explanation suggests that sovereignty is possessed jointly, by the whole federal state, and exercised in different fields by both the federal and the state governments each directly over the individual citizens, even though this explanation may tend to fragment "indivisible sovereignty" or at least tend to suggest that the accepted definitions of state and sovereignty do not fit realities of federalism. After all, it is citizenship of one sovereign state and if each state were to grant citizenship according to its own standards, then the situation would be constitutionally indefensible, administratively confusing and in practice perplexing. Similarly a unified judiciary, administering both federal and state laws, ensures uniformity in legal structure and procedure and cannot be said to be intrinsically anti-federal in character.

It is a noticeable feature of federalism under the Constitution of Nigeria that matters which are likely to cause disputes between the states have been taken by the federation under its own control. Such an approach would reduce bitterness among states and the solution to the problems would be found in the spirit of nationalism, welding the nation together. For example, the Constitution has an important provision regarding waters from such sources that affect more than one state.[47] Similarly inter-state trade and commerce,[48] mines and minerals resources,[49] are taken care of by the federal government. Aware of the unending disputes in other federations, particularly the U.S.A., the Constitution makers decided that the power to deal with such subjects should be vested exclusively in the National Assembly. Thus the National Assembly by law provides for the adjudication of any dispute or complaint with respect to use, distribution or control in such matters. The solution is both national and rational. It avoids situations of tension between two waring parties. Such a solution will take the heat out of such disputes and avoid the unending wrangle between states in the judicial courts.

Another feature of the Nigerian federalism is the setting up of the various executive bodies under section 140 for the federation and under section 178 for the states. The Nigerian Constitution makes

47. *Schedule 2, Part 1, entry 62.*
48. *Id., entry 59.*
49. *Id., entry 36.*

use of these bodies as a constitutional method of finding facts and solving tensions under the Constitution. The executive bodies recognised by the Constitution have interesting and varied functions and statuses and have bearing on Nigerian federalism in practice. For example, the Federal Electoral Commission provided for under section 140 is charged with the superintendence, direction, and control of all elections to the National Assembly, Houses of Assembly, President, Vice-President, Governors, and Deputy governors of states. As a federal commission it helps to achieve uniformity of standards in elections and electoral matters. Moreover, it is taken care of that their composition is to reflect the federal character of the Country.[50]

The federal executive bodies are not only for matters affecting the federal government, they are also for guiding and advising the federal government regarding matters relating to the states as in the case of National Economic Council, National Population Commission, Police Service Commission. This facilitates the smooth working of the administrative machinery of the country as a whole as well as to ensure the better co-ordination of policy and action between the federation and the states. The federal executive bodies and the state executive bodies are to work in union, extending full co-operation with each other in related fields. This includes the giving of directions by the federal executive bodies to the state executive bodies. This becomes clear if one reads the working of the Federal Electoral Commission and the State Electoral Commission.[51]

Federalism in the Nigerian Constitution has not come out unscathed in the matter of the division of financial powers. Here again one finds an urge towards centralisation in public finances. The reason appears to be the unification of the economy and the multiplying of governmental functions. Many of the most expensive functions of government are allotted to the federal government in the distribution of powers in the Constitution. It is thought to be contrary to the interest of the country as a whole that there should be wide disparites in the number and quality of public services among the states. The capacity of the different states to raise revenue needed to maintain public services at a uniform level vary greatly. Some can maintain a high level of public services at moderate rate of taxes while others cannot do so even at very high rates of taxation. That is why some states have prospered while others remain relatively poor. In most cases the plight of the latter

50. Section 14(3).
51. Schedule 3, part 1(c), & part 2(c).

is largely due to the poverty of or lack of variety of their resources. Their condition, however, is assuaged by a general centralising of the economic system. This also helps in establishing a uniform pattern of public services in the states. To avoid all such disparities the Constitution makes elaborate provisions with respect to the financial relationship between the federation, the states, and the local government councils. It makes a clear cut statement that the financial arrangements between the Federal, the States, and the Local Government Councils in each state shall be prescribed by the National Assembly.[52] The significance of this provision becomes clear when one takes into account the unending conflicts between the federation and the states and their local government councils in the financial fields. The Constitution provides for the adjustment of receipts from certain specific sources and this avoids the conflicts where the federation and the states have tried to raise revenue by taxing the same source such as income tax and capital gains tax, etc.[53] Double taxing the same source both by the federation and the states, and the local government councils in theory looks all right. In practice, however, it creates great inconvenience. The federation thought that the states stood in its way to enhanced taxing while the states looked upon the federation as a hinderence to their financial soundness and thus as impinging on their provision of public services. Similarly, a conflict may arise between the state and its local government councils. At the same, people are apt to resent that they are subject to double or excessive taxation. Such a policy amounts to enormous and waxed problems.

When one talks of finance in a federal system for running governments, for states and local government councils, an essential and fundamental feature is to find out where the purse string lies and how the Constitution can best use it. The taxing power is a mighty one under the Constitution. Taking a close look at the distribution of powers in the Second Schedule of the Nigerian Constitution, one cannot fail to observe the concentration of financial powers in the federal government. The federal government is in a favourable and strong position as a collector and distributor of taxes since the terms and the manner of distribution of taxes to the states and local government councils is to be prescribed by the National Assembly.[54] However, under section 151 the federation may also make grants to a state to supplement the revenue of a state in such sums and subject to such terms and conditions as may be

52. *Section 149(2).*
53. *Schedule 2, Part 2, D.*
54. *Section 149(2).*

prescribed by the National Assembly. Federal grant is a kind of equaliser of the disparities among the states in respect of what they need and what they can afford. Grant programmes are hailed for providing services in areas where the tax basis is small, for increasing the capacity of the state government to meet demands on it and for enabling state legislatures to initiate programmes they might otherwise find impossible. Thus through grants the states can tailor their programmes to meet local needs and conditions. A modern industrial nation must furnish extensive social services. This consideration is, of course, reinforced under the present Constitution by the Fundamental Objectives set out in chapter 2. States are apt to be slow in moving in this direction. Grants-in-aid permit desirable and necessary programmes to be developed within the framework of the federal system. Through the grants-in-aid system the spending power has been developed as a potent weapon by the federal government in securing state co-operation in many fields. Again it can also be argued that though aid programmes helps state's needs, they also lead to fragmentation of federal programming, overlapping, and weakened co-ordination. But sometimes excessive national control ignores area differences and special needs. Grants-in-aid also promote inter-governmental co-operation. Furthermore, the grants-in-aid system enables states to administer functions bearing on a national interest and thereby, in effect, to acquire a measure of control over national policy. The states can use this administration as a check on national policy, and also as a moderation of tendencies towards excessive centralisation.

There is one government, however, that has ready access by taxation to all pools of wealth in the country. That, of course is the federal government. The poorer states which find it difficult to finance their activities, and other interests that want a high level of government services, are tempted to argue that they nave an inherent right to be taken care of by the federal government. As the federal government collects large funds, so goes the argument of the poorer states, so it should either make grants to states enabling them to maintain desired levels of government services, or it should itself take over some of the more costly functions of government and administer them.

When either course is adopted, it enhances the importance of the federal government and diminishes the autonomy and independence of the state governments. When federal government is given over-riding control over financial matters, the states are left either to follow federal government directives or to live with their poverty, with poor public services and finally perhaps with public

frustrations at the inadequacy. Grants-in-aid put states in the position of being supplecants for the favour of money grants from the federation. In such circumstances a member in the Constituent Assembly remarked:

> States are virtually beggars and I do not think that we can operate a federation like this.[55]

This diminishes their position as partners in the federation. Their independent role and status as federal units is weakened. It is inevitable that some federal control will accompany the grants, as well as federal assistance and co-operation. If the sums are large in amount, as they usually must be to accomplish their purpose, the authority that takes the odium of collecting them is unlikely to give a completely free hand to other authorities in spending them. Control is usually secured by earmarking the grants for specific purposes such as public health services, old-age pensions, or unemployment relief. To earn the grant the state governments must comply with the specification laid down by the federal government covering the particular activity that is being aided. Techniques of federal supervision include periodic reports, audits, and inspections, in addition to the basic specifications.

The reason for adopting federalism in Nigeria is to arrest the reach of a distant government that is not trusted to take account of unique circumstances in different areas. A member in the Constituent Assembly expressed this clearly when he stated:

> Federalism is the best system of government for Nigeria because of our nature and our ethnic plurality. We are a nation of different interests, different thinking and different pattern of life and culture.[56]

Many matters that would cause the sharpest conflict if they were thrown into national politics cause little dissension when dealt with separately in each state. Federalism enables many regional interests and idiosyncracies to have their own way in their own areas without ever facing the necessity of reconciliation with other regional interests. Individuals identify themselves with particular regional interests and find in them a satisfying expression of what might be called local culture and personality. Thus, as long as the federation of widely autonomous states continues to exist the legislatures of these states adopt laws significantly relating to the

55. *Proceedings, op. cit.*, p. 70, para 120.
56. *Proceedings, op. cit.*, p. 313, para 606.

special circumstances of their particular areas. Consequently there is less need to rely on the administrative process and less strain on the constitutional safeguards than there would be if one central legislature made all the laws for the country. Federalism is a device for combining unity and diversity in accordance with the requirements of liberal democratic ideals. The claim is made that libertarian values are closely tied to a system of decentralisation and spread of decision-making since excessive centralisation is apt to tyranny. Federalism certainly offers advantages by increasing opportunities for "multiple sources of cleavages."[57] But at the same time one cannot say that a unitary system like Great Britain's has resulted in a debasement of citizen's liberties. It can, then, be said that federalism is a neutral system neither promoting nor restricting the maintenance of liberal values. In fact, the vitality of pluralism is indispensable to the survival of a free society whether formalised in federal or unitary arrangements.[58] Again it depends largely on how federal governments and administrations use the system whether it promotes liberal values or not.

Only up to a certain point can diversities be welcomed as an attempt to accommodate local needs and interests. Despite the carefully designed structure of federal systems, jurisdictional separations cannot always be meticulously maintained when a problem reaches a point of national concern. It then becomes the concern of all the public at all levels of government. Stress may come to weight on the niceties of structure. An analysis of the legislative and administrative relations between the federation and the states shows that the federal structure established under the Nigerian Constitution aims to achieve the paramount need of unity within diversity. But to maintain and safeguard this unity within diversity will be tested by the working of the Constitution. Some members of the Constituent Assembly described the new federal system as a trial.[59] The future of Nigeria as a Federal Republic, the future of the new Constitution, as an examplification of the federal model, will depend upon how the nation evolves the principles and practices of federalism. The Constitution holds out great promise as a dynamic instrument of accommodation. It will need to be turned to resolving conflicts and to pointing the way to adjustments. In principle, and it is to be hoped in practice, it will be found to be suited to Nigeria, whose indispensable requisite as a lasting political community is unity and harmony as one indivisible and indissoluble sovereign nation.

57. S.M. Lipset, *Political Man: The Social Bases of Politics* (New York Doubleday, 1960). p. 91.
58. R.A. Dahl, *Modern Political Analysis* (New Jersy: Prentice-Hall, 1963). p. 37.
59. *Proceedings, op. cit.*, p. 700, para 1379, and p. 772, para 1523.

THE SEPARATION OF POWERS UNDER THE CONSTITUTION OF NIGERIA

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

Madison[1]

Practically all modern states have provided some form of checks upon the free action of their governments. This is not a primordial principle born with the state itself, like the distinction of rulers and the ruled. It belongs to the modern democratic state whereby the power of the government is reduced by effective means of checks and counter-checks. To understand the working of the government it has thus become important in modern times to study how this principle of checks and counter-checks works in the working of the government. This principle is based on the idea that to ensure the proper working of the law, the various functions connected with its working are to be separately executed by separate authorities.

The distinctive feature of government is the exercise of power by some men over other men, and the classification of the kinds of power thus exercised though artificial to a degree, aids the understanding of government functions. At the simplest level of discussion, a familiar classification, as old as the Politics of Aristotle, is available for use when he advocates the separation of executive from judiciary in the interest of liberty and justice. Though he has not anticipated the modern classification but one finds the germ of the doctrine of separation of powers in his classification between the executive and judicial functions. There are, it is said, three distinct kinds of governmental powers — legislative, executive, and judicial. Legislative power consists in law making, general rules of conduct supplementing or replacing some of the older rules based on custom or unwritten laws. Executive power consists in the executing or carrying out the laws and the carrying on the manifold public activities and services. Judicial power consists in interpreting the laws or, more concretely, deciding in the event of disputes which specify acts are permitted or required or forbidden in execution of the laws; it is to ensure as far as possible, the impartial settlement of disputes under fixed and known laws.

Aristotle's idea of the separation of powers made no advance towards the development of the modern doctrine of separation

1. H. Hamilton, J. Madison, and J. Jay, The Federalist (London: J. M. Dent & Sons, 1970) paper No. 51.

of powers. One of the major reasons for this failure was the early medieval conception of law associated with the idea of absolute natural law. Commenting on this conception of law and its relation to the separation of powers, Vile states:

> The connection between modern theories of law and sovereignty and the emergence of the concepts of the legislative, executive and judicial function of government is very close. The idea of an autonomous 'legislative power' is dependent upon the emergence of the idea that law could be made by human agency, that there was a real power to make law, to legislate. In the early medieval period this idea of making law by human agency was subordinated to the view that law was a fixed unchanging pattern of divinely-inspired custom, which could be applied and interpreted by man, but not changed by him. In so far as men were concerned with 'legislation' they were in fact declaring law, clarifying what the law really was, not creating it. Legislation was in fact part of the judicial procedure.[2]

In the early forteenth century Marsilius of Padua[3], an Italian jurist and philospher, introduced a new conception of law which represents a complete break with the medieval thinking, He advocated the autonomy of the positive law from the idea of the absolute natural law or 'higher law.' At the same time he first developed the idea that the people are the source of all political power and government is by the mandate of the people and with their consent. In this new context, Marsilius clearly made the distinction between making of the law and execution of the law. Marsilius placed the law making power with the people and the Prince is therefore under an obligation to observe and executive the law and can be punished if he violates it. This truly revolutionary proposition contains the elements of the construction of the doctrine of separation of powers. Carey, while commenting on Marsilius' contribution to the theory of separation of powers, states:

> Although differentiation of functions can be attributed to Marsilius, there are two aspects of his theory which are important because of their being at variance with the pure doctrine. He did suggest a separation of functions in order to guard against tyranny, uphold the rule of law, or further any of the other ends normally attributed to the doctrine... he did not make provision for an independent judiciary. Presumably he felt, as did many who came later, that this function was subsumed under the executive one.[4]

2. *M. J. C. Vile,* ***Constitutionalism and the Separation of Powers*** *(Oxford: Oxford University Press, 1967) p. 24.*
3. W. Friedmann, ***Legal Theory*** (London: Stevens and Sons, 1967). p. 117–118.
4. G.W. Carey, ***"The Separation of Powers," in Founding Principles of American Government Two Hundred Years of Democracy on Trial,*** *edited by* G.J. Graham, Jr. and S.G. Graham (Bloomington: Indiana University Press, 1977) p. 104.

Generally speaking, Marsilius' theory did not provide sufficien explanation of the functioning and, particularly, of the manner in which the enacting function and the executing function could relate to each other. However, John Locke, points out some of the complexities involved in an attempt to separate functions. John Locke, the philosopher of constitutionalism emphasised the doctrine though in a different form than its final version given by Montesquieu. Locke states:

> The first and fundamental positive Law of all Common-wealth, is the establishing of the Legislative Power .... This Legislative is not only the supreme power of the Common-wealth, but sacred and unalterable in the hands where the community have once placed it.[5]

Thus, according to Locke there is only one power, legislative, that is supreme and all the rest are and must be subordinate to it. Locke, in fact, thinks that if the legislators are also the executors of laws, they might exempt themselves from their application. He, thus, states:

> But because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the Legislative should be always in being, not having always business to do. And because it may be too great a temptation to humane 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 make ... Therefore in well order'd Commonwealths... the Legislative Power is put into the hands of diverse Persons who duly Assembled, have by themselves, or jointly with others a Power to make laws, which when they have done, being separated again, they are themselves subject to the laws, they have made...
>
> But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual Execution, or an attendance thereunto: Therefore 'tis necessary there should be a Power always in being, which should see to the Execution of the Laws that are made, and remain in force. And thus the Legislative and Executive Power come often to be separated.[6]

Locke says that laws take little time to be made and, therefore, the legislative body need not be always in being. Locke, being a natural law philosopher, argues the separation between the legislative and the executive on the basis of his philosphy that man being selfish in nature will try to take advantage if he be made both

5. John Locke, ***Two Treatises of Government,*** *edited by* P.P. Laslett (Cambridge: University Press, 1970), para 134.
6. Locke, *op. cit.*, para 143 & 144.

a legislator and executor; and thus advocates separation of powers on the basis of natural justice rather than a physical separation being two different powers. In conclusion one can say that Locke's thesis contains only two separate powers, the legislative and the executive. Locke seems to include, like Marsilius, the judicial power in the executive power which is concerned with the whole administration of laws. The separation of these powers would seem, therefore, to be only a matter of convenience, and not a dogma emphasised by Locke as vitally important.[7] Gough while commenting on Locke's thesis states:

> It is true that Locke does not go as far and declared that if executive and legislative powers were in the same hands there could be no liberty, but he clearly believed it desirable to keep them separate.[8]

Mostesquieu, a French jurist and philosopher of the mid eighteenth century adopted the classification of separation of powers – legislative, executive, and judicial and made himself famous by arguing that the secret of civil liberty lay in the separation of these powers, in the reserving of each type of power to different persons or body of persons. The result of associating three powers or linking two powers will destroy liberty. One man or group of men should exercise substantially all legislative powers and at the same time have no extensive share in or control over the executive or the judicial power. Men will always push what powers they have to the limits; and if those who make the laws also enforce them, they can tyrannise over their fellows. The result will be the same if either the executive and the judicial or the legislative and the judicial powers are joined in the hands of the same person. No one body of men, according to this argument can be trusted with the monopoly of forces possessed by the government. Montesquieu states:

> When the Legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again there is no liberty, if the judicial 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 be then the legislator. Were it joined to the excutive power, the judge might behave with violence and oppression.[9]

7. Cf G. Barker, ***Social Contact*** (Oxford: Clarendon Press, 1947) p. xxvii.
8. J.W. Gough, ***John Locke's Political Philosophy*** (Oxford: Clarendon Press, 1973) p. 108.
9. Montesquieq, ***The Spirit of Law,*** *trans. by* T. Nugent (New York: Hafner Publishing Co., 1949) bk. 11, sec. 6.

According to Montesquieu, assurance that government shall be servant and not master depends on the separation of powers' principle since power should be a check to power, if liberty or law itself is to be endured. This he argues is the essence of the effective constitution. To him the important thing was not the analysis of functions but the principle of their embodiment in separate organs together with the mutual checking and balancing of one another. To a separation of functions, Montesquieu added an elaborate system of checks and balances to produce a balanced government far more intricate than the one proposed by Locke. Montesquieu gave judicial power equal status co-ordinate with those of the executive and the legislative. Carey[10] elaborating on the function of checks and balances states:

> In this respect, we should note that Montesquieu, unlike those who preceded him, did not rely upon a separation of powers alone to prevent tyranny or extremism. He saw a need for each branch to possess a positive check on the operations of the other, in order to produce that result. Though he was aware that his intricate system might well seem to be an invitation to deadlock wherein nothing could be accomplished, he could answer: "These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the cause of human affairs, they are forced to move, but still in concert".[11]

This, however, raised problems as to whether or not this mutual checking and balancing will be an interference into each others' affairs. As Marshall states:

> Through a running together of the checking and balancing theories of mixed government with the separation of person doctrine, neither he nor many others down to the present day seem clear as to whether 'checking' of one branch by another is a participation in the other's function and a partial violation of the separation of powers doctrine, of whether it is actually an exemplification of the doctrine, which carries out the very purpose of the separating and balancing off against each other of the three branches of government. Thus legislative impeachment of executive officers, or executive veto of legislation or judicial review of administrative, or legislative actions, are sometimes treated in the one way and sometimes in the other – as illustration of the theory, or as partial exceptions which need explanation or excuse.[12]

10. Carey, *op. cit.*, p. 110.
11. Montesquieu, *op. cit.*, bk. 11, sec. 6.
12. G. Marshall, ***Constitutional Theory*** (Oxford: Clarendon Press 1971) p. 102.

A clear understanding of the doctrine is made by James Madison in the Federalist paper number 47, 48, 51. In paper 47, Madison states:

> From ... facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'there can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates'; or 'if the power of judging, be not separated from the legislative and executive powers 'he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning .. can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principle of a free constitution are subverted.

In the Federalist paper number 48, Madison states that the interlinking of these powers is essential for free government and advocates that:

> Unless these departments be so far connected and blended, as to give to each a constitutional control over the other, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

Thus to think of absolute separation of powers without one providing a partial check or partial control is impossible to run a government. Montesquieu only means that the powers properly belonging to one of the departments ought not be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an over-ruling influence over the others in the administration of their respective powers. It is not possible to avoid all intermixture of functions since the line between legislative enactments and executive and judicial decisions is never hard and fast. Though powers are of an encroaching nature but it ought to be effectually restrained from passing the limits assigned to it. Marshall state:

> Separation of powers theory seems a mixture of ideas about isolating, checking, balancing, and interacting. These were sometimes brought into a sort of consistency by the argument that mutual checks and powers of interaction were necessary practical ways of protecting and preserving the original 'paper' separation or isolation.[13]

13. Ibid., p. 103.

Application of the doctrine of separation of powers under the Nigerian Constitution:

Constitution is that system of rules, principles, and standards that are fundamental in the governence of the government. It provides for the establishment of the chief organs of the government. It outlines the relation between these organs and the citizens, between the state and the individuals. Being concerned mainly with the pedigree of government organs and the relationships between them, it does not create the government or make it work. As Corry and Abraham state:

> By itself, it is inert and lifeless, and only when clothed with flesh and blood — human passions and active agents — does it begin to win friends and enemies and influence people. We learn very little about a government merely by examining its skeletal structure. We have to study the complex functional system installed in it, and also the hopes, fears, aims, and prejudices, the fundamental drives and conflicts of the individuals and groups whose actions influence the government of the day and in turn provokes governmental action. We must go beyond anatomy to physiology and psychology.[14]

To understand the government, therefore, we have to examine the framework or constitution in its essential design and the working mechanism of government. And in this essay the working of the governmental powers, like the rule of law, which is essential to its functioning is sketched out. The Constitution of Nigeria adopts the doctrine of separation of powers, already discussed, rather than the concentration of powers.

The Constitution of Nigeria of 1979 is fairly a clean break with the past.[15] But the constitution makers did not write on an entirely clean slate, both in what they rejected and what they accepted they were decisively influenced by the past events. American constitutional thought and practice has also played a considrable role in their thinking. The progressive break down of the principle of separation of powers has been very clearly adopted as a salient feature in the Constitution as in the American Constitution. The makers of the Nigerian Constitution, to assure the liberties of the citizens and to avoid the excesses of the popular elected legislator as much as a powerful executive, set out to fashion a new gover

14. J.A. Corry and H.J. Abraham, ***Elements of Democratic Government*** (New York: Oxford University Press, 1958) p. 83.
15. Compare with the Constitution of Nigeria, 1963, which was on parliamentary system of government.

ment composed of three powers, each of which would be separate and at the same time serve as a check on the others. So whatever of enduring wisdom there is in the separation of powers, it is a principle closely associated with the rise and spread of constitutional governments which aim at strict accountability and have heavily relied on all devices to limit the powers of governments.

Though at no point does the Constitution specifically mention the separation of powers to be a fundamental and inviolable principle, one can say without fear of contradiction that the arrangement offered in the beginning of the Constitution leaves no doubt about its entrenchment in the Constitution.

Section 4 states:

> The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly.

Section 5 states:

> Subject to the provisions of this Constitution, the executive powers of the Federation — shall be vested in the President.

Section 6 states:

> The judicial powers of the Federation shall be vested in the courts... being courts established for the Federation.

All these sections state in essence that political power can be divided functionally into the three spheres of law-making, law enforcement, and law interpretation. The three sections and their phraseology leave no doubt that governments can be controlled by dispersing political power in such a fashion that no man and no institution can have supreme authority — that the three different prescribed functions are associated with three different types of legal actions. In short, the doctrine of separation of powers anticipates a process of government, and not a hierarchy of powers. These three sections in the Constitution of Nigeria fully define the nature and extent of the three powers and assign the executive, the legislature, and the judicial offices to three different organs that shall be kept forever separate and no person exercising the one shall be appointable to the others. It would appear that the powers of government are parcelled out among the three organs and kept separate by the unscalable walls of the Constitution. Separation of powers is a part of the Constitution for the simple reason that the Constitution makes legislative, executive, and judicial office holding in the same person incompatible. All the three departments

of the government work independently in the sense that neither derives its power from the other but each is co-ordinated in deriving its power separately from the Constitution. These three branches of the government though independent of each other are at the same time inter-dependent and this serves as a mutual check on one another; and this is the essence of the doctrine of separation of powers, the powers that are not separated but intimately linked together. In Nigeria Montesquieu's principle of separation of powers as developed in America (the essence and intention of the American Constitution was to allow no part of the government to be sovereign, but to assure that each should limit and check the scope of the other) has received its full expression.

Legislative and Executive:

The cardinal principle of the doctrine of separation of powers is that each department of the government should have a will of its own and consequently should be so constituted that each department should hold only one office; and at the same time each department should have a partial agency or partial control over the other department. Thus the holding of two offices as of legislative and executive in one hand is a violation of the principle of separation of powers, though the relation of executive and legislature is necessarily more intimate and continuous.

Section 135(4) provides that no member of the National Assembly or of a House of Assembly can be appointed as a Minister of the Government of the Federation. Where he is so appointed he shall be deemed to resign his membership from the National Assembly or of a House of Assembly on his taking oath as a Minister. No one can share in the exercise of more than one of the powers at the same time. One can either be a member of the National Assembly or of a House of Assembly or a Minister. Nor can the President or any member of his cabinet be a member of the National Assembly or of a House of Assembly as in Britain, France, and India. The executive power of the federal government is exercised by an independently elected president aided by such ministers or advisers outside the National Assembly as he sees fit to consult.

Again section 135(2) stipulates that any appointment to the post of a Minister of the government of the federation is to be confirmed by the senate. This provides opportunity for the legislature to have a check on the executive that the person to be appointed is above board and fit for the job. This makes the executive consistent, though indirectly, with the wishes of the people since it is the

elected representatives, rather than the elected President, who confirms them in their posts as Ministers. Thus the President cannot fill into his cabinet any one he likes. Legislative veto provides a check on the appointment of executive.

Even in the case of appointment of special advisers[16] the President is guided by the National Assembly. Though all such advisers hold office at the pleasure of the President but the number of such advisers and their salaries and allowances are prescribed by the National Assembly. The President's power in this respect are restricted.

Where it is provided in the Constitution that the President will make all the executive appointments subject to confirmation by the senate, the Constitution also provides protection to the executive members against the arbitrary dismissal by the President in certain cases. For example, the chairman and members of the Federal Executive Bodies[17] like Federal Civil Service Commission, Federal Electoral Commission, Federal Judicial Service Commission, etc. can only be removed by the President acting on an address supported by two-thirds majority of the senate. This is so since the officers holding these offices are made to discharge their functions without fear from the most powerful section of the executive. This serves as a check against the member of the National Assembly or of a House of Assembly or a Minister. Nor can the President or any member of his cabinet be a member of the National Assembly or of a House of Assembly as in Britain, France, and India. The executive power of the federal government is exercised by an independently elected president aided by such ministers or advisers outside the National Assembly as he sees fit to consult.

Having provided for executive independence and powers, the framers were keen that some check was needed to guard against executive encroachment on the other brahches as well to ensure that the executive performs the functions properly assigned to it by the constitution. The chief executive is kept in line through legislative control rather than through the limitation of the period of his term in office which is not a sufficient guarantee of his good behaviour. He might loos his capacity after his appointment; he might pervert his administration into a scheme of peculation or oppression; he might betray his trust to a foreign power. Thus the most important and the far reaching check is provided on the ex-

16. ***Constitution of Nigeria, 1979,*** section 139 (Hereinafter all sections refer to the Constitution of Nigeria, 1979).
17. section 144(2).

ecutive head of the government — the President if he is found guilty of gross misconduct[18] in the performance of the function of his office that mkes him unworthy of a president. The President being the executive head and the fountain of supplying unflinching services under the Constitution, is to serve as an example to the rest of the executive. But if he himself is guilty of gross misconduct, the legislature cannot accept or entrust in him the faith of executing the laws which they make from time to time for the governance of the country. His removal[19] is in the hands of the National Assembly who though does not appoint[20] him, can remove him. This serves as a check on the executive head by the legislative organ. Here legislature enjoys some judicial power.

Under section 63(1) the President is required to keep the National Assembly informed of the state of the union, to advise her about the administration of national affairs and to recommend such legislation as he thinks necessary. Though the President is not a member of the National Assembly yet he may attend any meeting of either house of the National Assembly or any joint meeting of the National Assembly; but beyond this he is not expected to shape

The National Assembly has an authority to call any minister of the government of the federation to explain to the house the conduct of his ministry or when the National Assembly is deliberating on the affairs of a particular ministry.[21] But a minister by himself has no right to attend any meeting of the National Assembly. Even when a minister is called to the National Assembly to explain the conduct of his ministry he cannot take part in any voting in the house.[22]

The National Assembly which is a law-making body can admonish the executive with respect to any matter to which it has power to make laws.[23] It has authority to investigate into the affairs of the executive to see that the laws have been properly executed. This is not an interference or assuming the responsibility of the executive to administer laws but a check on the executive to see that the Constitution and its laws are properly executed in the governance of the country. To keep such a watch, it is the responsibility of the legislature who is directly responsible to the people who have reposed their confidence in their legislators.

It was thought advisable to have still further checks on the powers of both the legislature and the executive and this extra cau-

18. section 132(2)(b).
19. section 132.
20. section 124.
21. section 63(2).
22. section 63(3).
23. section 82.

tion led the makers of the Constitution to introduce some qualifications on the clear cut separation of powers. The procedure of law-making[24] is based on this extra-cautious approach where the intention of the constitution makers is both to serve some check on the legislature's law-making power and at the same time usher co-operation between the legislature and the executive. Bills passed by the majority in each house of the legislature require the approval of the President in order to become law. The President is given some share in legislative power. But where the President vetoes the bill, the bill can only become law if it is again passed by each house of the legislature by two-thirds majority. The purpose of such a procedure is to entertain co-operation between the legislature and the executive in making laws. The deliberation of the executive is to be given due weight whose officials have to deal with the situation directly. Keeping this in view the executive is given a share in the legislative power. This provision also introduces a second thought on the bill in the case of disagreement between the legislature and the executive. But this does not make the executive a law making body (except where the Constitution originally gives power to the executive to makes laws) the dominant role of the legislature will always be there as is clear in the case of over-ruling the veto of the President by two-thirds majority in each house of the National Assembly when the President refuses to give assent to a bill. Again such a veto power given to the President gives the executive confidence that he would not otherwise have had and without which the revisionary power would be of little avail. But this veto is not absolute, as it is seen, because absolute veto power will be too great a grant of power which conceivably might bring the entire government to a stand still, produce confrontation between the legislature and the executive, and raises questions of superirority between the two wings of the government.

Sometimes the executive is given power to make laws. But this power is subject to approval by the national Assembly as in the case of treaty making power of the executive under section 12(1). Any treaty made between the federation and any other country shall have the force of law only when it is approved by the National Assembly. Similarly the declaration of war, an exective act, can only be made with the approval of the National Assembly under section 5(3)(a). The President who is the Commander-in-Chief of the armed forces of the federation cannot commit any member of the armed forces of the federation outside Nigeria without the prior approval of the senate.[25] Again, the declaration of emergency under

24. section 54, see also section 55.
25. section 5(3)(b).

section 265 of the Constitution is made by the President but it is subject to approval by the National Assembly. These acts and activities of the nature of law making are given to the executive under certain circumstances and under certain conditions to deal with the situation immediately and promptly when there is actual or clear and present danger, since the National Assembly cannot be in session all the time. But the ultimate authority of law making vests in the National Assembly. This serves as a positive check of the executive.

The giving of authority to the National Assembly and putting teeth in the executive to check the excesses of the National Assembly or giving authority to the executive and putting teeth in the National Assembly to check the excesses of the executive is not to be understood to knit the two powers together, but this mutual checking and balancing is one of the mechanism to keep each other at their proper place for the purpose of producing good laws and administration for the welfare of the community. Checking and counter-checking is neither to be understood as establishing the authority of one organ over the other nor the superiority of one over the other since no one organ of the government is superior over the other, their respective functions are elaborately prescribed by the Constitution. The onus of their coordination is achieved by constitutional devices.

Legislative and Judicial:

If one scans through the three governmental powers — legislative, executive, and judicial, the judiciary from its very nature and function appears to be the least dangerous to the liberty of the citizens. Hamilton states:

> The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truely be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the effeciency of its judgments.[26]

From all this one can agree with Hamilton that the judiciary is beyond comparison, the weakest of the three departments of power, that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.[27] The threat to liberty, thus, comes not

26. The Federalist, *op. cit.*, paper no. 78.
27. *Ibid.*

from the judiciary which has to arbitrate or separate or protect according to law from unjust treatment but from its union with the executive or the legislature or with both. There will be no liberty if power of judging is not separated from the legislative or the executive power. A country can put up for some time with laws that are unjust and repressive so long as they are administered by judges who can mitigate the repression of the law.[28] One can safely conclude that liberty has nothing to fear from judiciary but only from its dependence on either of the other organs of the government. It, thus, becomes a primordial principle of liberty that judicial institutions must remain separate and independent of the executive and the legislature. What is demanded as an independence of judiciary is that the legislature or the executive should not invade he domain of judiciary by pronouncing judgments or over-ruling the verdict by the judiciary — this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and, in a great measure, as the citadel of the public justice and the public security. This is what separation of powers implies.

This is all about the separation of judiciary from the legislature or executive. But it does not imply that legislature has nothing to do with administration of judicial system. Separation of powers as a system of checks and balances imples checks on the judiciary as well so as to make the judges avoid their becoming arbitrary as to miss their own ends of justice.

The judiciary enjoys the "power" to declare null and void any law passed by the National Assembly which is inconsistent with the Constitution.[29] The question arises who is to make a declaration of inconsistency? The abvious answer is the judiciary — it is a judicial function to see that no law is to be inconsistently made so es to nullify the provisions of the Constitution. Here one enters onto a very difficult question which gives the impression of supremacy of the courts or of judicial legislation over legislation by the National Assembly. It can be argued that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. But such a conclusion is by no means correct. The declaration by the court as to the validity of a statute made by the National Assembly is not a show of its power but the function assigned to it by the Constitution. Marshall, while commenting on this function of the judiciary, remarks:

> The legislative organ, with its procedures and powers as defined in the constitution, might be said to be served, enhanced, or protected, rather than restricted, when declarations are made that preserve its legitimate powers from abuse[30]

28. A.T. Denning, ***Road to Justice*** (London: Stevens & Sons, 1955) p. 7.
29. section 1(3).
30. G. Marshall, *op. cit.*, p. 108.

By making such a declaration courts are merely asserting that the will of the people is superior to the legislature and their declaration is, thus, asserting the superiority of the constitution or will of the people rather than their own superiority. Courts stand midway between the will of the people and legislature and it is their solemn function to keep the legislature within its authorised limits assigned by the constitution. The interpretation of law is their proper function and the Constitution in Nigeria is the fundamental law[31] as a guide in all judicial decisions. It is to misread the facts to regard judicial review as a check on the legislature. Montesquieu believes that power should be a check on power. But judicial review is not a power of the judiciary but is a function to which judiciary is goaded and guided by the Constitution thought of as a higher law and deemed to be binding on government at all levels. Judicial review can serve as a check only if through judicial review the judiciary can estop the legislature (or for that purpose any law-making body that is authorised to make law) from discussing a bill or passing a law which in view of the judiciary is unconstitutional. But this is beyond the reach of the judiciary and not a part of the judicial review. Judicial review is an activity posterior to legislation and not prior to it. Law may be unconstitutional but it is valid so long as it is not challenged in the court of law and declared null and void. Moreover the declaration of nullity is not a power but only disapproval of a statute in terms of constitutional principle; declaration is a symbol of constitutionalism. Thus by declaring the law unconstitutional judiciary is not stopping the legislature either from passing unconstitutional laws in the future or reprimanding the legislature, but is only serving as a guide by pointing out the lacuna in law. Comenting on judicial review, Marshall states:

> Where constitutional law places restrictions on legislative power, a duty to declare the law seems to imply a duty to declare when such restrictions have been violated, whether by the legislature or by anyone else.[33]

Thus the controlling and checking function of the judicial branch can be said to consist in impartial application of laws. In furtherance of this function, the Constitution of Nigeria[34] provides that the legal power of the National Assembly or of a House of Assembly shall be subject to the jurisdiction of courts and of judicial tribunals established by law; and accordingly, the National

31. section 1(1).
32. G. Marshall, *op. cit.*, p. 104.
33. *Id.*
34. section 4(8).

Assembly or a 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. But at the same time assigning of jurisdictions on the courts is within the ambit of the National Assembly.[35] But beyond that the National Assembly is not to go to shape and participate in judicial deliberations.

The National Assembly provides a check on the judiciary and keeps it within its assigned fields and true function by having power in its hands to remove the judges for their misconduct or any other inability to perform their proper functions. The appointment and removal of the judges[36] is subject to approval by the senate. The President makes certain appointments subject to approval by the senate[37] and certain appointments on the recommendation of the Federal Judicial Service Commission.[38] In case of removal of a judge, it is the legislature that approves the removal except in certain cases.[39] This serves as a check on the judiciary and prevents the establishments of a government by the judiciary and avoids the arbitrary discretion of the courts.

Judiciary and Executive:

The judicial application of laws is vested in the courts, the exercise of powers that they enjoy under the Constitution. The execution of judgments of the court of law is within the scope of the executive.[40] Judiciary in its interpretation, application, and execution of laws in adjudication of disputes is superior to executive since this is its assigned field under the Constitution. But it will be wrong to presume that this gives judiciary immunity from executive interference. The correct view will be that the executive power is restricted in relation to judicial matters. The co-ordination or equality of executive and judicial functions mean simply that both organs are allotted their role by the Constitution. All the three organs of the government have equal capacity in their own fields. They might be considered superior only in those fields for which they had a peculiar capacity.

Though the judiciary sits to interpret and apply the law in a disputed case, an ultimate safeguard is even here necessary. None can be entrusted with power without some guarantee against its

35. sections 212 and 213.
36. sections 211 and 256.
37. sections 211 and 218(1).
38. sections 218(2) and 229.
39. section 256(1)(b).
40. section 251.

abuse. A judge within the limits of its jurisdiction can be arbitrary and abuse his power. Though the right of appeal from a lower court to a higher court is a restraint, but in the last resort the judges have been made subject to the general power of the executive.[41] This final guarantee is a check on judiciary though it should be exercised in such a way that political expediency is not to effect the status of judiciary.

The freedom of judiciary in its assigned field does not mean the freedom to debar other organs of government such as the executive from any say in judicial set up. The executive is restrained so far as the interpretation and judicial application of law is concerned in the adjudication of disputes, but the executive is not restrained in the setting up of a legal system. Here one finds the very interdependence and link between the executive and the judiciary. The judiciary is appointed by the President subject to confirmation of such appointment by the senate for certain cases[42] but once appointments are made the judges hold office during good behaviour till their retirement[43]. The executive cannot intimidate the judges by varying their conditions of service to their disadvantage like reducing salaries.[44]

One might think that when section 161 provides that the President can pardon, remit in part or whole, any sentence passed by the courts, he is assuming judicial function, but this is not true. In fact, he is exercising powers of an entirely different character than exercised by the courts. This is the power given to the President by the Constitution. It is his original power which he enjoys under the Constitution rather than a derogative or a derivative from the judicial power of the courts. All crimes are crimes against the state and the President being the executive head of the state is given this power to see for himself whether certain convictions against the state deserve his leniency or not. Moreover his prerogative that appears to a common man as reflecting his whim, is in fact a judicial prerogative that he exercises after consulting his council of states. Thus it is not an interference into the judiciary but rather a supplement to the idea of justice.

Conclusion:

Every modern state seeks to a degree to articulate the three generally accepted functions of government. But the method adopted differs in different governments in very important respects. In this essay the writer is dealing with the system of

41. section 256(1)(b).
42. sections 211, 218 and 229.
43. section 255.
44. section 78(3)(4).

government where the separation of powers is physically articulated in three distinct organs of government as specifically mentioned by the Constitution, and seeks to uphold its essential and fundamental importance by various constitutional devices for the cause of good government which is a trust delegated by the governed.

The doctrine of separation of powers is a mechanism that marks the separation between the vital functions of the government. It is a principle that approaches to limit the rigours of governmental activities. But it is in no way to be thought as undermining the national authority as Hegel advocates.[45] The whole mechanism of separation of powers suggests only the balancing and coordination of powers for the smooth running of the government. Each wing of the government strengthens its efficiency and responsibility through its expert and limited function and in return strengthens the over all activity of the government. The doctrine of separation of powers is not to be understood as superlative activity into which government functions can be tight fisted. It is, as Odegard states:

> a sort of practical shorthand on the borderland to aid us in the quick application of one or the other agency to a piece of work, in proportion to its fitness for the task.[46]

It is a rough and ready dichotomy which makes one convenient to understand the working of government. But one must not forget that there are certain other agencies (outside the three agencies of government power) that effect the working of the government such as organised political parties, pressure groups, and above all the electorate themselves that keep check on all powers of government and prevent government from converting these agencies of power into masters of the people.

The doctrine of separation of powers is said to coordinate the activities or functions embodied in separate organs of the government. The question arises: Does it really co-ordinate the activities of the three organs of the government? Their activities depend on the sphere of life they cover in carrying on the activities of government. Can they equally serve as a check on one another? The judiciary can hardly be said to check the legislature or the executive. MacIver states:

> The judicial function, although its range is much wider than the interpretation and application of legal enactment, is obviously subordinate to the legislative. And in the growth of modern democracy the executive have been gradually reduced

45. G.H. Sabine, ***A History of Political Theory*** (London: George G. Harrap & Co., 1963) pp. 662—663.
46. ***American Government: Readings and Documents,*** edited by P.H. Odegard (New York: Harper & Row, 1966) p. 220.

> from a superior or coordinate power to one which is subject to legislative control. This subjection is an essential condition of all 'responsible' government, without which democracy cannot exist ... If then the functions are to be separately embodied it is not because they are or should be equal in authority. Nor can they equally act as a check upon one another. The judicature, for example, can scarcely check the legislature at all.[47]

Again under certain circumstances the doctrine of separation of powers breaks down. In case of national emergency such as war the powers of the executive for all practical purposes are held and accepted supreme. The whole machinery of the government is geared towards the national efforts to successfully come out of the conflict. Certain laws are passed during an emergency that will take away the rights of individuals to seek redress in the courts of law.[48] At this time one can see that the running of the government is entrusted to the two wings of the government the legislature and the executive. The third wing, judiciary, is absolved from dealing with rights of the individual and for that matter is dormant during the state of national emergency. The doctrine of separation of powers is, thus, a peace time doctrine since it ceases to operate during national emergency. Professor Odegard states:

> [It] only serve to help the assignment that [it] always stand ready to slink into obscurity the moment it appears that [it has] not properly reflected the facts of the developing situation.[49]

As regards the separation between legislature and executive, it is well guarded by various constitutional devices. But in the case of the executive and the judiciary, the independence of the judiciary as a characteristic of the separation of powers is not well balanced in the Constitution. Under section 218(2) and section 229 the appointment of judges to the Federal Court of Appeal and the Federal High Court are made by the President on the recommendation of the Federal Judicial Service Commission. Similarly their removal, including the removal of the judges of the Supreme Court, under section 256(1)(b) are based on the recommendation of the Federal Judicial Service Commission. If one scans through the composition of the Federal Judicial Service Commission under schedule 3, part1(D), the membership seems in favour of executive bias. This seems to violate the principle of separation of powers so dearly enshrined in the beginning of the Constitution, and endangers the independence of the judiciary.

47. R.M. MacIver, ***The Modern State*** (London: Oxford University Press, 1966) p. 370.
48. section 41.
49. Odegard, *op. cit.*, p. 220.

Whatever criticisms one may advance against the doctrine of separation of powers one has to accept that the doctrine is in confirmity with the idea of responsible government which rests on the proposition that no person should hold power completely and in perpetuity and that the person exercising power is accountable to some other person or group of persons he does not control. If responsibility is to be effective, the external unit to whom accountability is owned must have some independent source of power; some method by which it can make its presence effective. Unless such an accountability and separation of powers is present one has to agree with Madison who writes:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that ... the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[50]

Some persons[51], no doubt, would argue that one cannot attribute the relatively high degree of freedom to the doctrine of separation of powers. Carey, while commenting on such a positive assertion, states:

> There is no way of telling with certainty how much, and in what ways, our separate governmental structures have contributed in a positive manner to our present free state.[52]

However, without forcing the doctrine of separation of powers into specific molds, it is a useful guide for structuring the government agencies. The independence of judiciary is a primordial principle of liberty in order to maintain the rule of law. There is inestimable value in creating representative assemblies that debate policy, serve as a watch dog on government agencies in the execution of laws and make positive laws. The existence of a responsible, dedicated, and politically neutral executive is indispensable in the efficient running of the government in the modern state. In the words of Professor Sutherland:

> Without the separation of powers, without the institution of independent judiciary, without a champion furnished by government against government, constitutional right would become 'ghosts that are seen in the law, but that are elusive to the grasp.'[53]

50. *The Federalist, op. cit.*, paper no. 47.
51. R.A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956) ch. 1.
52. Carey, *op. cit.*, p. 130.
53. A.E. Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas* (Cambridge (Mass): Harvard University Press, 1963) p. 6.

INDEPENDENCE OF JUDICIARY UNDER THE CONSTITUTION OF NIGERIA

Introduction: The Importance of Independent Judiciary

It is of paramount importance that the Constitution of Nigeria is a written constitution since it lays down all the fundamentals required to set an affective government. This great document with a new character, as compared to the previous Constitutions of Nigeria, is a unique contribution to establish a new social order on the collapse of the First Republic and to lay foundation to secure in undiluted and unequivocal terms the good of the whole nation. In this respect the Constitution of Nigeria is not an accident of history but has evolved from the nation thriving for a new social order to protect its democratic institutions from earlier vicissitudes and social upheavals. The basic purpose and plan of the Constitution is that the Fed. Govt. should have powers except those that are expressly or impliedly granted and that no department of government should have authority to add to the powers denied it by the Constitution. The founders wrote into the Constitution their unending fear of granting too much powers and supression of one organ of government by another and thus establishing all the three organs — Executive, Legislative, and Judicial as independent organs of the government. The constitutional doctrine of the separation of powers is stated in the Constitution of Nigeria[1], and when translated laid great stress on the need of the judiciary to be kept apart from the legislative and executive functions of the government. Thus no wing of the government should expressly or implied try to over-run the other — for change in the basic character of the Constitution should be made by the people and their representatives and not by any other wing of the government.

A limited constitutional government — a government based upon specific limitations to its authority both legislative and executive — must have some institution that possesses authority to articulate and to enforce those limitations. Rule by law can, thus, only be maintained if such an institution exists within a governmental

system and it exists independently of legislative and executive influence in the exercise of judicial functions. If laws are to be fairly interpreted and impartially applied, it is very important that the judiciary should enjoy an independent status and be free from the pressure of other organs of the government. Such a rule by law to secure independence of judiciary in Nigeria is guaranteed by the provisions of the Constitution.[2] This guarantee of the independence of judiciary through formal constitutional provisions marks an acceptance of the principle of separation of powers embodied in the Constitution.

The Constitution of Nigeria sets out broad principles for the organisation and operation of the government. It sets up three branches of the government — legislature, executive, and judiciary; it recognises a division of power between Federal and State governments; it guarantees certain rights to the individuals; and it sets certain limits to the exercise of power by the federal and state governments. However, these rules by their very nature are virtually meaningless without interpretation. What is the exact meaning of "prompt payment of compensation"[3]? What exactly is entailed by "reasonably necessary"[4]? What is "commerce"[5]? These interpretations are endless. Who then should decide what the Constitution means and then apply that interpretation to specific cases? The constitution makes no direct reference to this problem other than the section 1(3) and section 6(1). Section 1(3) states: "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void"; and section 6(1) states: "The judicial powers of the federation shall be vested in the courts". These two sections read together give the judiciary power to interpret the constitution and any other laws.

The legislature, of course, has the ultimate power to amend the constitution under section 8 and section 9. Even then the interpretation of constitutional amendments and their application to judicial disputes is in the hands of the courts. Thus the courts have been granted a power through which non-elected judges can overrule the decisions of the elected representatives of the people.[6]

1. ***Constitution of Nigeria, 1979,*** *sections 4, 5, and 6. (hereinafter all sections refer to the Constitution of Nigeria, 1979)*
2. section 4(8).
3. section 40(1)(a).
4. section 30(2).
5. schedule 2, item 61.
6. *M.J.C. Vile,* ***Politics in the U.S.A.*** *(London: Allen Lane, The Penguin Press, 1970) p. 241.*

The function of the judiciary is to interpret the laws and the fundamental principles and assumptions that underlie it. Under the written constitution, in determining the limitations placed on the legislature and executive, the constitution serves as a fundamental law in interpreting all laws and statutes. Limitations of this kind can only be preserved in practice through the courts whose duty is to declare all acts contrary to the manifest tenor of the constitution void. Rule by law as enshrined in the constitution, and independence of judiciary thus go together. Without independence of judiciary, the entire notion of a limited constitutional government and its protection of particular rights and privileges would amount to nothing.[7] This function of the judiciary does not place it above the legislative nor does it imply a superiority of the judiciary to the legislative power. It implies, as Hamilton puts, that the judiciary is to serve as the only guarantee that the constitution is itself superior to the legislative act. He states:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.
>
> . . . .
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[8]

Blackstone[9] writes that a court is a place wherein justice is judicially administered. But in the course of performing this function, the judge interprets the laws and ascertains their meaning. The

7. A. Hamilton, J. Madison, and J. Jay, ***The Federalist*** (London: J.M. Dent & Sons, 1970) paper No. 78.L. Hand, "The Constribution of an Independent Judiciary to Civilization," in ***Jurisprudence in Action — A Pleader's Anthology*** foreward by Hon. R.H. Jackson (New York: Baker, Voorhis & Co., Inc., 1953) p. 228.

8. ***The Federalist,*** *op. cit., paper no. 78. S. M. N. Raina, Law, Judges and Justice (Indore: Vedpal Law House, 1979) p. 145.*

9. *W. Blackstone,* ***Commentaries on the Laws of England*** *(London: Thomas Tegg, 1830) Vol. iii, p. 23.*

interpretation of the laws is the proper and the peculiar province of the courts. and a constitution is, in fact, and must be regarded by the judges, as a fundamental law.[10] The judiciary, therefore, performs political and constitutional functions of the greatest consequence by applying legal criterion to the actions of government. This is the essence of judicial duty, otherwise the legislature and the executive will be superior to the constitution.[11] The fact that the judiciary has no influence over either the sword or the purse and that the executive abuses official discretionary power and the legislature may over-stretch constitutional limitations, but the judiciary is in the most eligible position for determining constitutional limits. Under the Nigerian Contitution[12] this authority is vested in the judiciary[13] as the final arbiter in disputes over the meaning and application of the Constitution. Judiciary, thus, guided and limited by constitutional limits provide for a rule by law properly consented to, and protects the rights of the individuals from an arbirtary authority by way of constitutional guarantees. Graham states:

> To be sure: Congressmen and Presidents swear to uphold the constitution, but only the courts are in a position to judge whether they have overstretched their constitutional power. The written constitution was a fundamental expresion of popular opinion, and therefore served as a permanent limit on the people's representatives.[14]

The position of the judiciary as the final arbiter of relations among the states, and between the states and the national authority, and involving conflicts between states and national statutes and the constitution now appear only to reflect a part of the logic of a separation of powers.

With the development of judiciary, a constitutional principle of considerable importance has also developed — that is, that the courts should be resolutely independent. They are expected to be independent of the party, independent of the government of the

10. Section 1(1).

*11. **The Federalist,** op. cit., paper no. 78.*

12. Section 213.

13. section 274(3).

*14. G. J. Graham, Jr. "The Supreme Court", in **Founding Principles of American Government: Two Hundred Years of Democracy on Trial** edicted by G.J. Graham, Jr. and S. G. Graham (Bloomington: Indiana University Press, 1977) p. 185.*

day, independent of the entire influence and they must make decisions according to law.[15] If the judiciary is not independent or in other words is subservient to the executive authorities in power, it is bound to have greater regard for the wishes of the authorities than for law and justice and as such would not be able to do justice between man and the state.[16] Since liberty depends on the independence of the judiciary, the judicial system must be independent, and the judicial independence symbolises that the judges in the administration of justice must not be subject to any external influence, whether executive or legislative or political force or group or any other source.[17] Young writing about judicial independence states:

> legislature is a kind of appendage to the judicial system, which may supply new law, but must not otherwise tell it what to do. The legislature is kept at arm's length to prevent external influence over the judicial process.[18]

Sir Winston Churchill as Prime Minister of Great Britain made the following remarks in the House of Commons regarding independence of judiciary:

> The principle of complete independence from the executive is the foundation of many things in our island life.... The judge has not only to do justice between man and man. He also — and this is one of the most important functions considered incomprehensible in some large parts of the world — has to do justice between the citizens and the state. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the executive of its power.[19]

Provisions in the Constitution to ensure independent judiciary:

The independence of the judiciary is regarded as one of the pillars of the constitution, and in the constitution of Nigeria it is built on sure foundations.[20] A member of the Constituent

*15. J. A. G. Griffith, **The Politics of the Judiciary** (Manchester: Manchester University Press, 1977) p. 29.*

16. Raina, op. cit., p. 131.

17. Hand, op. cit., p. 234.

*18. R. Young, **American Law and Politics: The Creation of Public Order** (New York: Harper and Row, 1967) p. 185.*

19. Quoted in Raina, op. cit., p. 131.

20. Section 4(8).

Assembly while commenting on the independence of judiciary and comparing it with the strangulated judiciary during Military Regime, states:

> ... the practice you find in recent legislations ousting the jurisdiction of the courts is a very, very dangerous one. We should try and stop it and go further to expunge those laws which are now in our statute books ousting the jurisdiction of the courts. We should also make sure that no further laws are passed in this country ousting the jurisdiction of the courts ... Let me hasten to say at once that the first of these laws to go away is the Decree No. 28 of 1970. They call it the Federal Military Government Supreme Military and Enforcement of Powers Decree 1970. It has been so far used mercilessly as a sword of damocles against Nigerian citizens and their rights. If you read that law you will find there that any Edict passed by the states or any decree passed by the Federal Government cannot be subject of question in any court of law.[21]

In considering the question of the judicial independence under the assumption of a separation of powers, the appropriate questions that emerge are — how judges are to be appointed and for how long and how to apportion judicial authority. It is implicit in the concept of judicial independence that provisions should be made for the adequate remuneration of the judges, and that the judges' right to the remuneration settled for his office should not during his term of office be altered to his disadvantage. Terms of judges like non-reducible salaries are, thus, necessary safeguards for the independence of judiciary. A liberal pension scheme would stimulate their sense of security and induce them to retire before they suffer from senility or impairment of judgement. Under the Constitution of Nigeria judicial independence is also secured by the creation of independent Judicial Service Commission that deals with judicial appointments and discipline independent of legislative and executive interference.

Appointment of Judges

The nature of the judicial process restricts the court to a rather different role from that of the other branches of government and the judiciary is not subject to the same overt pressure as other branches of government. Thus, the unique function that the judiciary performs in the government makes it imperative that they should be given a different position from that of the great majority of government officials. As Dawson states:

> [The judges] are not representative agents who, like the members of the legislature and the executive, are expected to reflect some interest or opinion and are chosen to carry out

*21. **Proceedings of the Constituent Assembly,** Vol. 1 (Lagos: Federal Ministry of Information) pp. 222-223, paras 424-425.*

> desired measures. The judges who would try to voice the opinion of the public, of the government... would obviously lose all value as a judge, for the whole weight and value of a decision depend on the very absence of influence of this kind. His opinion is not to be founded on what people want, but rather on what is the law, and the decisions emerge from these principles when applied to the facts before him.[22]

The judge is the most important person in the entourage of the court and his office is hedged about with safeguards to help preserve his autonomy. But for a human being to keep this impeccable autonomy combined with honest and just character as not to waiver with temptations of malicious, corrupt and oppressive acts, the quality of the judge is the most critical of all factors in his appointment.[23] The judge will, thus, begin with two main assets, character and ability, and these become the foundations on which is based his most conscientious performance of the judicial functions. The conditions under which he works after his appointment should allow full scope and opportunity for the display of his talents; but the great pre-requisite for usefulness, the character of the judge, has been formed in early years and must be weighed and tested before he takes his seat on the bench. Raina J. states:

> In other departments of government dishonesty may be tolerable. A police officer or an executive officer may be dishonest but if he is able to control or avoid a riot or a disturbance he may still be considered useful to the society. A dishonest man in the medical profession may be tolerated if he is a good physician or a surgeon as he is still of some use to the society. But in the case of a judge, it is entirely different Judiciary is one department where dishonesty is unthinkable and cannot be tolerated at all.[24]

The Chief Justice of the Supreme Court of Nigeria[25] is appointed at the discretion of the President subject to confirmation by a simple majority of the Senate. All other judges of the Supreme Court are appointed by the President on the advice of the Federal

22. *R. M. Dawson, **The Government of Canada** (Toronto: University of Toronto Press, 1964) p. 434.*
23. Raina, op. cit., p. 136.
    Griffith, op. cit., p. 24.
24. Raina, op. cit., p. 136
25. section 211(1)
    Appointments of judges and the composition of Judicial Service Commission is now regulated under Decree No. 1, 1984.

Judicial Service Commission[26] subject to approval of such appointments by a simple majority in the Senate.[27]

In the case of the Federal Court of Appeal, the President of the court is appointed by the President on the advice of the Federal Judicial Service Commission subject to approval of such appointment by a simple majority of the Senate.[28] All other judges of the court are appointed by the President on the recommendation of the Federal Judicial Service Commission.[29]

In the case of the Federal High Court, Chief Judge and all other judges are appointed by the President on the recommendation of the Federal Judicial Service Commission.[30]

In the case of the state judiciary, the Chief Judge[31] is appointed by the governor of a state on the advice of the State Judicial Ser-

26. The Federal Judicial Service Commission shall comprise the following members, namely:
    (a) the Chief Justice of Nigeria, who shall be Chairman;
    (b) the President of the Federal Court of Appeal;
    (c) the Attorney-General of the Federation;
    (d) 2 persons, each of whom has been qualified to practise as a legal practitioner in Nigeria for a period of not less than 15 years, from a list of not less than 4 persons so qualified recommended by the Nigerian Bar Association; and
    (e) 2 other persons, not being legal practitioners, who in the opinion of the President are of unquestionable integrity.

    From the membership of the commission one can clearly see that the weight of the Commission is leading in favour of the executive. Such a tilt towards the executive (though the executive appointees are subject to confirmation by the Senate under section 141(1) of the Constitution of Nigeria) makes one suspicious of political influence of the working of the commission. More so, all decisions of the Commission under section 146(2) of the Constitution of Nigeria are decided by majority vote rather than by unanimous voting of all the members. This, to an extent, makes one suspicious about the impartiality of the working of the commission. Such a suspicion in the eyes of the public endangers the impartial character of judicial institutions.

    Proceedings, op. cit., p. 52, para. 84
27. section 211(2).
28. section 218(1).
29. section 218(2).
30. section 229(1)
31. section 235(1)

vice Commission[32] subject to the approval of such appointment by a simple majority of the House of Assembly of the state. All other judges are appointed by the Governor on the recommendation of the State Judicial Service Commission.[33]

At the state level two other courts that represent the interest of the local community in their indigenous law are Sharia Court of Appeal[34] and the Customary Court of Appeal[35] of a state. The appointment of a Grand Khadi[36] of a Sharia Court of Appeal of a state is made by the governor on the advice of the State Judicial Service Commision subject to approval of such appointment by a simple majority of the House of Assembly of the state. All other Khadis[37] are appointed by the Governor on the recommendation of the State Judicial Service Commission. Similarly in the case of judges[39] of the court are appointed by the Governor on the recommendation of the State Judicial Service Commission.

The Constitution does not provide for the establishment of the inferior courts; it is left to the House of Assembly of a state[40] to provide for inferior courts as it thinks fit from time to time.

32. A State Judicial Service Commission shall comprise the following members, namely:
    (a) the Chief Judge of the High Court of the State, who shall be the Chairman;
    (b) the Attorney-General of the State;
    (c) the Grand Khadi of the Sharia Court of Appeal of the state, if any;
    (d) the President of the Customary Court of Appeal of the state, if any;
    (e) one member, who is a legal practitioner, and who has been qualified to practise as a legal practitioner in Nigeria for not less than 10 years; and
    (f) one person, not being a legal practitioner, who in the opinion of the Governor is of unquestionable integrity.
    (For the criticism of the Commission, see n.26).
33. section 235(2).
34. section 240.
35. section 245.
36. section 241(1).
37. section 242(2).
38. section 246(1)
39. section 246(2)
40. section 6(4)

In the appointment of the judges, the two terms "advice" and "recommendation" need careful explanation. The President or the Governor, as the case may be, appoints a judge on the advice of the Federal Judicial Service Commission or the State Judicial Service Commission, and this advice is subject to approval by the Senate or the House of Assembly of the state. Since it is an advice, that is, an expression of an opinion, the President or the Governor is not bound by the advice. Thus the advice of the judicial service commission can be ignored and the executive can appoint men of their own choice on the bench. Against this executive fiat, the constitution proves a legislative check (under its system of checks and balances) in the form of approval by the Senate or the State House of Assembly. So even if the executive accepts or rejects the advice of the Judicial Commissions, the legislative check provides impartial appointments to the bench.

Again, in certain cases of appointments of judges the president or the governor, as the case may be, merely appoints the judges on the recommendation of the judicial service commissions. In this case the use of the word recommendation indicates that the president or the governor has no choice to substitute his own choice but must depend on the choice of the commission. Thus in cases where the executive fiat is excluded the makers of the Constitution think that check is unnecessary because executive cannot interfere.

A distinct character of the Nigerian judicial system is that there is no separate judicial profession as a branch of the public service but the judges are selected from among the leading members of the bar (there is no provision for appointing academic lawyers.) This also accounts for the fact that the professional education of lawyers and the organisation of the bar are controlled by the profession itself. Thus an essential part of the judicial system is the legal profession, and in the legal tradition, the judge must first have been a lawyer. His legal ability is measured by success at the bar. Once a lawyer appointed to the bench he is expected to be resolutely independent of his former associations. The Constitution of Nigeria prescribes that no one can be appointed as a judge unless he has been a lawyer for a prescribed period at the bar.[41] But in the case of the Sharia Court of Appeal[42] the knowledge of Islamic personal law from an institution approved by the State Judicial Service Commission is a pre-requisite for appointment of either Grand Khadi or

41. sections 211(3), 218(3), 229(2), 235(3).
42. section 241(3)(a) & (b)

Khadi. In addition Grand Khadi or Kadi must have considerable experience in the practice of Islamic personal law or must be a distinguished scholar of Islamic personal law. Similarly in the case of the President of the Customary Court of Appeal or other judges of that court[43] the qualification is to be prescribed by the National Assembly and in the opinion of the State Judicial Service Commission the person has a considerable knowledge of and experience in the practice of the Customary law.

Merit is the main consideration in making judicial appointments; but under the Constitution of Nigeria, in addition to merit, all appointments whether at the federal level or state level must be made to reflect the federal character of the country.[44] It is believed that such a representation from all parts of the country and from all sections of the community will present all shades of opinion. This idea of sectional representation that appears in courts is a deliberate effort made to avoid choosing too many judges from one part of the country. It is vital to maintain public confidence in the judiciary and this measure is a very wise step. No one can deny that the judiciary filled with judges from all over the country is credited with the ability of sound administration of justice.

Security of Tenure

It is implicit in the concept of the independence of judiciary that judges have security of tenure. Dawson states:

> The foundation of judicial independence is security of tenure; for it is this which sets the judiciary free from the ordinary bonds of political responsibility [45]

Judges in all courts in Nigeria cease to hold office when they attain the age of 65 years, but they can also seek retirement when they attain the age of 60 years.[46] This legal tenure excludes their removal on virtually any ground except for their inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) for misconduct or contravention of the Code of Conduct.[47] As Dawson states:

> A judge may be stupid, and makes scores of wrong decisions; he may be indolent, and neglect his work; he may be, at least to a degree, biased and unfair, yet there is every likelihood

43. section 246(3)
44. section 14(3)
45. Dawson:, op. cit., p. 436.
46. section 255(1)
47. section 256(1)(b).

> that he will be retained in office. The government would certainly not punish him for stupidity, for over that he has no control. Nor is it at all likely that the government would take any action against him for the above, and many other, faults for which he is definitely to be blamed. While his conduct may be shocking and the administration of justice may suffer, the lesser evil is to leave him alone; for an attack and a removal for any but the most flagrant and scandalous offences would have a detrimental effect on the work, security, and peace of mind of all the other members of the judiciary.[48]

The Nigerian Constitution, by fixing the retirement age has avoided the kind of judicial laxity and inefficiency[49] that comes as a result of old age and infirmity as under American judicial system because some judges even when their usefullness is largely spent might not leave their position.

The Constitution of Nigeria introduces a liberal pension system to stimulate retirement[50] even at an early age if the judge feels the strain of his job. This scheme is good from another point as well. Since judges are not allowed to continue practice[51] when they leave service for any cause, liberal pension scheme is an encouragement to lead their later life in comfort.[52] Section 255(1) and (2) of the Constitution provides for an early retirement to cope with judges who feel inefficient due to any reason without loosing any benefits of retirement. If this would not be there, some inefficient judges might continue to complete their retirement age for the sake of securing full advantage of their legal services.

Removal of Judges from Office

The most unassailable position of the judges is best seen in the difficulty of their removal, that is, forcible ousting of judges from their position when they are in full possession of their faculties and quite capable of doing their work. A judge can be removed[53] for his inability to discharge the function of his office or appointment

48. Dawson, op. cit., p. 436.
49. W.T.Taft, ***Popular Government*** (New Haven: Yale University press, 1913) pp. 159-160.
50. section 256(2).
51. section 256(2).
52. ***Proceedings,*** op. cit., p. 198, para 376.
53. section 256(1) (a) & (b).

(whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.[54] Misconduct[55] may include bribery, gross partiality, criminal proclivities since all these degrade the office of a judge, betrayal of his trust and perversion of the course of justice.

The process of removal[56] for judges varies according to their status in different courts as their method of appointment varies with their status in different courts. The Chief Justice of the Supreme Court can be removed by the president acting on an address supported by two-thirds majority of the Senate. The Chief Judge of the High Court of a state, president of a Customary Court of Appeal, Grand-Khadi of a Sharia Court of Appeal can be removed by the governor of a state acting on an address supported by two-thirds majority of the House of Assembly of the state. In all other cases the judicial officers can be removed either by the President or the Govenor, as the case may be, on the recommendation of the Federal Judicial Service Commission or the State Judicial Service Commission. Any person so removed is barred from legal practice in any court or tribunal in Nigeria.[57]

The procedure of removal of judicial officers is hedged with many formalities under the Code of Conduct[58] that prescribes in broad terms the conduct expected from judicial officers. Any allegation that a judicial officer has committed a breach of or has not compiled with the provisions of this code is to be made to the Code of Conduct Bureau,[59] who shall then refer the complaint of such violation to the Code of Conduct Tribunal.[60] The complaint about the breach of code of conduct can also directly be made to the Code of Conduct Tribunal.[61] The code of conduct tribunal is constituted of a chairman and two other persons, all selected from

54. schedule 5, part 1
55. S.A. de Smith, ***Constitutional and Administrative Law*** (Harmondsworth: Penguin Books Ltd., 1977) p. 363.
56. section 256.
57. section 256(2)
58. schedule 5 part 1.
59. schedule 5, section 12.
60. schedule 5, section 15(1)(d).
61. Id.

the code of conduct bureau members.[62] When a code of conduct tribunal finds a person guilty of contravening any of the provisions of the code of conduct it shall impose upon that person any of the punishments prescribed in section 20(2) of the schedule 5. These punishments shall be without prejudice to the penalties that may be imposed by any law where the conduct is also a criminal offence.[63]

Where the Code of Conduct tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provisions of this code, an appeal shall lie as of right from such a decision or from any punishment imposed on such person to the Federal Court of Appeal at the instance of any party to the proceedings.[64]

Section 256(1) (b) of the Constitution of Nigeria states:

> ... the president or, as the case may be, the governor acting on the recommendation of the Federal Judicial Service Commission or the State Judicial Service Commission that the judicial officer be so removed for his inability to discharge the function of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the code of conduct.

This section in fact applies to both the cases of misconduct and the code of conduct and states the position of the President or of the Governor in removing a judicial officer. But to take the language of the section as it stands it will create contradiction in the removal of a judicial officer by the President or the Governor in the case of contravention of the code of conduct since the procedure[65] provided by the code of conduct for the removal of a judge is quite different from the procedure provided for the removal of a judge in the case of misconduct. The code of conduct provides a procedure

62. The Code of Conduct Bureau shall consist of not less than 9 members. They are responsible to the National Assembly. The Chairman and members are appointed by the President on the approval of the Senate. The Code of Conduct Tribunal consists of a Chairman and two other members appointed by the President from among the members of the Bureau, in accordance with the recommendation of the Federal Judicial Service Commission. The conditions of service, qualifications of the members of the Code of Conduct Bureau are similar to the judges.
63. schedule 5, section 20(3).
64. schedule 5, section 20(4)
65. see section 256(1) & schedule 5, part 1.

which is a legal procedure for the removal of a judge but the removal of a court judge for misconduct is an executive and a legislative procedure. Under section 256(1)(b) the president or the governor can remove a judge for violation of code of conduct. Suppose the President removes a judge for violation of code of conduct and the judge appeals against his removal, which he can as of right under section 20(5) of schedule 5. Suppose the court of appeal declares against his removal. In such a case there will be a clear conflict between the executive power of the President and the judiciary which has declared the act of the President null and void. But one must find a harmonious construction of section 256(1)(b) so as to avoid any conflict between the executive, the legislature, and the judiciary, within the broad framework of the constitution itself since no other law can supplement the constitution. The conflict can be avoided by a clear cut demarcation between acts of misconduct and acts of violation of code of conduct. In the case of misconduct it is the President or the governor, as the case my be, that has competence to remove the judge. In case of contravention of the code of conduct, it is the code of conduct bureau that should deal with all such violations. Thus the two methods of removal of a judicial officer can run side by side. Again the contravention of the code of conduct is not misconduct as such but is a misconduct of a different type. Suppose a judge receives a gift from his relatives or inherits property but he fails to pay tax over it or registers it with the code of conduct bureau, it is not a misconduct that interferes with his dispensing of justice or perverts the course of justice or impairs his sense of justice in a particular case. The code of conduct is prescribed for public officers with a view to keep their private lives above board, that their private lives should not become a topic of discussion in society and at the same time to instal in them a moral standard. It is to ensure their prestige in the public eyes that the code of conduct is formulated. But how far the private life affects the public life is a matter of ones gues but is not a topic for discussion 66

Determination of Salary of Judges:

The question of salary is another factor in determining the independence of the judges. The first condition is that, it should be certain and not subject to the changing opinions of the National Assembly or the House of Assembly. Judicial salaries are, therefore, fixed by statute and do not appear in the annual parliamentary vote; and they are given special security by being made a charge on the Consolidated Revenue Fund of the federa-

66. *Proceedings,* op. cit., p. 127, para. 234, p. 185, para 350; p. 210, para 400.

tion[67] in the case of the federal judiciary and on the Consolidated Revenue Fund of the state[68] in the case of state judiciary. To provide judges good living so as to keep them away from monetary constraints and thus from corrupt temptations, Dawson writes:

> The lowest limit of the judge's salary should clearly be sufficient to enable him to live in moderate comfort with financial security. In practice, however, the salary will have to be set at a much higher figure than this, for it must be large enough to induce many of the best lawyers to accept position on the bench. A good lawyer may not insist on an enormous salary, but he will demand one which will enable him to live on approximately the same scale as that to which he has become accustomed. While it is true that the highest paid lawyer will not necessarily make the best judge, there can be no doubt that the correlation between legal and judicial ability is high, and that if the state wants the best material, it must be prepared to pay for it. In entering this competition, however, the government has a valuable item to throw into the balance in the prestige and security that go with the judicial appointment, and many lawyers are prepared to make a genuine sacrifice in exchange for the more intangible rewards of a judgeship.[69]

One must take cautious note that even in giving the highest salary to the judges, that a judge who considers his salary above his career, above his duty is not fit to be a judge. Thus the main considerations in appointing a person to the position of a judge is that, he should be one who unites requisite integrity with the requisite knowledge. The prestige that the general public attaches to the office of judgeship, the faith that the public have in the institution of courts, the credit of mini gods that they enjoy in the society is a proof in itself that they must be above all superflous temptations in the performance of their duties. Dawson while reconciling judge's ability, salary, and prestige writes:

> The judge will thus usually begin with the twin assets of character and ability, and these become the foundation on which the indirect appeals are based. He is paid a substantial salary, which not only removes some of the obvious temptations, but frees him from financial distractions. The importance of his office is continually stressed; his own rectitude and sense of fairness are invariably assumed; the dignity of the court and the respect accorded his office are rarely, if ever, challenged; his social position is always assured. These efforts

67. section 78(2)
68. section 116(2)
69. Dawson, op. cit., p. 442.
Federalist, op. cit., paper no. 78.

> to accentuate the eminence of the office are made infinitely more effective by the fortunate regard which the legal profession has for the judiciary and its ingrained habit of regarding a seat on the bench as the crown of a legal career. Thus some of the very men who built up the tradition may be induced to accept judgeship a few years later, influenced to a material degree by the tradition which they themselves have helped to create. Not the least important result of this prestige is its effect on the public, who have come to accept it — and with some justification — at its face value, and who see in judicial independence a great promise of justice than could be obtained through the application of ordinary politial sanctions.[70]

Next to permanence in office, nothing can constitute more to judicial independence than a fixed salary for the judges and that should be outside the control of external influence. Madison states:

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.[71]

One might suggest that if judges' salaries are fixed permanently there will be no temptation for higher earnings. In such a case the legislature can review their salaries subject to variations in social and economic circumstances. But the main point that is stressed is that the judges' salaries should be put under such restrictions as to be out of the reach of the executive or the legislature to change the conditions of the judges for the worse. Under the Constitution of Nigeria section 78(3) and section 116(3) provide that the salaries and conditions of service of judicial officers shall not be altered to their disadvantage after their appointment; but their other allowances are subject to change.

Promotion of Judges

The question of promotion is almost as important as that of initial appointment in regard to judicial independence. For, as Lloyd[72] maintains, if the judiciary has to look for its future prospects to the politicians they may be unwilling to incur executive displeasure and so mar the chances of later promotion even though they are secure in their posts. Though promotion is not the criterion for judges in the administration of justice, as Raina J. writes:

70. Dawson, op. cit., p. 449.
71. *Federalist,* op. cit., paper no. 79.
72. D.Lloyd, ***The Idea of Law*** (Harmondsworth: Panguin Books Ltd., 1973) p.258.

> A judge who considers his promotion and his career above his duty as a judge is not fit to be a judge and cannot earn the respect of anyone if considerations of his career can prevail over his sense of duty. He might as well yield to other mundane temptations.[73]

But in the general course of human nature, the temptations to go to a higher position is always present. This craving can only be checked if, as Madison states:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government.[74]

The constitution should guarantee either the procedure for promotion or fix the position of a judge once appointed. This will ensure the quality of a judge which is most critical of all the factors in the administration of justice. This will ensure him the conditions of his service and tie him to a fixed position which he envisages before his appointment and puts an end to all allurements for promotions. Dawson writes:

> While a system of promotion is usually most desirable within any organisation, promotion from one judicial position to another is to be regarded with misgiving. If the executive is to exercise no control and no suggestion of control over the judiciary, any major promotions become impossible, for they may always raise the question of the executive paying its debts to its friends. To object to the elevation of a judge to the chief justiceship on the court or even, perhaps, from one branch to another in the same court would doubtless be carrying this fastidiousness to extremes, but promotions involving greater rewards are most certainly inadvisable.[75]

The system of promotions under the English judicial system is worth mentioning in this regard and deserves careful reading. In England the judiciary is not a career service and, thus, the system of promotions is avoided by avoiding too hierarchical a pattern in regard to the higher judiciary.[76] A certain uniformity of status has been retained in regard to all the higher judiciary from the High Court level to the House of Lords, particularly by keeping salaries on almost the same level throughout and by avoiding any form of promotion on the basis of seniority. As Hartley and Griffith states:

73. Raina, op. cit., p. 141.
74. ***Federalist***, op. cit., paper no. 51
75. Dawson, op. cit., p. 444.
76. de Smith, op. cit., p. 357.

> Judicial promotions are rare and there is little to be gained from attempting to curry favour with the government. Thus there is no formal system of promotion in the judicial hierarchy.[77]

In this connection, perhaps, it is not unnecessary and unconnected with the independence of judiciary to mention the extra-judicial work given to judges. No doubt by their habit and temperament the judges have acquired enough impartial sense and fair play but this temptation of extra-money by extra-work can mislead them and give to the public suspicion of their impartial role. Dawson writes:

> To assert that these things have no effect on a judge's independence may or may not be true; but even if that sinister factor were completely absent, the popular suspicion that such influences are present is in itself a most serious matter.[78]

Dawson quotes with approbation a speech by a lawyer in the House of Commons of Canada which states:

> To the extent that these tasks [the work of commission] are paid for, they are subversive of the principle of independence which is the bed-rock of our whole judicial system. If a judge is to receive remuneration in excess of his statutory compensation ... he is beholden to the body paying him, be it the political party in power or be it a labour union or employer who commands his services...
>
> It is impolitic for a practising barrister to say anything which might be construed as criticism of the bench. It is most unfortunate that stern necessity imposes on me the duty of pointing out the dangers to the greatest of our institutions inherent in this practice. I do not accuse the government in power of being the sole offender, but circumstances have made it the most frequent and the most recent offender. Whenever it has had a difficult problem to solve, whenever it is confronted with a perplexity, it has pulled members of the bench down into the dust of the political authority and so far unimpeached integrity of the bench.
>
> I say with sorrow that the reputation for impartiality, dignity and honour enjoyed by the bench has been exposed to criticism by this practice. All who believe in the law, who depend upon its fearless administration, and admit that the people at large must have complete faith in the integrity of the judiciary, must oppose the continuance of this practice.[79]

77. T.C. Hartley & J.A.G. Griffith, ***Government and Law — An Introduction to the Working of the Constitution in Britain*** (London: Weidenfeld and Nicolson, 1975) pp. 181-182.
78. Dawson, op. cit., p. 446.
    Griffith, op. cit., p. 51
    de Smith, op. cit., p. 359.
79. Dawson, op. cit., pp. 446-447.

The government seeks judges on inquiries and commissions with a view that their impartial judgements will be confidently accepted by the general public. As Hartley and Griffith state:

> When wild rumours are flying and confidence in some aspect of public life is at stake, it is advantageous for the government to turn to that branch of the state whose integrity is most respected and appoints a judge to inquire into the fats and reassure public opinion (of course, if the government feels that the facts might not be reassuring, it is unlikely to adopt this course).[80]

There is a great deal of truth in this but it stretches the work of the judiciary which affects the work of the judges in the courts. Again, there is another danger when judges are called for some committees and commissions which are concerned with matters deep in political controversy and when large number of people feel that their impartiality is a sham , the damage is done to the judicial system. Hartley and Griffith observes:

> The reports produced by judges on these questions are widely accepted and usually to restore public confidence in the poltical system; but there may be a price to pay in that those who have a political interest in the outcome of the inquiry may be tempted to attack the impartiality of the judge concern if the result is not to their liking. The effect of this might be a slight lowering of public esteem for the judiciary itself. In fact there are some questions on which partisan prejudice is likely to be so strong that a report by a judge is bound to be rejected by one side or the other.In such a situation the creaibility of the judge will suffer in the eyes of some sections of the community. For this reason judicial inquiries should be used sparingly.[81]

To remedy this situation the government should have a permanent commissioners' office to conduct inquiries and give the commission members the same advantages and facilities as given to judges. This independence and impartiality should be restored in the same way as that of the judiciary. This will relieve the extra-judicial work of the judges and fill that gap of confidentiality for general public which government seeks by appointing judges.

From the above discussion it is clear that the function of judges and their independence is mentioned in the Nigerian Constitution and is an accepted principle. For independence of judiciary is vital for the survival of democratic institutions. Raina J., however, gives a cautious note on the independence of judiciary and the role of the judges. He writes:

80. Hartley & Griffith, op. cit., p. 175.
81. I d., pp. 175-176.

The judges must fully understand what it means and the responsibility that it carries. It does not mean a license to discharge the judicial function in whatsoever manner one pleases. It calls for a judicial discipline governing the discharge of judicial functions in a purposeful manner. It must be borne in mind that independence merely consists in giving a decision without fear or favour, without malice or ill-will. It does not mean independence to criticise or condemn other functionaries except to the extent it is absolutely necessary for the judicial determination of the questions of fact and law in a case in hand. Independence should not give rise to judicial arrogance on account of an assumed air of superiority over other organs of the state and should never be misused to make disparaging, disrespectful or contemptuous remarks about others. Independence must be coupled with humility, courtesy and respect for the views of others particularly the representatives of the people and the legislative assembly of which they are members. Any disrespect for the legislature or their members exhibited expressly or by implication may give rise to bitterness and confrontation. It must be realised that in a confrontation between the judiciary and the legislature or the members of the legislature, judges will always be at a disadvantage because while the latter can freely speak out the judges by nature and habit are reserved and refrain from joining issues in public; having expressed themselves in the judgment they have nothing more to say. The judges must, therefore, tread their path cautiously with aloofness and dignity and express their views in the judgment in simple but convincing language without making any disparaging remarks against any one. Having performed their solemn duty, their task is over and it should be left to the members of the legal profession to explain and expound the judges' point of view to the public.[82]

82. Raina, op. cit., pp. 144-145.
F.J. Klein, *Federal and State Court System — A Guide* (Cambridge (Mass): Ballinger Publishing Co., 1977) p. 27.
Hartley & Griffith, op. cit., p. 183.

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY UNDER THE CONSTITUTION OF NIGERIA

A map of the world that does not include Utopia is not worth even glancing at, for it leaves out the one Country at which Humanity is always landing. And when Humanity lands there, it looks out, seeing a better Country, sets sail. Progress is the realisation of Utopia.

Oscar Wilde*

The most practical problem that political philosophers face is the relationship of the individual to society and of citizens to the state. Of course, everybody admits that the individual has some rights against the society; of course everybody has obligations towards society and society through its agent, the state, enforces those obligations against the individual. The individual cannot demand from society unless he also contributes to society. But where the line is drawn between the rights of the individual and the obligations to society, what is the balance between the rights and the obligations of the individual in society, is an empirical question which in different societies finds different solutions at different periods of history. The notion of the Fundamental Objectives and Directive Principles of State Policy represents such a solution.

There is nothing new as regards the fundamental objectives and directives principles as concerned in Nigeria since successive governments have always made economic, political, and cultural uplift of its people as its main objective. Four National Development Plans made and implemented by successive governments are motivated by a common social purpose identifiable in all the National development plans. These common social purposes aimed at firmly establishing Nigeria as a united, strong and self-reliant nation are:[1]

(a) Increase in per capita income
(b) More even distribution of income
(c) Reduction in the level of unemployment
(d) Increase in the supply of high level manpower
(e) Diversification of the economy

* Oscar Wilde, *The Soul of Man Under Socialism in Complete Works of Oscar Wilde*, introduction by V. Holland (London: Collins, 1948) p. 1089.

1. *Third National Development Plan, 1975-1980 (Lagos: Federal Ministry of Information)* p. 29

(f) Balanced development
(g) Indigenisation of economic activity

An important objective of all these plans, therefore, has been to spread the benefit of social developments at all levels of human aspirations, educational, economic, cultural, and political, and thus to remove the age old inequalities based on the separation of different strata of the population from each other by the existence of sharply contrasted rights and obligations, enforced not merely by custom or social influence, but by law. Tawney states:

> Since inequalities appeared to be the reason, not of individual freedom, but of the absence of it, the abolition of restrictions upon the latter seemed to be the most certain way of abolishing the former[2]

The basic idea is, thus, to establish a procedurally efficient and fair society to meet the needs of its members. Keeping this in view the makers of the Second National Development Plan stated:

> A just and egalitarian society puts a premium on reducing inequalities in inter-personal incomes and promoting balanced development among the various communities in the different geographical areas in the country. It organises its economic institutions in such a way that there is no oppression based on class, social status, ethnic group or state. A distributive equity is, therefore, an important cornerstone in the act of national objectives for the Government's programme of reconstruction and social reform.
>
> The ultimate goal of economic development is the welfare of the individual. The focus of our policy objective should, therefore, be on how the ordinary citizen is to be affected by the resulting set of action programmes and projects. The prospect of the citizen in the process of economic development and social change should not be determined by the mere accident of the circumstances of his birth. He should be able to have equal access to all the facilities and the opportunities which could help him realise his potential and develop his full personality. A sense of self-reliance and a sense of national pride are worthy objectives which the Government believes the average Nigerian wishes to cultivate. But he can only do so in an atmosphere of expanding opportunities for full employment, for education and for self-fulfilment. The nation will, therefore, remain fully committed to the achievement of these objectives at all times.[3]

2. R. H. Tawney, *Equality* (London: Unwin Books, 1964) p.95.
3. *Second National Development Plan, 1970 - 1974* (Lagos: Federal Ministry of Information) p.33.

The only new significance attached to the directive principles is their entrenchment in the Constitution as sacrosanct objectives. This gives them special status among the many legal- moral provisions of the legal system in Nigeria. They are legal- moral because their enforcement is a moral obligation on the part of the government; they are legal, on the other hand, because they are given a suitable place among the laws of Nigeria. The Constitution has left the performance of these obligations on the fidelity of the government and ultimately on the vigilance of the voters in exercising their political rights.

Directive Principles, therefore, open a new chapter of ' social service' or ' welfare state' in the constitutional history of Nigeria, and the contitutional history of a welfare state

> . . .begins when history becomes concerned with the future as well as with the past. Modern man peers eagerly back into the twilight out of which he has come, in the hope that its faint beams will illuminate the obscurity into which he is going; conversely his aspirations and anxieties about the path which lies before him sharpens his insight into what lies behind. No consciousness of the future, no history.[4]

The past experience of colonial days and of civil war made Nigeria conscious that progress would be faster only if the nation moves with a common social purpose. Development process is a function of the innate forces in society. Directive Principles are the outcome of this past experience and the conscious development of the future. The future development, thus, must deal with the community' s quality of life.

Chapter 2 of the Constitution that deals with the Fundamental Objectives and Directive Principles of State Policy, provides one of the striking features of modern constitutions since the introduction of the idea of a welfare state after the First World War. In introducing the fundamental objectives and directive principles into the Constitution, the framers[5] of the Constitution were in this respect influenced by other constitutions such as Irish Constitution, and the Indian Constitution that were in turn influenced by the Constitution of Republican Spain, the first ever to incorporate such principles as part of a constitution.

4. E.H. Carr, *The New Society* (London: Macmillan, 1951) p. 2.
5. *Proceedings of the Constituent Assembly*, Vol. 1, (Lagos: Federal Ministry of Information) p. 483, para 945.

Every social institution is a product of developments whose causes are to be found in changing social conditions. Each stage contains the next in germ. So far as anyone starts to find the starting point of the idea of directive principles one has to go back at least as far as the French Revolution and the American Declaration of Independence by the American Colonies. The influence of these declarations was so profound and lasting in Europe and America that they inspired systematic and organised efforts to compel the state to take positive measures for the removal of many anti- social practices for the fulfilment of civil, political, and cultural conditions under which the legitimate aspirations and dignity of man may be realised. There is a growing tendency towards increasing recognition of social interest in individuals needs and their satisfaction. As Pound states:

> We all have a multiplicity of desires and demands which we seek to satisfy . . . There is a task of making the goods of existence, the means of satisfying the demands and desires of men living together . . . such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and to do things.[6]

It is a social task to establish such an order that is conducive to the improvement of the standard of living of the members of the society. The means of satisfying wants are valued not by individuals who merely interact, but by all the individuals acting as a community consciously and jointly because production and distribution are ruled by social processes. Social influences are thus the keys to the analysis and understanding of the directive principles. The development of social welfare state ideas is nothing but the result of different social tendencies, the result of steady growth of the principle of social responsibility, the result of action and interaction of old and new social systems. Giddings states:

> Since the tendencies towards both cohesion and dispersion are persistent, the social system simultaneously exhibits phenomena of combination and of competition, of communism and of individualism. Neither order of phenomena can ever exclude the other, but at any given time one or the other order may be ascendant and there may be a rhythm of alternating ascendancy of combination or competition, communism or individualism.[7]

6. R. Pound, *Social Control Through Law* (London: Yale University Press, 1942) pp. 64-65
7. F.H. Giddings, *Principles of Sociology* (London: Macmillan, 1896) pp. 398-399.

In more recent times, thinkers on political and social reforms, who did not agree with the Marxian approach for the removal of the ills and evils of modern society, advanced such ideas as directive principles to be made the guiding force of state policy. The liberal philosophy of the political and social reformers, the major principles of Fabian socialism and Guild socialism[8] are all akin to much of what is embodied in Chapter 2 of the Constitution. Moral and social ideals revived in jurisprudence after the Second World War are responsible for stimulating the process towards establishing a welfare state and, thus of entrenching the idea of the directive principles in modern constitutions. Friedman gives his own explanation for the increasing tendency towards state responsibility. He states:

> The growth of the new policy is due largely to the social transformation of ...society in which more and more vicissituder threaten a multitude of individuals whose liberty to avoid them shrinks steadily. The steady growth of the principle of social responsibility... is not due to any cynical abandonment of the principle of individual responsibility but to the extent to which millions of individuals find themselves exposed to the threats of modern industrial life.[9]

It would, however, be wrong to suppose that the various principles embodied in chapter 2 of the Constitution are mere foreign borrowings or adaptations of principles of western politics and social philosophies; but as a Head of the Federal Military Government stated in his opening speech to the Constituent Assembly that in the Constitution due regard should be given to cover every aspect of the national life...

> Together with this, I would advocate that you should always be guided by humility and the willigness to compromise — the twin attributes all true Africans seem to share. in our zeal and endeavour to advance and catch up with coutries in other climes, we must not overlook the contribution our unique character as a people and the values our tradition and culture hold dear are bound to make on the outcome of these deliberations.[10]

In fact, a number of these principles are entirely Nigerian, particularly those that formed an integral part of the very foundations of the national movements as provided in section 19 and section 20 .

8. See, G.D.H. Cole, *A History of Socialist Thought*, Vol. 3, part 1, (London: Macmillan & Co., 1960) pp. 179–248. *The Challenge of Socialism,* edited by H. Pelling (London: Adam & Charles Black, 1954) chs. 11 & 14.
9. W. Friedmann, *Law in a Changing Society* (Harmondsworth: Penguin Books Ltd., 1972) p. 163.
10. Proceedings, op. cit., pp. 15–16, paras 9 & 11.

As the title of chapter 2 itself indicates, the principles embodied in the chapter are directions to the various governments and their agencies to be followed as fundamental obligations in exercising legislative, executive, and judicial powers. The use of the word fundamental[11] describes in rhetorical language, hopes, ideals, and goals rather than the actual reality of government. The principal objective in enacting the directive principles appears to have been set standards of achievement before the legislature and the executive, the local and other authorities by which their success and failure could be judged. It shall be the duty of the state to apply these principles in making laws. Thus, they place an ideal before the legislators while they frame new legislation for the country's administration. They lay down a code of conduct for the administrators while they discharge their responsibilities as agents of the sovereign power of the nation. In short, the directive principles enshrine the fundamentals for the realisation of which the state of Nigeria stands. They guide the path that will lead the people of Nigeria to achieve the noble ideals which the preamble of the Constitution proclaims:

> To live in unity and harmony as one indivisible and indissoluble Sovereign Nation . . . dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding:
>
> AND TO PROVIDE for a consitutition for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people.[12]

The expression of such laudable ideals can

> easily be forgiven for speaking of them as if they are actual rights, for this is but a powerful way of expressing the conviction that they ought to be recognised by states as potential rights and consequently as determinants of present aspirations and guides to present policies.[13]

There are ten sections in the Constitution, section 13 - section 22, that deal with the Fundamental Objectives and Directive Principles of State Policy. These cover a wide range of state

11. H.M. Seevai, *Cons titutional Law of India*, vol. 2, (Bombay: N. M. Tripathi Private Ltd., 1976) p. 1026.
12. *The Cons titution of the Federal Republic of Nigeria 1979.* (hereinafter all sections refer to the constitution of Nigeria. 1979)
13. J. Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall Inc., 1973) p. 67.

activities embracing political 14, economic 15, social 16, educational 17, foreign and international obligations 18, and cultural 19for the realisation of noble ideals given in the preamble.

Taken together these principles and directives lay down the foundations on which a new Federal Republic of Nigeria will be mounted. They represent the minimum of the ambitions, aspirations, and claims cherished by the people of Nigeria, set as a goal to be realised in a reasonable period of time, and that reasonableness depends on the speed and manner the law responds and its response is usually proportionate to the degree of social pressure and also on circumstances and personalities 20 that may hasten or retard the response. Indeed when the state of Nigeria translates these principles into reality, she may justly claim to be a welfare state. The central objective of public policy and national endeavour as evinced through these principles has been the promotion of rapid and balanced economic development which will raise the living standard and open out to the people new opportunities for a richer and more varied life. The idea is not to absolve the individual from his personal and social responsibilities but to encourage him in social participation for the sake of national production. Such developments are intended to expand the community's productive power and to provide the environment in which there is scope for the expression and application of diverse faculties and urges. It follows, therefore, that the pattern of development must be related to the basic objectives stated in the Constitution. Section 16 states that the basic criterion for determining the lines of advance must not be private profit but social gains and that the pattern of economic development and the structure of socio- economic relations should be so planned that they result not only in appreciable increase in national income and employment but also in greater equality in income and wealth. Major decision regarding production, consumption, and investment - in fact all socio- economic relationships are called in question under section 16 for providing social welfare through activities that affect the economic life of the citizens by providing suitable and adequate shelter, suitable and adequate food, reasonable

14. Section 15.
15. Section 16.
16. Section 17.
17. Section 18.
18. Section 19.
19. Section 20.
20. F. Frankfurter, "Property and Society," in *Science and Social Change,* compiled by J.P Thornton (Washington: The Brookings Institute, 1939) p. 446.

minimum living wages, old age care and pensions, and unemployment and sick benefits 21. The benefits of economic development should be so construed and distributed as not to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group 22. The economically weak will not be at the mercy of the economically strong. The control of these aspects of life by which all are affected will be amenable, in the last resort, to the will of all. It will ensure a large measure of equality. The extension of liberty from the political to the economic sphere is evidently among the most urgent tasks of industrial society. Such readjustments would call for an entirely new economic pattern, readjustment of production and distribution of material resources which affect the economic life of the individual and thus give him proprietary benefits. The motive force behind all these changes is a demand for social justice, a demand for an egalitarian society. The real purpose and paramount need is to create a milieu in which the material sources of the community are harnessed and distributed as best as possible to serve the common good. The state shall in the process promote and advance the economic and social status of its citizens. Stressing the importance of directive principles and their necessity in creating a welfare state, a member of the Constituent Assembly remarked:

> It is absolutely necessary that the goals and objectives of this nation should be clearly stated for the guidance of those who are called upon to govern us. We cannot take these things for granted. It is important that they become an accepted burden instead of being items for political manifestoes subject to discussion and being set aside when the election has been won.[23]

This statement of objectives makes it clear that the directive principles are not allowed to remain in the Constitution as mere high platitudes or pious declarations. As every good organisation or government should have at the start of business clearly defined objectives and measurable standards of performance by which it should be judged, directive principles provide a yardstick. They provide constitutional guidance to the government as to the aims and goals to be attained. They are so fundamental to national

21. Section 16(2)(d).
22. Section 16(2)(c).
23. Proceedings, op. cit., p. 109, para 197.

unity, national integration, and national stability that to leave them as mere platitudes, mere goals to be aimed at, will be to defeat the various aims which the government hopes to achieve and to lose sight of the lesson learnt from previous experiences.[24] When they are systematically put into application with a view of transforming Nigerian society, they will bring about a social order in conformity with these principles so as to establish a welfare state. It is true that the state has not yet moved very far on the road of achieving the objectives. Nevertheless most of them have already found a place in the development programmes.[25]

Finally it is perhaps unnecessary to detail the efforts made by Nigeria towards the promotion of international understanding, peace, and security. Suffice it to say that her contribution in this field is widely and generously acknowledged by almost all nations of the world.

Section 13 states:

> It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this Chapter of this Constitution.

And section 6(6)(c) states:

> The judicial power vested in accordance with the foregoing provisions of this section — shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

When reading these two sections together the inevitable conclusion that follows is that chapter 2 does not impose any enforceable duties on the state and consequently confers no corresponding rights on anyone, if rights and duties are used in a legal sense. Seervai, while commenting on the nature of directive principles states:

> If "duty" were used in a legal sense, then the persons to whom that duty was owed would have a corresponding right to require that the duty should be discharged, and if it was not, to enforce its performance by legal action but that is precisely what . . . [section 6(6)(c)] forbids. That the word duty is not us-

24. Proceedings, op. cit., p. 72, para 123.
25. See *Labour Decree 1974; Wages Board and Industrial Council Decree 1973.*

ed in the sense of a legally enforceable duty, will also be clear from another consideration. All legal duties imposed on the state by the Constitution are limitations on the legislative and executive power of the state, so that a law which violated that duty would be void. The duty imposed by . . . [section 13] is not a limitation on legislative power, because a law made in contravention of . . . [section 13 – section 22] would remain a valid law would create legally enforceable rights and would impose legally enforceable duties since no court can declare the law void, for to do so, would be to enforce the directive priniples which [section 6(6)(c)] says the court cannot enforce.[26]

It is, thus, obvious that the word " duty" in section 13 is used in a moral sense rather than in a legal sense.

Though the directive principles are fundamental in directing and framing the policy of the government or as section 13 states, it shall be the duty and responsibility of the state to apply these principles in law making and executing, these principles are expressly made non-justiciable.[27] It means that the courts in Nigeria have no power to enforce them. This is in contrast with the position of fundamental rights, guaranteed in chapter 4, which are justiciable and, therefore, enforceable by the courts of law. Thus, while there is a judicial remedy for every violation of a fundamental right, there is none for the enforcement of directive principles. Does it mean that these are a set of platitudes designed to deceive the layman by clever politicians to hoodwink the credulous Nigerian masses? Is there no remedy if the government in power ignores and violates these principles that are of fundamental character in discharging government responsibilities? The answer is ' no' to the first question and ' yes' to the second question. No doubt there is no direct judicial remedy, but other remedies there are and they are reasonably effective since the basic principles of democracy is the attachment of responsibility to power by the vigilant electorates. In conformity with this principle of democracy the government in power hardly dares to ignore the idea contained in chapter 2 of the Constitution. A member of the Constituent Assembly, thus, states:

> What is the punishment behind these non-justiciable items. It is public opinion, public political opinion, and for people who are politicians, that is more important because that is something against which you cannot hire a lawyer. Public political opinion is the thing that stands between you and the next election. If you were in power and you were to go on violating these Fundamental Objectives and Directive Principles, you must know that your chances of coming back into

26. Seervai, op. cit., p. 1033.
27. Section 6(6)(c).

power must be very slim in present-day Nigeria which is becoming more and more conscious of its political requirements, economic requirements and social requirements. So, that is the sanction behind these Fundamental Objectives and Directive Principles on State Policy.[28]

It must be remembered in this connection that the Constitution establishes a democratic form of government, a representative government where the government derives all its powers from the people through the Constitution. It is also a responsible government, one that is continuous and always responsible for all its actions to the representatives of the people in general. Those who are in power are there because the people of Nigeria who have been guaranteed universal adult sufferage have given them power and any violation of their trust shall be regarded as a breach of trust of the people of Nigeria. The powers of the government must never be regarded as an end in themselves but as means for the advancement and promotion of the welfare of the people. These representatives of the people are not the masters of the people but their ' servants' . They are voted into power to translate into practice the provisions of the Constitution to uplift and promote the welfare. Accordingly, those powers must be exercised in accordance with the directive principles set out in the Constitution. If they fail in their solemn duty, then they have no right to continue in office. They should and can be removed from office when the stocktaking of their work is done at the end of every four years at the time of the general election. The fundamental objectives and directive principles are a government's charter over which government operates for four years. Since the country ensures free choice by the people from among different candidates with different political programmes, it is logical to conclude that the people will elect those who are likely to transform these principles into reality. These fundamental objectives, thus seen, constitute a kind of basic standard of national conscience. Those who violate its dictates do so at the risk of being ousted from the positions of responsibility to which they have been chosen. The agents of the state at a given time may not be answerable to a court of law for the breach of these principles but they have to stand for judgement, from which they cannot escape, facing a higher and more powerful court which will at regular intervals (of four years) do the reckoning. Thus, in this sense, justiciability is not to be insisted upon as the only sentinel that can keep eternal vigilance over the sanctity of these principles, though their

28. Proceedings, op. cit., p. 326, para 631.

non- justiciable character makes them sometimes a dicy and tricky instrument of state policy.

Some members, however, are of the view that these principles should be made justiciable to attach more value to their high spirited ideas for the uplift of the generality of the people of Nigeria. So far these objective principles are not made enforceable in any court of law, they have completely defeated the purpose and have been described as meaningless 29, useless 30 , dicy and tricky insurance policy 31. If one says that each government must be guided by these principles and then one turns round to say that there should be no other judge of these principles but the government itself, then it is like appointing a judge to decide one' s own case. A member commenting on the enforceability of these principles stated:

> The Fundamental Objectives and Directive Principles... have been introduced in the Constitution for the first time. That is a very lovely reading material. It is a very fine and very good guiding principle for the government and really, if it can be strictly followed, the country can be run well. However, the pity of it isthat it is not justiciable. In other words, the government of the day can afford to ignore it and yet not be taken to task about it. Therefore, one finds that the very basic idea of having it is almost defeated.
>
> What is the need for having something if you cannot enforce it? What is the need for deceiving your countrymen about what they are entititled to? Yet the government can afford to ignore it and not be told that the government itself is ignoring it and should please come to order. I, therefore, feel that probably the best thing is to have it somewhere else, not in the Constitution. I am therefore of the opinion that we make them enforceable and if we cannot do that because the government has no sufficient resources to do them, then, let us select the ones which will be useful for the social security of the country. Those useful ones which we can enforce should be put in the Constitution. I must say that it is a lovely idea we have, but without enforcing them I would say that we are deceiving ourselves.[32]

Confusion may arise from the use of the word fundamental, both in the case of the fundamental objectives and the fundamental right in chapter 2 and chapter 4 respectively of the Constitution. The word fundamental in both cases is used in two different senses. Fundamental rights are fundamental not only for the person and dignity of the individual but they are fundamental vis- a- vis the

29. Proceedings, op. cit., p. 214, para 407.
30. Ibid., p. 434, para 848.
31. Ibid., p. 519, para 1017.
32. Ibid, p. 62, paras 103-104.

existence of the state, as is clear from the restrictions 33 to which they are subject. If they had been ' purely fundamental' for the individual they would not have been subject' to restrictions vis- a- vis the state; they are not human rights which are available to human beings under all circumstances and under all conditions 34. The basic character of fundamental rights was emphasised by a declaration that any law abridging or abrogating them would be void, even without an express declaration; any law contravening a constitutional limitation would be void. The right to move the High Courts 35, for the enforcement of fundamental rights, is itself regarded as a fundamental right. This further emphasises the basic or essential character of fundamental rights. Here the word fundamental refers to the legally enforceable rights. Commenting on the use of the word fundamental in the case of directive principles, Seervai states:

> The word "fundamental" in the expression...[Fundamental Objectives and Directive Principles of StatePolicy] is not used to characterize a basic or essential legal duty, first, because there is no enforceable legal duty, and secondly, because on the legal plane, it is incongruous to speak of a basic or essential duty of the state to implement directive principles when the state is free to ignore, or even to contravene them. Therefore, the word "fundamental", like the word "duty", is used not in the legal, but in a moral sense. It is the moral duty of the state to implement the directive principles.[36]

33. Section 41.

34. Some writers use the term 'fundamental human rights' but such a use is inconsistent. Fundamental rights are rights that are available to citizens and in certain cases to all individuals in a given state. But they have a specific qualification, and that is,that they are made available subject to reasonable restrictions or requirements of the state. Thus, they change from state to state, and even in a given state from time to time. Fundamental rights represent not only the interest of the individual but also that of the state. They represent not only personal interests but public interests as well. For example, under section 34 of the Constitution, the privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communication is hereby guaranteed and protected, but this right is subject to change under certain conditions by section 42 of the Constitution. Again this right is not available to non-citizens. Thus fundamental rights are specific rights. Human right is a generic term. It refers to rights that are available to a human being as a human being irrespective of his nationality or any creed. It is no subject to variations under any circumstances; it's Kant's notion of categorical imperative. Reading both these concepts of fundamental rights and human rights together, one can see that human rights cannot be fundamental. Fundamental right is a relative concept. Human right is absolute concept. To say fundamental human right is to norrow down the field of human rights and look at them as if they are not available to all human as human beings. Again fundamental right is a legal term but human right is a moral concept. Thus the term fundamental human rights misreads the concept of human rights.

35. Section 42.

The question arises regarding a conflict that may arise between a fundamental right and directive principle, as to which should prevail. The directive principles which by section 6(6)(c) are expressly made unenforceable in a court of law, cannot override the provisions found in chapter 4 which, notwithstanding other provisions, are expressly made enforceable under section 42. The fundamental rights entrenched in the Constitution are designed to protect individuals from abuse of government powers. They are sacrosant and not liable to be abridged by any legislature or executive act or order except to the extent provided in section 41. The directive principles have to conform to and run subsidiary to fundamental rights.

The directive principles, however, give an important guide in determining a crucial question for regarding the validity of certain Acts. The directive principles can be taken into consideration in construing the ambiguous provisions of statutes. They have an educative value. 37 The question may arise whether there is any public purpose to justify the legislation, for example, the compulsory taking of property under section 40 of the Constitution. In dealing with such a question, section 16(2)(c) of the Constitution provides an important guidance which states that the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group, is to be avoided. The purpose of the acquisition contemplated by the Act, therefore, is to do away with the concentration of property in a few hands, and the distribution of material resources which come in the hands of the state, so as to subserve the common good as best as possible Here the directive principles give an important guidance.

As far as the courts are concerned where there is a clear conflict between the fundamental rights and the directive principles, they should uphold the fundamental rights being justiciable, that is, fundamental rights should prevail. In fact, there can be no conflict between fundamental rights and directive principles because fundamental rights confer legally enforceable rights. The conflict can only be between fundamental rights and the statutory rights and duties conferred by a law enacted by the legislature in order to implement directive principles. And it is obvious that in the case of a conflict between constitutional rights and statutory rights, the former shall prevail. 38 But this solution is only a judicial solution of the matter. The courts cannot go further than that, but

36. Seervai, op. cit., p. 1034.

37. G. Austin, *The Indian Constitution: Conerstone of a Nation* (London: Oxford University Press, 1972) p. 77.

38. Section 1 (3).

parliament can. The final solution is arrived at only when the social conflict arising out of the competing claims of a justiciable and non- justiciable rights are resolved. The guiding principle here is the superiority of the social interest over that of the individual. To facilitate the putting into effect of this principle, the Constitution may have to be amended and the directive principles allowed to prevail. It should, however, be added that whenever the courts are called upon to resolve a conflict between a fundamental right and a directive principle, it is the duty of the courts to resolve the conflict with an eye on the spirit of the Constitution and with a view to harmonising differences to the extent that is possible and feasible.

The significance of directive principles in relation to that of fundamental rights can be determined only by making a reference to the aims of the Constitution makers in making these principles an integral part of the Constitution. They represent the basic principles which aim at the creation of a welfare state. Taken together these principles form a charter of economic and social democracy. Political democracy as well, if there is an extension of equality from politics to economics. And this is what the Constitution makers have in mind as the ultimate goal to achieve through the implementation of directive principles, depending on the availability of sufficient resources. Thus, on one hand, directive principles are assurances to the people as to what they expect, while on the other hand, directive principles are directives to the organs of the government as to what policies they ought to pursue. They directive principles do not restrict the legislative power nor do they enhance it by freeing the legislature from the limitations imposed by fundamental rights and other sections of the Constitution. The directive principles are in the nature of an instrument of instructions, which both the legislature and the executive are expected to respect and to follow. However, they confer no legislative competence on a legislature in respect of any matter over which it had no competence.

It will be unfair to the people, as well as inconsistent with the spirit of the Constitution, to allow these principles to remain pious hopes. Austin, while stressing the aim of directive principles states:

> For here lies the best insight into the member's approach to the issue of liberty and the social revolution, to the classic dilemma of how to preserve individual freedom while promoting the public good.[39]

Thus, every effort should be made by the representatives of the people and the agents of the government to translate them into

39. Austin, op. cit., p. 50.

reality. Nothing should be allowed to stand in the way of directive principles, not even the fundamental rights guaranteed to the individual. After all, the progress and welfare of society as a whole should not be hampered by the rights of the individual. This is why fundamental rights are subject to reasonable restrictions in the interest of general public. 40 It is in this sense that the fundamental rights are to subserve the directive principles. Indeed, there can be no real conflict between the two. They are intrinsically related to stand, and inseparably bound with each other.

The problems of political organisation in the twentieth century is to adapt the conception of democracy formed in the earlier individualistic period to industrial democracy, since in modern times it is believed that the problem of liberty is necessarily concerned not only with political but also with economic relations. 41 Thus a constitution framed in the twentieth century could hardly ignore the idea of welfare state and thus of directive principles as a guide set in chapter 2 of the constitution.

The establishment of political, social, and economic democracy is a paramount goal set out in the Constitution as is clear from the preamble. To sustain these forces, democracy has to be carefully built up. The fundamental rights guarantee political democracy, the directive principles ensure the eventual emergence of an economic democracy to sustain the former. Where there is no economic democracy, political democracy is bound to degenerate into dictatorship and denigrate the ' right to life' . For it is hollow to say that a man has a right to life but not give him those basic essentials that will make him live. Hobson states:

> "The right to life" is not a foolish or a useless phrase. It implies a recognition that it is the supreme duty of society to secure the life of all... members.... there is a clear individual right to property in all "necessaries" of life implied in the right to life, for "you do take my life when you do take the means by which I live."[42]

The directive principles become the greatest guarantee for a genuine democracy. It would be a paradoxical dismissal to consider the directive principles as a mere political manifesto 43 without any legal sanctions or to characterise them, as some members of the Constituent Assembly do, as vague and indefinite

0. Section 41.
1. H. J. Laski, *A Grammar of Politics* (London: Allen & Unwin Ltd., 1938) p. 162.
2. J.A. Hobson, *The Social Problem* (London: James Nisbet and Co., 1901) pp. 89—90.
3. Proceedings, op. cit., p. 191, para 362; p. 385, para 750.

serving no useful purpose [44] or to dismiss them as a mere moral homily. By inserting directive principles in the Constitution the Constitution makers have realised and recognised the sense and direction of social justice and provided the remedy to remove social inequalities. They, at least, have realised the need for a just and egalitarian society. Tawney states:

> A society which is convinced that inequality is an evil need not be alarmed because the evil is one which cannot wholly be subdued. In recognising the poison it will have armed itself with an antidote. It will have deprived inequality of its sting by stripping it of its asteem.[45]

Thus the important thing is not that fair play in human relations will be completely attained but that it should be sincerely sought. What matters to the health of society is the objective towards which its face is set.

This is what the Constitution makers for the present think of building a society based on economic justice. Change is inevitable with the new potentialities of economic development and all claims of society which present needs and demands in movement will transform as society advances into civil and political rights. In such a state of affairs the directive principles will indeed look not only outmoded but even reactionary. But as the present state of society is concerned, we are in need of directive principles towards which the nation can strive. They will revolutionalise the whole economic and social system.

Society is not merely an economic mechanism in which different groups combine solely for the purpose of production and distribution. It is also a system of social groups with varying scale of values. Since the social is moulded on economic patterns, it is thus logical to conceive and attain a measure of economic equality to establish social equality. In such a society inequalities of wealth between different members would remain but they would have lost their sting. Individuals would live, nevertheless, in much the same environments, would enjoy similar standards of health, education, etc. There are some needs which almost everyone will agree should be satisfied on egalitarian principles. In such a society, Tawney explains:

> No one complains that captain give orders and that the crew obey them, or that engine-drivers must work to a timetable laid down by railway-managers. For, if captains and managers command, they do so by virtue of their office, and it is by virtue of their office that their instructions are obeyed. They are not the masters, but the fellow-servants, of those whose work they

44. Id., p. 214, para 407; p. 434, para 848; p. 530, para 1039.
45. Tawney, op. cit., p. 56.

direct. Their power is not conferred upon them by birth or wealth, but by the position which they occupy in the productive system, and, though their subordinates may grumble at its abuses, they do not dispute the need for their existence.[46]

We have reached a point in history where the process of transition from a nineteenth century capitalist order to a social and economic order that we call welfare state is unavoidable. The essence of the welfare state resides in the manner in which production is organised, in the manner which inspires the public control and planning of the economy. Directive principles represent such a thinking in our system of government. Keeping in view the present state of the economic progress and economic resources available, they have been made non-justiciable. As one member in the Constituent Assembly remarked the country is not ripe[47] to make them enforceable; he was referring to the state of the economy. With the new vista of economic progress and with new conceptions of social relations and social obligations growing side by side with the old patters and gradually driving them out — the new revolutionary changes in social, economic, and political patterns provide an opportunity for converting them into enforceable obligations on the part of the state. The same broad development occurred in all industrialised countries through many variations where the state has assumed the paternalistic system of government.

If and when directive principles become outdated they can be suitably amended or altogether abolished. However, by the time Nigeria reaches the stage when directive principles are no more required except as a token or symbol of or expression of noble ideals, Nigeria will have benefitted greatly by directive principles and economic democracy will have gone deep into roots of soil. They would have become part and parcel of Nigerian heritage existing as habits rather than creed. They instil the fundamental value of a stable order and a dynamic economic system, showing the genealogy of progress and aspiration of generations, their toil and sweat. The future will take care of itself if the present is built on solid foundations.

The real importance of directive principles is that they contain positive obligations of the state towards its citizens. These obligations are of revolutionary character and yet are to be achieved in a constitutional manner. Herein lies the real value embodying these principles as an integral part of the Constitution. The future of Nigeria as a Federal Republic, and her Constitution

46. Tawney, op. cit., p. 113.
47. Proceedings, op. cit., p. 353, para 685.

expressing and aspiring as a welfare state, will depend upon how the nation uses these objectives and principles of welfare state to suit the demands of society.

Conclusion

The introduction of the directive principles into the Constitution is a new innovation that makes the Constitution an ornamental piece in the constitutional history of Nigeria. But there is another aspect of this ornamental character - the degree of slow progress towards realisation of welfare state if directive principles are kept in the present form in the Constitution. The question of social welfare state, the idea of establishing complete environmental equality in respect of the conditions of health, education, and social security, shall be carried forward year by year. The Constitution makers have failed to realise this. These laws of peace will become laws for new wars at the time of elections since everybody will be carrying the corpse round his neck.

The Constitution makers are most impressed by the European paternalistic system and tried to introduce the same into Nigeria, but they fall short of the means of implementing them. Despite the sympathies for equality, the means envisaged are too remote to be of any practical value. The basic justification of having directive principles can only be that they secure to everyone the means of subsistence, decent subsistence. Their mere existence on the statute book as a goal to be achieved is of little solace to a poor man. Their non- justiciable character is the main stumbling block towards the realisation of a welfare state. As a member of the Constituent Assembly remarked:

> You cannot talk of a welfare state on the pages of the newspapers.[48]

Having directive principles in the Constitution is regarded as a constant reminder to the authorities or to the people seeking positions of authority that their goal is set towards which they are obliged to work. Their powers are conditional on their performance of these obligations. If they fail in their charter of obligations, they will be rejected at the polls. A member of the Constituent Assembly remarked:

48. Proceedings, op. cit., p. 85, para 150.

> Now, the electorates are awake. They watch the government and, in the end, within four years, the government has to come to the people. The people would then wish to know if that government has been guided or whether it has worked conscientiously by the Fundamental Objectives and Directive Principles of State Policy? I believe . . . that coming to the electorate is the main check on government to ensure that they follow the wishes and desires of the people.[49]

But to see whether the authorities do perform their duties and taking assessment after four years is too much of a wait and within that period one can even see a generation begging for subsistence. This will lead to lack of credibility and therefore growing discontent and thus, lack of faith in the usefulness and meaning of directive principles, nay in the whole system of government. Looking into the slow development process of the philosophy of directive principles, the views expressed by a member of the Constituent Assembly are to be stated:

> Fundamental objectives are . . . a set of goals, ideals and values that we intend to attain. They are the organising principles on which the state is run. They also defined not the powers and rights of government and citizens but also their responsibilities. I consider these, therefore, as very important and should comprise the back-bone of the Constitution . . . The non-justiciability of these provisions makes nonsense of their inclusion in the Constitution . . . Why cannot a man challenge his unequal treatment in a law court? What happens if, say, the Head of Government refuses to take measures to reflect the Federal character of Nigeria? Shall we wait for five years before we seek redress at the polls? It should be possible to take him to court.[50]

It is doubtful that the directive principles shall serve as a constant reminder to the politicians, since they know how to play on the intelligence of the electorates by appealing to ethnic and religious sentiments. A member of the Constituent Assembly aptly put it:

> I doubt if there is any country in the world where such directive principles have served even as constant reminders to the government of the day. I think it will be making a laughing stock of the Constitution to put these laudable objectives only to honour them in their breach.[51]

Federalism is legalism. Judicial development of law is a very slow process. Judges by profession and nature are an aristocratic class since they form the upper strata of society. The development of law where a judge has to support the cause of the poor is very slim. The slow development of welfare ideas in the early twentieth

49. Proceedings, op. cit., p. 258, para 495. Austin, op. cit., p. 78.
50. Proceedings, op. cit., p. 191, para 362.
51. Proceedings, op. cit., p. 258, para 495.

century is due to the attitude of the courts which failed to see through social changes and had not realised the incorporation of social developments into legal institutions. The partial and partisan attitude of the judges in taking social considerations into their judgments, leads to resentment among the majority in the society to whom courts are the only impartial judges of their plight. This matter was put with candour by Lord Justice Scrutton when he stated:

> The habits you [judges] are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that when you have to deal with other ideas, you do not give as sound and accurate a judgment as you would wish. This is one of the great difficulties at present with [illegible] Labour says: "Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.[52]

Thus, if the development of directive principles into active practice is left in the hands of judiciary, the process will [illegible] be frustrated due to slow implementation of directive principles.

In fact, the whole rationale of directive principles, [illegible] mode they are to be implemented. The sense of equality and [illegible] purposes lost ground to wait and see [illegible] in chapter 2 since what is dominant philosophy [illegible] practice.

52. Frankfurter, op. cit., p. 448.

RULE OF LAW UNDER THE CONSTITUTION OF NIGERIA

We are servants of the law in order to be able to be free.
Cicero.

Kant in his famous Categorical Imperative states — So act that the law of thine action were to become by thy will the law universal. What is right for me, must be at the same time right for all others to whom the same alternatives under the same circumstances are presented. The logic of law leads to an objective imperative of a similar nature. This principle ensures the "rule of law" as a high tenet of constitutional jurispredence. MacIver states:

> Its acceptance enables us to interpret government as an organ of society, an agent empowered to work in appointed ways, owing a derived authority and a delegated might, no longer the mast of the state.[1]

This tenet of constitutional jurisprudence is the very soul of constitutional law. It is a concept that has been examined and debated over the years but the misfortune is that the usual discussion over the rule of law are often superficial and concerned with generalities, more sentimental than legal. The stake of the state and society in the rule of law is serious and great. Realising the paramount importance of the concept, let us give it a less abstract character.

When the fathers of the American Constitution proclaimed that their constitution is establishing Governments of laws and not of men, they were merely restating in essence the variant of the ancient principle of Aristotle regarding rule of law as applied to constitutional jurisprudence. In thirtheenth century Bracton gave expression to the view that the rulers themselves were subject to the law of the land. Blackstone's Commentaries carry almost an implicit assumption in favour of the rule of law. These writers, however, based their ideas on natural law philosophy. Dicey while explaining the concept of rule of law propounded the practical effects and gave detailed and concrete expression to the concept.

The very idea of rule of law implies that laws are more often obeyed than violated, for if this were not the case we should have to speak of lawless behaviour rather than of a legal order. Thus to identify rule of law with public order is to give too broad a definition of rule of law since anarchy in time of peace is a rare and tem-

1. R.M. MacIver, *The Modern State* (London: Oxford University Press, 1964) p. 264.

porary phenomenon. Rule of law is not to be understood as a rule, but a statement of principle that law rules or ought to rule, and connotes the general supremacy of law. In this sense it can be said that rule of law is an actual state of society when law rules. Rule of law does not depend merely upon the courts and the law enforcement agencies. Rule of law needs a general climate of order and discipline. It postulates an attitude of mind according to which the bulk of population is inclined to obey the law and act in accordance with it irrespective of the fact whether the law enforcement agencies are on the watch.[1a]

Dicey referring to this practical and concrete expression, attributes three meaning to the rule of law.

Dicey states:

> The rule of law means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government... a man may be punished for a breach of law, but he can be punished for nothing else.[2]

It ensures the supremacy of law and the supremacy of legal procedure.

No one should be adversely affected by the government except for an infringement of the law clearly established and also that the courts should be available for every one who might feel aggrieved by the action of the government or any one else. No one is to suffer in body or goods except for a definite breach of law established in the ordinary legal manner before the ordinary courts of law. The rule of law is, therefore, the supremacy of courts over the supremacy of the government.

In his second meaning of the rule of law, Dicey states:

> The rule of law means equality before the law or the equal subjection of all class to the ordinary law of the land administered by the ordinary law courts.[3]

It ensures the government of laws rather than government of men. No one is above the law. The still more practical effect is that officials and administrators like the private citizens are under the duty to obey the same law — law is no respector of persons, privileges, and positions. Dicey was very critical of the French

1a. H.R. Khanna, "Rule of Laws", (1977) 4 S.C.C. p.12
2. A.V. Dicey, *Introduction to the Study of the Law of* the *Constitution* (London: MacMillan, 1959) p. 202
3. Id

system of administrative courts to judge disputes between officials and citizens.[4] Though Dicey's criticism appears unsound if one studies the actual working of the French courts, but his emphasis on equality before the law served to stress the fundamental liberties of the citizens. It shows his concern about fundamental liberties and his stress on constitutionalism.

Dicey's third meaning of the rule of law is based on individual rights vis-a-vis constitutional provisions, and he states:

> The 'rule of law' ... may be used as a formula for expressing the fact that with us the law of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the cause but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have, with us, been by the action of the courts and parliament so extended as to determine the position of the crown and of its servants; thus the Constitution is the result of the ordinary law of the land.[5]

Dicey's emphasis in his third meaning of the rule of law that in England, the legal rights of the British subject such as freedom of speech, freedom of person, and freedom of property are secured not by guaranting rights in a formal constituional code but by the operation of the ordinary remedies of private law available against those who unlawfully interfere with his liberty of action, whether they be private citizens or officials. Free access to the courts of justice and a remedy for every wrong are the direct practical results that follows from this meaning of the rule of law. Law is a process and this meaning of the rule of law gives such a dynamic idea that law is never static but always seeks new horizons with the progress and changes in human society.

Dicey's formulation of the rule of law is no longer acceptable because of modern developments. Dicey's rule of law, in a purely form sense, equates the rule of law with the absence not only of arbitrary executive power but it also excludes the existence even of wide discretionary powers on the part of the government. Rule of law in a purely formal sense of Dicey can qualify even a most tyranical rule.[6] But in modern democratic societies the idea of rule of law carries with it the idea of social justice which enshrines the

4. Sir A. Denning, *Freedom Under the Law* (London: Stevens & Sons, 1949) pp. 77-78
5. Dicey, op. cit. p. 202
6. W. Friedman, *Law in a Changing Society* (Harmondsworth: Penguin Books Ltd, 1972) p. 500.

philosophy that liberty is necessarily secured through economic euality.[7] (such an idea one finds in Chapter II of the Constitution of Nigeria). Because of emphasis on the idea of social justice in modern societies, it has become difficult to give definite contents to the rule of law as Dicey did.

Friedman while commenting on Dicey's stereotyped meaning of the rule of law states:

> The difficulty, however, is that to give to the "rule of law" concept a universally acceptable ideological content is... difficult... To some, the rule of law means a minimum of administrative power, even if it entails the sacrifice of good government, whereas to others it means, on the contrary, assurance by the state to all of minimum standards of living and security.[8]

The Nigerian Constitution embodies and enshrines the basic principles of the rule of law to ensure progression and stable society. Chapter IV on the Fundamental Rights guarantees the crystalised principles of the rule of law. Equality before the law or equal protection of the laws, which is the basic doctrine of the rule of law is provided in the very conception of fundamental rights which are guaranteed to all persons ubject to certain restrictions in the interest of defence, public safety, public order, public morality, public health, and for the purpose of protecting the rights and freedom of other persons.[9] Discrimination against any citizen on the ground of a particular community, ethnic group, place of origin, sex, religion or political opinion is prohibited[10] to ensure a common rule of law for all citizens. Generality of law is the essence of justice. The basic freedom of speech and expression,[11] of peaceful assembly and association,[12] of free movement, residence and settlement[13], of acquisition, holding and disposal of property[14], are guaranteed by the Constitution. These provisions are an acknowledgement of the rule of law. Similarly other tenets of rule

7. T.H. Tawney, Equality (London: Unwin Books, 1976) pp. 164-168.
8. Friedman, op. cit. pp. 501-502
9. *Constitution of Nigeria,* Section 41
   (Hereinafter all reactions refer to the Constitution of Nigeria, 1979)
10. section 39
11. section 36.
12. section 37
13. section 38
14. section 40

of law such as protection from ex post facto laws, double jeopardy, and self-incrimination are guaranteed by the Constitution.[15] Life and personal liberty are guaranteed by providing that no person shall be deprived of the same except according to the procedure established by law.[16] Protection against arrest and detention within limits, a foundation of the rule of law, is provided in the Constitution.[17] Similarly Constitution guarantees the right to move the courts by appropriate proceedings for the enforcement of fundamental rights.[18]

Although these rules are formally embodies in constitutional provisions, it is submitted that they form part of the rule of law. Dicey's third meaning that the British Constitution is a result of the rule of law does not make any difference for when Dicey was writing, most of the British Constitution was unwritten and the rule of law in British Isles can certainly be said to be part of the unwritten Constitution of Great Britain. Whether constitution is the result of the rule of law or the rule of law is the result of the constitution, may be a relevant question on legal history and legal evolution, but its effect is the same so far as operation of the rule of law is concerned. Constitutionally guaranteed rule of law in the modern context is just as effective, as a rule of law under the ordinary law or the common law of the land, and perhaps more effective at least in the theoretical sense. The recognition of these principles of the rule of law in the present Nigerian Constitution can also be said to be the result of the legl history in Nigeria. For instance, the principle and procedure for Habeas Corpus, procedure for arrest and detention in accordance with the procedure established by law were part of the rule of law in Nigeria, long before the present Constitution.

While the basic concept of fundamental rights recognise and represent the integral part of the rule of law in Nigeria under the Constitution, its Fundamental Objectives and Directive Principles of State Policy do not form part of the rule of law because they are not enforceable by any court.[19] All types of taxation and other money matters are regulated by law made by the National Assembly or the House of Assembly of a state. Thus the old dictum of the times of Locke — No taxation without legislation is recognised under the Nigerian Constitution. This feature of the rule of law

15. section 32
16. section 32.
17. section 32
18. section 42
19. section 6(6) (C).

is very important in modern democratic societies. This law can always be tested in the court of law, subject, however, to certain constitutional or statutory exceptions.[20] Similarly freedom of trade and commerce through out Nigeria is a part of the rule of law under Schedule 2, item 61 of the Constitution. Any law made by the National Assembly in this respect is always open to be tested in the courts.

Growing complexities of modern states and their methods and techniques of government and administration are the cause of the present twilight of the rule of law — growing complexities of social relations, recognition of new rights, re-structuring of the economic life of the society all form the basis of legal development, have effected the notion of the rule of law. Every legal institution as part of the social function, thus, represents a part of the organised legal order. As Pound states:

> We do not base institutions upon deducation form assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.[21]

No country can escape this growing mechanism with such developments whose causes are to be found in changing social conditions, and thus changes, or one may call decline, in the concept of the rule of law as understood in the days of Dicey. Nigeria is no exception. While a citizen is subject to the ordinary laws, he may also be subject to the special laws affecting special situations and enforced by special tribunals. This is not to temper with the ordinary course of law but to deal with special situations to accommodate the changing social needs.[22] The armed forces are subject to the military laws[23] in addition to the ordinary laws of the land and offences against military laws are tried in court martials with their own procedure and rules. For discipline, speed, and efficiency this departure from the conservative meaning of the rule of law is necessary. Many special tribunals and courts outside the ordinary or constitutional laws of the country operate in Nigeria like Industrial Tribunals, and other special courts for the special crimes and offences which are being created by new laws and by new

20. section 77.
21. Pound, "Mechanical Jurisprudence", Col. L.R. 1908 p. 609.
22. section 161.
23. section 198 (4)

statutes.[24] In addition there are many domestic tribunals operating in professional bodies of law,[25] medicine, chartered accountants and others where they have their own special forms to administer their special rules, ethics, and conduct with disciplinary powers to control the rights of members and to admit and expel them. In the light of these facts, which are familiar in the legal systems of modern constitutional democracies, the whole legal system may be seen as within the changing conception of the rule of law.

The traditional notion of the rule of law has always condemned discretionary authority in government departments or public offices. That was the traditional thinking which Dicey approved. But this notion of the rule of law is not much in vogue, and the change is due to the change in the functions and obligations of the modern state. The functions of the state in traditional jurisprudence were preservation of law and order, protecltion from foreign invasion, and the erection of works of public importance from which an individual would never get profit.[26] But this picture has changed today. With the change in the political concept of the state, the state now being a welfare state, there is a change in the concept of the rule of law. The modern state in its welfare mission of service necessarily regulates national life in diverse ways and in spheres that were formerly regulated as outside the pale of the activities of the state. As Friedman states:

> That the state today exercise a degree of control over the individual for exceeding, in scope and intensity, that of any other period in history ... It has taken over many responsibilities formerly confined to the family, or it has added new duties which take the individual out of the family nexus ... The state has taken over vast responsibilities in the field of employment; statutory minimum standards of wages and of conditions of work, unemployment insurance and old-age pensions; workmen's compensation or industrial insurance; and the official protection of collective labour agreements.[27]

This has changed the concept of the rule of law; and it has been recognised, as Nkrumah states:

> that the rule of law is a dynamic concept for the expansion and fulfilment of ... not only ... civil and political rights of the individual in a free society, but also to establish social,

24. ***Military Courts (Special Powers) Amendment Act, 1979.***
25. ***Legal Practitioners (Amendment) (No. 2) Act, 1979.***
26. A. Smith, *Wealth of Nations*, vol. 2, book I, ch. 1.
27. Friedman, op, cit., pp. 495-496.

economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realised.[28]

The result is that discretionary authority in every sphere has become inevitable. For instance, the whole field of delegated legislation has its basis in the discretionary powers of the delegatee. Laws today are common prodiving for state acquisition of private property.[29] In many spheres of statutory legislation a vast body of administrative laws is growing up where administrative tribunals and administrative officers have to perform judicial or quasi-judicial duties, which in by-gone days used to be performed by the orinary courts of the land under the ordinary law of the land. Many judicial issues affecting private rights are today decided not by courts of law but by administrative tribunals, government departments or even by ministries. The increasing complexity of modern states, the growing emphasis on the social rather than the individual goods, and the resulting necessity for government intervention in almost all fields of human endeavour have inevitably resulted in far wider discretionary powers being given to executive and administrative officials. The sweeping accountability of officials to the courts of law when the legality of their acts was in question has had its scope somewhat diminished by the grant of wider and more general legal powers, and this has tended to a limited degree to remove the acts of the officials from judicial scrutiny. Despite this modification the rule of law remains a cardinal principle of the Nigerian Constitution and a sturdy bulwark against abuse of power.

From this follows many immunities from ordinary laws and procedure, and public bodies and officers,[30] enjoy many privileges given by statues which immunities and privileges are not available for redress of wrongs committed by private citizens. As certain protections give by the Constitution to the President and the governors.[31] Corry and Hodgetts while commenting on privileges and immunities and thus narrowing down of the rule of law, states:

28. K. Nkrumah. "Law in Africa" J.A.L. 1962, pp. 107—108 O. Ohunbamu, "The Rule of Law in Nigeria" in *Law and Social Change in Nigeria* Edited by Prof. T.O. Elias (Lagos: University of Lagos Press, 1972). p. 225.
V.R. Krishna Iyer, *Social Mission of Law* (New Delhi: Orient Longman, 1976) p.38.
29. section 40
30. *Diplomatic Immunities and Privileges (Amendment) Act, 1979.*
31. *Constitution of Nigeria,* section 267

> For a long time now, parliament has been granting to officials special powers to take action not justified under the ordinary law, and it has been limiting the right of the citizen to have the actions of officials scrutinized by the judicial power. Yet there has been no general removal of officials from judicial surveillance, and it remains true in most cases that anyone who asserts that he has been wronged by the action of a government official can bring that official before the courts of law to answer for his conduct. The official may justfiy himself by pointing to an act of parliament which gives him a special privilege to do what he has done. But he cannot turn aside the complaint merely by asserting an exalted official status and an inscrutable executive expediency in what he has done. Thus state can throw away the conscript's life but it cannot conscript him in the first instance on the pleade of high policy or public expediency except as supported by law sanctioned by parliament. The rule of law, although qualified today by the grant of special powers to officials, remains as indispensable instrument for ensuring that government remains servant.[32]

An independent judiciary is an indispensable requisite of a free society under the rule of law. Justice Raina states:

> Rule of law and independent judiciary go hand in hand. You cannot have rule of law without an independent judiciary. If the judiciary is not independent or in other words is subservient to the executive authorities in power, it is bound to have greater regard for the wishes of the authorities than for law and justice and as such would not be able to do justice between man and the state. It is for this reason that in almost all countries which have adopted the democratic form of government ... a good deal of importance is attached to the independence of the judiciary.[33]

The rule of law lays down limitations on tne authority of the government but somewhere and somehow within that government itself some institutions must be given the authority to articulate and to enforce those limitations, and here the courts are the mainstay of the rule of law. What is essential in issue is the making of the executive subordinate to the judiciary in all points concerning judicial decisions where the judgment of the executive is questioned by a private citizen. In that sense, the doctrine of separation of powers enshrines a paramount truth.[34] Unless this type of independence of judiciary is maintained, the executive will always have an unlimited

32. J.A. Corry & J.E. Hodgetts, ***Democratic Government & Politics*** (Toronto, 1959) p. 96.
B.O. Nwabueze, ***Constitutionalism*** (London: C. Hurst and Company, 1973), p. 35
33. S.M.N. Raina, ***Law Judges and Justice*** (Indore: Vedpal Law House, 1979) p. 131.
34. section 4, section 5, section 6.

advantage over other organs of government and against the private citizens. Again to ensure the independence of the judiciary section 4(8) states that no law shall be enacted that ousts or purports to ousts the jurisdiction of a court of law or of a judicial tribunal established by law. Sidgwick states:

> The importance of judiciary in political construction is rather profound than prominent.... in determining a nation's rank in political civilisation, no test is more decisive than the degree in which justice, as defined by the law, is actually realised in its judicial administration, both as between one private citizen and another, and as between private citizens and members of the government.[35]

It is, thus, clear that an independent judiciary is fundamental to the establishment of the rule of law.

When the existence of a state is at stake, no constitution will ever enact that the executive cannot interfer with the normal course of the rule of law. It is urgent in such circumstances that the power of the courts are effected and their functions and procedure are limited so as to give "necessary" meaning to the rule of law. Under section 41 such a deviation from the rule of law is effected so as to allow a derogation from fundamental rights in case of emergency declared under section 265 of the Constitution of Nigeria. Though one can say that such a derogation itself is a rule of law since it is provided in the Constitution and is not an arbitrary power enjoyed by the executive. But it is beyond the perview of the courts to review such an executive policy. To a conservative writer such a limitation on the power of the courts is a derogation from the traditional meaning of the rule of law.

It is said that eternal vigilence is the price of freedom. This vigilence is a part of the rule of law.[36] The courts are charged with natural vigilence in a constitutional democracy. They expect that subjects and citizens in a democracy would be vigilant not only to protect their private rights but also to protect public rights and liberties. Laws and courts are the custodians to express such vigilence. Rule of law is infringed by secret vigilence which have not the publicity and the opennes of public laws and the courts of the land.Secracy defeats democracy and the public administration of public and private laws. Its next step is spying and secret espionage followed by secret police and underground informers.

No constitution ever enacts a static philosophy; it is made in terms of what life is meant to a nation. For no system can stand on

35. H. Sidgwick, ***Elements of Politics*** (London: MacMillan, 1897) p.481
36. Lord Denning, op. cit. pp. 11-12

its own feet unless it is based on the ever growing and changing mileau of society. It is dynamic and progressive, responsive and its great virtue is flexibility. So is the concept of the rule of law which is the soul of the constitutional law. It is not a static concept; nor even, in modern times, it is a limited concept. In modern constitutional democracy the rule of law has fourfold implications: freedom of mind and conscience; personal freedom; justice between man and man and between man and the state; and the power of the executive and the legislature.[37]

Personal freedom is a dominant primary concept of the rule of law. It includes freedom from arbitrary arrest and unreasonable arrest. It includes freedom from oppression and torutre. Section 31, section 32, section 33 of the Constitution of Nigeria secures a person in his life, dignity, and liberty — three strands of social living. Section 33 protects a person against Ex Post Facto laws, double jeopardy, self-incrimination, arrest without warrant information on the grounds for such arrest, grants the right to consult and be defended by a lawyer of ones choice and require an arrested person's production before a court of law within a reasonable time of his arrest. Personal freedom is safeguarded by the most famous writ of Habeas Corpus.

Freedom of mind and conscience is guaranteed by such freedoms as freedom of speech[38], freedom of religion,[39] freedom of organisation,[40] freedom of private and family life,[41] freedom of movement,[42] freedom of discrimination,[43] and freedom to hold and dispose of property.[44] But many of these freedoms are subject to restrictions[45] on the basis of public policy with the ever changing needs of society. So long as these restrictions are properly exercised, they are themselves the safeguards of freedoms. The freedom of the individual has to be balanced with his duty, for every one owes a duty to the society of which he forms a part. The individual cannot demand from society unless he also contributes to society. These freedoms are, nevertheless, fundamental freedoms to the fullest extent. These are regarded fundamental vis-a-vis the individual and the state since the growth and development of both is inclusive.

37. See generally, Lord Denning, opp. cit.
38. section 136
39. section 35
40. section 37
41. section 34
42. section 38
43. section 39
44. section 40
45. section 41

The rule of law, however, in the great sphere of justice between man and man, and between man and the state has acquired new significance and new dimensions in modern jurisprudence. The rule of law in favour of freedom of contract and freedom of property and their sanctity have now been saddled with increasing social responsibilities — a product of growing social consciousness.[46] As Ihering states:

> All rights of private law, even though primarily having the individual as their purpose, are bound by regard for society. There is not a single right in which the subject can say, this I have exclusively for myself, I am lord and master over it, the consequences of the concept of right demand that society shall not limit me.[47]

The judges of the last century failed to see through social changes and had not realised the incorporation of social developments into legal institutions.[48] They were over-awed by the sanctity of private property and unqualified private right of property. In fact, that is the rule of law to which they were born, to which they were trained, and which they were supposed to administer.[49] Rights of the individual were the dominant part of the rule of law. As the individualistic view of institutions fades before the growing recognition of the corporate nature of society, implying a loss of individuality, also implies the depreciation of the santity of private property. With these development, the idea of private right were mixed with social responsibilities. Friedmann expressing such a change from individual rights to social responsibilities states:

> Political and legal ideology partly prepared and followed the general increase of public responsibility in social and economic affairs, by putting ever greater emphasis on social interdependence, responsibility, discipline, and duty, rather than on individual rights and freedom of economic competition ... From the end of the nineteenth century onwards legal theory, as well as the trend of legislative and judicial development... emphasized the limits of property rights, and stressed more and more the duties of the individual towards his follow-citizens and the community; the same time jurists boldly denounced the

46. See generally, Friedman, op. cit., ch. 3.
47. R.V. Ihering, ***Law as a Means to an End,*** trans. by I. Husik (New Jersy: Rothman Reprinters Inc., 1968) p. 396.
48. F. Frankfurter, "Property and Society", in ***Science and Social Change,*** compiled by J.E. Thornton (Washington: Brookings Institute, 1939) p. 446.
49. Id., p. 448.

notion of individual rights altogether and knew nothing but "the right to do one's duty."[50]

The idea of duty in relation to right of property was conceptualised in terms of the social purpose of property. The duties, rights, obligations, and responsibilities of property and contract gained recognition in the sphere of the rule of law. All this is reflected in the Laws of Nigeria.[51] Freedom of property right is subject to public policy as prescribed by law. The property is liable to compulsory acquisition, though subject to just compensation. Sanctity of private property have yielded place to the rights of collective bargaining especially under labour laws.[52]

Many news tribunals[53] and growing administrative law are competing with the ordinary courts of the land and the ordinary law in dispensing justice in the state. To that extent the ordinary rule of law has been infringed but the rule of law that includes condition that wherever any form of conduct is emenable to legal control, independent of executive interference, it is not a violation of the rule of law. The rule of law is. thus, not violated by a system which establishes tribunals to administer substantial and crucial justice in significant fields of rights between man and the state that these tribunals should be independent of the executive. The indenpendence of these tribunals is assured if the executive board establishing these tribunals grants a right of appeal on a point of law to the superior courts of the land.[54] For in that extent the law which the tribunals will apply will be the law laid down by the superior courts and not by the executive.[55]

The rule of law determines how the power is to be exercised, that is, it serves as an antidote to power and its abuse since absolute power corrupts and absolute power corrupts absolutely. The state officials exercising executive power do not realise the limits of their power and think of the laws unto themselves; though, of course, not every unauthorised act may have to refer to the office-holder's belief, officials can also make mistakes about what they are to do. Lord Denning while commenting on the executive power writes:

> Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to

50. W. Friedmann, **World Revolution and the Future of the West** (London: Watts & Co., 1942) pp. 77-78.

51. ***The Land Use Decree 1976***
Capital Transfer Tax Act, 1979.
Price Control Act, 1977.

52. ***Labour Act, 1974.***

53. ***Trade Dispute Act, 1976,*** section 15.

54. MacIver, op. cit. p. 265.

55. Lord Denning, op. cit., pp. 92-94

assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant.[56]

What, essentially, is here in issue is that the paramount role or the judiciary and the rule of law is that the powers of the executive are used properly, honestly, reasonably and in an articulate manner for the purposes authorised by the National Assmbly and the House of Assemblies and not for any ulterior purposes. Lord Denning on the problems of the executive powers states:

> The problem before us today is not so clear-cut. It is more subtle, as is to be expected in more complex society: but it is in principle the same and it must be solved by the courts and not by a civil war. For to-day the executive have great powers over the lives and property of every one of us. No one will dispute that the power exist, for parliament has granted them, but the question is what remedy the courts provide if they are misused or abused.[57]

This is the greatest challenge to the rule of law in modern times since the delegation of legislative powers to the executive is indispensable.[58] In modern times it is not only an increase in executive power but the extension of this power that brings a citizen in direct conflict with the state —it produces a direct conflict between the rights of an individual and the state. For example, power given to the police officer for arrest without warranr,[59] or powers given to the enforcement officer for realising Capital Transfer Tax and thus to distrain the property of the given person without authority from the magistrate.[60] Modern statutes grant these powers and enforcement officers 'jack-in-office'' becomes a master of the householder and shopkeeper to inspect and order for the production of his good. Sometimes these statutes saddle these powers on enforcement officers that a mere department incharge's authority is enough to carry out search and seizure (as under section 24 of the Capital Transfer Tax Act 1979). In such circumstances these statutes surpass the powers even those of police officers (one can compare section 9 of the Public Order Act 1979 with section 24 of the Capital Transfer Tax Act 1979). These enormous powers are not always exercised reasonably and individuals often assert that powers have been exercised in some abusive, im-

56. Id., p. 100.
57. Id., p. 103
58. S.A. de Smith, ***Constitutional and Administrative Law*** (Harmondsworth: Penguin Books, 1977) pp. 320-324.
59. ***Public Order Act, 1979,*** section 9.
60. ***Capital Transfer Tax Act, 1977,*** section 24.

proper, or negligent manner to his detriment. In such a case there is no tyranny like this. To remedy this defect in all modern states which subscribe to the principle of rule of law have found it necessary to develop rules of administrative law which enable either the ordinary courts of law or some special tribunals or officials (like Ombudsman) to exercise supervision over the administrative or quasi-judicial functions of the executive in all it branches.

Administrative justice is not necessarily a form of justice. In modern complex governmental system administrative justice has been indispensable. But what is here in question is not the use of the powers but the misuse of them. No one for a moment can dispute the policy of delegating power to administrative agencies which is a matter for the legislature to decide. What the rule of law insists is that these powers and their mechanism must be exercised genuinely for the purposes conferred by the legislature. If these powers are exercised in an abusive and insidious way, beyond the purpose and limits of the statute, the courts and the process of law should be able to effectively interfere. Similarly Pound finds fault with the legislative justice which is not a form of justice and is open to abuse. According to Pound[61] legislative justice has the following infirmities:

> Legislative justice is unequal, uncertain and capricious. Legislative justice shows the influence of personal solicitation, lobbying, and even corruption far beyond anything. Legislative justice has always proved highly susceptible to the influence of sentiments and bias.

Legislative justice is purely partisan or political. Finding the defects in both administrative and legislative justice, Pound[62] mentions four threats to the rule of law:

> The tendency to decide without a hearing or without hearing the necessary parties or by mere appearance of a hearing; the result having been pre-determined.
>
> The tendency to make determination on the basis of consultation with witnesses in private or of reports not divulged and which the affected parties had no opportunity to refute or explain.
>
> To make such determination without a basis of dependable evidence of rational probative force.
>
> The .widespread tendency to set up and give effect to policies beyond or even at variance with the statute or the general law governing the action of the administrative agencies exercising these powers.

61. R. Pound, *Jurisprudence* (Cambridge (Mass) West Publishing Co., 1959) Vol. II pp. 397—402.
62. R. Pound, ***Justice According to Law*** (New Haven: Yale University Press, 1959) p. 65.

Pound,[63] however, offers a remedy by giving preference to judicial justice over executive justice. But here one can argue with Pound's preference by making executive justice open to judicial review.

The main problem about the rule of law stems from two widely held views. One is by philosopher of the seventeenth and eighteenth century that morality is anathema to law; law is a springboard for any moral act.[64] To obey law is to obey morality and an unjust law is a contradiction in terms. This view, however, makes legal systems static since the changes in social, political, and economic phenomena of any society creates changes in moral values of society which in terms be used by the community to judge the existing legal systems. But if legal system is the sole generator of moral values, social millieu will become useless in which system is to operate. Second view which has its basis in the ninetieth and twentieth century philosophy that law is an instrument of social regulations and can be effective only if its contents are drawn from a generally held public opinion regarding morals, customs, education, political, and social views etc. In fact social regulations here include a wide variety of social spectrum. The rule of law in the modern welfare states draws its content from the second view since it is concerned with the fulfilment of social, educational, and cultural aspirations of the people. For such a rule to be ensured and adopted by the courts and the rule of law, the makers of the Nigerin Constitution have adopted and provided guide lines in the Constitution.[65]

It is for the courts to conform to these guidelines to establish a rule of law that is not less wanting for the future of Nigerian society.

Again any hope of developing the idea of the rule of law in a welfare state and thus preserving the supremacy of both law and order and at the same time meeting the aspiration of its citizens, depend on the cooperation of citizens of a given state. As Lord Widgery stated:

> It must be obvious to all that the rule of law will not govern us unless we have a fierce and burning determination that it shall do so. It is not enough that those of us here today

63. Id.
64. Hobbes, *Leviathan* (London: J.M. Dent & sons, 1914) ch. 15.
65. Constitution of Nigeria 1979, ch. II

> should realise the importance of its restoration, or that this should be pursued by any limited class of people. We must somehow make it fashionable to be law-abiding instead of being fashionable to be smart.[66]

To attain the cooperation of its citizens, it is evident that the state must dedicate itself to providing and preserving the legitimate desires of its citizens through wise and appropriate laws and their proper enforcement. If it does not, the rule of law will remain an empty concept and the whole business of rule of law will fall into disrepute since all fundamental principles derive their authority from the people and they are designed to be permanent and stand on their footing only if they serve social purpose. Thus the decline in active civic participation tantamounts to decline of the rule of law.

66. Lord Widgery, "The Rule of Law" in *American Law: The Third Century* edited by B. Schwartz (New Jersy: Fred B. Rothman & Co., 1976) p. 439.

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