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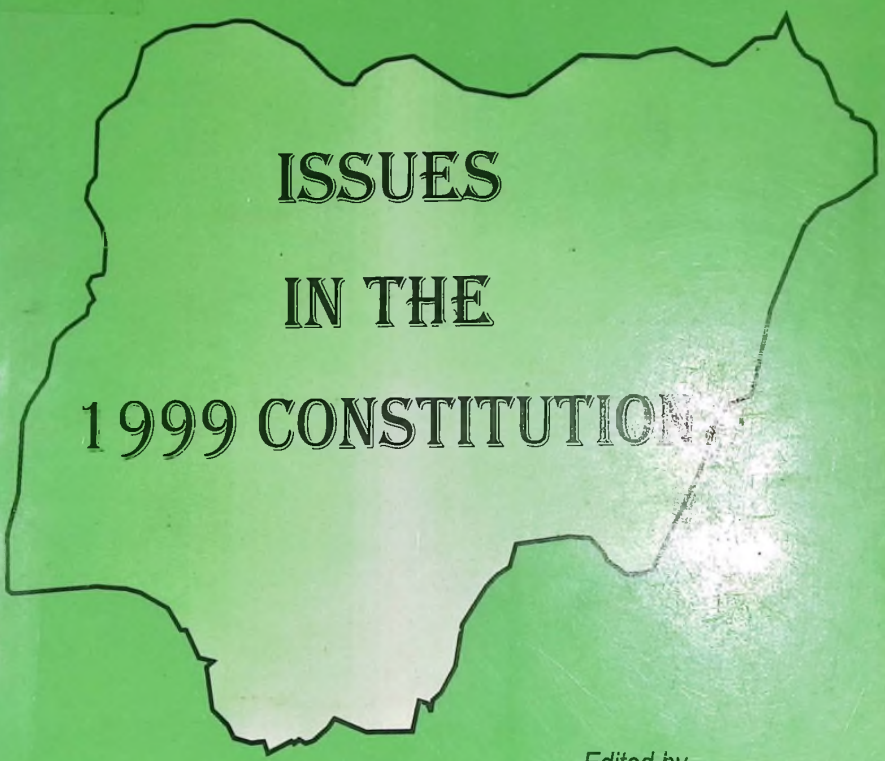

ISSUES IN THE 1999 CONSTITUTION

Edited by
I. A. Ayua
D. A. Guobadia
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NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES

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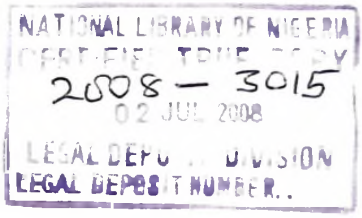

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NIGERIA Issues in the 1999 Constitution

edited by

Ignatius A. Ayua Ph.D (Birmingham),
(Professor of Law and Director-General, Nigerian Institute of Advanced Legal Studies)

and

D.A. Guobadia LL.M (London)
(Professor of Law and Director of Studies, Nigerian Institute of Advanced Legal Studies)

A.O. Adekunle LL.M. (Lagos)
(Associate Research Professor, Nigerian Institute of Advanced Legal Studies)

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Preface

Within its first year of operation, the Constitution of the Federal Republic of Nigeria, 1999, had become a very controversial document with trenchant calls for its review. A lot of criticisms had in fact trailed the Constitution from its promulgation. Such criticisms ranged from the method of creation and subsequent adoption to reservations about some of its contents.

At the heart of the continuing controversy surrounding the Constitution are such issues as control over natural resources, its legitimacy and, following from that, the propriety of its continued application. Some other view points have it that some of its contents are not appropriate for the environment within which it operates. Yet, another controversy concerns the location of the power to amend the Constitution and the consequences, if any, that follow therefrom. There are others who believe that only minor amendments to the Constitution are required seeing that it is essentially a rehash of the 1979 Constitution, a document which some of the most ardent critics have recognised as having been created by what did indeed approximate effectively to popular participation. The controversy over the 1999 Constitution has continued and in fact moves have since been made by both the legislature and the executive arms of government, political parties and civil society groups to set in motion processes for its review.

Beyond the hue and cry of discordant voices on these issues, the Nigerian Institute of Advanced Legal Studies (NIALS) saw the need, early in the life of this Constitution, to put the issues in proper perspective and provide a forum to properly articulate the different issues arising under the Constitution.

In pursuance of this, five months into the life of the present civilian administration and the operation of the Constitution, NIALS, in October 1999, organised a highly successful National Conference on "Issues in the 1999 Constitution." Participants at the Conference were drawn from the different arms and levels of government, the academia, commentators on public affairs as well as politicians. The broad focus

of the different presenters was how, ultimately, to foster good governance in the polity. The conference papers form the contents of this book, *Nigeria: Issues in the 1999 Constitution.*

At a time when efforts are being made to take another look at the Constitution, this book is NIALS' contribution to the process of focusing attention on aspects of the Constitution that may require changing as well as the extent of such change and gently goading the populace to accept those portions that do not require change. It is, therefore, our own modest contribution to the search for a sincere and viable Constitution and constitutional order for Nigeria.

Professor I.A. Ayua
(Director-General,
Nigerian Institute of Advanced Legal Studies)
November, 2000

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List of Contributors

1. ***Dr. J.V. Achimu***
   Private Legal Practitioner,
   Lagos.

2. ***Justice Niki Tobi (CON),***
   Court of Appeal,
   Enugu.

3. ***Professor D.A. Guobadia,***
   Director of Studies,
   Nigerian Institute of Advanced Legal Studies,
   Lagos.

4. ***Professor I.E. Sagay (SAN)***
   Professor of Law,
   Private Legal Practitioner.

5. ***Professor Sam Oyovbaire,***
   Consultant in Public Policy
   Tas & Associates Nigeria Limited
   Lagos

6. ***Professor Ignatius A. Ayua,***
   Director-General,
   Nigerian Institute of Advanced Legal Studies,
   Lagos.

7. ***Mr. Oyelowo Oyewo,***
   Associate Professor,
   Faculty of Law,
   University of Lagos.

8. ***Dr. Onye Gye-Wado,***
   Office of the Deputy Governor,
   Nassarawa State, Lafia.

9. ***Dr. Etanibi E.O. Alemika,***
   Department of Sociology,
   Faculty of Social Sciences,
   University of Jos, Jos.

10. ***Professor Jadesola O. Akande,***
    Executive Director,
    Women, Law and Development Centre, Nigeria
    Lagos.

11. ***Mr. Bolaji Owasanoye,***
    Associate Research Professor,
    Nigerian Institute of Advanced Legal Studies,
    Lagos.

12. ***Professor Aaron T. Gana,***
    Director,
    African Centre of Democratic Governance,
    Jos.

13. ***Professor Kyari Tijani,***
    Director,
    Centre for Tran-Saharan Studies,
    University of Maiduguri.

14. ***Professor Alaba Ogunsanwo,***
    Department of Political Science,
    University of Lagos,
    Lagos.

15. ***Dr. Tunji Olagunji,***
    Nigerian High Commissioner to the
    Republic of South Africa.

16. ***Professor Auwalu H. Yadudu,***
    Faculty of Law,
    Bayero University, Kano.

17. ***Professor D.I.O. Ewelukwa,***
Dean of Law,
University of Nigeria,
Enugu Campus.

18. ***Dr. Maxwell M. Gidado,***
Senior Special Assistant to the President on
Legal and Constitutional Matters,
The Presidency, Abuja.

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THE LEGITIMACY OF CONSTITUTIONAL CHANGE: THE ENACTMENT OF THE 1999 CONSTITUTION

by

J.V. Achimu
(Private Legal Practitioner)

Introduction

The Constitution of the Federal Republic of Nigeria was enacted into law by the Constitution of the Federal Republic of Nigeria (Promulgation) Decree.[1] This Constitution clearly departs from the provisions which one finds in the Independence Constitution of 1960.[2] It represents a radical departure from the attempts at constitution-making which we find in the Constitution of 1963.[3] It cannot be described as being on all fours with the Constitution of 1979,[4] even though there are many similarities between the two Constitutions. The legal order which this Constitution establishes represents a departure from all previous attempts on the subject. Indeed, the 1999 Constitution is an example of constitutional change. This chapter examines the extent to which the quality of legitimacy can be claimed for this kind of constitutional change.

Webster's *Dictionary*[5] notes that in order to be legitimate, the subject-matter for analysis ought to have been produced in "accord with the provision of law" or in "accord with the existing rules and

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1. Decree No. 24 of 1999.
2. Nigeria Independence Act, 1960 and the Nigeria (Constitution) Order in Council, 1960.
3. No. 20 of 1963. It is noteworthy that this Constitution was an amended version of the 1960 Constitution and was brought into force after following the manner and form of amendment prescribed in section 5(3) of the pre-existing Constitution
4. A Decree which was eventually adopted by the Law Revision Committee and thereby transformed by the Constitution of the Federal Republic of Nigeria (Enactment Act), into the Constitution of the Federal Republic of Nigeria, 1979, and became featured as Cap 62, Laws of the Federation of Nigeria, 1990.
5. 1995 edition, Lexicon Publications Inc.

procedure." The concept of legitimacy is commonly applied in everyday usage to distinguish between children who are born in wedlock and those who are born out of wedlock. This is the narrow and strict application of the concept. It should not take too much reflection to appreciate that this strict and narrow test which applies in the area of matrimonial and family relations will not suffice for the consideration of constitutional changes which are very much in the domain of public law.

A constitution seeks to regulate the complex and divergent interests which exist within a given State. In the first place, it defines the confines of the State and spells out the totality of powers and authority which may be exercised therein. It identifies the organs of the State in which the powers and authority of the State may be vested. It places limits on the powers and authority which it vests and usually provides a mechanism for ensuring that those limits are observed.[6] In the particular example under consideration, the constitution also seeks the restoration of normalcy, rescue from a period of constitutional brigandage during which only rascals and sycophants were permitted to express their political views with impunity. It seeks salvage from a vicious and long period of permanent subversion of an established legal order which had been based on popularly accepted norms of behaviour. Given these considerations, it should be apparent that the question of its legitimacy cannot be fully answered by simply passing it through the narrow test of whether there has been compliance with some existing or pre-determined criterion, to the exclusion of other criteria which may be just as pertinent and germane to the inquiry. Expediency, therefore, demands a multifaceted approach to the subject of this inquiry.

Pre-existing Order

Most modern writers on political science and the nature of the State are in agreement that sovereignty today belongs to the people. The world has come a very long way from the days of the divine right of Kings.[7]

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6. An examination of the genesis and nature of these features in any constitution is obviously relevant to the determination of the question of legitimacy.
7. While the European of early modern times was contesting the assertion that unelected monarchs have a divine right to govern their peoples, the modern African was left to contend with what appeared to be the divine rights of military

Democratic representation has become the accepted mode of giving expression to that popular conception of sovereignty. It is an uncontested fact that prior to the Constitution of 1999, the last time the people of this country had an opportunity to determine what the national legal order should be was in that period just before the enactment of the Constitution of the Federal Republic of Nigeria in 1979. It will be recalled that that particular exercise was preceded by the establishment of a Constituent Assembly which considered the draft of the Constitution already tabled by the Constitution Drafting Committee. It was this Assembly, representing the entire people of this country which, in due course, formally recommended the adoption and enactment of that draft as modified by their own deliberations. It is also true that the authorities at the time, subjected the recommended draft to some degree of tinkering before enacting the final version of the Constitution. For all practical purposes, however, there was a large extent to which the 1979 Constitution truly embodied the sovereign desire of the people of Nigeria as expressed through their representatives in the Constituent Assembly. The 1979 Constitution might not have been passed in accordance with any existing rules or procedures. It certainly was not passed according to any guidelines for constitutional change written into the 1963 Republican Constitution of Nigeria. It was, nevertheless, a legitimate exercise in constitution-making because it contained the sovereign will of the nation as expressed through their representatives. This was the former legitimate constitutional order which was displaced and replaced by the Constitution of 1999. Can it be said that the 1999 Constitution draws its legitimacy from the Constitution of 1979? Is the 1999 Constitution legitimate because of any direct links or because of compliance with the manner and form of change, prescribed in the 1979 Constitution?

The question cannot be fully answered except by reference to constitutional and legal developments in the intervening period. The most notable of this was represented by the Constitution (Suspension and Modification) Decree of 1984[8] and the Constitution (Suspension

rulers, (who are really, mere employees of the State) to misrule and to plunder their communities. That must remain the painful irony of our age.

8. Decree No. 1 of 1984.

and Modification) Decree of 1993[9] as modified by the Constitution (Suspension and Modification) Decree of 1994.[10] These pieces of legislation had quite a dramatic effect on the legal order set up under the Constitution of 1979. They had the combined effect of radically changing the framework of government set up under the old Constitution. A number of examples drawn from the last two of these decrees will suffice. The important matter of note is that these changes were effected in total disregard of the mechanism for altering the Constitution provided in section 9 of the Constitution of 1979.

Notable Departures

Any casual comparative study of the content of the peoples' Constitution of 1979 and the imposed legal order of 1993 (brought about by the military regime of late General Sani Abacha) soon brings out the more salient of the changes effected. The definition of the state was radically altered. In the place of a federation of twenty-one states provided for under the 1979 Constitution, Decree No. 107 of 1993 made provision for thirty[11] states as well as a mayoralty for the Federal Capital Territory, Abuja. The 1979 Constitution recognised that the powers of the State could be clearly divided into legislative, executive, and judicial powers and created three distinct organs through which the State was expected to exercise them. That Constitution conferred the legislative powers of the State on the National Assembly and the various Assemblies which were set up for the States.[12] Under Decree 107 of 1993, there is no clear recognition of any distinction between the legislative and the executive powers of the State. There was a deliberate merger of these two in the Federal Military Government. Under the old Constitution of 1979, the exercise of these powers was subject to the Constitution. Under Decree 107, the legislative powers of the Federal Military Government were unlimited.[13]

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9. Decree No. 1 of 1993.
10. Decree No. 13 of 1994 under which was set up the Provision Ruling Council, the National Council of State and the Federal Executive Council.
11. Compare the First Schedule of Cap. 62 LFN 1990 with the First Schedule of Decree No. 107 of 1993.
12. Section 4 Cap. 62 LFN 1990.
13. Sections 2(1) and 6. Strange as this may sound, the Administrator of a State never had any direct executive powers. What he had in a way of executive powers were

The old distinction between areas of exclusive Federal Legislative competence and areas of legislation specially reserved for the states became completely blurred. The concept of a Federal State, albeit, with as many as thirty states became meaningless, in view of the virtual absorption of the law-making and executive powers of the states by the Centre. Quite clearly, the law-making powers of the Federal Government of Nigeria could quite easily have been exercised by the one man who was Head of State and Commander-in-Chief of the Armed Forces.[14] Again, the executive powers of the Nigerian State were vested in the Head of State, Commander-in-Chief of the Armed Forces, with the admonition that these powers shall be exercised in consultation with the Provisional Ruling Council.[15] That which the Decree appears to have conceded, it took away very quickly in the next section which provided that:[16]

> "The question whether there has been any consultation with the Provisional Ruling Council with respect to any exercise of the executive authority of the Federal Republic of Nigeria shall not be enquired into in any court of law."

Here again, the executive authority of the State could, in theory, have been exercised by the one man without reference to any other person or body of persons. This did not compare too well with the provisions on the matter in the repealed 1979 Constitution. In that constitution, the executive powers of the State were vested, "subject to the provision of the Constitution."

Curiously, an examination of the judicial powers of the State does not reveal their specific recognition in the main body of Decree 107 of 1993. A paramount feature of this decree was the limitation which it

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deemed to be delegated to him by the Head of State and Commander-in-Chief of the Armed Forces.

14. Sections 3(1) and 4(1) of Decree No. 107 of 1993 leave one with the impression that all that was required was the production of a Decree which bears the signature of the Head of State and Commander-in-Chief of the Armed Forces, and no more.
15. Section 6(1) of No. 107 of 1993.
16. Section 6(2) of No. 107 of 1993.

placed on the power of the courts to review any creation of the law-making organs (or rather the one and ultimate law-making organ) which it recognised. Given the general trend in that Constitution (Suspension and Modification) Decree, it remains a matter for surprise that it did not contain a section in the following terms:

> "The judicial powers of the federation shall vest in the Head of State, Commander-in-Chief of the Armed Forces, and (Senior Advocate of Nigeria!)"[17]

In contrast, the Constitution of 1979 provided quite categorically that the judicial powers of the State were vested in the Courts which were set up under the Constitution. While there was no attempt to abolish these Courts in Decree No. 107,[18] their powers were very seriously truncated. The power to review legislation was reduced to the most minimal. The courts became helpless in the face of blatant departure from the protection which was conferred upon the citizen under the Constitution of 1979. Faced with an omnipotent legislature which also carried the executive powers of the State, the courts became mere appendages to an oppressive State machinery against which they had no remedies.[19]

This system which departed so fundamentally from the type of government envisaged under the 1979 Constitution was the immediate predecessor of the machinery of government out of which the Constitution of 1999 was extracted. Can legitimacy be traced to this legal order which so blatantly subverted and departed from the constitutional order set up under the 1979 arrangement? Where the

17. In this connection one must express great admiration for some of our Military Officers who took up the study of law after formal discharge from the Army. That kind of qualification would have helped to fill the lacuna in a Military Head of State who already is the embodiment of the legislative and executive powers of the State.

18. See section 4(5) of No. 107 of 1993.

19. Given the aversion and contempt which this Decree showed for the exercise of the judicial powers of the State, it remains a matter for surprise that the same Decree contained an amendment which actually established the High Court, the Sharia Court of Appeal and the Customary Court of Appeal of the Federal Capital Territory. See the amendment of section 233 of the 1979 Constitution by the addition of section 233A to 233K.

sovereign will of the people had become as undermined as it was under the intervening constitutional order which immediately preceded the regime which passed the 1999 Constitution into law, can that Constitution be described as having been passed in accord with the law? The truth surely is that those who seek to establish the legitimacy of the 1999 Constitution by reference to the constitutional order which preceded it would labour in vain, under the classical theory of positivism.[20] The formal umbilical cord which might have linked the Constitution to the 1979 legal order was severed by the changes which took place in the intervening period. The intervening period rendered the order established in 1979 completely unrecognisable. The sovereign will of the people was reduced to no more than mere words while the unrestrained and uncontrolled will of the one man held sway. To say that the sovereign will of the people survived the constitutional depravity of the intervening period would be tantamount to doing injustice to the people who expressed that will in 1979.

Theory of Revolution

Fortunately, the matter does not end there. There are other considerations upon which the legitimacy of the 1999 Constitution may be founded. It should first of all be recalled that there were a number of half-hearted instances in which the judiciary attempted to question the primacy which the Federal Military Government had assumed. In a number of cases, judicial pronouncements posed some threats to the pretensions of the aforementioned intervening constitutional order. These efforts were indirect and came from the level of the judiciary where it was easy to quash and suppress the incipient revolt.[21] The ultimate machinery of suppression took the form of the draconian Supremacy and Enforcement of Power Decree.[22] The wording of the 1994 version of this masterpiece of constitutional betrayal by men who held their very office by virtue of an existing constitution, is

20. Represented by the works of the English Jurist John Austin in the middle of the 19th Century.
21. A number of High Court decisions which questioned the validity of certain acts done under the auspices of some edicts was obviously perceived as posing a challenge to the legitimacy of the entire military regime.
22. Decree No. 12 of 1994 which was back-dated to the 18th of November 1993 and used to validate the provisions of Decree No. 107 of 1993.

remarkable. A substantial portion thereof is reproduced below because it offers some food for thought:

> "WHEREAS the military revolution which took place on the 17th November, 1993 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree No. 107 of *1993*.
>
> AND WHEREAS the military revolution aforesaid involved an abrupt political change which was *not within the contemplation of the Constitution of the Federal Republic of Nigeria 1979*.
>
> AND WHEREAS BY THE Constitution (Suspension and Modification) Decree No. 107 aforesaid there was established a new government known as the Federal Military Government "*with absolute powers to make laws for the peace order and good government of Nigeria or any part thereof...*
>
> AND WHEREAS by section 5 of the said Constitution (Suspension and Modification) Decree, no question as to the validity of any Decree or any Edict... shall be entertained by any Court of Law in Nigeria..."

It is interesting that the draftsman of this Decree was so enthralled by its content that he forgot to include the operative clause -

> "Now therefore the Federal Military Government hereby decrees as follows."

He had to produce Decree 16 of 1994 in which he effected an amendment to Decree 12 to include this operative clause! The important matter to note about Decree 12 is that it provided in its very first section that:

> "The preamble hereto is hereby affirmed and declared as forming part of the Decree."

The Decree then proceeded to exclude any questioning of any of the activities of Government carried out pursuant to a Decree or an Edict. It also forbade any court from inquiry into whether or not there had been or would be breaches of the fundamental rights of the citizen by virtue of anything done under a Decree. In other words, the Federal Military Government was given a blank cheque on issues concerning human rights. No breach of any such rights could be questioned in the courts.

The passing of the Supremacy and Enforcement of Powers Decree was the final indication that the previous regime made no claims to be operating under the old Constitution or to having any links therewith. It affirmed its constitutional roots as the outcome of a revolution and thus sought to derive its legitimacy from the very act of revolution. The passing of the supremacy decree by the military is, perhaps, best represented by the artist who produced the cartoon, Tom and Jerry. This specie of legislation established the supremacy of the military over the Courts in a cat and mouse game which featured after every forceful overthrow of an existing constitution. In the eyes of the democrat, they represent the ascendancy of evil over good in the Nigerian polity. Ironically, therein lies their value as a source of ultimate legitimacy for the Constitutions which have been priced out of the regimes responsible for these supremacy decrees.

In overthrowing the existing system, the "supremacy decree" creates at the same time, a *'tabula rassa'* upon which a new system may be built. For the analytical positivists, the ignoble thinking which informed the supremacy decree also offered the start of a legal norm and became the foundation of a new legal order. If we disregard the more obnoxious abuses of this decree, if we overlook what befell citizens as a result of its coming into existence, it can be held up as the prop which compelled the state to cohere and subsist. This decree became the final source to which the legitimacy of the new legal order and all its consequential Decrees, Edicts and the rest of the legal system could be traced. The supremacy decree was indeed an evil piece of legislation. It was, however, normative to the extent that it set the standards for legal behavior within the polity. In the form, which it took, and the consequences, which it had on both the general public and every other organ of the State, the supremacy decree became the *grundnorm*, the "initial hypothesis" in which all the other laws found

succour. It became the reference point for the entire legal order which was the Nigerian State. The supremacy decree had the potential of being used for evil and instances abound of the evil application of the Decree.[23] But it could also be used for good, while exploiting the wide and unlimited legislative powers which it conferred on the Federal Military Government.

The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999 is obviously an example of the proper use of the Supremacy and Enforcement of Powers Decree of 1994. It is in that absolute usurpation of legislative powers that we find in law the legitimacy of what the Federal Military Government did in passing the Constitution of 1999 into law. The same reasons of expediency which compelled the acceptance of legislative abuses without question under the Supremacy Decree, no doubt compel a similar acceptance of a good outcome of the use of the same Decree.[24]

Enactment of the Constitution of 1999

There may be an unjustified overstatement of the position when critics of the Constitution state that the Constitution has been imposed by the military. That objection is obviously based on the realisation that the Federal Military Government placed the formal clothing of legality on the Constitution. It, however, fails to take into consideration the activities that preceded the formal signing of the Constitution into law, as well as the source of the substantive parts of the Constitution. An examination of these two issues will show that there had been some input which can be traced directly to the people.

The erstwhile military government had set up a Constitution Debate Coordinating Committee. This committee had called for memoranda from Nigerians and conducted oral hearings in various centres in the nation. It would appear that the preponderance of the popular view was that the State should revert to the Constitution of 1979. This was

23. E.g., State Security (Detention of Persons) Decree.

24. On whether a revolution can and should become the basis for legitimacy in a constitutional Order, see the works of the German jurist Hans Kelsen. The following decided cases, *The State v. Dosso and Anor.* (1958) 2 Pak Sup. Ct. 180; (1958) PLD SC 533; *Uganda v. Commissioner of Prisons ex parte Matovu* (1966) E.A. 514 from Pakistan and Uganda respectively support this position.

presumably the basis of the recommendation that was made to the Provisional Ruling Council. It is clear that this recommendation was accepted because a close comparison of the two Constitutions discloses great similarities between the clauses contained in both. It may be the case that the 1979 Constitution took longer to put together. It had in fact, been deliberated upon by a Constituent Assembly which was not completely elected by the people. There is the further consideration that the members of the Constituent Assembly were probably, more interested in the formation of political parties rather than in the very boring and not so rewarding task of reviewing a Constitution. The outcome may very well have been that popular participation in the formation of the Constitution of 1979 had been just as superficial as was that participation in the creation of the 1999 Constitution. Whatever value is attached to this common defect in these Constitutions, the truth of the matter is that the 1979 Constitution was adopted and accepted by the generality of Nigerians as adequate for meeting the constitutional needs of the State. It is submitted that the people, having been just as involved in the formative stages of the 1999 Constitution would have no basis for questioning its legitimacy. That level of participation does justify the preamble to the Constitution which is identical with the preamble to the 1979 Constitution.

Aspirations of the People

Further, the vital question of whether the Constitution actually represents the aspirations of the Nigerian people is relevant to the issue of legitimacy. What then are the broad aspirations of the peoples of Nigeria which may be captured and made enduring by a Constitution?

State Creation

It will be recalled that independence for the entire country was delayed till 1960 because that amorphous part of the country which continues to be described as the "North" had insisted on a delay. The outcome was that while the two regions in the south were already attaining the status of independent regions, the north remained a protectorate right up to the 1st of October 1960. After independence, the main preoccupation with the Constitution was the worry that it did not have the stamp of our local parliament as a source of it's legality. That obstacle was overcome in 1963 when the new Republican Constitution was put in

place. At that stage the constitutional lawyer would submit that the Nigerian Constitution had then reached the level of autarky and that the umbilical cord which bound it to the parliament in Westminster had been severed. But it had also become apparent that something had to be done to secure a distinct identity for the minority communities in the State. It was not enough to proclaim the fundamental rights of the individual. There was also a need to secure a degree of autonomy for distinct groups within the confines of the larger State. That was how the need for the creation of more States within the Federation came to be articulated. First, it was the Mid-Western Region. Then as the military took over government, more States came into being. The result is that we have moved from a Federation of the original three powerful and sometimes domineering regions to a thirty-six State structure through which the various communities are granted a degree of self-expression. It may very well be the case that in the search for a degree of autonomy for various communities, Nigeria has adopted the other extreme position. There will always be the question as to whether the same results could not have been achieved with, perhaps, a smaller number of States than the current thirty-six recognised under the 1999 Constitution. In the meantime, though, there appears to be a great degree of satisfaction with the current thirty-six State structure of the Federation. In that sense, the 1999 Constitution has improved on the 1979 version in the drive to respond to the peoples' aspirations.

Legislative powers

A federal system requires that the centre and the component units have a certain degree of autonomy over certain areas of legislation with the proviso that the exercise of legislative powers by the latter does not jeopardise continuation of the federation. The legislative lists contained in the Second Schedule to the 1999 Constitution provide enough scope for the exercise of legislative powers by the two levels of Government. A comparative study of the exclusive legislative list contained in the First Schedule to the 1999 Constitution reveals that apart from the introduction of a new item 14, i.e. "creation of States," it is identical with the exclusive list contained in the 1979 Constitution. The concurrent legislative list in the First Schedule to the 1999 Constitution is identical with that of the 1979 Constitution. The legislative powers granted to the centre and to the component units i.e., the States will

determine the relative strength which the States can wield. Legislative powers, of course, presuppose executive capacity. Executive capacity itself depends on the nature of the financial resources which are available to the different units in the federation. The ability of the units to raise revenue remains limited in the case of most of the States. Dependence on the centre will always remain a means of ensuring that the States stay in line. The distribution of legislative powers may thus be seen as a device by which local autonomy is allowed to the units while continuation of the federation is guaranteed through the powers of the centre to control the purse. More noteworthy and relevant to the issue of legitimacy is the great reliance which the 1999 Constitution places on the 1979 version in the apportioning of legislative powers. When it is recalled that the people had their say before the powers were allocated in 1979, it is reasonable to assume that the present allocation of powers remains in accord with the aspirations of the people.

Directive Principles and Human Rights

The same case can be made out with regard to the Directive Principles of State policy and the Bill of Rights which are written into the Constitution. Again, these were features of the 1979 Constitution. It should be noted that there is nothing original in these provisions. The Irish Republic had, as far back as in 1922, introduced the idea of directive principles of state policy into their Constitution. They also featured in the Constitution of India which came into full effect in 1950. The fundamental human rights provisions in the 1999 Constitution are modelled after the American model along with its several amendments. The 1999 Constitution makes these fundamental human rights justiciable. However, the fundamental objectives and directive principles of State policy are not justiciable.[25] A critic might argue, therefore, that there is no place in a written Constitution for the directive principles of state policy. On the contrary, the combination of these two sets of provisions in the Constitution could be shown to be in response to the deep-seated yearnings of the Nigerian people. There is, on the one hand, a common agreement that the Government should not be permitted to trample on the basic rights of members of the community. The protection against that kind of conduct on the part of

25. See section 6(6)(c) of the 1999 Constitution.

Government is found in the protective clauses of Chapter IV of the Constitution of 1999. There is, on the other hand, a desire to set down certain social ideals and goals which should provide the guiding principles and serve as a beacon to the policies pursued by government. The State is thus encouraged to pursue certain economic ideals judged to be beneficial to the community at large. There is similarly, due encouragement to the State to promote certain rights of the individual which though not enforceable as a matter of constitutional law, are, nevertheless, judged to be desirable. The experience of other jurisdictions has shown that resort to the directive principles of State policy has assisted the courts in maintaining the validity of legislation. The combination of these two items in the Constitution should appease the worries of the typical Nigerian who, while wishing to reap all the beneficial fruits that government can confer is, nevertheless, anxious to avoid all the consequences of possible oppression by that same government.

Legitimacy can also derive from the concept of autochthony; the notion that a constitution should be homegrown, rooted in the preoccupations and basic yearnings of the community at large and derive its legality from acceptance by the community. This examination of the three preceding subjects – that is to say, the creation of states, the distribution of legislative powers, and the constitutional provisions on fundamental rights, are examples of how the 1999 Constitution seeks to meet the needs and respond to the aspirations of the community at large. These examples also reveal an attempt to consolidate some of the basic constitutional ideas which the recent past has shown to be desirable for the State. A careful analysis of the judiciary and its relationship with the executive and legislature can also be used to demonstrate the affinity between the Constitution of 1999 and this patent desire of the vast, but perhaps also silent majority of the population. Surely where there is such remarkable correspondence between the general desire of a given community for the establishment of some ordered and predictable form of government, not to concede legitimacy to it will do injustice to that form. Admittedly, a Constitution can never contain a perfect statement of all that society yearns for. It may not represent an accurate response to all the needs and desires of a community. It cannot anticipate and cater for all eventualities, including changes in public opinion. That is the function

of the provisions for the amendment of the Constitution that are to be found in section 6 of the 1999 Constitution.

Constitutional Changes

There is also a prospective side to legitimacy. A constitution by its very nature remains the subject of progressive legitimisation. In our particular circumstances, this takes on some significance. The latter part of the last military regime was a rushed affair. The military were in a rush to hand over power to a civilian regime. That must explain why we could not have and did not set up a Constituent Assembly to study and adopt a draft constitution. There was always going to be some complaint that in their rush to return to the barracks, the military handed down an imposed constitution. This was a potential complaint which the Constitution Coordinating Committee did not seem to have taken into account. That consideration would have compelled the draftsman to draft a constitution which provides for a somewhat flexible altering clause to enable any amendments to be easily carried out by the anticipated civilian regime. A good example of such an approach is to be found in the Constitution of India as drafted and adopted by the Indian Constituent Assembly. The procedure for changing the constitution was made deliberately flexible to enable desirable changes to be effected with ease applying the manner and form for change provided in the Constitution.[26]

An examination of the 1999 Constitution does not reveal that kind of flexibility. Under section 8 of the Constitution, a new State can be created only if:

(a) the request is supported by at least two-thirds majority of members (representing the area demanding the creation of the new state) in the Senate and House of Representatives; in the House of Assembly in respect of the area and the local government Council in respect of the area is received by the National Assembly.

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26. The flexibility of the Indian Constitution is illustrated by the fact that during the first fifteen years of the working of that Law, it was amended as many as seventeen times, relying entirely on the manner and form for amendment written into that law.

(b) The proposal is thereafter approved in a referendum by at least two-thirds majority of the people of the area where the demand for the creation of the State originated; and

(c) The result of the referendum is then approved by a simple majority of all the states of the Federation supported by a simple majority of members of the Houses of Assembly; and

(d) The proposal is approved by a resolution passed by two-thirds majority of the members of each House of the National Assembly.

Any section of the community which is desirous of having a new state will have to think very carefully before embarking on such a project. The same difficulties apply to the creation of new local government areas and even boundary adjustments. Where it is a desire to alter some other provisions of the Constitution not relating to the creation of States and not relating to the fundamental human rights provisions, section 9 provides that the requisite Act of the National Assembly shall not be passed by either House of the National Assembly unless:

(a) the proposal is approved by the votes of not less than four-fifths majority of all the members of each House and also approved by resolution of the House of Assembly of not less than two-thirds of all the States.

These provisions are not the easiest to implement. The clauses of the Constitution are all so firmly entrenched that the process of progressively amending the Constitution and aligning it to the ever-changing needs of the community cannot be easily realised through the amending clauses just examined. In this context one may refer to the many calls so far made for amendments to the Constitution emanating from the House of Representatives and members of the general public.

It is a matter for worry that the actual reasons asserted for the change do not appear to stand up to the test which is being suggested here. One call was for a return to the four-state structure which

obtained under the 1963 Constitution. Another call was for a review of what was initially described as an element of religion in the Constitution. Yet another call complained about the absence of proper identification of traditional rulers and their role in society. It is sometimes difficult to see the substance of the changes which are being suggested and even more difficult to see how these calls can be described as aimed at better aligning the Constitution to the authentic needs of the community at large. One is also left with the impression that these calls for constitutional changes have not carefully considered what it takes to effect even the smallest of changes in the 1999 Constitution of the Federal Republic of Nigeria. There are some more general calls which simply stress the need to set up a sovereign national conference which will fashion out and adopt a constitution for the nation. Short of the National Assembly passing and obtaining the requisite approval for a Supremacy Act, such a sovereign national conference may prove impossible to convene in so far as its objects remain the alteration of the Constitution.

The lesson of all this may very well be that alarmist complaints about the need to amend the constitution may not be the best way to ensure continued adherence to its provisions which in turn contributes to the progressive legitimisation which the passage of time brings. In this connection the resolution which was reportedly passed by the House of Representative on the 13th of July 1999, upholding the validity and legality of the 1999 Constitution is of momentous significance. It would be helpful if there was a similar resolution from the Senate placing the stamp of validity and legality on the new Constitution. All that would help to place the issue of legitimacy beyond any further questioning.

The Judiciary and Constitutional Change

Fundamental to the Constitution of 1979 is the idea of Constitutionalism; the notion that the government of the people shall be subject to law, the law of the Constitution. So sacred is the idea that the Constitution has expressly provided against its own abrogation in its very first section thus:

> "(1) This Constitution is supreme and its provision shall have binding force on all authorities and

persons throughout the Federal Republic of Nigeria.

(2) The Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the Government of Nigeria or any part thereof except in accordance with the provisions of this Constitution.

(3) If any other law is inconsistent with the provisions of this Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."[27]

Section 6(1) and (2) further provide respectively that:

(1) "The judicial powers of the Federation shall be vested in the Courts... established for the Federation," while

(2) "The judicial powers of a state shall be vested in the Courts... established for the State."

This has been interpreted to mean that the Courts have the powers to determine what is and what is not constitutional. If it is the province of the Courts to expound the laws, then it must follow that it is within that same remit to determine the meaning of the Constitution. This is the logical outcome of the constitutional effort to provide an arbiter of legality to adjudicate in those conflicts which may arise between the State and the individual on the meaning of the Constitution. As such an arbiter the Courts are obviously in the forefront of the list of protectors and guardians of the constitution. It behoves the judiciary, in the process of interpreting the Constitution to put some flesh on the bare bones which are represented by the words of the Constitution. This process of exposition of the Constitution also offers an opportunity for the progressive alignment of that law to articulated trends in

27. Section 1, Constitution of the Federal Republic of Nigeria, 1999.

government, in the body politic and in social behaviour. Words have a social context. The Courts have a special duty in their interpretation of the Constitution to endeavour to establish the social context in which the words they are called upon to interpret must be understood. Only through such an approach can the great task of making the Constitution continuously relevant be carried out.

Does this not place too much responsibility on the shoulders of our judges? There is no doubt about the integrity with which the majority of our judges have applied themselves to this task in the past. The courage of judges which provoked the passing of the Supremacy Decree during military regimes can only be commended. But then there are also instances of judges who appeared more eager to cooperate and collaborate with those who were only too anxious to subvert the Constitution in the past. The contributions which such judges made to our peculiar jurisprudence during the debacle that has come to be immortalised as "June 12th" must remain the subject of very special study by our future constitutional historians. It is a matter for regret that no provision has been made to purge such judges from the new system of government. More disturbing is the patent defect evident in non-insistence that every judge of our superior Courts of Record subscribes to the Oath of office under the new Constitution. All principal actors under the Constitution subscribed to the oath of allegiance before embarking upon the performance of their duties. Given our contention that the new Constitution has in fact established a new legal order, there is an obligation upon all our judges to subscribe a new to the oath of allegiance to the Constitution as required under section 290.

This would have signalled to the judiciary that it can no longer be business as usual. It would have implied sworn rededication to the sacred duty of maintaining and upholding the 1999 Constitution. Therein may lie the secret for ensuring that every one of the judges in our Superior Courts of Record does indeed owe an allegiance to the Constitution of the Federal Republic 1999.[28] Glorious would be the day when, in the face of an incipient *coup d'etat* which is strenuously

28. It is submitted, with the greatest respect, that the position canvassed here goes beyond the purview of the formal saving provision to be found in section 316(2) of the Constitution of the Federal Republic of Nigeria, 1999.

opposed by the people at large and by their Representatives in the National Assembly, we have a collective act of mass resignation by the judges of our superior Courts of Record, on the grounds that a coup stops them from continued loyalty to the Constitution. That may very well be the day when the legitimacy of the Constitution would be truly enthroned.

Conclusion

The position canvassed in this chapter may be summed up as follows:

> Legitimacy has a narrow meaning when applied in the field of private law. In the case of the Constitution of the Federal Republic of Nigeria 1999, an application of this narrow meaning would certainly be unhelpful. In the search for legitimacy in the Constitution, due cognisance must be taken of the concrete legal context out of which it was created. There must be similar appreciation of the extent to which it reflects the authentic aspirations of the members of the State community to live together under one constitutional umbrella. Just as fundamental is the extent to which it embodies the historical experience of that community in the area of Constitutional Law no matter how short that history has been. No less important is the potential of the Constitution for growth and for progressive acceptance by the community at large. It has also been pointed out that the Courts have an important role to play in this process of progressively legitimizing the Constitution. Thus viewed, the 1999 Constitution of the Federal Republic of Nigeria passes the text of legitimacy.

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THE LEGITIMACY OF CONSTITUTIONAL CHANGE IN THE CONTEXT OF THE 1999 CONSTITUTION

by

Niki Tobi, CON
(Justice, Court of Appeal, Enugu)

Introduction

Nigeria, as a nation, has often experienced constitutional change; some subtle or cosmetic and some revolutionary. Constitutional change has brought about not only change *qua* change, but the enactment or promulgation of different constitutions for the nation. That has been the position from colonial times to the present.

In order to fully appreciate the volume of constitutional changes, this chapter will commence with a brief historical account from the government of Sir Frederick Lugard to the last military regime of General Abdulsalam Abubakar (1998-1999). Following the amalgamation of Northern and Southern Nigeria in 1914,[1] the Nigerian Council was established. This was to ensure a proper co-ordination of administration between Northern and Southern Nigeria in the true spirit of amalgamation. As expected, the Council was made up of officials who were mainly white.[2]

The Clifford Constitution was enacted in 1922. This was followed by the Richards Constitution of 1946. The Richards Constitution was followed by the Macpherson Constitution of 1951. Three years later, the Federal Constitution of 1954 was enacted. That was the position until 1960 when the Independence Constitution was enacted.

As a prelude to the Independence Constitution of 1960, a number of constitutional Conferences were held in London in 1957 and 1958

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1. For a detailed account of the amalgamation, see Odumosu, O. I. *The Nigerian Constitution: History and Development*. Sweet and Maxwell (1963, pp. 10 to 17).
2. Elias indicates that the Council was composed of 36 members, 6 of whom were Nigerian ex-official members. See T. O Elias *Nigeria: The Development of its Laws and Constitution*, Stevens (1967), p. 24.

between representatives of the major political parties, on the one hand, and the British Government, on the other. During the meetings, Nigerian political leaders pressed for a number of issues which bordered on an independent status for the country. After settling the issues at the 1958 resumed constitutional Conference, a date for the country's independence, which was October 1, 1960, was formally named. This was made possible by the British Government's enactment of an Act titled: "An Act to make provision for, and in connection with the attainment by Nigeria of fully responsible status within the Commonwealth." The name and legal status of the country was changed from the "Colony and Protectorate of Nigeria" to Nigeria.[3] By the same token, the dependent status of Nigeria on Britain was formally terminated in these words:

> "Her Majesty's Government in the United Kingdom shall have no responsibility for the Government of Nigeria or any part thereof."[4]

The independent status of Nigeria was further reinforced by the Nigeria (Constitution) Order in Council, 1960 which provided for the Constitution in its second schedule.

That was the position until October 1, 1963 when the country attained a republican status. The new status was reflected by the enactment of the Republican Constitution of 963 which had basically the same features as the 1960 Constitution. The major difference, however, was the change in status to a Republic.

The point should be made that the British Government was directly responsible for the enactment of all the Constitutions mentioned above. Although some Nigerians attended the meetings which resulted in the enactmem of the Constitutions at different times, the truth is that it was the British Government and the British Government alone that was the architect or brain behind the enactment of the Constitutions.

There is, however, some qualification to this statement as it relates to the 1963 Constitution. It was the Nigerian Parliament that formally

3. Section 1(1) of the Nigeria Independence Act, 1960.
4. Section 1(2)(a), *ibid.*

enacted the Republican Constitution into law.[5] Although that was the situation, it is a fact that the British Government had so much influence on the 1963 Constitution. It had entered into dialogue with representatives of Nigeria in Parliament before the enactment of the Constitution.[6] According to Professor Ojo,

> "Although Nigeria could be congratulated for not sacrificing legality by merely indulging in formalistic demonstrations of legal severance for the purpose of constitutional autochthony, as was done in India in 1950, it may be difficult to resist the conclusion that the Republican Constitution was born out of the exercise of imperial sovereignty. This is not, however, to say that a breach of legal continuity could not be deliberately continued by peaceful means as an assertion of legal nationalism."[7]

The next Constitution was the Presidential Constitution of 1979. In September 1975, General Murtala Mohammed (then Head of State), appointed a Constitution Drafting Committee of 50 members, who were called the 50 wisemen.[8] In his speech at the inauguration of the Committee, General Mohammed gave some guidelines to the Committee.[9] The Committee under the chairmanship of Chief F.R.A. Williams, Senior Advocate of Nigeria, called for memoranda[10] from the general public.[11] After deliberations in sub-committees and plenary sessions, a Draft Constitution was submitted to Government.

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5. See Sessional Paper No. 3 of 1963.
6. It should be noted that the Bill on the 1963 Republican Constitution received the assent of the Governor-General, who at the time was the representative of the British Queen in Parliament.
7. Ojo, A. *Constitutional Law and Military Rule in Nigeria,* Evans Brothers (Nigeria Publishers) Limited (1987), pages 10 and 11.
8. Of the 50 members one could not serve. 49 persons thus served on the Committee.
9. Report of the Constitution Drafting Committee Containing the Draft Constitution, Vol. 1, page xiii (1976).
10. The Committee received a total of 346 memoranda.
11. See Report of the Constitution Drafting Committee, Vol. II, page 9.

A Constituent Assembly[12] was established to deliberate on the Draft Constitution. The recommendations of the Constituent Assembly by way of another Draft Constitution were placed before the Supreme Military Council, which promulgated the 1979 Constitution[13] after due deliberation, amendment and approval of the Draft Constitution. The 1979 Constitution became a victim of the 1983 military intervention which resulted in the overthrow of the civilian government and the establishment of the military regime of Major-General Muhammadu Buhari on the 31st December, 1983.

When General Ibrahim Babangida came to power in 1985[14] as Military President and Commander-in-Chief of the Armed Forces, the Armed Forces Ruling Council (the highest law-making and executive authority of his government) established a Constitution Review Committee on the recommendations of the Political Bureau.[15] The Honourable Justice Muhammadu Buba Ardo was the chairman of the Review Committee which consisted of 45 other members.[16] In the light of the recommendations of the Review Committee, a Constituent Assembly[17] was established under the chairmanship of the Hourable Justice A. N. Aniagolu in 1988.[18] On completion of its work, the Constituent Assembly sent the Draft Constitution to the Armed Forces Ruling Council through the President, Commander-in-Chief of the Armed Forces, General Babangida. The Armed Forces Ruling Council deliberated on the Draft Constitution and by the Constitution of the Federal Republic of Nigeria (Promulgation) Decree of 1989,[19]

12. See Constituent Assembly Decree, No. 50 of 1977.
13. Constitution of the Federal Republic of Nigeria (Enactment) Decree No. 25 of 1978.
14. Precisely on August 27, 1985.
15. Which had been established under the chairmanship of Dr. S.J. Cookey to, among other things, "gather, collate and evaluate the contributions of Nigerians to the search for a viable political future and provide guidelines for the attainment of the consensus objectives." See the Report of the Political Bureau (1987), the Federal Government Printers.
16. Chief A. S. Asebimo, a member from Ondo State, died on October 10, 1987 after attending the inauguration ceremony, and so the work of the Committee was completed by the Chairman and 44 members.
17. See Constituent Assembly Decree No. 14 of 1988.
18. Precisely on May 11, 1988.
19. No. 12 of 1989.

promulgated the 1989 Constitution into law, after making amendments to the Draft submitted.

That Constitution did not see the light of day. Political events changed rapidly. General Babangida stepped aside. Chief Ernest Shonekan took over from General Babangida becoming head of the Interim National Government (ING) created by the latter.[20] And so the Constitution of 1989 became moribund.

When General Sani Abacha came to power in 1993,[21] he convened a Constitutional Conference[22] to deliberate on all matters specified in the agenda of the conference submitted by the Constitutional Conference Commission established by the Constitutional Conference Commission Decree.[23] The Constitutional Conference which was under the chairmanship of Hon. Justice A. G. Karibi-Whyte, submitted the Draft Constitution 1995 to General Sani Abacha after deliberation at committees and plenary sessions.[24] The Draft Constitution was not promulgated into law before the death of General Sani Abacha.

The Constitutional Debate Co-ordinating Committee

On the 11th of November 1998, General Abdulsalami Abubakar, then Head of State and Commander-in-Chief of the Armed Forces, inaugurated the Constitutional Debate Co-ordinating Committee, carrying the acronym, "CDCC," to organise a national debate on the 1995 Draft Constitution. The Committee consisted of the Chairman and 23 other members. Its membership was drawn from most of the States of the federation.

In his inauguration address to the Committee, the Head of State charged the Committee:

> "...to pilot the debate, coordinate and collate views and recommendations canvassed by individuals and groups and submit your report not later than December 31, 1998."[25]

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20. For a detailed analysis of the political situation, see generally Nwabueze, B. O., Nigeria '*93: The Political Crisis and Solutions*, Spectrum Books Limited (1994).
21. Precisely on November 18, 1993.
22. See Constitutional Conference Decree, No. 3 of 1994.
23. Section 2 of the Decree.
24. See letter dated June 7, 1995 from the Chairman to General Sani Abacha.
25. Paragraph 3 of the Address, contained in the Main Report of the Constitutional Debate Coordinating Committee, Annexure 1, pages 44 to 50.

The Head of State further presented to the Committee what he called "the most contentious issues in the Draft Constitution" thus:

> "I will like to raise most pertinent questions on the most contentious issues in the draft constitution in respect of which I and my colleagues in the Provisional Ruling Council would welcome any fresh ideas."[26]

The issues are the rotation principle, cultivating a sense of belonging in all segments of the Nigerian society, merits and demerits of multiple Vice-Presidents, effective anti-dote to future forceful seizure of political authority other than constitutional means, the devolution of power to reflect the federal structure, the principle of derivation as criteria for distributing the national wealth, creation of commissions in the Constitution, establishment of National Judicial Council and constitutional court in the Constitution and the workability of the provision in the Draft Constitution for proportional representation of political parties in the formation of the cabinet and that which permits ministers appointed to the Federal Cabinet to continue to retain their seats in the National Assembly.[27]

It is necessary to point out that by the specific mention of the above issues, the Head of State did not foreclose public debate on other aspects of the draft Constitution. In the now too familiar Nigerian expression, the Head of State did not indicate to the Committee any "no go areas." He merely called the attention of the Committee to some provisions in the Draft Constitution which in his own words are "wholly new and untested."[28]

In the aforementioned, the Head of State, General Abubakar, recalled the promise in his national broadcast of July 20, 1998 that the Draft Constitution "will be widely publicised to give every citizen the opportunity to study its provisions and engage in its debate in an

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26. Paragraph 10, *ibid.*
27. Paragraph 10, *ibid*, pages 48 to 49.
28. See An Address by Hon. Justice Niki Tobi, Chairman Constitutional Debate Co-ordinating Committee at a Press Conference, held at the International Conference Centre, Abuja on November 18, 1998, contained in the Main Report of the Constitutional Debate Coordinating Committee, Annexure 2, page 54, paragraph 5.

informed manner."[29] In keeping with this, the Committee called for memoranda from individuals and groups within and outside the country and there was a large response. Individuals and groups were also requested to organise workshops and symposia on the Draft Constitution.[30] The public responded by making available to the Committee, deliberations at workshops and symposia held within and outside the country.

To facilitate the orderly conduct of the Debate, the members of the Committee were divided into five teams.[31] Each team handled public hearings at two Debate Centres. The committee created a total of ten Debate Centres: Benin-City, Enugu, Ibadan, Jos, Kaduna, Kano, Lagos, Maiduguri, Port Harcourt and Sokoto. Each Debate Centre covered a cluster of States.[32]

A special hearing was also held in Abuja to which the then provisionally registered political parties and the following interest groups were invited: The Judiciary, Nigerian Bar Association, Nigerian Medical Association, Nigerian Society of Engineers, Nigerian Press Organisation, Chartered Institute of Bankers of Nigeria, Nigerian Labour Congress, Academic Staff Union of Universities, Armed Forces, the Nigeria Police, Organised Private Sector, Nigerian Farmers

29. Paragraph 1 of the Address
30. Page 17, paragraph 1.4.4. of the Main Report, *ibid.* See also Annexure 2 of the Main Report for the Press Conference held at the International Conference Centre, Abuja on November 18, 1998 at which the Chairman also called for memoranda. See further the advertisements in the daily newspapers, viz: the *Vanguard* of November 16, 1998; the *Daily Champion* of November 19, 1998; the *Tribune* of November 25, the *Concord* of November 19, 1998; the *Punch* of November 20, 1998 and the *New Nigerian* of November 19, 1998.
31. The teams were named in numerical order as 1, 2, 3, 4 and 5
32. The Benin-City Debate Centre covered Delta, Edo and Ondo. The Enugu Debate covered Abia, Anambra, Ebonyi, Imo and Enugu. The Ibadan Debate Centre covered Ekiti, Osun and Oyo. The Jos Debate Centre covered Bauchi, Benue, Gombe, Nasarawa, Plateau and Taraba. The Kaduna Debate Centre covered Abuja, Kaduna, Kwara and Niger. The Kano Debate Centre covered Jigawa, Kano and Katsina. The Lagos Debate Centre covered Lagos and Ogun. The Maiduguri Debate Centre covered Adamawa, Borno and Yobe. The Port Harcourt Debate Centre covered Akwa-Ibom, Bayelsa, Cross River and Rivers. The Sokoto Debate Centre covered Kebbi, Sokoto and Zamfara.

Association, National Association of Market Men and Women, Women Associations and Students.[33]

The Debate was conducted at the ten centres and the Federal Capital of Abuja for six days under the direct supervision of the members of the Committee.[34] In order to ensure effective participation, Nigerians who did not submit memoranda were allowed to contribute to the Debate.[35] Facilities for verbatim reporting were available and used.[36] Rapporteurs who recorded the debates at the different centres were made available to the Committee.[37] Indeed, to facilitate correct and accurate recording of the proceedings at each centre, a complete team of reportorial and secretarial staff was assigned to each Debate Centre to assist the members of the Committee. Nigerians participated effectively in the Debate.

At the conclusion of the public hearings and the submission of memoranda, the Committee proceeded to collate and synthesize the data collected. Each team which piloted the Debate in the centres submitted a Report containing a summary of the views canvassed in both the written and oral submissions made to it.[38] The Team Reports were debated at plenary sessions of the committee in order to distill the preponderance of views canvassed on the Draft Constitution.[39]

The Report of the Committee was submitted to the Head of State, General Abdulsalami Abubakar on the 30th of December, 1998. The point should be made that the Report was based on the views expressed by Nigerians in their memoranda and oral submissions made to the committee at the oral hearings held in the Debate Centres. This was emphasised in the Main Report of the Committee thus:

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33. Page 18, paragraph 1.4.7. of the Main Report.
34. The Chairman and the Deputy Chairman who were not assigned to specific teams, visited some of the centres. As a matter of fact, the Chairman presided over the Abuja Debate.
35. In order to ensure that Nigerians fully participated in the Debate, the rules of the Committee were also relaxed to accommodate individuals at the Abuja Debate. Earlier, the decision of the Committee was that individuals were to be heard only at the Debate Centres created in the States. Quite a number of persons took advantage of the decision and made valuable contributions.
36. See Volume IV of the Report of the Committee.
37. See Volume III of the Report of the Committee.
38. See Volume III of the Report of the Committee.
39. Page 19, paragraph 1.6.1. of the Main Report.

> "The recommendations contained in this Report are based on the views of Nigerians on the 1995 Draft Constitution as expressed in their written and oral submissions to the Committee. Volume IV contains the verbatim reports from each of the Debate Centres."[40]

Making the Constitution into Law

The Provisional Ruling Council, the highest law-making body of the erstwhile Military Government, debated the Report of the Constitutional Debate Coordinating Committee between January and May, 1999. The Council accepted quite a number of the Committee's recommendations. It, however, rejected some of them. The Federal Ministry of Justice was requested to present a Draft of the Constitution as agreed by Council. The Draft was deliberated upon. This was followed by another look at the Draft by a Committee of Council. It was after a final Debate and amendments made by Council that the Constitution was promulgated on May 5, 1999, by the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999. The Constitution came into force on the 29th of May, 1999.

The Issue of Autochthony

It is against the foregoing historical background that the subsequent examination of the jurisprudence of autochthony and its applicability or otherwise to the Constitution making process will be undertaken.

The *Chambers 20th Century Dictionary*[41] defines the word 'autochthon' as one of the primitive inhabitants of a country: an aboriginal. The *Dictionary* defines the adjective 'autochthonous' as indigenous: formed in the region where found: in the place of origin: pertaining to ideas unrelated to a person's train of thought which come into the mind. The same *Dictionary* defines the nouns, 'autochthonism' and 'autochthony' simply as the condition of being autochthonous.[42]

In general terms, a Constitution is said to be autochthonous if it derives its force and validity from "its own native authority," and here the expression "native authority" is not used in the context of a local

40. Page 19, paragraph 1.6.2. of the Main Report.
41. Edited by Kirkpatrick, E. M., Chambers (1983).
42. *Op. cit.*, at page 82.

government authority, but rather in the wider context of the people in their sovereignty. In other words, an autochthonous Constitution must be home-grown in the sense that is home-made and not a product of imperialism or colonialism. An autochthonous Constitution should be free from any imperial or colonial intervention.

The point should be made that a Constitution is no less autochthonous merely because some of its provisions are similar to some imperial, colonial or foreign Constitutions. That is an area of adoption or adaption which has nothing to do with the autochthonous character of the Constitution. Once the entire constitution-making process is indigenous to the people, in the sense that the entire document is home-grown and home-made, the element of autochthony is fulfilled. This quality of nativity does not mean that the Constitution must contain traditional or customary law provisions native or aboriginal to the people.

In order to determine whether a constitution is autochthonous or not, the entire Constitution-making process should be taken into consideration and examined not bits and pieces of it. Therefore, once the totality of the Constitution-making process moves or slides in favour of a home-grown and home-made nature and content, the Constitution qualifies for the appellation, "autochthonous."

Three Words of the Preamble

Most Constitutions commence with three now famous or celebrated words: "WE THE PEOPLE." In constitution making, these three words made up of eleven letters of the English alphabet are not only strong but telling and powerful in the determination of the constitutional legitimacy of the supreme document in any democracy.

Before considering the constitutional conceptualisation of the three words, there is need to construe their dictionary meanings. The word "We," is a plural pronoun, meaning "I and others." The word "the", is a definite article used to denote a particular person or thing, and in the context, it denotes the word "People." The word "People," generally means a nation, a community, a body of persons held together by belief in a common origin, speech, culture, political union or other bonds.[43] The plural pronoun, "We," in the text, is used instead of the noun,

43. Kirkpatrick, E. M., *Chamber 20th Century Dictionary Chambers (1983)*

"People." In other words, it stands in the place of "People" in order to avoid tautology in syntax.

The three strong and powerful words were introduced into constitution-making in Nigeria for the first time in the 1963 Republican Constitution in the following terms:

> "We the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following Constitution:-"[44]

The Constitution of the Federal Republic of Nigeria, 1979, dropped the expression, "by our representatives here in Parliament, assembled, do hereby declare."

The Preamble provided in part:

> "We the people of the Federal Republic of Nigeria... DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution:-"

The preambles to the 1989 Constitution, the Draft Constitution of 1995 and the Constitution of the Federal Republic of Nigeria, 1999 adopted the exact wordings of the 1979 provision.

The word "People" in the preamble, relates to the Federal Republic of Nigeria. The operative word here is "republic." What then is a republic? In political theory, the word republic is used in different ways. Abraham Lincoln, in his great exposition described a republic as "government of the people by the people for the people." The pet expression or common denominator in Lincoln's definition is the word "people." That word appears thrice in the definition. It is that same word that is used in the preamble to the Nigerian Constitution, conveying a similar meaning to Lincoln's democratic America.

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44. The sentence followed the following preamble: "Having firmly resolved to establish the Federal Republic of Nigeria, with a view to ensuring the unity of our people and faith in our fatherland, for the purpose of promoting inter-African co-operation and solidarity. In order to assure world peace and international understanding, and so as to further the ends of liberty, equality and justice both in our country and in the world at large."

Certainly, a republican government is not one by an individual. It connotes the idea of numbers.[45] Madison described a republic as:

> "a government which derives its power directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is essential to such a government that it be derived from a great body of the society, not from an inconsiderable proportion or a favourable class..."[46]

The word "republic" can be used in two senses i.e. the narrow and the wide. In the narrow sense, it is used in contradistinction to a monarchy. In the wider sense, it is used to convey the meaning that in the art of government, there is no single authority or person that is solely responsible for the governance of the populace. Rather, the government is collectively run for the common good of all persons who have some say in their governance. This position is clearly articulated in the United States. Thus in *Ghisholm v. Georgia*[47] the court held that "the supreme power resides in the body of the people. This means that political power resides in the people who exercise it through their representatives in the government of the State. In its total package, the word "people" includes all Nigerians, irrespective of their place of origin, circumstances of birth, sex, religion, political opinions and status in society.

The collegiate or community meaning of the word "people" is further indicated in Chapter II of the 1999 Constitution on Fundamental Objectives and Directive Principles of State Policy. Section 14(2)(a) specifically provides that "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."[48] That is the fundamental essence of those three strong and powerful words used in the preamble.

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45. This is a view associated with writers like Jellinek.
46. Federalist, No. xxxix.
47. (1792) 2 Dall. 419 (457).
48. The whole of section 14 thereof provides for the Government and the people, as contained in the side note.

The position is clearer in the preambles to some other Constitutions. For example, it is provided in the preamble to the Japanese Constitution that:

> We, the Japanese people... proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people."

The preamble to the French Constitution provides as follows:

> "The National Constituent Assembly has adopted, the French people have approved, the President of the Provisional Government of the Republic promulgates the following Constitution."

The above two examples clearly show the people as the authority behind the document of the Constitution. It is that same word which forms part of the preamble to the Nigerian Constitution 1999. The word carries a generic and nebulous signification. It connotes, in the context of the preamble, that the Constitution is made or created by the people of Nigeria in their aggregate capacity and not by a section of the populace. In other words, no group of citizens, either from a group of states, political, religious, tribal or cultural organisation can claim to be the makers of the Constitution. On the contrary, it is a collective responsibility of the entire people of the country.

This does not mean that all Nigerians physically participated in the making of the Constitution. This is both a factual and physical impossibility. It does mean, however, that the Constitution is made by some Nigerians having the full authority, and consent of other Nigerians. Putting it differently, the Constitution was enacted with the consent and acquiescence of the people of Nigeria.

The Military and Constitution-Making

It is clear from the introduction to this chapter that military governments, at different times in Nigeria's political history,

promulgated three Constitutions: the 1979 Constitution, the 1989 Constitution and the 1999 Constitution. A consideration of the legitimacy of constitutional change within the context of the 1999 Constitution certainly calls for an examination, albeit briefly, of the legality or otherwise of military regimes and their law making powers. A short excursion into jurisprudence gives background to the subject.

The Legality of Military Regimes

Hugo Grotius, a frontline naturalist, observed that whatever opinion one might hold about the excellence of one or other form of Government, the people have the right to choose the Government they prefer. However, once the people have transferred their rights of government to the ruler – whether in order to find a protector against danger or because they prefer autocratic rule to liberty or as a result of war, they forfeit the right to control or punish the ruler, however hard his government may be. In order to justify his contention, Grotius went so far as to deny that all Government is for the sake of the governed.[49]

Hobbes stressed the overwhelming importance of State authority, which in his opinion, ought to be vested in an absolute ruler. While he discouraged civil disobedience, he affirmed that where resistance is successful, the sovereign ceases to govern and the subjects are free to elect a new ruler.[50] In opposing Hobbes' theory of absolutism Locke accepted the concept of social contract and justified Government by majority positing that Governments hold powers in trust with a duty to preserve individual rights the protection of which the individual has entrusted to them. Locke therefore believed in the inalienable rights of man.

Rousseau postulated the doctrine of liberty and equality. His theory of popular sovereignty was adopted by the makers of the French Revolution to justify revolution without end or measure. It should be noted that the theories of Locke and Rousseau wielded tremendous influence upon the formative era of American independence and the belief in the rights of man.

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49. See Tobi, N., *The Rule of Law Under the Military Government in Nigeria*, Law Times Press (1982), page 10.
50. The Leviathan (1651).

Hans Kelsen of the analytical school of jurisprudence, contended that a revolution occurs whenever the legal order of a community is nullified and replaced by a new order in an *illegitimate way*, that is, in a way not prescribed by the first legal order itself. In this context, it is irrelevant that the replacement is effected through a movement emanating from the masses of the people, or through the action of those in Government positions. From the juristic point of view, the decisive factor is that the order in force is overthrown and replaced by a new order in a way not contemplated by the former order. According to Kelsen:

> "Every jurist will presume that the older order - to which no political reality any longer corresponds - has ceased to be valid within the order, receive their validity exclusively from the new Constitution. It follows that from the juristic point of view the norms of the older order can no longer be recognised as valid norms."[51]

Kelsen further asserted that a legal system consists of a hierarchy of norms. The validity of each norm resting upon a higher norm standing behind it. This chain of norms continues until the one on the pyramid, which is the ultimate norm is reached. He called the ultimate norm the Grundnorm. The violation of an individual norm within the hierarchy may not harm the legal order until the legal order, that is, the Grundnorm, is destroyed as a whole.

In order to maintain the Groundnorm, Kelsen propounded his theory or principle of effectiveness. He pointed out that the new legal order will remain valid and legal if it maintains a minimum of effectiveness to sustain the social equilibrium of the society.

Olivecrona, the Scandinavian Realist, said that the validity of the law lies in the psychological reaction of the populace to pronouncements emanating from certain organs acting in accordance with certain procedures. He said that in the case of a successful revolution, there is hardly any explanation of how it acquires binding force in the face of its manifest illegality. The only explanation may be that the revolutioners are bound to control the machinery capable of

51. Kelsen, H., "The Pure Theory of Law" (1934-35) 50 and 51, *L.Q.R.*, page 37.

exerting the psychological pressure to give it the necessary binding force. This may occur in two ways:

(a) By taking over all existing machinery and the psychological forces associated with it, such as happened in the bloodless revolution of 1689 in England;

(b) By creating a new machinery as was the case in Russia in 1917.

In either case, Olivecrona contends, the force and propaganda have to be maintained until the new order is properly established. There should be force to oust those in power and to suppress their supporters. There should also be sufficient propaganda to facilitate the creation of the new psychological association.[52]

All these are reminiscent of Kelsen's theory or principle of their minimum effectiveness required to maintain the social equilibrium after the revolution. In order to stabilise the revolution, the revolutioners, in the language of Olivecrona, have to apply force and propaganda, with a view to maintaining what Kelsen called minimum effectiveness, to the extent that there is no rival Government.

Without going into the theory of Customary International Law on a revolution as a proper and effective legal means of changing a Government, and the case law,[53] it is clear from the foregoing that all the revolutions which brought about military regimes in Nigeria were valid and legal.

A discussion of each of these regimes is not necessary here except that of General Abdulsalami Abubakar. It will be recalled that on the sudden death of General Sani Abacha, the mantle of leadership fell on General Abdulsalami Abubakar. Nigerians did not only welcome the change of baton but hailed the leadership of General Abubakar. Some referred to him as a messiah to deliver Nigeria from the woes of the previous administration. The newspaper editorials and columnists also

52. See generally, *Law as Fact* Ejnar Monksgaa rd., (1939).

53. See *Madzimbamuto v. Lardner-Burke and Others* (1968) 3 WLR 1129; *The State v. Dosso and Another* (1958) 2 pak. Sup. Ct. 180. *Uganda v. Commissioner of Prisons, Ex Parte Matovu* (1966) E. A. 514.

hailed the General's immediate actions on assumption of office. So too the common man. Although there were individual misgivings about some issues in the course of his administration,[54] it is on record that Nigerians gave him a very big pass mark, particularly in the matter of handing over power to a civilian government on the scheduled date of the 29th of May 1999. As a matter of fact, Nigerians admired and still admire the General's political programme, the successful implementation of which earned him prizes and awards outside the country.

Law Making Power

The different military regimes from 1966 to 1999 were vested with law making powers by the Decrees which established them.[55] The Constitution (suspension and Modification) Decree, 1993[56] is relevant. Section 2(1) of the Decree provided thus:

> "The Federal Military Government shall have the power to make laws for the peace, order and good government of Nigeria or any part thereof which respect to any matter whatsoever."

Section 3(1) of the Decree provided for the mode of exercising legislative powers as follows:

> "The power of the Federal Military Government to make laws shall be exercised by means of Decrees signed by the Head of State, Commander-in-Chief of Armed Forces."

Section 8(1) of the Decree established the Provisional Ruling Council and section 10(1) provided for the functions of the Council. Infact, section 10(1)(b) vested in the Council functions in respect of

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54. The misgivings were on the state of the nation's economy.
55. See Decree No. 1 of 1966; Decree No. 32 of 1975; Decree No. 1 of 1984; Decree No. 107 of 1993. See generally Azinge, E., *Law Making Under Military Regimes*, Oliz Publishers (1994); Tobi, N., *The Rule of Law Under the Military Government in Nigeria*, Law Times Press (1982), pages 15 - 34.
56. No. 107 of 1993.

"constitutional matters, including the amendments of the Constitution of the Federal Republic of Nigeria 1979."

Nigerian courts have interpreted the Decrees which vested law-making powers in the military regimes. Beginning from the case of *The Council University of Ibadan v. Adamalokeun*[57] right up to the end of the last military regime of General Abubakar on May 29, 1999, the courts held that they lacked the jurisdiction to question the ***vires*** of the Federal Military Government to make Decrees.[58]

The Military and Constitution Making Power

Has a military regime any power in law to make a Constitution for the land? Is it an exclusive power of a civilian Government to make a Constitution for the land? If the former is the position, what law supports that position? If the latter is the position, again, what law supports it?

Any Government, civilian or military, vests in itself the power to make laws. In a civilian Government, the power is exercised by the Legislature; in a Military Government, the power is exercised by a body authorised to do so. In the context of Nigeria, the power to make law was exercised under different military regimes by the Supreme Military Council, the Armed Forces Ruling Council and the Provisional Ruling Council.

The answer to the first of the foregoing questions is that military regimes had power in law to make Constitutions and indeed they made Constitutions. It is clear from the introduction to this chapter that the 1979, 1989 and 1999 Constitutions were lawfully made by three

57. (1967) 1 All NLR 213.

58. See also *Ogunlesi and Another v. Attorney-General of the Federation* (1970) LD/28/69 (Unreported); *Ojokolobo and Others v. Alamu and Another* (1987) 3 NWLR (Pt. 61) 377. The attempt by the Supreme Court in the case of *Lakanmi & Kikelomo and Anor v. Attorney- General of the Western Region* (1971) I *UILR* 204 to question the validity of legislation made by the military was effectively countered by the promulgation by the Military Government of the Supreme Military Council Supremacy and Enforcement of Powers Decree No 28 of 1970 which emphasised the absolute legislative authority of the Federal Military Government and barred the courts from enquiring into the validity of their actions. They thus left no one in doubt that the military take over of government was indeed a revolution that changed the pre-existing legal order.

different military regimes, in the sense that there were appropriate enabling laws at the material times. In the case of the 1999 Constitution, the enabling law was Constitution (Suspension and Modification) Decree, No 107 of 1993, specifically, sections 2(1), 3(1) and 10(1)(b) thereof.

The answer to the second question is that there is no law known to this writer that it is the exclusive preserve of a civilian Government to make a Constitution for the land. A military regime which vests in itself the power to make laws, including a Constitution, can do so willy-nilly and without much ado.

Chief Rotimi Willians, SAN, a very great Nigerian lawyer and who has been involved in Constitution making in the country, in a lecture titled "A Constitution for the People of Nigeria," delivered under the auspices of the United Bank for Africa Plc, quoted what he said in November, 1977 on the floor of the Constituent Assembly when he moved "the Second Reading of the Constitution" in his capacity as an ex-officio member of the Assembly[59] as follows:

> "A Constitution can have an extra legal origin. What is meant by this is that in its origin the constitutional law of a State can be enacted by an authority which does not claim to derive its power to enact a Constitution from the existing Legal Order. This happens either following a revolution or with the acquiescence or by the permission of a revolutionary regime. A Constitution enacted by a Revolutionary Government will have as much validity as one enacted by a Constituent Assembly set up by a Decree enacted by such Revolutionary Government."[60]

That statement clearly and brilliantly portrays the legal position. It is obvious therefrom that constitution-making is not the monopoly of civilian Governments. Political happenings and exigencies may dictate, and even justify the making of Constitutions in military regimes. In view of the fact that General Abubakar's regime came within the

59. He became an ex-officio member of the Assembly because he was the Chairman of the Constitution Drafting Committee.

60. *The Guardian*, Thursday, August 26, 1999, page 47

purview of Chief Williams' analysis, it is submitted that that regime legitimately carried out the function of constitution-making.

At this point, it is necessary to revisit the issue of autochthony in its applicability to the Nigerian situation. In one of the books, authored by the writer of this chapter,[61] the following view was expressed on the 1979 and 1989 Constitutions:

> "There was one argument advanced against the autochthonous content of the Constitution of the Federal Republic of Nigeria, 1979. It is this. Since the then existing Supreme Military Council made amendments to the Draft constitution before promulgating it into law, some Nigerians thought the element of authochthony was broken. This argument, with respect, is not correct, as it gives a restrictive meaning to the words, WE THE PEOPLE. Certainly, the military personnel are Nigerian citizens. The Constitution says so. They are no less Nigerians because they chose the military profession. The Supreme Military Council was a Nigerian Institution set up by Nigerians to operate in Nigeria in the Nigerian Constitution making process. Accordingly, the 1979 Constitution, and indeed its 1989 counterpart, have the element of autochthony as they both derive their validity from the native authority and they are both thoroughly home-grown and home-based."[62]

Although made in 1991, the statement holds true for the 1999 Constitution. The members of the Provisional Ruling Council of the military regime of General Abubakar were and still are Nigerians. As a matter of law, they are Nigerian citizens by birth and it is unthinkable that the military profession they chose could have denied them their constitutional right to such citizenship. The point should be made, on the lighter side, that if that were to be the position, it is logical to assume that none of them would have chosen the military profession. It

61. N. Tobi *Understanding the 1989 Constitution Better: The Citizens Campanion.* Forward Press and Bookshop (1992).
62. Tobi. N. *ibid.* page 10.

is highly unlikely that they would have opted for a profession at the great cost of giving up their birth right.

The argument is that the 1999 Constitution, like the 1979 and 1989 Constitutions, is autochthonous. This leads to the body which promulgated the Constitution, the Provisional Ruling Council. The question arises as to whether the Provisional Ruling Council was competent in law to promulgate the 1999 Constitution? This must be answered in the affirmative particularly in the light of the aforementioned provisions of Decree No. 107 of 1993. At the material time, the Provisional Ruling Council, though not an elected body, was the highest law- making and ruling body in the country. Relating this argument to the views of Chief Williams earlier quoted, it is correct to state that the Provisional Ruling Council rightly functioned as a ruling body and duly promulgated the 1999 Constitution.

The Legitimacy of the Constitution

By the Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1999,[63] the Constitution of the Federal Republic of Nigeria, 1999 was promulgated into law. Section 1(1) of the Decree provided as follows:

> "There shall be for Nigeria a Constitution which shall be as set out in the schedule to this Decree."

By section 1(2) thereof, he Constitution came into force on the 29th of May, 1999.

In view of the fact that the 1999 Constitution was promulgated by virtue of the law making power conferred on the Provisional Ruling Council by Decree No. 107 of 1993, the legitimacy of the Constitution is beyond any shadow of doubt. This is because Nigerians do not have the right to restrict the law-making power of the military regime as contained in Decree No. 107 of 1993. Was it plausible for the military regime to have been capable of making any other law for the country and to have been handicapped from making a Constitution simply on the grounds of being a military regime whose functions do not include constitution-making?

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63. No. 24 of 1999.

While many Nigerians seem to hold the view that the military was so handicapped, is it a correct view in law? It would be recalled that it was the same military regime of General Abubakar that promulgated all the Decrees which ushered in the civilian Government on the 29th of May, 1999. The most relevant are the Local Government (Basic Constitutional and Transitional provisions) Decree, 1998,[64] the State Government (Basic Constitutional and Transitional Provisions) Decree, 1999[65] and the Presidential Election (Basic Constitutional and Transitional provisions) Decree 1999.[66] Can Nigeria and Nigerians who took the benefit of the country returning to a democratic government and participating in elections under these decrees really condemn the same military government that made these events possible, for promulgating a Constitution which is the main plank of democracy? Is such a position not tantamount to eating one's cake and still trying to have it intact? Is that factually possible? Thus laid bare, the position taken by this writer has a sound basis in law.

Conclusion

The hue and cry of some Nigerians on military regimes promulgating Constitutions is quite an understandable sentiment but sentiments, however, understandable do not take the place of law. Accordingly, those who call upon the present Government to throw the 1999 Constitution into the dustbin merely because it was promulgated by a military regime are not taking due cognisance of the law. A country which is ruled or governed by law cannot triumph on sentiments. Such a country will fall into decay. The crucial issue is whether in law, General Abubakar's regime, of which arrival was hailed by Nigerians, had the backing of the law to promulgate the Constitution. These issues have been effectively examined in this chapter. From the analysis, the legitimacy of the Constitution of 1999 is not in doubt just as it has been established that the military regime had full legal authority to promulgate it.

64. No. 36 of 1998.
65. No. 1 of 1999.
66. No. 6 of 1999.

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THE LEGISLATURE AND GOOD GOVERNANCE UNDER THE 1999 CONSTITUTION

by

D.A. Guobadia
(Professor of Law & Director of Studies,
Nigerian Institute of Advanced Legal Studies)

Introduction

Within the context of the frequency of its occurrence in recent times, it is not out of place to observe that the expression "good governance" is beginning to take on a conceptual character. Although it could defy a straightforward meaning, like the proverbial elephant however, it is easy to identify. Concepts have their ways of emerging in a people's consciousness and, taken as one, the notion of good governance in contemporary Nigeria has, no doubt been conditioned by the vagaries and vicissitudes of our national life. Succeeding governments (particularly of the military type), have tended to seek to justify their emergence and/or policies on the basis of the perceived failure of their predecessors to promote good governance. These governments have, in turn, been criticised by the populace for their rather dismal performances in that regard. All these facts provide ample reasons for those institutions and individuals currently at the helm of affairs to direct their energies at making the much needed difference.

The structure of governance under the 1999 Constitution makes for three arms of government in an executive presidential system. It is on these three arms of government viz – the Executive, the Legislature and the Judiciary that the populace ultimately place their hopes for the fulfillment of these expectations. As concepts go, it would be difficult to identify all the indices of good governance. There is no denying the fact however, that among other things, good governance would, in our circumstances, be directed at poverty alleviation and providing a reasonable living standard for the populace; guaranteeing the security of life and property of the people, the maintenance of law and order and the provision of an accepted level of infrastructural development in

Nigeria – all of these in furtherance of the democratic process under the rule of law. At some point of course, good governance metamorphoses into national development.[1]

This chapter is concerned with the legislature within the purview of the 1999 Constitution and its expected role in the quest for good governance in Nigeria. As C.F. Strong once put it, "... the raison d'etre of a legislature is not only to reflect the opinion of the country but to maintain good government."[2] Identification of the nature of our democracy provides the setting for properly situating the legislature in its different facets – as an arm of government, as an institution; as a representative of the people and as a law making authority.

Our Kind of Democracy

A detailed and informed analysis of the different kinds of democracies belongs really to the discipline of political science and no effort is being made here to lay claim to such expertise. There is something about Nigerian present system of government, however, that evokes the idea of representative democracy and no other institution or organ of government exemplifies this better than the legislature. In structure and composition, both the National Assembly and the State Houses of Assembly can be described, using the words of John Stuart Mill as "representative assemblies." The legislature is also an institution that has the other quality of being an arm of government. In this capacity, it has different functions and powers as well as corresponding obligations. The object of this discussion is not to reel off a list of the powers and functions of the legislature as set out in the Constitution. Rather, in discussing the nature and position of the legislature, the discourse is transposed to a consideration of these issues with a view to determining how they can be employed to foster and sustain good government.

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1. The problems to be addressed in the quest for good governance have been broadly categorised into four main areas by Professor S.E. Oyovbaire in a paper titled: "The Structure and Working of a Democratic Government: Constitution and Separation of Powers" presented at the National Seminar on Democracy, Good Governance and National Development in Nigeria held in Abuja from the 25th to the 26th of May, 1999.
2. Strong, C.F. *Modern Political Constitutions* (1939), London Sidgwick and Jackson Ltd., 184.

The Legislature as an Arm of Government

The system of government established under the Constitution of 1999 provides for the division of the powers of government into three distinct types to be exercised by the three arms of government under a system of separation of powers. The executive and the judicial arms are assigned the functions of executing and interpreting respectively, the laws made by the legislature.[3] In order to capture the whole gamut of legislative responsibilities, the following statement from the American Committee for Economic Development is instructive. According to it:

> "Congress (i.e. the American Legislature) has two primary responsibilities. One is to reconcile or compromise divergent interests so that the informed will of the people may find expression in legislation. The other is to review program execution and agency performance in order to check tendencies toward improper exercise of executive activity or perpetuation of obsolete programs."[4]

This description clearly accommodates, in broad terms at least, the entire spectrum of legislative activity which includes the following, among others;

(a) the law making and policy formulation functions;

(b) the oversight functions;

(c) the investigative functions;

(d) the legislature's powers and duties with regard to public finance – i.e. its role as watchdog of public funds;

(e) the legislature's educational role which can, in many respects, be subsumed under its responsibility to the constituency i.e. its representative role.

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3. See sections 4, 5 and 6 and Chapters V, VI and VII of the 1999 Constitution respectively.
4. Quoted in Ferguson and McHenry: *The American Federal Government*, 13th Ed. McGraw Hill Book Company, Chapter 6, p. 207.

On the law making functions, writing on an earlier Constitution (with similar provisions to the relevant ones under the 1999 Constitution), Professor Nwabueze observed that, the formula employed for granting legislative power under the Constitution is one that empowers. It empowers the legislature to "make laws for the peace, order and good government of the federation [or the State][5] as appropriate. This, according to him is not a limiting power. Rather, "it is simply a legal formula for expressing the widest plenitude of legislative power execrable by a sovereign legislature."[6]

Expansive though this formula does appear to be, there is no gainsaying the fact that the law making power thereunder provided is limited by the formula itself. The purposes of the laws to be made are specifically stated to be "the peace, order and good government" of the state. Thus, apart from all other considerations that may be applied in construing the law making power, clearly the purpose of the law must fall within the three broadly set out in this formula. According to Nwabueze, this is a necessary consequence of the written nature of the Constitution "as a law antecedent and superior to government..." For him, this superiority "lies not so much in its function as a source of power but rather in the consequence that it necessarily operates as a limitation upon government. This is a consequence that flows inexorably from the fact that in constituting a government and in granting and distributing power, a Constitution cannot but limit it not only as regards subject matter and the aims to be pursued but the procedure for exercising it as well."[7] In support of his thesis, Professor Nwabueze quotes Professor McIlwain -

> "the supreme authority must be defined and defined by a law of some kind, [but] "there can be no definition which does not of necessity imply a limitation."

Indeed, Professor Nwabueze goes on to emphasise that –

5. Section 4(2) and (7) respectively of the 1999 Constitution.
6. B.O.N. Nwabueze: *Ideas and Facts in Constitution Making*, Spectrum Books Ltd. 1993, 29.
7. Which is what it does with such devices as the legislative lists.

> "A Constitution as a supreme law which merely grants power in all its plenitude without limitations of any kind hardly merits to be so called. To justify the name it must be, as Hayek puts it, "a Constitution of liberty, a Constitution that would protect the individual against all arbitrary coercion."[8]

Thus, a legislature that proceeds to pass a law, the contents and purpose of which are in flagrant violation of the spirit and letter of the Constitution is not acting within the ambit of the law making powers granted it. On rather delicate issues, this becomes an open invitation to anarchy.

In its law making functions, the legislature is further limited by the procedural requirements for law making set out in the Constitution. There is also, in this connection, the requirement that it should work in concert with the executive in the process of law making. This is why there is a power in the executive to *veto* bills.[9] This is in furtherance of the principle of checks and balances ingrained in the doctrine of separation of powers which is a major plank of the system of governance established in the Constitution of 1999.

The Legislature and Public Finance

In an earlier piece[10] on aspects of the legislative function, that arm of government was described as "a watchdog of public funds." In this capacity it exercises its power to audit public finances as well as the power of investigation into the affairs of government departments or officers in order to scrutinise the use of such funds.

The Constitutional functions of the legislature with regard to public funds include among others,

(a) pre- and post-appropriation control;

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8. See note 6 supra.
9. See section 58(5) with regard to money bills and section 58(4) for other bills.
10. See Ameze Guobadia: "The Legislature as a Watchdog of Public Funds" in I. A. Umozulike ed. *Toward the Stability of the Third Republic* (1993) Fourth Dimension Publishers for the Federal Ministry of Justice, 73.

(b) authorisation of expenditure form the Consolidated Revenue Fund;[11]

(c) it's role in the auditing of public accounts;[12]

(d) directing or causing to be directed, investigations into "the conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty of or responsibility for "disbursing or administering moneys appropriated or to be appropriated by the National Assembly."[13]

Pre-Appropriation Control

Of particular importance is the legislature's role in respect of the budget and appropriations. The Appropriation Bill is the basis of the Executive's plans for the running of government within the relevant fiscal year. The Constitution provides that the budget must be considered by the legislature and the appropriation bill passed before money can be withdrawn from the relevant funds to run government.[14]

What does a legislature actually do with its power over appropriations? Can it give conditions and place limitations on spending and how funds are to be used (such as details on what may be spent on specific items e.g. travel, purchase of cars and general spending under different heads)? After all, the Constitution[15] provides that the estimates and heads of expenditure for the financial year shall be included in the Appropriation Bill laid before the legislature. Can the legislature introduce issues outside the subjects under consideration in the Appropriation bill presented to it? Roland Young[16] gives the example, (with regard to the US Congress), of introducing "legislative riders" by reference to "a rider on resale price maintenance to the Appropriation

11. Section 82.
12. Section 85(2) and (5).
13. Section 88. There is an equivalent provision in respect of the state legislature in section 128.
14. Sections 80; 81 for the federal level and section 120; 121 at the state level.
15. Section 81(2) and Section 121 respectively.
16. See Roland Young: *The American Congress* (1958) Harper and Bros, New York 1.

Bill for the District of Columbia (in 1938) which, though he saw as "indirect legislation", the President, for reasons of political expediency, went along with because he wanted to ensure that his Appropriation Bill sailed smoothly in the legislature. Can the legislature's power over appropriations be employed to perpetuate legislative self interest? Can it in like manner be used to favour the ends of other interests extraneous to the proper purpose of government? Is it also possible that the role and power of the legislature over appropriations can provide an opportunity for the negative consequences of the practice of "lobbying" which really ought to be employed by the executive in seeking to pass its appropriation bill?[17]

Some criticism can be made of the constitutional arrangements governing the legislature's role in the matter of appropriation. All that has been said so far relates to the process of appropriation and the provision of funds for the running of government. Are there similar schemes under which the legislature can control just how the money is actually spent? Beyond the provisions set out for what may be termed a "postmortem" i.e. auditing and investigation of accounts and related matters (which will be discussed later), the Constitution does not seem to do much else. There is therefore a "lacuna" between these two existing stages of appropriation and what is presently post appropriation control.

Writing on the American experience, Tribe[18] points out that in practical terms, the resultant effect of the emphasis on and publicity given to the process of appropriation and the interaction of the various agencies concerned with the legislature[19] rather than the way the money is eventually spent, is that no account is taken of the other vital aspect of legislative control of public funds – i.e. that over actual expenditure. He offers an explanation for this. According to him,

> "...although taxation without representation has been the occasion of many a revolution, expenditure without

17. These issues have been considered in greater detail elsewhere (see note 10 *supra*). Some of the ensuing discussion is culled from that piece.
18. L.H. Tribe: *American Constitutional Law*, 2nd ed. (1988), Foundation Press at p. 257.
19. Because there has to be legislative authority for withdrawing money from the US Treasury.

> authorisation has been the cause of few, and the transfer, reprogramming, or impoundment of funds already authorised and appropriated has been the occasion of none."[20]

The issue of legislative control of actual expenditure must be considered alongside the equally fundamental need for the executive to have sufficient leeway within which to perform its functions. There are different ramifications to these issues and they include the power if any, in the executive to withhold payments or impound expenditure already approved.

In one of the earliest cases on this issue, *Kendall v. U.S. ex parte relstokes*,[21] the United States Supreme Court held that the President could be compelled to obey the Congressional (i.e. legislative) instruction to spend as the duties of the executive extend to the execution of the laws duly passed (such as the Appropriation Act). According to the court, to contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction and entirely inadmissible.[22]

The question that then arises is as to whether the executive is to have no discretion in the matter of actual expenditure? To accept this position fully, is, as Tribe notes, to reduce the Chief Executive to "Chief Clerk" as there are no fixed rules on how to manage expenditure. Decisions need to be taken in the context of issues that arise. Where then is the line to be drawn between the two extreme positions that could emerge? Tribe points out that in the United States, Congress has passed statutes designed to "frustrate executive impoundment attempts."[23]

Executive cuts in total spending or outright cessation of programs must be backed by Congressional approval within 45 days, while the President's unilateral power to delay the expenditure of appropriated

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20. Tribe *supra* note 18 at page 257.
21. 37 US (12 Pet) 524 (1838).
22. See Lockhart, Kamisar and Choper: *Constitutional Law* 5th edition (1980), West Publishing Co., page 210.
23. For example, the Impoundment Control Act 1974 discussed by Tribe *supra* at page 259.

funds could be countered by resolutions from either house of the legislature "calling for their expenditure."[24]

In the separate instance of what Tribe has termed "expenditure without authorisation" (noted above), the measure of control which the legislature has over the executive is rather minimal. Section 83 of the Constitution empowers the National Assembly to make provisions for the establishment of a Contingencies Fund for the Federation and for authorising the President, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provisions exist, to make advances from the Fund to meet the need.[25] This provision leaves much to the discretion of the Chief Executive - as to when there has arisen "an urgent and unforeseen need" for such expenditure.

In the related matter of authorising expenditure in default of appropriations, however, where the bill has not been passed by the beginning of the financial year, the Chief Executive is not left entirely to his own discretion. Section 82[26] of the Constitution provides that in such circumstances, the Chief Executive may authorise the withdrawal of moneys from the Consolidated Revenue Fund to carry on the services of government for up to a maximum of three months. It is however, provided that the sum withdrawn from the fund must be proportionate to the total amount authorised to be withdrawn by the Appropriation Act of the previous year.[27]

In the control of public revenue, Section 162 of the Constitution (1999) provides for a Federation Account into which shall be paid all revenues collected by the Federation except the proceeds from the personal income tax of armed forces personnel, the Police Force, the Ministry of External Affairs as well as the residents of the Federal Capital Territory. It is from this distributable pool account that any

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24. Tribe, *supra* at page 260. Perhaps an analogy can be drawn in Nigeria in relation to payment for specific projects for which legislative approval may have been given in the budget. It may happen that the executive may thereafter, in its wisdom decide to withhold payment thereon or redirect policies or priorities away from that particular project.
25. See section 123 in respect of the States. By sections 83(2) and 123(2) of the Constitution, a Supplementary Appropriation Bill will thereafter be introduced in order to replace the money advanced.
26. See also section 122 in respect of the States
27. By so limiting the amount which the Chief Executive can spend in default of Appropriation, there is some legislative control over the funds.

amount standing to the credit of the federation account shall be distributed among the federal and state governments and the local government councils in each state, on such terms and in such manner as may be prescribed by the National Assembly.

For the judiciary, section 162(9) of the Constitution provides that sums due to the judiciary from the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and states under Section 6 of the Constitution.

Section 164 empowers the federation to make grants in aid to supplement the revenue of a State in such sum and subject to such terms and conditions as may be prescribed by the National Assembly. This is an example of cooperative federalism – the power of the federal government to come to the assistance of the federating states. This provision can be used to bail out states in trouble or to shore up the finances of others where necessary.

It is a well known fact that on a regular basis, States and Local Governments tend to require this kind of support because of some disaster or unforeseen need. Thus, the law, rather than give the Chief Executive a blank cheque to disburse national funds as he likes, does attempt to inject some controls. The input of the legislature in this matter should go beyond merely approving payments. It has to consider the merits of each case. In addition, it should be able to ensure some fairness or balance in such expenditure such that all the States and Local Governments in the Federation can be sure of being equally important in the scheme of things. The legislature should also be able to ensure that each claim is handled on the basis of genuine need and not extraneous political considerations.

Post-Appropriation Control

(a) Auditing of Public Accounts

One vital aspect of the legislature's role as a watchdog of public funds arises in the area of post-appropriation control and the auditing of public accounts. It has already been stated that legislative activity seems to be confined to the process of enabling expenditure and the post mortem of such activity after the expenditure has been incurred. In this

context, section 85(1)[28] creates the office of the Auditor-General of the Federation who is charged with the responsibility of auditing the public accounts of the Federation and reporting to the legislature. He is empowered to have access to all books, records and other documents relating to the accounts.[29]

On receipt of the financial statement of the Accountant-General, the Auditor-General shall within 90 days, submit his report to the legislature. This will then be considered by the Legislative Committee in charge of public accounts.[30]

Is this procedure for accounting adequate? Is the Auditor-General sufficiently independent to be able to carry out his functions impartially? His salary is charged on the Consolidated Revenue Fund which thus protects it so that it cannot be altered to his disadvantage after his appointment.[31] In addition, the Auditor-General cannot be removed except by the President or the State Governor (as the case may be) acting on an address supported by a 2/3 majority of the Senate or the State House of Assembly.[32] His tenure of office is thus guaranteed.

These facts and the added protection of not being subject to the direction or control of any other authority or person in the exercise of his functions,[33] should enable him to perform his duties adequately. One issue, however, remains – i.e. the extent of his functions. Are they

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28. See section 125 in respect of the States.
29. Note that his authority does not extend to government statutory Corporations, Commissions, Authorities, Agencies and persons and bodies established by an Act of the National Assembly but the Auditor-General shall provide such bodies with a list of auditors qualified to be appointed by them as external auditors, and (ii) guidelines on the level of fees to be paid to external auditors, etc. See section 85(3). This exception in relation to these bodies was introduced by the military regime of General Babangida. It was then included in the moribund Constitution of 1989 and subsequently included in the present Constitution of 1999.Under the 1979 Constitution, the authority of the Auditor- General of the Federation extended to the aforementioned bodies. Certainly that position made for greater accountability and transparency in the activities of these publicly funded institutions.
30. See section 85(5).
31. Section 84(4).
32. Section 87(1). These are comparable with the practice in the U.K. discussed in O. Hood Phillips and Paul Jackson: *Constitutional and Administrative Law*, 7th ed. Sweet and Maxwell, p. 226.
33. See section 85(6).

limited to merely checking on the legality of government expenditure or do they go beyond to include pronouncing on whether such funds could have been better employed? A combination of these two could effectively help to facilitate the role of the legislature as a watchdog of the public funds since the report of the Auditor-General is presented to that arm of government. In the United Kingdom, the old practice of limiting his activities has been altered. Not only does he now "conduct a finance and regularity audit, which is to ensure that expenditure was made for the purposes authorised by Parliament, "*he also carries out a value for money audit*." This enables him to examine "the economy, efficiency and effectiveness"[34] of the use of resources to discharge the functions of the bodies concerned.

The Conduct of Investigations

Not totally unconnected with auditing is the constitutional power vested in the legislature to direct or initiate investigations into "the conduct of affairs of any person, authority, ministry or government department charged, or intended to be charged with the duty or responsibility for disbursing or administering moneys appropriated or to be appropriated by the legislature[35] to enable it prevent and expose corruption, inefficiency or waste... in the disbursement or administration of funds appropriated by it."[36]

Sections 89 and 129 of the 1999 Constitution empower the legislature to, procure whatever evidence it requires, summon before the House any person to give evidence and produce any document or other thing in his possession or control and to examine such a person. The provisions also empower the legislature to compel the attendance of any person so summoned by warrant.[37]

Investigations can serve as a potent source of control over public funds by the Legislature and properly used, can make all persons who deal directly with public funds aware that their conduct could be called into question at any time. Having said so, it must also be observed that

34. See O. Hood Phillips and Paul Jackson: *Constitutional and Administrative Law* 7th ed. Note 32 above at page 227.
35. Section 88.
36. Sections 88(2)(b) and 128(2)(b) of the Constitution.
37. And may in fact impose a fine to cover costs incurred in compelling such attendance; see section 89(1)(d) of the Constitution.

the issues go beyond this. Can the Legislature, for all practical purposes, ever really force the disclosure of information? As Young points out, writing on the American experience:

> "Legal answers go only part way in providing an acceptable solution. The issue frequently raised by investigations may be stated simply. How in marginal cases can Congress disgorge information...? What pertinent information does Congress need to establish effective controls over policy?"[38]

In reality, the utility of spending time and resources on investigations is debatable as it may result in "chasing shadows." Similarly, in dealing with individual witnesses, sensitive decisions may have to be made on procedure, the need or otherwise to divulge information and how far the cloak of secrecy over certain matters can be removed.[39]

Other practical problems include the fact that quite often, there is not enough time for the legislature and her committees to inquire into every fiscal activity of government. Ideally, other effective structures should be in place, even within each government department in order to ensure scrutiny and control of public spending. Similarly, the lack of modern technology such as adequate computerisation may make the process of record keeping and indeed access to information a problem. There is also the underlying question of whether the legislators are themselves adequately equipped in terms of skills to know what the issues are in the management of government programmes and attendant fiscal activities. In many cases, there is a consequential tendency to rely on the technocrats and other executive functionaries whose conduct may be called to question, thus defeating the whole essence of legislative

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38. *Supra* at page 245.
39. Perhaps limits are required as to the scope of legislative inquiry and the attendant practice of compelling the disgorging of information. This may in fact be what the Constitution envisages in providing that the powers of investigation conferred on the legislature here are exercisable for the limited purpose of enabling it to undertake its law-making functions within the competence granted it by the Constitution; to correct defects in existing laws; and also for the aforementioned purpose of exposing corruption, inefficiency or waste in the execution of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

control.[40] In sum, being able to review executive spending gives the legislature the opportunity for what Young has termed, *sharp insights into the adequacy of existing policy or the extent to which administrators have complied with instructions*.[41]

Other Checks on the Executive

Removal of the Chief Executive

The ultimate weapon provided as a check against the executive is the power of removal consequent upon the sustenance by the legislature of an impeachment for gross misconduct in the performance of the functions of his office. Sections 143 and 188 of the Constitution provide for the removal by the legislature, of the President, Vice-President; the Governor and Deputy Governor respectively from office for gross misconduct. It will be recalled that in the Second Republic, this power of removal under the Constitution of 1979 was used against the Governor of Kaduna State. The contentious issue with regard to the removal of the Chief Executive here has to do with the fact that there is an ouster of the courts' jurisdiction in relation to the exercise of the power. There is, however, provision for some judicial input in the process under the 1999 Constitution which was not provided for in the repealed 1979 Constitution.

By Section 143(5), within seven days of the passing of a motion that the allegation against the President or Vice-President be investigated, the Chief Justice of the Federation, shall, at the request of the President of the Senate appoint a panel of seven persons to investigate the allegation. The corresponding provision in respect of the states is to be found in Section 188(5).

Under the Constitution of 1979, the procedure for impeachment (set out in sections 132 and 170) did not allow for any input from the judiciary, however, insignificant. Although there was provision for the allegation of gross misconduct against the Chief Executive to be investigated by a seven-man committee, this Committee was to be appointed by the President of the Senate or the Speaker of the State Assembly respectively and not, as under the 1999 Constitution, by the

40. See G.O. Nwankwo (1983) Vol. xviii Nos. 1-2 *Journal of Constitutional and Parliamentary Studies*, pp. 53-65.

41. *Supra*, at page 222.

head of the Judiciary. In spite of what happens to be a difference of some sort between the relevant provisions of these two Constitutions, the point to note, however, is that there remains an ouster of the courts' jurisdiction in the matter of impeachment. It is difficult to fault this non-justiceability as the whole notion of impeachment is essentially a political question with all the nuances that this implies. As much as possible, therefore, such issues ought, ideally to be left for the political arms of government to handle. The definition of "gross misconduct" which will found the basis of impeachment under the provision lends credence to this view. Section 143(11) defines it to mean -

> "a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct."[42]

The decision is left to the "opinion" of the legislature.

When the provision for the removal of the Chief Executive was used in the Second Republic under the Constitution of 1979, it had been suggested that there should be room for the courts to pronounce on whether the procedure followed in the removal process was in accordance with the Constitution. Certainly, this would hardly make much difference because the sustenance of the allegation of wrongdoing and circumstances that gave rise to removal remain political issues to be decided upon by the legislators themselves. The possibility of the power of impeachment and removal being put to mischievous use remains real and in the efforts towards sustaining good governance, the very base tendencies of those who will seek to misuse this power must be watched, but how?

Other Functions/Powers

Other aspects of the functions of the legislature include:

(a) the administrative one, under which would fall the power of approval of certain executive appointees. These include Ministers and

42. (1982) 2 NCLR. 1.

Commissioners,[43] ambassadors, etc. A statement credited to John Stuart Mill in 1862 describes the legislature as the people's representatives. According to him,

> "The proper office of a representative assembly is to watch and control the government to throw the light of publicity on its acts, to compel a full exposition and justification of all of them which any one considers questionable, to censure them if found condemnable... In addition to this, the Parliament (legislature) has an office... to be at once the nation's Committee of Grievances, and its Congress of Opinions."[44]

Thus, the legislator is a leader of his people. Leadership entails among other functions, being in touch with the people, i.e. the constituency. This can explain in part why provision is made for legislators to have offices in their constituencies. However, merely maintaining an office there is not enough. Legislators must stay in touch with the people. After all, they did this when they were canvassing for votes.

In what can be regarded as a prelude to further elucidation of the term, an English Dictionary defines a Constituency first as:

> A body of voters living in a district having its own elected representatives in Parliament. And secondly, as A group of people with the same interests that one can turn to for support.

The same dictionary defines a constituent as "a member of a Constituency."[45] Both meanings are relevant to this discourse. The first, in the context of who gives the legislator his mandate and the second, in the sense of backing or supporting him where necessary. According to Ralph K. Huitt:

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43. See e.g. Sections 147 (2) and 192 (2)
44. Quoted by Norman Ornstein in "the Role of the Legislature in a Democracy" in *Freedom Papers*, USIA, 1992.
45. A.S. Hornby: *Oxford Advanced Learners' Dictionary of Current English*, 4th ed. by A.P. Cowie.

> A ...simplistic view of the Constituency is employed. A conception of the Constituency as all the people of voting age living in the district or state is bound to lead to remarkable results. Everyone knows that the constituency so conceived will have opinions on very few issues indeed. Nevertheless, the member talks about his constituency; he says he follows its wishes sometimes or all the time, and it is not safe to assume without proof that this is double talk or that he is a dunce. On the contrary, his perhaps tacit concept of Constituency is more complicated; he responds to different constituencies on different issues. He may try to paint an image of himself in the broadest strokes as an "economist", say, for the vast number of voters who will try to remember something about him when they go to the polls, while at the same time he works to amend one line of a bill to please a half-dozen labour leaders who can make or break him by the kind of voter-registration effort they put on. These are "Constituencies" – the people of varying degrees of influence, knowledge, and intensity of feeling who are aware of and respond to particular issues. The students of public opinion long ago learned that if they defined "public" as all the people living in a society there usually would be no public opinion. Because this was a nonsense result they defined the term in a variety of ways that would support analysis. This is what we must do with the concept "Constituency." In as much as "party" and "constituency" in this sense are systems of influence, why not go for help with our model to the persons presumably influenced - the members of Congress themselves? How do they perceive party and constituency?[46]

What then are the dynamics of the power play between the legislature and the constituency? Is the National legislature responsible to the country, the state or even the party? Once a legislator has been

46 . In a piece titled "Congress, the durable Partner" in Ecle Frank: *Law makers in a Changing World* (1996) Prentice Hall Inc. Englewood Clifts New Jersey, pages 26-27.

elected, does he owe obligations to even non-members of his party? Can there be unanimity in the constituency given the fact that it is not necessarily a homogeneous group? How does the legislator handle the differences in the constituency and resolve the potential conflicts between competing interests (in the nation and even within his own constituency)? If he loses the confidence of his constituency, is he obliged to resign? (This is different from the power of recall which he does not himself initiate) Are the legislature's powers held in trust? If so, for whom? The questions are myriad and they arise because in a very real sense, the legislator is a representative of the people.

Direct Popular Participation in Legislative Activity

Apart from the underlying theme of representative democracy, the imperatives of legislative activity demand that legislators as elected representatives, consult with and are accountable to their Constituents. It is in that sense therefore that the next sections of this paper become relevant as they deal with ploys by which such accountability and responsiveness to the electorate can be assured alongside giving a measure of direct popular participation to the constituency.

The Referendum

In furtherance of the need to ensure greater participation and control by the populace in issues that seriously affect them, the Political Bureau recommended the use of "Referendum and Recall.[47] The former, " a device", according to Sundquist, "by which people themselves vote yes or no on a Legislative or constitutional proposition."[48]

Rejecting the erstwhile reluctance of the political elite over time to encourage the use of the Referendum in Nigeria, the Political Bureau recommended its enhancement and use on such major issues as:

(a) "the ratification of a new Constitution
(b) major amendments to the Constitution affecting:

47. See the *Report of the Political Bureau* (1987) Federal Government Printers Lagos, pp. 138, 139, etc.
48. James L. Sundquist: *Constitutional Reform and Effective Government* (1986), the Brookings Institution, Washington DC page 233.

(i) new philosophy of government
(ii) creation of states
(iii) adoption of a national language or languages; and
(iv) changes in the system and forms of government."

The use of the referendum was included in the procedure for the following under the 1999 Constitution:

(a) the creation of new states.[49]
(b) the creation of new local government areas.[50]

It must be noted, however, that the power of the National Assembly to alter the provisions of the Constitution including the provisions for creation of states and local government areas etc. is not similarly subject to the use of the referendum.

By way of general discussion, it should be observed that the referendum can also be used to break deadlocks that could arise between the different arms of government. Indeed, differences of opinion and attitudes are the very essence of democracy and quite often, when the legislative and executive arms of government are dominated by different political parties, the proposals of one arm may be at variance with the views of the other. In such instances, the referendum could be used to end the deadlock. Thus, the people themselves become the determinants of policy.

In suggesting this option for the United States, Sundquist observes that "one side of a controversy would have to be able to initiate the referendum over the opposition of the other. The logical approach would be to authorise any two elements of the policy making triad - President, Senate and House - to ask the public by referendum to overrule the third.[51] The issue could be taken further. What kind of majority would be needed in either house of the legislature acting with the President in such a proposed scheme for a referendum? Sundquist indeed goes further to suggest that, in the process of law making, when the President refuses to give his assent to a proposed law and the

49. See section 8(1) of the 1999 Constitution.
50. Section 8(3).
51. Sundquist, *op. cit.*, p. 235.

legislature cannot muster the required extra majority to pass the legislation, the matter ought not to end there. Indeed, the issue should be determined by the people in referendum. Should Nigeria consider this suggestion?

There is another side to the issue. Quite apart from the other disadvantages of the referendum, in the specific instance of a deadlock between the President and the Legislature, Sundquist further observes that the executive i.e. the President would have an unfair advantage over the legislature in such circumstances because of "his superior access to the media and his other advantages in gaining the attention of the people."[52] And if the President were to have the backing of financially and otherwise powerful interest groups on such an issue, his views are likely to influence the populace more.

The referendum provides an avenue for consultation with the populace. Further, submitting proposals to referendum helps to undo the acts of a legislature done against the wishes of the electorate or for motives considered improper. Thus, even where the legislature is able to manipulate members to pass a proposal into law, subjecting it thereafter to a referendum ensures a further check to avoid the enthronement of laws at variance with the popular will.

It does have its disadvantages too! While the referendum may be neat in smaller states, because of the numbers involved, its use could lead to delays in the law-making process. The larger the number of people whose views must be sought, the more the danger of the process degenerating to a situation reminiscent of the "Tower of Babel."

A wholesale adoption of the referendum as a device for law making does not seem to take into account the rather technical and specialised nature of many laws, the details of some of which a large proportion of the populace cannot appreciate. A situation could indeed arise in which, in trying to be cautious, the electorate would simply vote "no" where they do not understand the proposed legislation. The potential cost to the system is of course that many a good legislative proposal may die an unnecessary death. This and related problems would render futile in such a case, the whole purpose of submission to a referendum.

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52. *Ibid.*

In the light of all that has been said on the issue, perhaps the approach of the Political Bureau is to b e preferred, i.e. restricting the use of the referendum to a limited number or species of constitutional matters. This preserves its essence within acceptable limits.

The Popular Initiative

Apart from the Referendum, there is another device which the Constituency can employ to ensure that its impact is brought to bear on legislative activity. According to C.F. Strong, its

> Object is to place in the hands of the people a direct power of initiating or proposing legislation which must be taken up by the legislature...[53]

In his view, it is more "advanced" than the Referendum for "while the Referendum protects the people against the legislature's sins of commission, the initiative offers them a remedy for its sins of omission."[54]

How then does this work? Simply thus:- in situations where the legislature fails to act, the Constituency can take the initiative. The disadvantage of this device lies in the fact that proposals introduced thereby may ultimately lose out on the advantages of proper debates and consideration in the legislature. More than that, as a writer observes,

> The initiative gives opportunities to unscrupulous leaders of corrupt factions to do great harm to the state by playing upon the ignorance and irresponsibility of the crowd.[55]

This is so because, it is indeed the vocal minority that would often lead the moves for the popular initiative.

The 1999 Constitution has not included the use of the popular initiative as a viable option. Initiation of legislation continues to be the

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53. C.F. Strong *op. cit.*, p. 294.
54. *Ibid.*
55. C.F. Strong, op. cit., at 294.

business of the executive and the legislature – indeed mainly of th former.[56] Commenting on the 1979 Constitution, Professor Nwabuez observed that in contrast to the United States where the Constitutio expressly allows the President to initiate these moves,

> The 1979 Constitution of Nigeria has no such explicit stipulation on the point. Yet by vesting in the President in Council with his Vice-President and Ministers responsibility for policy in respect of all matters within the legislative competence of the National Assembly... the Constitution manifests a clear intention that the President is to be the main organ for the initiation of legislation.

Against a background of the modern day need for what Professor Nwabueze has termed "legislation with high policy content"[57] which he sees as within the domain of the executive, he further emphasises the justification for executive initiation of legislation, thus:

> Much of it (i.e. high policy legislation) is of an extremely complex and technical nature, with wide ranging ramifications, which at once put it beyond the capacity of an individual legislator to manage or even to comprehend. The dimensions of the issues with which it deals may be beyond his vision; may be issues arising in the administration of the department or other institutions of state and about which only someone inside the government can have knowledge and experience.[58]

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56. For a further account, see B.O. Nwabueze; *The Presidential Constitution of Nigeria* (1982), C. Hurst and Co. London, pages 183-187, commenting on the Constitution of 1979.

57. See Note 56 above. This issue is also discussed by the same writer in *Presidentialism in Commonwealth Africa* (1974) Hurst & Co., London, pages 267-272.

58. Nwabueze: *The Presidential Constitution* at page 185. He cites the U.S. example where strict adherence to separation of powers seems to make initiation of legislation traditionally a preserve of the legislature. He does, however, note that there are facilities in the American legislature to enable legislators prepare and draft bills. Interestingly, he points out that even in the same U.S., "Congress is coming increasingly to yield legislative leadership to the executive, because of the latter's superior resources and capacity of action." (at page 186).

Can the same arguments be used to rule out the popular initiative? On a related issue, Professor Nwabueze points out that the process of initiating legislation is not as elaborate in Africa as in other parts of the world, e.g. the U.K. "...consultation with interested groups being rare and never exhaustive..."[59] The time has come to move forward! The populace must be consulted at the very least and in some situations, they should be encouraged in principle, to initiate legislation. The modalities for the later scheme being a matter of detail.

Who will Guard the Guards?

So far, the discussion has turned largely on constitutional provisions and practices enabling the legislature to check the executive in its dealings both in respect of public funds and the execution of its functions. In the course of its own operations, the legislature does incur financial obligations at public expense. The basic structure of the legislature provides for several key functionaries. Each of them has a retinue of support services and staff that go with their positions. These all cost money. Sometimes indeed, the public purse can become encumbered with what could, with some frugality, be unnecessary burdens. On the one hand, it must be noted that one cannot be dogmatic about this issue because the Constitution does give the legislature the power to formulate its own procedure and also provides for various functionaries therein. It is right however to question the reasonableness of an extravagant approach if the legislature's functions can rightly be said to include keeping a close watch on public funds. Thus, the query who will guard the guards themselves?

When questions arise, emanating from this issue, who will be the arbiter? Is the judiciary effectively placed to mediate? Or will the issue be resolved by the political process itself which then raises the issue of Political Questions." This doctrine posits that certain issues are so obviously political that they should be left to the political arms of government and not brought before the courts.

In another respect, the Constitution itself provides procedural checks on the legislature and all concerned in the passing of bills of which the Appropriation Bill is a prime example. This procedure, set

59. *Presidentialism in Commonwealth Africa, supra* at page 271.

out in section 59 in relation to the National Assembly, must be followed strictly if the final legislation is to be valid.

It will be recalled that in the case of *Attorney-General of Bendel State v. Attorney-General of the Federation and 22 Others*,[60] the constitutionality of the Allocation of Revenue (Federation, etc. Account) Act of 1981 was successfully challenged as having been passed in breach of constitutionally prescribed procedure. The conflict that arose in respect of this was resolved by the court as the issues in the case were certainly within the jurisdiction of the courts. Thus, in relation to the question who will guard the guards themselves, the Constitution provides procedural checks on the legislature in its handling of matters concerning public funds. This case is also important as it illustrates an issue which was raised earlier on – the fact that a legislature dominated by the party that also controls the executive may sometimes fail to perform, properly, its constitutionally assigned task of "guardian of public funds" among others.

The Right of Recall

Section 69 of the 1999 Constitution provides a right to recall a member of the National Assembly.[61] It is perhaps in the practical application of this provision that the impact of the constituency on the activities of the legislature is greatest. It is members of the legislator's constituency that are empowered to set in motion the process for recalling a legislator. Section 69 provides that a legislator may be recalled, if:

> "(a) there is presented to the chairman of the Independent National Electoral Commission a petition in that behalf signed by more than one-half of the persons registered to vote in that member's constituency alleging their loss of confidence in that member; and
>
> (b) the petition is thereafter in a referendum conducted by the Independent National Electoral Commission within 90 days of the date of receipt of the petition, approved

60. Similar provisions are made in respect of the state legislature in section 110.
61. See also the recommendations of the Political Bureau in the *Report of the Political Bureau*, page 141, para. 8.069.

> by a simple majority of the votes of the persons registered to vote in that member's Constituency."

One rationale for its introduction, according to the Political Bureau, was to establish, in a permanent manner, "a culture of consultation and reciprocal control with regard to law making and the use of power and privileges."[62]

Furthermore, it was based on the belief that Nigerians have an idea of the goals of nationhood and the objectives of representation. It is this idea or conception which determines the depth of their faith in popular democracy and the nature of political judgment they form on the behaviour and the performance of their elected representatives.[63]

The power of `recall' is no doubt a potent weapon in the `hands' of the Constituency? Could failure to represent the varying wishes of several constituents be one reason to activate the recall process? The Political Bureau recommended that the power should be *used in cases of misdemeanours considered to have fallen short of the minimum "good behaviour" required by the electorates of their elected officials.* At best, it remains a subjective test as what amounts to "good behaviour" and the minimum standard thereof.

Apart from this, the process of recall underscores the relevance of an accurate voters' register by which the relevant members of the constituency can be identified. The different controversies that have attended our several attempts at compiling voters' registers illustrate the problems that the issue can throw up. Needless to say, the whole process of recall can be bedeviled by fraud, victimisation and undue influence in the process of setting the machinery in motion within a given constituency. Although not on all fours with the process of recall of elected legislators under the 1999 Constitution, the controversies that raged in the first Republic over the issue of a Regional Premier being removed by the Governor on the ground that he no longer commanded the support of the majority in the legislature comes to mind. The issues culminated in the well known case of *Akintola v. Aderemi.*[64] These

62. *Ibid*, at page 141, para 8.082.
63. *Ibid*, para 8.084.
64. [1962] WNLR 185. See the dissenting judgment of Brett F.J. The case went on appeal to the Privy Council as *Adegbenro v. Akintola & Aderemi* (1963) 3 WLR, 63 where Brett's view was upheld.

problems become more fundamental against the background of the rather limited role, if any that the courts can play in the determination of controversies that may arise here. First a question!

Is the issue of recall subject to judicial review or is it purely a political question and so outside the jurisdiction of the courts? Section 69 of the Constitution which introduced the process is silent on the point. While the issue of impeachment of the President, his Vice or the Governor and his deputy are specifically stated to be outside the purview of the courts. Section 69 makes no such ouster in respect of "recall" However, it would appear that if any, the courts' jurisdiction cannot go beyond determining whether the procedure set out in section 69(a) and (b) has been employed. As to the substantial issue of what would found a basis for recall, it remains clearly a subjective decision for the Constituency to take – a political question – how they arrive at that conclusion is certainly their own business.[65] This makes sense too as it is the members of the Constituency that understand best, their own expectations of one who has been given the mandate to represent them.

One view has it that the possibility of this device being used against him might make a legislator:

> A mere delegate, making him the victim of the corrupt attacks of any active and intriguing clique, and this would tend to draw public spirited men out of public life.[66]

Are these reasons strong enough to warrant the removal of the right of recall from the Constitution? Certainly not. For while it has the potential of being abused, its utility lies in the very factors that propelled its introduction in the first place. It will be recalled, for example, that the Political Bureau had emphasised the need to develop a culture of "consultation and reciprocal control" between the electorate and their elected representatives.

In his memoirs on the American Constitutional experience, Tip O'Neill, sometime speaker of the United States House of Representatives made an observation, the vital truth of which is applicable here:

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65. An echo perhaps of the *Adegbenro v. Akintola* case noted in note 64 above.
66. See C.F. Strong, *op. cit.*, page 295.

> "...the whole point of having a Congress is that the representatives of the people are accountable to their Constituencies."[67]

If the power of recall serves:

(a) as a constant reminder to the legislator of the people whose interests he is mandated to represent; and

(b) to develop a culture of consultation with the Constituency,

it raises other issues as well. These include the kind of loyalties that are required of the legislator. There is a peculiar mix of loyalty to the party, to the Constituency and perhaps other interest groups that may have had a hand in his election.

The Constituency, Pressure Groups, Party Influences and Legislative Activity

The issue of what loyalties are expected of the legislator remains topical. Several groups and interests have been identified as expecting some measure of loyalty from him with each group quite often believing that its own interest should be paramount. It is a fact that the role of the party becomes less visible after election. The party cannot remove the legislator thereafter but the Constituency can. However, the role of the party is crucial because no one can be a legislator unless he is a party member. There is as yet no provision for independent candidates under the 1999 Constitution.

There is further dilemma!- while the legislator is essentially a representative of a Constituency made up of a community or communities, with the complexities of under development, these communities or electoral constituencies have metamorphosed into areas with large numbers of persons with interests that are at the simplest, multiple. At the local level of his particular Constituency, how then does the legislator hope to satisfy these interests? On another level, it must be understood that a legislator in a National Assembly does have a

67. Tip O' Neill: *Man of the House: The Life and Political Memoirs of Speaker Tip O' Neill* (1987) Random House New York p. 204.

larger group to consider – the national interest. As Konsoulas observes,[68] "his most important decisions relate to matters of national concern. Yet, narrow local interests may oppose a particular piece of legislation whose passage is considered important to the nation as a whole. If the representative is to speak for his district only, who is to speak for the nation?" The same writer points out that ideally, the policies of national political parties should reflect the interests of the nation. That is, itself subject to varying interpretations for as he further observes:

> ...it is not easy to determine the national interest. The leaders of political parties can only empirically distill the views of the most active groups in the light of their own values and prejudices.[69]

How then are leaders and members of the political parties really expected to react to policies? Where these dilemmas do exist, there are still ways in which to balance what may be the conflicting interests of the small constituency and those of the nation. There is for example, the possibility of horse trading – thus, where the legislator cooperates on a national issue/policy, his consideration could be something in return for his bargaining which are basic planks of democracy.

As leaders and representatives, legislators must deal with issues that touch the lives of the people. To use a credible example – a child who (in the opinion of his parents), has qualified for admission into a Federal Government college, fails to gain admission. This is a matter that the parents should be able to bring to the attention of their representative who then can take the matter up. This could serve one of several purposes. Perhaps, in investigating the facts, the legislator will be in position to discover that the parents were absolutely right and so take steps to remedy the situation on their behalf, with the appropriate

68. D.G. Konsoulas: *On Government, a Comparative Introduction* (1968) Wadsworth Publishing Co. Inc., Belmont California, page 92. See also A Guobadia: "The Federal Constituency and the Imperatives of Legislative Activity" in I.A. Umozurike ed., *Democracy Beyond the Third Republic* (1993) Fourth Dimension Publishers for Federal Ministry of Justice, pp 13-32.

69. *Ibid.*

authority. On the other hand, he may discover that the parents had their facts all wrong and that in fact the admissions were correctly handled. In conveying this fact to the aggrieved parents, the legislator would be correcting a misconception that if improperly handled could lead to other problems.

This illustration underscores the educational role of the legislature. It is expected that in the process of performing its various functions, it will be able to guide the populace towards making informed choices on different issues. According to Norman Ornstein:

> "In addition to their official lawmaking capacity, most legislatures perform a unique educational role. Individual legislators simplify complicated issues and define policy choices. They use their resources and expertise to filter information from many sources and to resolve conflicting ideological positions, ultimately presenting their constituents with clear-cut options. This educational function has become increasingly important as societies have become more complex, as the scope of government activity has become more extensive, and as the public has gained increased access to legislative proceedings, particularly via television."[70]

Good Governance and National Development:
The Role of the Legislature

It is clear that in the performance of the different functions and the execution of the different powers already discussed, the important thing, with regard to the subject of this presentation is for the legislature to act with a view to facilitating good governance both in the structure and workings of government as well as in impacting on the populace.

Good governance would ultimately lead to national development which should be reflected in every facet of our national life. It has already been pointed out that the burden of ensuring good governance

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70. Norman Ornstein "The Role of the Legislature in a Democracy" in USIA Freedom Papers, 1992.

falls on all arms of government. What role does the legislature have to play in all of this?

Building the Required Bridges

Inter-Branch Relations

In terms of the structure and workings of government, the legislature can, as an arm of government, foster the kind of relations between the arms of government, particularly as between the legislature and the executive that will help the growth of the rule of law and democratic governance.

As we take our tottering steps under our Presidential System, "effective and purposeful leadership" [from the legislature will act] as a counter-poise to the Executive President[71] and protect the system from what Prof. Nwabueze has termed "...the tendency of presidential rule towards autocracy." This is not all. Engendering good relations between these two arms in the spirit of negotiation and compromise which is so vital for the survival of democracy should also be the approach to inter-branch relations.

Inter-Governmental Relations

This really is addressing the issue of how to manage our federal system effectively in order to cope with the conflicts between the centrifugal and centripetal forces that constantly tug at the state. Not unrelated to this is the need to address the issue of polarisation along several lines - ethnic, religious, regional, etc. It is clear that the polarisation has arisen from the fear of dominance by one or other group or interest along the different lines identified. The real or perceived marginalisation or neglect of segments of the population must be addressed. The legislature can indeed take the lead in addressing them such that polarisation is kept at a minimum even if not eradicated entirely. The solution will not lie in playing one interest or group up against the other.

Socio-Economic Development

In laying the foundations for a sound future, i.e. one that will foster sustainable human development in Nigeria, a good starting point would

71. S.E. Oyovbaire, *op. cit.* note 1 *(supra).*

be Chapter II of the Constitution, i.e. the fundamental objectives and directive principles of state policy which together set out what really can be seen as the hallmarks of good governance. In sum, the creation and sustenance of a solid socio-economic and political system that all can enjoy. In this regard, the issue is whether the legislature, as representatives of the people can afford to be insensitive to what is happening in the country. There must be an awakening to and a response from the legislature to the needs of the various communities that make up Nigeria and consequently, to the issues that lie deep at the root of our social and political problems. The Niger-Delta stands out and continues to haunt the state; so also do the problems of other minorities and disadvantaged groups. In addition, poor infrastructure, unemployment, the problem of insecurity of life and property, the complete degeneration of the educational and health sectors to mention a few – the list could be endless! These are issues that must be tackled effectively. There must be sustained effort by the legislature, alone and also in concert with the other organs of government, by law and policy to initiate the process of adequately addressing these problems.

Not unrelated to this is the rather pressing issue of dealing with what has been termed the "enemy within." The monster called corruption. This is not the forum at which to articulate some of the well documented statistics depicting the endemic nature of the problem in Nigeria. It is however necessary to observe that if the legislature, like any other arm of government is to make any impact in the quest for good governance, something must be done systematically and seriously about the problem. Whatever steps are taken must go beyond paying lip service to the idea of tackling it.

This certainly revisits the functions of the legislature already discussed, in particular, those that have to do with public funds and investigations. In order to be able to carry out these functions effectively, the legislature must have not only the legal authority to do so, i.e. deriving from the Constitution, it must have the moral authority so to do – for if it is to check reckless spending on the part of other institutions and departments of government, it must itself not be guilty of the same. Ultimately, it is fundamental to good governance that these elected representatives must be able to stand in the court of public opinion – or how else will they be able to check the excesses of the executive?

Building an Institution

Good governance will rest on among other things, the structures of governance that are put in place. In the case of the legislature, it must make every effort to develop as an institution. This will be fostered where a tradition of tolerance and democracy in the practice of governance is developed. This tradition will take root from a culture of compromise, "give and take," i.e. negotiation and learning to debate issues rather than resorting to violence and other rough tendencies in the conduct of the legislature's business. Institution building is also geared towards accommodating the minority parties by allowing them a voice in the conduct of affairs. Good governance should eschew a "winner take all" approach both in the membership of committees and in the general functioning of the legislature. Finally, on this point, building the legislature up as an institution means making full use of the committee system. This would not only allow for division of labour but would also give room for detailed and specialist consideration of issues. It must be emphasised also that the requisite facilities for the operation of the legislature must also be in place. A well developed legislature would produce results. Indeed, to foster good governance, the legislature must produce results – It must ensure that at the end of the day, it is not correctly referred to as an "expensive and irrelevant talking shop."[72]

Conclusion

This Chapter has tried to examine the possible role of the legislature in our quest for good governance. In the process, the different facets of the legislative function have been examined. It has been established that the legislature is not only an arm of government, but is also a representative assembly in which character it is expected to play certain roles for the constituency. In identifying the hallmarks of good governance, the Chapter has demonstrated that ultimately, good governance will lead to sustainable national development.

In all, it has been emphasised that in a fledgling democracy such as ours, there is need to develop the legislature as an institution that will endure. The success of the legislature as an institution will also be the success of the other arms of government and vice-versa. Some of the

72. Taken from a reference made in the *Report of the Political Bureau* (1987), p. 89.

factors required for the institutional development of the legislature have been articulated.

In reducing the idea of good governance to a fulfillment of the needs of the populace, there continues to be an echo of the following statement credited to Senator Herbert Humphrey of the United States:

> "The moral test of government is how it treats those who are in the dawn of life, the children, those who are in the twilight of life, the aged; an d those who are in the shadows of life – the sick, the needy and the handicapped."[73]

Reduced to basics that really is the bottom line of good governance. However, deceptively simplistic these indices may sound, everything that has been said in the foregoing pages about the hallmarks of good governance is really an amplification of this simple view.

73. Quoted by Tip O'Neil *op. cit.*, at page 203.

4

THE JUDICIARY IN A MODERN DEMOCRACY

by

I. E. Sagay, SAN
(Professor of Law and Private Legal Practitioner)

Introduction

It is often forgotten, that the Judiciary is the third great arm of government and that in democracies with written Constitutions, it is usually given supervisory powers over the actions of the other two arms, namely, the Legislature and the Executive. It is significant that whilst the Legislative and Executive arms of government are dissolved during a military take over, the Judiciary survives or is allowed to survive during military dictatorship. Is there anything inherent in the nature of the Judiciary that enables it survive Military coups, or is this phenomenon attributable to the kindness and charity of the Military?

In *Government of Lagos State v. Ojukwu*[1], Kayode Eso, JSC. appeared to have adopted the latter view when he stated as follows:

> "By virtue of the Constitution (Suspension and Modification) Decree No. 1 1984 a good number of the provisions of the Constitution were suspended. Indeed, what was left was what had been permitted by the Federal Military Government to exist. All the provisions relating to the Judiciary were saved. Section 6 of the Constitution, the most important provision, in so far as the institution known as the Judiciary is concerned, which vests in courts the judicial powers of the Federation was left extant. The Military Government had the power, and still has, to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that the rule of law should pervade. It is the clearest indication against rule by Tyranny, by sheer force of arms against a presumption

1. [1986] 1 NWLR (Pt. 18) p-621 at 634.

subjecting the nation to the rule of might as against rule of right."

On the other hand, Pats-Acholonu, J.C.A., takes a contrary view:

> "I do not share his [Eso's] view that it [The Military] can abolish the Court, if of course by that he is understood to mean that a Decree can be passed to literally obliterate or extinguish the Court. The Military as an institution like the judiciary is a creature of statutes and indeed the Court in this country is older than the armed forces. Mere enactment of a noxious law by which the powers that be seek to abolish the Court does not bring a final end to the judiciary. Such a course of action would cause chaos and bring such cataclysm in the country that no one can fathom its dimension. Indeed neither Napoleon nor Hitler nor the maverick Mussolini each in his madness abolished courts. The armed forces and the Judiciary are Nigerian establishments and the people who can abolish them are the people who set them up"[2]

This writer agrees entirely with the views and reasoning of Pats-Acholonu, J.C.A. However, it is still necessary to dig further in order to reveal what gives the Judiciary such fundamental character and resilience in our polity. Unfortunately, this will be outside the already very wide scope of this Chapter.

Mandatory Factors in a Democratic System of Government

The concept of 'Democracy' has been subjected to numerous definitions. However, the one by John Plannetaz would seem to capture the essence of the concept. According to him, "Democratic Government means government by persons freely chosen by and responsible to the governed "

The attributes of democracy are well known. These include amongst many others:

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2. "Threats to the Jurisdiction of the Court and the Rule of Law in Nigeria", in *All Nigeria Judge's Conference Papers*, 1995 p.112 at 124.

(i) The Rule of Law

(ii) The independence of the Judiciary

(iii) Separation of Powers

(iv) Constitutionalism in governance

(v) Enforcement of Human Rights.

All the foregoing factors co-exist and are inter-twined and inter-related in any truly democratic system. As Justice Eso has rightly observed, for democracy to reign, there must be entrenched, the rule of law in contra-distinction to the rule of man and that the rule of law itself is predicated upon the separation of powers.[3] Thus, the three concepts are political triplets which depend on each other to survive in a symbiotic relationship.

The intertwining relationship between separation of powers, democracy and the rule of law is even better appreciated by defining and explaining the latter two concepts. Thus, the term "rule of law" is now a convenient short hand for the full complement of our civil and political rights. It has grown beyond the narrow Diceyan definition which, however, still forms the core of the concept. According to Dicey, the doctrine means, "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative or even of wide discretionary authority on the part of government. Englishmen are ruled by the law and by the law alone. A man may with us be punished for a breach of the law, but cannot be punished for nothing else."[4]

In summary, this means that no man is punishable except for a distinct breach of law established in the ordinary legal manner before ordinary courts. This of course means that the establishment of special tribunals is a violation of the rule of law. So too is detention without trial,

3. "The Role of the Judiciary in a Changing Africa.," p.3 Paper presented to the conference of the World Jurists Association on "Judicial Independence in Post-Colonial Africa" held in Cape Town, January 1997.

4. Dicey, *Law of the Constitution*, 10th ed. Macmillan p. 202.

ouster of the jurisdiction of courts, any concept of supremacy of a decree over the Constitution, retroactive laws and sanctions etc.

The second aspect of Dicey's classification of the rule of law means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals.[5] This aspect of Dicey's thesis on the rule of law is most graphically illustrated by the following passage from the judgment of Oputa JSC. in the *Governor of Lagos State v. Ojukwu.*[6]

> "...The law is no respecter of persons, principalities, governments or powers and the courts stand between the citizens and the government alert to see that the State or government is bound by law and respects the law."

But the whole concept of the rule of law has been expanded considerably beyond its original classic meaning and scope. Today that term denotes the minimum condition of existence in a free, open, humane, civilised and democratic society. It encompasses the following:

- The supremacy of the law including judicial decisions over all persons and authorities in a State.
- The supremacy of the Constitution.
- Independence of the judiciary.
- The right to personal liberty.
- Observance of democratic values and practices including: freedom of speech, thought, association and the press and regular, free and fair elections as the basis for assuming power in government.

5. Dicey *op.cit*, pp. 202-3.
6. [1986] 1 NWLR (Pt. 18) p. 621 at 647-8.

All these are constitutionally guaranteed fundamental rights.

Separation of Powers

Any system of Government based on the Rule of Law and Democracy must consist of the three great arms, namely, the Legislature, the Executive and the Judiciary. This division of labour is a condition precedent to the supremacy of the Rule of Law in any society.[7] The doctrine of Separation of Powers advocates the independent exercise of these three governmental or constitutional functions, by different bodies of persons, without interference or control or domination, by one of the other or others.

The doctrine as presently understood is derived from Montesquieu, whose elaboration of it was based on a study of Locke's writings and an imperfect understanding of the eighteenth Century English Constitution.[8] In his *Second Treatise Civil Government*, Locke laid the basis of the doctrine of Separation of Powers thus:

> "It may be too great a temptation to human frailty, apt to grab at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantage."[9]

Just like Locke, Montesquieu was concerned with the preservation of political liberty and the prevention of oppression and abuse of power. Montesquieu wrote:

> "Political Liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and carry his authority

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7. See Aihe, *Selected Essays on Nigerian Constitutional Law* Idodo Umeh Publishers (1985) p. 32.
8. See O. Hood Phillips - *Constitutional and Administrative Law* 6th ed. Sweet and Maxwell., p. 14.
9. See E.C.S. Wade and A. W. Bradley Phillips - *Constitutional and Administrative Law*, 9th ed., Longman p. 45.

> as far as it will go. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another...When the Legislative and Executive Powers are united in the same person or body... there can be no liberty... Again there is no liberty if the judicial power is not separated from the legislative and executive. There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers."[10]

According to Justice Oputa, the concept of Separation of Powers arose from the need to ensure the restraint of governmental power, by dividing that power, without carrying that division to an extreme, incompatible with effective government. A constitutional democracy thus, presupposes a balanced system of divided or shared powers. It is only within such a system that individual citizens can ever hope to enjoy any measure of independence and freedom from arbitrariness and governmental lawlessness and thus, maintain the civil rights and liberties conferred on them by the Constitution.[11]

It is an irony of history that the doctrine of Separation of Powers was not in operation in the 18th century English Constitutional System which was the source of Montesquieu's inspiration, nor was it adopted in his homeland, France at that time. Indeed, even today, in both countries, the executive and legislative functions are largely in the hands of the same group of people. It was in the United States of America that the doctrine was fully embraced for the first time.

The concept of Separation of Powers is even more crucial to the survival of the modern State, than it was in the days of Montesquieu. The point was most graphically made by Chief Gani Fawehinmi in his 1991 Lecture delivered under the auspices of the Nigerian Bar Association, Ibadan Branch. Thus, stated that great Jurist:[12]

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10. *L'Espirit des Lous* Chap. XI, pp. 3-6. See e.g translation by Thomas Nugent, New York Hafner, (1949).
11. Oputa: "Independence of the Judiciary in a Democratic Society" - An unpublished paper.
12. "Denial of Justice Through Ouster of Court Jurisdiction in Nigeria" June, 1991, pp. 86-87.

> "Those who invented the Rule of Law believed that the national polity could only attain order and peace through the furtherance of the ideals of social justice, an integral part of which is the non-interference in the structure for the resolution of disputes otherwise the alternative is a pressure-cooker friction, deep distrust, constant instability with periodic chaos and violence. To obviate divisive tendencies, they advised in their God-given wisdom that those who make laws for societies must be distinct from those who carry out those laws and each one of the two (makers and executors of law) must be different from those who interpret the laws or adjudicate on them. Hence, in the modern constitutional parlance, every civilised society must be governed by law makers who are styled legislators to make laws, the executives to carry out those laws and the judiciary to adjudicate. Shorn of its imperfections, the Rule of Law is the only path yet designed by man to political sanity in any Nation. Nigeria cannot afford to be different if it is to survive as a Nation."

Perhaps the most comprehensive consideration of the doctrine of separation of powers and the independence of the Judiciary by the Supreme Court occurred in the famous election case of *Unongo v. Aku*[13]. It will be recalled that the appellant was the defeated candidate in the Benue State Governorship election in July 1983. His Petition to have the results of the election nullified was frustrated by an Act of the National Assembly[14] which stipulated that any election petition filed before a High Court, which was not disposed off within 30 days, was time barred and would become null and void. The thirty days elapsed, in the middle of the case, which had involved an appeal to the Court of Appeal on some interlocutory matters. The question which arose for the consideration of the Supreme Court was whether a law which effectively fettered the operations of the Judiciary was not in breach of the Constitutional doctrines of separation of powers, and the independence of the Judiciary.

13. [1983] 2 SC. N.L.R. 332
14. Electoral Act, 1982

It was held that the relevant section of the Electoral Act,[15] was null and void for these very reasons and also for infringing the right to fair hearing. Bello, J.S.C., as he then was, analysed the principle of separation of powers as contained in the 1979 Constitution and proceeded to lay down the rules which arose from these principles:

> "In the United States of America it is trite rule of constitutional law that in consequence of the principle of separation of governmental powers embodied in the Constitutions of the United States and of the several States any statute by which the Legislature attempts to hamper judicial functions of the courts or to interfere with the discharge of judicial duties or to unduly burden the exercise of judicial functions is unconstitutional and void unless the Constitution of a state so permits. Thus, statutes which prescribed and fixed the time limits within which certain cases must be tried and determined by the courts or limited the time within which appeals must be heard and determined were held unconstitutional and void: See *State of Indiana ex rel Kostas v. Johnson* 168 A.L.R. 1118 and the several cases cited therein.
>
> Now, the principle of separation of the powers of the Federal Republic of Nigeria was well entrenched in our Constitution which under section 4 vests the legislative powers of the Federation in the National Assembly and under section 6 vests the judicial powers of the Federation in the Courts specified therein. It is pertinent to state that the National Assembly is not a sovereign Parliament. Its legislative powers are limited by express provisions of the Constitution."

The learned Justice of the Supreme Court then adopted the following relevant passage from the judgment of Fatai-Williams C.J.N., in *Attorney General of Bendel State v. Attorney General of the Federation and 22 Ors.*:[16]

15. Section 140.
16. [1982] 3 N.C.L.R. 1, at p. 40.

> "By virtue of the provisions of Section 4(8) of the Constitution, the Courts of Law in Nigeria have the power, and indeed, the duty to see to it that there is no infraction of the exercise of Legislative power, whether substantive or procedural as laid down in the relevant provisions of the Constitution. If there is any such infraction, the courts will declare any Legislation passed pursuant to it unconstitutional and invalid"

What is more, whilst conceeding the basic principle that a court must not interpret its jurisdiction under section 4(8) to include the internal proceedings of the National Assembly, *unless the Constitution made provisions to that effect* the learned Justice of the Supreme Court added, however, that, if the Constitution makes provisions as to how the legislature should conduct its internal affairs, or as to the mode of exercising its legislative powers, then the Court is duty bound to exercise its jurisdiction to ensure that the Legislature complies with the Constitutional requirements.

Indeed, as will be seen later, this is what the Court did in the *A.G. of Bendel State* case when it declared that a money bill of the National Assembly was null and void, because the procedure adopted in passing it into law was contrary to the requisite Constitutional provisions.

In concluding his judgment, Bello, J.S.C. referred to the requirement that each arm of government should respect the rights of the other thus:

> "As the courts respect the right of the Legislature to control its internal affairs so the Constitution requires the Legislature to reciprocate in relation to the jurisdiction of the courts. It may be observed that sections 73(1)(c), 111(1)(c), 233 and 239 of the Constitution empower the National Assembly or a House of Assembly, as the case may be to make laws for regulating the practice and procedure of the Federal High Court and the High Court of a State. It seems to me, if in the purported exercise of the powers under these sections the National Assembly makes any law which hampers interferes with or fetters the jurisdiction of a court of law such law shall be void for being inconsistent with the provisions of the second limb of section 4(8)."

Judicial Powers

Judicial Powers are provided for in section 6 of the 1999 Constitution. The Courts established by the Constitution are;

(i) The Supreme Court,
(ii) The Court of Appeal,
(iii) The Federal High Court,
(iv) The High Court of the Federal Capital Territory, Abuja,
(v) State High Courts,
(vi) Sharia Court of Appeal of the Federal Capital Territory,
(vii) Sharia Court of Appeal of States,
(viii) Customary Court of Appeal of the Federal Capital Territory,
(ix) Customary Court of Appeal of States,
(x) Such other Courts that may be established by the National or State Assemblies in their areas of legislative competence, but which must be of sub-ordinate jurisdiction to that of High Courts established by the Constitution.[17]

The extensive scope of a Court's powers are revealed in sub-sections 6(a) and (b) of the Constitution which provide as follows:

The Judicial powers vested in accordance with the foregoing provisions of this section:

(a) shall extend, notwithstanding anything to the contrary in this Constitution,
to all inherent powers and sanctions of a court of law;

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

17. See section 4 of the Constitution.

Judicial powers are expressly protected against the well known predatory ouster clauses of the Military era by section 4(8) which states as follows;

> "Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National 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."

In this way, courts are enabled to play their full role in the governance of the State and in the affairs of society.

The Role of Judges

As Uwais, J.S.C., (as he then was) noted in 1995,[18] Judges do not have an easy job. They repeatedly do what most people seek to avoid, that is, making decisions, and what is more, they are expected to give reasons justifying their decisions. "These reasons get examined by Lawyers at their leisure in order to find errors which will enable them appeal."

According to the learned Justice of the Supreme Court, as he then was, these judgements or decisions constitute materials for the books and lectures of academic lawyers, who use these opportunities to show that the Judges made mistakes in these decisions.

Apart from their duty to maintain discipline in their courts, and to conduct trials fairly and efficiently, they are also expected to resolve disputes before them wisely, according to law so that the parties before them can conclude that they have had a fair hearing.[19]

Conduct of Judges

As the former President of the Court of Appeal Akanbi, PCA., stated at the 1995 All Nigeria Judges' Conference, the nature of the office and

18. "The Court: An Instrument of Justice and Democracy" in *All Nigeria Judge's Conference Papers* 1995, p. 1 at p. 3.
19. Uwais, *ibid*, pp. 3 & 4.

functions of a Judge require persons holding that office to have a high sense of duty, responsibility, commitment, discipline, intellect, integrity, probity and transparency.[20]

According to the learned President of the Court of Appeal,

> "anyone who gets appointed to the exalted position of a judicial officer, without possessing these supreme qualities is sure to be a No. 1 obstacle to justice according to law. Indeed a dishonest or corrupt Judge or a Judge of little or no learning can be a most dangerous clog in the administration of Justice."[21]

However, of the twin evils constituted by a corrupt Judge and an ignorant Judge, Akanbi, P., makes it clear that the former is by far worse for according to him, a Judge with little or no adequate knowledge of the Law may be considered a nuisance and his lack of understanding and appreciation of the Law may constitute an obstacle in the path of Justice, yet he is still more tolerable than a corrupt Judge."For a corrupt Judge is not only a dangerous obstacle, he is anathema and disgrace to the Profession or institution to which he does not deserve to belong."

In a lecture delivered at the Obafemi Awolowo University in 1988,[22] Justice Oputa devoted space to some of the qualities a Judge must posses if he is to be capable of dispensing justice. He stated *inter alia:*

> "The qualities of courage, honesty and integrity required of Judges are meant to ensure that they do not, either under pressure or of their own volition, yield their moral authority, and that they do not in the process of decision making allow themselves to be swayed from the path of truth and justice. The qualities of firmness and impartiality will allow the judge to turn the wheels of justice objectively and not subjectively. In the Chambers of the Legislature or the Executive, it may be necessary and at times even expedient to listen to the sirens of

20. "The Many Obstacles to Justice According to Law" p. 38 at p. 40. Paper delivered at the Conference
21. *Ibid at* p. 40.
22. Titled "Access to Justice"

power and influence. But in the halls of justice the battle is for truth and against expediency. It is a battle for protection from power or its abuse - the power of the Police and of Prosecution, the power of Business and of Wealth and Status and the most subtle of all, the power of the majority. It needs a man of commensurate moral fibre and moral courage to stand up to this assault from power, to maintain his balance and deliver justice.

Honesty and judicial rectitude are thus, the badge of a good judge. It is a calamity to have a corrupt judge, for money - its offer and its receipt - corrupts and pollutes not only the channels of justice but the very stream itself. Honesty and judicial rectitude are therefore, the very minimal requirements of the judicial office. Less than that no disciplined and responsible judiciary should accept and less than that no disciplined society should tolerate. The offer and acceptance of money, and unlawful or immoral gratification by a Judge - these ruin every other virtue of the judicial office. They snap at and break the brittle bond of confidence which unite our citizens with the Court System. Thus, scandalised and morally deformed, bewildered litigants no longer expect from the Courts a just decision. The entire experiment of justice through the courts then becomes an exercise in futility, and justice becomes a sham or at best a counterfeit, for nothing is as hateful and as odious as venal justice."

In *Dickson Ikonne v. (i) The Commissioner of Police, Imo State (ii) The Hon. Justice Nwanna Nwa-wachukwu*[23], the Second respondent, a Judge, had issued a warrant of arrest against the Applicant, for private and personal motives. The Supreme Court (Aniagolu, JSC.) had this to say about him:

"Having regard to the foregoing it is unthinkable that a Judge of the High Court to whom the law looks up for the protection of the fundamental rights of the people should be the one to trample upon those fundamental rights. The precise wordings of the Judicial Oath under the Sixth

23. [1986]4 NWLR (Pt. 36) 473.

Schedule to the 1979 Constitution to which the Respondent subscribed are very significant. The said Judicial Oath to the extent to which it applies to the Respondent as Judge of the High Court of Imo State reads:

'...do solemnly swear that I will be faithful and bear true allegiance to the Federal Republic of Nigeria; that as a Judge of the High Court of Imo State ... I will discharge my duties, and perform my functions honestly, to the best of my ability and faithfully in accordance with the Constitution of the Federal Republic of Nigeria and the Law; that I will abide by the Code of Conduct contained in the Fifth Schedule to the Constitution of the Federal Republic of Nigeria; that I will not allow my personal interest to influence my official conduct or my official decisions; that I will preserve, protect and defend the Constitution of the Federal Republic of Nigeria. So help me God.'

It is clear from the facts of this matter on appeal that the Judge, the Hon. Justice Nwanna Nwa-Wachukwu, had no valid legal reasons for issuing the Warrant of Arrest complained of in this appeal. The issue of the Warrant of Arrest was, in the circumstances of this matter on appeal, an abuse of legal process - an abuse of judicial authority.

It is particularly painful that I should come to this conclusion concerning a Judge of the High Court, but the conclusion is inevitable having regard to the facts and circumstances of this matter on appeal. The conduct of the Judge in issuing the Warrant of Arrest upon what obviously was fictitious reason, had the undesirable effect of denigrating the judiciary in the eyes of the public and of eroding the confidence of the people in judicial process and the Rule of Law."[24]

The extremely high standards required of a Judge arise from the enormous, indeed, unlimited powers of a Judge over all persons and

24. (1986) 4. N.W.L.R. 473 at p. 496.

institutions in Nigeria. Of the three arms of government, it is only the Judiciary that has the competence to supervise and review the actions of the other two and where necessary, declare them null and void.

The Powers of the Court in a Democracy

Section 1(1) of the Constitution, declares that "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". Furthermore, Section 1(3) provides that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

It ought to be clear that in case of any dispute as to the consistency of any action of the other arms of government with the Constitution, it is the Courts that have the authority to make the appropriate pronouncement as to the lawfulness of such action. This point was eloquently and lucidly made by Justice Uwaifo, then a Justice of the Court of Appeal. He not only made a conclusive case, but demolished convincingly, all arguments to the contrary as follows:[25]

> "Once it is admitted that the Courts are given the constitutional authority to resolve any dispute between persons and between the State and any person, or to resolve any conflict between a statute and the Constitution in all cases properly brought before them, it must follow that their decisions should be final, conclusive and binding. Whenever they affect organs of government, in particular as to the legality of their action, they must be accepted as the constitutional position as interpreted by the courts, or in case of appeal, by the final court in the land.
>
> But there has been the unfortunate tendency, even by the constitutional government, i.e. the democratically elected government, to resist this result upon spurious arguments. The issue is raised as a question whether the decision of one organ of government, namely, the judiciary (given the constitutional responsibility to interpret the Laws and the Constitution)

25. Hon. Justice S. O. Uwaifo. "The Court as an Instrument of Justice and Democracy" see *All Nigeria Judges Conference Papers,* 1995 pp 152-4

should be final, conclusive and binding upon the political organs of government. First, it is argued that the authority which can declare the acts of another void must necessarily be superior to that other. Second, that it is intolerable that the views of a handful of men should be allowed to override those of elected representatives of the people on so crucial a matter as the interpretation of the Constitution. Third, that there is the danger that the courts might become something of a 'despotic oligarchy' and that if a choice has to be made between that scenario and the possible tyranny of an elected majority, the latter is the less intolerable of the two.

To my mind, these arguments have the implicit design to destroy the very Constitution considered to be supreme. The Constitution has no room for tyranny of any kind. It has assigned responsibilities to the different organs of government and it is in the interest of the people that those responsibilities are performed within the limits prescribed in the Constitution itself. Those performing their respective responsibilities are public servants. They will necessarily do so with the personnel allowed under the Constitution. In the case of the judiciary it is the Judges of the different hierarchy; as for the executive, the President and Ministers are in charge; while for the legislature, the Senators and Legislators are concerned with making laws. The question of despotic oligarchy in relation to the judiciary, can therefore, not arise as the judges simply interpret the laws and the Constitution. It must not be forgotten that the judges are trained and experienced in the art and that there is a system of appeals in the judicial hierarchy. An understanding of how it works will completely dispel the idea of any possible 'despotism of an oligarchy.' The idealism behind the system is to arrive at the best possible result in any case determined; and when it involves interpreting the Constitution, to discover what the people have declared and hold the government bound by it. There is no question of superiority whatsoever." [26]

26. *Ibid* at p. 18.

To further buttress the foregoing arguments, Uwaifo J.C.A., as he then was, called in aid the famous statement of Chief Justice Marshall of the United States Supreme Court in *Marbury v. Madision*[27] in which the Chief Justice argued that the distinction between a government with limited powers (Constitutional government) and one with unlimited powers (Totalitarian government) would be abolished if those limits did not confine the persons on whom they were imposed and if acts prohibited and acts allowed were of equal obligation. On acts in transgression of the Constitution, he added:

> "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 if 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. It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide the case, conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In a Federal system of government, in which powers are shared between the Centre and the States under the Constitution, the supremacy of such a constitution and the power of courts to declare infringements of

27. (1803) 1 Cranch 137; 2L. Ed. 60 See pp. 154-5 of the 1995 *All Nigeria Judges Conference papers*.

the Constitution illegal, null and void, is without doubt. As Wheare rightly stated:[28]

> "I think it is more accurate to say that if a government is to be federal, its Constitution, whether it be written or unwritten, or partly written or partly unwritten, must be supreme. By this I mean that the terms of the agreement which establish the general and regional governments and which distribute powers between them must be binding upon those general and regional governments. This is a logical necessity from the definition of federal government itself... So far as this agreement regulates their relations with each other, it must be supreme."

True to principle, the Nigerian Courts have taken on the supervisory role of reviewing the actions of the Legislature and the executive, from time to time, to determine whether they are in conformity with the Constitution.

Soon after Nigeria gained its independence, the powers of our Courts to exercise their functions under the Constitution was put to the test. The Tafawa Balewa Government got the Nigerian Legislature to pass the Tribunals of Enquiry Act in 1961. This Act was intended to empower the Federal Government to set up a Tribunal of Enquiry to look into the transactions of a Western Region owned Bank, National Bank. The Chairman of the Board challenged the validity of this Act of Parliament on the ground amongst others, that it infringed on a matter within the exclusive competence of the Western Region Government.[29]

It was held by the Supreme Court that in so far as the Act purported to have effect throughout the Federation, the general powers given the Prime Minister under section 3(1) of the Act to appoint Tribunals to enquire into any matter or thing within Federal Competence anywhere within the Federation, was in excess of the powers of Parliament under the Constitution.

Indeed, the Act was guilty of many crimes against the Rule of Law, namely:

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28. C.K. Wheare, *Federal Government*, Oxford 1963, p. 53.
29. *Doherty v. Balewa* [1961] 1 All NLR 604.

(i) attempting to oust the Jurisdiction of the Courts in hearing and determining the civil rights of Nigerians, (ii) the right of imprisonment (an exclusive power of the Courts) was granted the Tribunals to be set up under the Act. The Supreme Court held that section 3(4) of the Act was unconstitutional because it purported to limit the jurisdiction of the Courts, and that a Commission of Enquiry could not be granted power to imprison because imprisonment by order of such body was not one of the enumerated grounds by which a person could be deprived of his constitutional rights to personal liberty.[30]

During the Second Republic, operating under the 1979 Constitution, which is in *Pari Materia* with the present Constitution for our present purposes, the Courts also reviewed legislation passed by the National Assembly and some actions taken by the executive to determine whether they were consistent or inconsistent with the provisions of that Constitution. Thus, in *A.G. of Bendel State v. A.G. of the Federation,*[31] a money bill, purportedly passed into Law by the National Assembly was declared null and void, because the bill was directly signed into law by the President after a joint Committee meeting of the Senate and the House of Representatives. By the provisions of the Constitution, the final decision ought to have been taken by a joint sitting of the Senate and the House of Representatives. The joint Committee had, therefore, usurped the constitutional powers of the National Assembly. The Supreme Court held that the procedure adopted for the enactment of the bill was unconstitutional.

On the executive side, it will be recalled that in the famous *Shugaba* case, it was held by the Supreme Court, confirming the decisions of the High Court and Court of Appeal, that the deportation of a citizen of Nigeria to another country was illegal and was a breach of the Human Rights provisions of the Constitution.[32]

Judicial Approach to Cases

In order to meet the requirements of a modern democratic society, our courts must adopt an activist approach to the interpretation of law and take a liberal view of *locus standi*. Judicial activism involves a creative

30. See also D.O. Aihe, *Selected Essays on Nigerian Constitutional Law* Idodo Umeh Publishers Ltd. (1985) pp. 83-88.

31. [1981] 10 SC, 1.

32. *Minister of Internal Affairs v. Shugaba Abdulrahaman Darman*, [1982] 3 NCLR 915

interpretation of the law in order to achieve justice, and the true objective of the law. A comprehensive description of what constitutes judicial activism was given by Justice P.N. Bhagwati, a former Chief Justice of India as follows:[33]

> "Technical activism may be contrasted with what I would call "juristic activism". Juristic activism is not concerned merely with appropriation of increased power, but is concerned as well with the creation of new concepts, irrespective of the purpose which they serve. Common law itself is an example of the development of juristic activism. Over the centuries it has been fashioned and refashioned to deal with new claims and demands; it has developed new concepts and invented new principles. The doctrine of common employment enunciated in *Priestly v. Fowler* and the concept of negligence in *Donoghue v. Stevenson* are examples of juristic activism. So also is the decision in *Ridge v. Baldwin* which, in its aftermath, led to a creative reassessment of British Administrative Law through a process of judicial activism. When the English Court of Appeal held, in a recent case, that no action of libel would be maintainable by a public authority in respect of criticism of its governmental or administrative functions, because there was no pressing social need to allow such a right to sue for libel to derogate from freedom of expression, the English Court of Appeal was adopting an activist approach by qualifying the right to sue for libel by invoking the analogy under the European Convention on Human Rights."

Nigerian examples abound. The famous *Unongo v. Aku* case discussed earlier is a case of judicial activism *per excellence*. Basing itself on the fundamental principles of separation of powers, independence of the judiciary and the right to fair hearing, the Supreme Court held that an Act of the National Assembly limiting hearings in election petitions to 30 days, was null and void. The National Assembly had express powers to make laws for the peace, order and good government of Nigeria, but such

33. *Journal of Human Rights Law Practice* Vol. 2, 1992, p.8 at p.11.

power is limited by those fundamental principles already referred to. So although such a limitation of Legislative power was not expressly stated in the Constitution, the Supreme Court implied it, in a creative interpretation of our Constitutional provisions.

In a series of judgments regarding the application of Decree 17 of 1984 by agents of Military Governments to dismiss public servants, without giving them a right of hearing or due process, the Supreme Court demonstrated how judicial creativity and activism can tame even a monstrous law, made by the military.

The Decree as usual contained the ouster provision that no civil proceedings should lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under the Decree. The Decree also suspended all the human rights of all victims of such official action by suspending Chapter IV of the 1979 Constitution in relation to any act under the Decree. The Decree defines the 'appropriate authority' as the Military Governor of any State or any person authorised by him in respect of the State Office and Head of the Military Government or anyone authorised by him or the Supreme Military Council.

Inspite of these provisions, the Courts have by an intelligent and creative process of interpretation, held that many cases of summary removals from office, do not come within the provisions of the Decree, and are, therefore, not only subject to the jurisdiction of the Courts, but also to all the constitutional provisions on fair hearing and other legal and statutory requirement as the case may be.

Thus, in *Wilson v. Attorney-General of Bendel State*[34] the Supreme Court invalidated a decision of the Bendel State Public Service Commission to dismiss the applicant, Mr. Wilson, on the ground that the Public Service Commission was neither an appropriate authority nor did it act under the directive or by the authority of an appropriate authority. In *Garba v. Attorney-General of the Federation,*[35] the same Court held that the dismissal of Garba from the public Service, and the Suit he brought to challenge it occurred and commenced respectively, before even the Military Government which promulgated Decree 17 came into existence.

34. [1985] 1 NWLR (Pt.4) 572 SC
35. *Op.cit.*

Thus, the said act, and the suit that followed it, could not be brought under the provisions of the Decree.

In *Kalu Anya & Others v. Festus Iyayi and Others*,[36] the Court of Appeal at Benin held that even the removal of academics from the service of the University of Benin purportedly, by the authority of the 'Visitor' was outside the compass of Decree 17 because:

> "Although, the President and Commander in Chief of Armed Forces, is by law, the Visitor to all Federal Universities in Nigeria, when he acts as President and Commander in Chief, he acts in accordance with the provisions of Decree No. 1 of 1984 and No. 17 of 1985, but when he acts as Visitor to a University, he acts in accordance with the Powers vested in him by the Statute creating the University and cannot exceed these statutory powers, See *Garba and Others v. University of Maiduguri.*
>
> When acting as a Visitor to a University, the President and Commander in Chief of the Armed Forces is not an "appropriate authority" when within the meaning of that expression in Decree No. 17 as the Visitor is not covered by the definition of the expression in section 4(2) (ii) thereof. It is clear from paragraph 13 of the second appellant's counter affidavit and exhibits 6 and 7 attached thereto that the President and Commander in Chief acted throughout in this matter as Visitor to the 4th Appellant (University of Benin) and not otherwise.
>
> Having held that the President acted as Visitor and that the Visitor is not an appropriate authority under Decree No. 17, I must conclude that the provision of the Decree cannot apply - see *Wilson v. Attorney General, Bendel & Ors.* The learned trial Judge was, therefore, right to have held that he had jurisdiction to entertain the suit before him."

The Court of Appeal at Enugu arrived at a similar conclusion in *Okara v. Ndili*,[37] a case involving the summary removal of the Vice-Chancellor of the University of Nigeria, by the Visitor, in response to a Visitation Panel Report.

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36. [1988] 3 NWLR Pt. 82 356 CA..
37. [1989] 4 NWLR (Pt. 118) 700.

Some of the absurdities arising out of the abuse of power inherent in Decree 17 of 1984, were revealed in *Emmanuel O. Ugowe v. Police Service Commission and 2 Ors.*[38], in which the Plaintiff, then a Senior Police Officer suddenly received a letter from the Police Service Commission (after refusing an invitation by the Inspector-General of Police to retire voluntarily) conveying to him the approval of the Police Council of his purported retirement from service. A subsequent letter also informed him that "Mr. President and Commander-in-Chief of the Armed Forces" had "accepted your voluntary retirement from the Nigeria Police Force with effect from 1st November, 1986." This ridiculous and laughable attempt to bring about the Plaintiff's removal from the Police Services within the provisions of Decree 17 of 1984 was rebuffed by Agoro J., (as he then was), who held that voluntary retirements were not within the ambit of the Decree.

On the issue of *locus standi*, the best statement of principle is still that of Fatai Williams CJN in *Adesanya v. President of the Republic*.[39] It will be recalled that Senator Adesanya challenged in court, the legality of the appointment by the former President, Alhaji Shehu Shagari, of Justice Ovie-Whisky a serving public servant, as the new Chairman of the Federal Electoral Commission. When the *locus standi* of Senator Adesanya was challenged, Fatai-Williams, C.J.N. used the opportunity to lay down the appropriate principle governing *locus standi* in a developing society like Nigeria as follows:

> "With those observations in mind, I take significant cognizance of the fact that Nigeria is a developing country with a multi ethnic society and a written Federal Constitution, where rumour mongering is the pastime of the market places and the construction sites. To deny any member of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of Law to air his grievance on the flimsy excuse of lack of sufficient

38. Unreported, Suit No. LD/358/87 (Lagos).
39. [1981] 2 NCLR 358.

interest is to provide a ready recipe for organised disenchantment with the judicial process.

The framers of our 1979 Constitution had all these factors in mind by providing for the many checks and balances which appear therein. In fact, a close scrutiny of its very detailed provisions will convince anyone that reliance on the decisions, whether British, Canadian, Australian, or American, given in a different social and political context, will only lead to restrictive rules of *locus standi* which, in the interest of the need for total compliance with the provisions of our Constitution, I find difficult to accept or countenance. As a matter of fact, what can be discerned from the cases to which we are referred and, indeed, to other cases, is this: the Canadian Supreme Court now takes a liberal view of *locus stand*; so do the Australian High Court and the Court of Appeal in England presided over by Lord Denning. The House of Lords, on the other hand takes a more restrictive view. Of course, England does not have a written Constitution.

In view of the scantiness of the language of the American Constitution when compared with ours, and the great opportunities thereby offered to use the American courts for expounding the intentions of the founding fathers through its interpretation one is not surprised that the American Courts were so inundated with legal proceedings that access to Court had to be restricted through the use of the rules formulated by the courts themselves, as to the *locus standi* of a plaintiff.

In the Nigerian context it is better to allow a party to go to Court and to be heard, than to refuse access to our courts. Non-access in my mind will stimulate the *free-for-all in the media* as to which law is constitutional and which law is not! In any case, our courts have inherent powers to deal with vexatious litigants or frivolous claims. To re-echo the words of Learned Hand, if we are to keep our democracy, there must be one commandment - thou shall not ration justice!"[40]

40. (1981) 2 N.C.L.R. p. 373.

Although, regrettably, the Learned Chief Justice executed a somersault when applying these principles to the facts of the case, those principles still remain a classic for our type of society, and a court in a modern democratic state in the third world ought to follow them.

Procedural Reforms

Sometime in 1997, the then Chief Judge of Lagos State wrote to the Director-General of the Nigerian Institute of Advanced Legal Studies, supporting the planned project of the Institute to review the civil procedure of the High Court of Lagos State. In that letter, the Chief Judge made the following pertinent observations:

> "Our Court procedures are tedious, archaic, slow and in all respects unacceptable to a civilised community within the scientific and technical environment of modern age. The delays that result from our court procedures have reached an indecent stage which cannot be allowed to continue.
>
> It is in the interest of us all either as individuals or corporate bodies that the cause of the delay be investigated and practical solutions be evolved. The Nigerian Court Procedures Project being carried out by your Institute has come at a psychological time as we prepare for the 21st century. The Lagos State Judiciary is a front house of legal activities in Nigeria. Majority of the litigation at first instance between individuals and corporate bodies are litigated in courts situated in Lagos. Consequently most of the appeals to the higher courts originate from courts situated in the Lagos State."

The project was actually carried out and far reaching, recommendations were made to the Government of Lagos State, which will involve radical and fundamental changes in the civil procedure rules. Basically the changes which included the adoption of a system, of total case flow management and use of procedural Judges are roughly as follows:

1. Automatic progression of cases, stage by stage. In other words, every stage in the process of filing and hearing a case could end automatically after a number of days usually 14, and the next

stage would follow automatically without requiring any appearance before the Court, for 'mention.'

2. All exhibits intended to be used in the case would be filed before hand, along with the statement of claim or statement of defence as the case may be,

3. All witness evidence is to be put in writing and also submitted at a specific date,

4. All pre-trial procedures - preliminary objections, discovery, depositions, interrogatories, inspection etc. will be taken in chambers by the procedural Judge on a date on which that stage is fixed in the calendar of that case,

5. Each party would be served with all the documents submitted by the other party and that party's comment in writing would be submitted to the court and to the other party,

6. On a specific date in the graduated scale of dates, all the parties will meet with the procedural Judge to conclude all preliminary matters, including the reconciliation of documents and evidence,

7. On another date, the matter will be heard by another Judge, and possibly concluded for judgment to be written.

Under this system, it was envisaged that cases would be concluded within 6 months. Unfortunately, these recommendations were not passed into law before Justice Ilori retired. It is hoped that the present Chief Judge will act speedily to bring the new system into practice, in order to save the Lagos Judicial System from choking to death.

Incidentally, the 1999 Rules of the Federal High Court contain some aspects of these revolutionary proposals. Thus, under Order 3 Rules 1,2 and 3, documents which the parties intend to tender in evidence are to be annexed to pleadings and later the parties shall settle between themselves or before a legally qualified Registrar or the Judge in Chambers, after which all the documents will be admitted in evidence.

Facilities and Environment

(i) ***Electronic Recording System***

It is universally agreed that our Judges have been and are still performing their functions under very onerous and uncomfortable conditions, which inevitably adversely affect their productivity. These include erratic electricity supply, manual recording of proceedings, harsh and uncomfortable office and court environment and poor remuneration. Much has been written about this subject in the past and what is left is official acceptance of the situation and action to remedy it. Thus, all Courts and Judges' quarters should be supplied with electricity generating sets. The Lagos High Court has had to adjourn sittings on numerous occasions because of power failure.

The issue of manual recording of judicial proceedings and the urgent need for electronic equipment for this purpose has been raised many times in discussions and proceedings on our system of administration of justice. Manual recording is slow and is one of the major causes of delay in Court proceedings. It is also a major contributor to the ill-health and premature aging of our Judges. Furthermore, it is the least efficient method of recording proceedings since it is susceptible to omissions and inaccuracies. Why the Executive and Judicial Arms of our Governments have continued to ignore such a glaring and perilous problem is a source of great puzzlement to all right thinking citizens.

As part of the modernisation process of the Lagos judicial system, electronic recording was supposed to have been introduced in 1998. The equipment was actually bought. The delay in introducing this system we are informed, is due to shortage of trained technical manpower to operate the System. It is strongly hoped that this training will be done urgently in order to bring the Leading Judicial System in Nigeria into the twenty-first Century.

(ii) ***Legal Research Assistants***

One necessary innovation desperately required by our judicial system, is the establishment of a corps of Legal Research Assistants in every Court system in this country. By Court system I mean the classification of our Judicial system in the following: (a) the Supreme Court, (b) each separate Division of the Court of Appeal, (c) each separate Division of the Federal High Court and (d) each State High Court system.

A core of trained young lawyers should be attached to each of these systems to assist our Judges in legal, related/relevant research towards the enhancement of the contents and quality of their judgments. Many judgements emanating from our High Courts in particular, tend to be shallow and devoid of legal reasoning. In some really bad cases, it is even difficult to appeal against such decisions as they lack *rationes decidendi*. The provision of Research Assistants should improve the quality of such judgments.

(iii) ***Remuneration***

Much has also been written on the poor salaries of our Judges. This is also generally accepted, although this is a problem common to the public service generally. But if it is agreed that the function of a Judge in our society is vital, special and delicate, and that he must be protected against temptation and indignity, then we must agree that Judges are entitled to special salaries, allowances and conditions of service. In addition to the enhancement of their salaries and allowances we should now also consider a system for their financial security after retirement. In this regard, it is proposed that any Judge once appointed as such, should earn his last salary and allowances for life, on retirement. There should no longer be a minimum number of years of service as a Judge or as a public servant to qualify for this status.

Judicial Orientation and Attitude to Work

This section will deal very briefly with the Judge in his Court and some of the problems arising from the wrong attitude or orientation to the judicial function.

(i) ***Adjournments***

Unquestionably, the major cause of delay in the hearing and conclusion of cases, is the perennial problem of adjournments. This is the bane of our legal system. The guilt for this malaise can be laid squarely at the doors of our Judges. Adjournments can arise from two sources (i) from the litigant's Counsel or (ii) from the Judge himself. In the first case, Judges encourage lazy or unprincipled Counsel to seek adjournments either frivolously or mischievously, by their eagerness in granting these applications. Most Lawyers use adjournments to cover laziness, lack of a good case or sheer vindictiveness. Many Judges, in their anxiety to avoid

work also grant such requests uncritically or even adjourn *suo motu*. The result is court congestion, frustration of litigation and of the serious and responsible litigant as well as the subversion of the judicial system. It is suggested that adjournments must no longer be granted, except in clear cases when the need arises from a cause beyond the control of or the fault of the applicant.

(ii) ***Judges' Lack of Punctuality***

One other cause of frustration amongst Lawyers and litigants and of delays in the administration of justice is the regular lack of punctuality by some Judges to their courts. Judges are supposed to be on their seats by 9.a.m. but there are a number in Lagos who regularly enter the Court room at 11 a.m. or later. Complaints to the Chief Judge in many cases, have brought no changes in the attitude of such Judges. There is need for an avenue to be created for reporting such Judges, which report must as a matter of fact and law lead to definite action to prevent a re-occurrence of such conduct.

(iii) ***Promotion of Judges and Uncompleted Cases***

This subject strictly does not come under the rubric of the attitude and orientation of Judges, but is nevertheless included here out of convenience. Since the decision of the Court of Appeal in *Ogbunyiya v. Okudo*[41] all Judges promoted to a higher level of the judicial service have automatically had to abandon all their current and uncompleted cases. In some cases, all evidence has been taken and all that is left is the address and judgment. This rule has had a devastating effect on many litigants for, in all cases, irrespective of the stages they have reached, the matter has to be heard *de novo* before another Judge. With all due respect, the principle in the *Ogbunyiya v. Okudo* case is too sweeping and is, as a whole, detrimental to the judicial process. It is recommended that Judges promoted to a higher court should be compelled to complete all part-heard cases in which evidence has either been fully taken or has reached an advanced stage. The decision in the *Ogbunyiya* case should, therefore, be overruled by practice direction, leaving the parties and the Judge free to bring a case to conclusion even after the Judge has been promoted.

41. [1976] 6- 7 SC. 32.

(iv) ***Confidential Reports on Judges***

Confidential Reports should be written at yearly intervals by the Local branch of the N.B.A. on the Presiding Judge in the relevant Division of the State High Court and the Federal High Court. Similar but modified arrangements should be made with regard to the Court of Appeal. Thus, will ensure regular monitoring of the performance of the Judges of the Courts concerned.

A "Watch Dog" committee, consisting of the State Chief Judge and the Chairman of the branches of the N.B.A. in each state should be constituted to receive complaints on the conduct of Judges from Lawyers and members of the public. This committee should have the power to settle minor matters and to refer grave and unresolved problems to the relevant Judicial Service Commission for action.

In the preparation of the yearly Reports, the evaluation of judicial performance should be based on (i) Independence and courage in the performance of duties (ii) industry, (iii) intellect and (iv) the issue of corruption.

(v) ***Appointments to the Supreme Court***

Finally, there must now be a very objective test for determining who is fit to sit on the Supreme Court. There should be clear criteria such as:

(a) Intellect, as determined by the contents and quality of the candidates' judgments and rulings.

(b) Courage and independence as determined by the attitude of the candidate to Executive Authority and actions and the contents of his judgments and rulings.

(c) Integrity as determined from the candidate's general comportment, his actions and omissions in and out of court and his judgments and rulings.

(d) Industry as determined from his out put, research and use of legal authorities and reasoning.

(e) Corruptibility as determined from the candidate's judgments, life style and properties owned by him. A Judge who owns

buildings at Ikoyi, Victoria Island and other choice estates in the land, owes the public an explanation as to the source of his wealth. So too a Judge who has luxury cars. Any Judge who engages in business such as contracts, acting as a Commission Agent, buying and selling of property and goods, should immediately be suspect. Any Judge who is close to top members of the Executive and is regarded as a 'links man' between the Executive and the Judiciary is subverting the whole judicial system.

These then are some of the suggested criteria for appointment to the Supreme Court. It is suggested that Law Academics and Legal Practitioners and Judges with a scholarly bent should be involved in the technical process of the evaluation of candidates for the Supreme Court.

Finally, the pool of materials for the Supreme Court and Court of Appeal should no longer be limited to serving Judges. Law Professors in the Universities and Legal Research Institutions and Private Legal Practitioners should join the pool. Only the best legal minds in the Country are good enough for the Supreme Court. If the Americans are painstaking in their search for fit and proper persons to man their Supreme Court, we have even more cause to do so. In this regard, there must be absolutely no quota system. We cannot and must not dilute or even pollute our highest temple of justice with poor quality material, just to satisfy the misguided chauvinism representation in our Supreme Court.

Courts in the Federal System

The 1999 Constitution sets up a National Judicial Council. Under the third Schedule to the Constitution, the National Judicial Council shall have power to:

(a) recommend to the President from among the list of persons submitted to it by -

(i) the Federal Judicial Service Commission, persons for appointment to the offices of the Chief Justice of Nigeria, the Justices of the Supreme Court, the President and Justices of the Court of Appeal, the Chief Judge and Judges of the Federal High Court, and

(ii) the Judicial Service Committee of the Federal Capital Territory, Abuja, persons for appointment to the offices of the Chief Judge and Judges of the High Court of the Federal Capital Territory, Abuja, the Grand Kadi and Kadis of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and the President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja;

b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over such officers;

c) recommend to the Governors from among the list of persons submitted to it by the State Judicial Service Commissions persons for appointments to the offices of the Chief Judges of the States and Judges of the High Courts of the States, the Grand Kadis and Kadis of the Sharia Courts of Appeal of the States and the Presidents and Judges of the Customary Courts of Appeal of the States;

d) recommend to the Governors the removal from office of the judicial officers specified in sub-paragraph (c) of this paragraph, and to exercise disciplinary control over such officers;

e) collect, control and disburse all moneys, capital and recurrent, for the judiciary;

f) advise the President and Governors on any matter pertaining to the judiciary as may be referred to the Council by the President or the Governors;

g) appoint, dismiss and exercise disciplinary control over members and staff of the Council;

h) control and disburse all monies, capital and recurrent, for the services of the Council; and

i) deal with all other matters relating to broad issues of policy and administration.

The Secretary of the Council shall be appointed by the National Judicial Council on the recommendation of the Federal Judicial Service Commission and shall be a legal practitioner.

On the other hand, the membership of the Council is as follows:

(a) the Chief Justice of Nigeria who shall be the Chairman;

(b) the next most senior Justice of the Supreme Court who shall be the Deputy Chairman;

(c) the President of the Court of Appeal;

(d) five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal;

(e) the Chief judge of the Federal High Court;

(f) five Chief Judges of States to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years.

(g) one Grand Kadi to be appointed by the Chief Justice of Nigeria from among Grand Kadis of the Sharia Courts of Appeal to serve in rotation for two years;

(h) one President of the Customary Court of Appeal to be appointed by Chief Justice of Nigeria from among the Presidents of the Customary Courts of Appeal to serve in rotation for two years.

(i) five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment:

Provided that five members shall sit in the Council only for the purposes of considering the names of persons for appointment to the superior courts of record; and

(j) two persons not being legal practitioners, who in the opinion of the Chief Justice of Nigeria, are of unquestionable integrity.

Two things are apparent on a proper analysis of the composition of the National Judicial Council and its terms of reference.

1. It is essentially a Federal Government Institution, under the almost total dominance of the Federal Chief Justice.

2. It is given responsibility to recommend the appointment, discipline and dismissal, not only of Federal Judicial officers, but also of all State Judicial officers, i.e. State Judges and Chief Judges.

The National Judicial Council is also empowered to collect, control and disburse all moneys, capital and recurrent for the judiciary.

In effect therefore, what the 1999 Constitution had established is a Federal Judiciary for the Federation and a quasi - Federal Judiciary for the States.

The complete domination of the council by the Chief Justice of Nigeria is a rather surprising element of the Council's membership. Apart from being the Chairman, he alone is responsible for appointing:

i) 5 retired Justices

ii) 5 Chief Judges of States

iii) One Grand Kadi

iv) One President of the Customary Court of Appeal

v) 2 persons, who are not legal practitioners

In other words, the Chief Justice of Nigeria alone, has power to appoint 14 members of the Council.

It is obvious that as presently constituted, the National Judicial Council is inconsistent with the Federal status of the country.

The Federal High Court

Finally, by section 251(1) of the Constitution, the Federal High Court, not only retains its exclusive powers in relation to the revenue of the Federal Government, Admiralty Matters, matters arising from the Companies and Allied Matters Act, etc. but has had added to this exclusive list, other matters like;

(i) diplomatic, consular and trade representation,

(ii) bankruptcy and insolvency all over the Federation,

(iii) arms, ammunition and explosives,

(iv) drugs and poisons,

(v) mines minerals (including oil fields, oil mining, geological surveys and natural gas),

(vi) weights and measures.

In other words, contrary to the long standing practice in this country, only Federal Courts can now hear matters in the Exclusive Legislative List. Previously, State High Courts were competent to adjudicate on matters concerning Federal Laws and bodies, but this Federal/State cooperation has been eliminated by the 1999 Constitution.

To take the matter beyond any doubt, section 251(1) (p)(q)(r) preclude States' High Courts from adjudicating on any matter concerning the administration and control of Federal agencies. By these subsections, the Federal High Court has exclusive jurisdiction over:

p) the administration or the management and control of the Federal Government or any of its agencies;

q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies;

The disadvantages of these provisions are numerous. In the first place, Federal High Courts are few and far between. This means that litigants will be compelled to travel hundreds of miles out of their stations to enforce their legal rights or seek relief for their injuries.

Secondly, by implication, where the party in dispute with a Federal agency is a State institution, it is compelled to bring a suit in a Federal High Court. Thirdly the Federal High Courts will become so congested that it will take many years of litigation for a party to see the end of his case.

These new and rather expansive provisions, that give the Federal High Court exclusive powers in every matter concerning a Federal Agency and other matters in the Exclusive Legislative List, is the outcome of the "Abacha phobia" for bringing all matters under his direct (Federal) control. His prejudice against State High Courts which was first given articulation in Decree 107 of 1993 (Constitution, Suspension and Modification Decree), has been transferred hook line and sinker into the 1999 Constitution.

It is clear that major revisions of the above mentioned provisions governing the National Judicial Council and the Federal High Court must be undertaken urgently, if we are to have a modern Judicial System suitable for our Federal Democracy.

Concluding Remarks

The use of different nomenclatures for the Federal and State Chief Judges is again another effort towards undermining the status of the State Judiciaries. Why should the Chief Justice of Nigeria be the only one to bear the title 'Chief Justice?' Why should his State counterparts not be called Chief Justices of their States? There is something local and degrading about calling someone Chief 'Judge,' when in fact he is correctly a Chief Justice. Up till 1979, all State Chief Judicial Officers

were called 'Chief Justices.' Why have they been down graded to Chief Judges?

Furthermore, why do we have a Chief Justice of Nigeria? In the United States of America, on which our Judicial System is partly modelled, and which operates a Federal System as we do, have a Chief Justice of the Supreme Court, and not Chief Justice of the United States of America. Is the Chief Justice of Nigeria, also by the same logic the Chief Justice of Lagos, Delta, Sokoto, Katsina, Cross-River, Imo and Rivers States? Do we then have both a Chief Justice and a Chief Judge for each State? In the U.K. which operates a unitary form of government, there is quite rightly, a Chief Justice of England, not even of the U.K. Scotland has its own President of the Court of Sessions, equivalent to the Chief Justice of England.

The current Judicial nomenclature in respect of the heads of the Federal and State Judiciaries, cannot stand up to logic and they should be scrapped. Certainly, the Federal Chief Justice should take precedence over all other Judges in Nigeria. The matter ought to be kept at that level, while the nomenclature and functions reflect that fact and our Federal status.

In conclusion, it must be said that whilst the basic judicial infrastructure exists in this country, it is presently beset by many fundamental problems. These include absence of equipment and facilities, archaic and chaotic procedures, lopsided centralism in a Federation, improper or wrong procedure for the appointment of Judges, total absence of input from Nigerian Lawyers in the monitoring of the performance of judicial officers and insufficient incentives for good candidates for judicial appointments.

Much still needs to be done for Nigeria to be able to claim a place amongst states operating an efficient, modern, just and enlightened Court system in a democratic environment.

5

FEDERALISM AND THE BALANCE OF POLITICAL POWER UNDER THE 1999 CONSTITUTION

by

Sam Oyovbaire
(Professor of Political Science and Consultant in Public Policy; Tas & Associates Nigeria Ltd)

The Argument: Revisionism in Experience and in the Literature on Nigerian Federalism

Both as experienced from 1954 through the civil war and series of military regimes to 1999 when the 4th Republic was inaugurated, and in the literature on Nigerian Federalism, there is an advocacy to revise certain fundamental aspects of Nigeria's federal statecraft which previously had passed as settled tenets or agreed ingredients of Nigeria's political order and governance. Federalism and its centripetal variant, presidentialism, observance of fundamental human rights, and the non-adoption of any religion as state religion are some of the fundamental tenets in the Nigerian system which were not too long ago taken as settled, even when deviations were experienced. Insightfully, these fundamental elements have become forces in the contested federalist terrain of the country in the late 1990s.[1]

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1. In inaugurating the Constituent Assembly at Abuja on May 11, 1988, President Ibrahim Babangida captured the sum total of the essentially structural boundaries of Nigeria's post-civil federalism by admonishing the Assembly against, "fruitless exercise of trying to alter the agreed ingredients of Nigeria's political order, such as federalism, presidentialism, the non-adoption of any religion as State religion, and the respect and observance of fundamental human rights." These "agreed ingredients" were considered as "no-go-areas" which the Assembly members were barred from debating. See "The March to a Viable Political Order" - address to members of the Constituent Assembly by President Ibrahim Babangida: 11th May 1988, in *Portrait of a New Nigeria*, edited by Tunji Olagunju and Sam Oyovbaire, (Precision Press, London: 1989, pp. 45 - 55).

"Federalism and the Balance of Political Power in Nigeria" was the title of an incisive article published by Billy Dudley in 1966.[2] The thrust of that article was that whereas federalism, as a theory of organising a pluralistic society for governance, was consciously adopted by the Founding Fathers of Nigeria in the early 1950s so as to secure equal and co-ordinate constitutional status for the component regions of the federation, on the one hand, and between the regions and the centre, on the other, yet, economic and political forces conjointly provided a political landscape by the mid 1960s in which the regions became subordinate to the central authority. As if this was not daunting enough, the operation of the political economy of the country had been so propelled by party and electoral politics as to have converted central dominance and supremacy into dominance and monopoly by one of the regions and one of the political parties, namely: the North and the Northern People's Congress (NPC). The operation of the system in the 1960s was so bad that it became easy to expect a fulfillment of what usually passes in the literature on federalism as "J.S. Mill's law of instability." The "law" provides and admonishes that there should not be any one region or component unit of a federation so much more powerful as to be capable of competing with and defeating the other units combined. Where such a situation exists the powerful constituent unit would inevitably insist on being master of the joint enterprise of federal statecraft.[3]

In the 1960s leading to the first military regime and civil war, Nigeria experienced this unhealthy dimension of federalism. Furthermore, the political system was polluted with irreconcilable crises among the principal actors and the component regions of the federation. The centre was overwhelmed by the crises and could not hold together the federal body politic. The regions, and particularly the North, were unduly powerful for an orderly development of a national

2. B. J. Dudley; "Federalism and the Balance of Political Power in Nigeria," *Journal of Commonwealth Political Studies*, (Vol. IV, 1966, pp. 16 – 29).

3. See Dudley: *ibid* for an application of this federalist law of probability to Nigerian federalism in its formative years, pp. 20 – 24. Also, B.J. Dudley: *Instability and Political Order: Politics and Crisis in Nigeria*, (Ibadan: IUP, 1973); and James O'Connel, "Authority and Community in Nigeria," in R. Melson and H. Wolpe (eds), *Nigeria; Modernisation and the Politics of Communalism* (Michigan State University Press, 1971)

and federal framework of governance. Coupled with bad governance and weak leadership, the inherited federal edifice from colonial rule was undoubtedly one of the fundamental causes of the collapse of the First Republic in January, 1966.

When crises heightened between 1966 and 1967 and the civil war subsequently engulfed the country, restructuring the federal system so as to restore some balance of power acceptable to the nationalities of the North and the South and between the major dominant nationality groups and minority nationality groups became quite logical and compelling. There was also the factor of military rule. These forces were the prelude to the creation of a twelve state federal structure in May 1967. Although the restructuring was done in the context of containing the crises, the exercise was a powerful weapon of the Federal Government to stem and roll-back the secession bid by the Eastern Nigerian Government ostensibly on behalf of the Igbo nationality under the banner of the Republic of Biafra. Both the civil war and military rule could not provide the arena to test the dynamics of the new structure of political power.

The end of the civil war early in 1970 generated an upsurge of renewed patriotism. As a result, federalism in Nigeria acquired the vocabulary of unity and integration of socio-political forces. There was renascent economic nationalism in which a powerful Federal Government vis-à-vis the constituent States was preferred and taken as good and, therefore, an acceptable federal arrangement. This federalist nationality appeared to be satisfactory to a large number of Nigerian communities especially communities in the North, the South-West and curiously, the Southern Minorities whose co-operation was carefully cultivated to win the civil war. However, the victims of the civil war, namely the core community of the South-East - the Igbo nationality - agitated against the on-going framework of the post-civil war governance. The Igbo argued that the post-civil system was at their expense and, therefore, was unacceptable to them. In spite of the Igbo psyche, the federal scenario in the period from 1970 to the 2nd Republic was one in which the federal centre became more dominant and more supreme over the States.The creation of additional States in 1976, 1987, 1991 and 1996, bringing the total to 36, further accelerated the process of dominance by the Federal Government. Communities and individuals that found comfort in the political economy of a powerful

central authority accepted the dynamics of the situation. Those which did not experience such comfort protested the new arena for the exercise of political power. Bureaucratic institutions such as the Federal Civil Service and government parastatals, the Nigerian Armed Forces, Police and other security establishments became increasingly skewed in composition and exercise of power in favour of the dominant ethnic nationalities, minus the Igbo.

While the Nigerian political system up to 1966 can be described as "the old federalism," the historically induced system from the end of the civil war through the 2nd Republic and military regimes to the 4th Republic as established by the 1999 Constitution, can be described as "the new federalism." The literature on this phase of Nigerian federalism is replete with justificatory warrants by intellectuals and government. The literature includes Decrees or Laws, provisions of the 1979, 1989 and 1999 Constitutions and the operation of the national economy with such instruments as "indigenisation" and development plan documents.[4]

Against the background of "the New federalism," it was generally accepted in experience and in the literature that the only problem to be dealt with was the termination of military rule and a return to democratic governance. It was generally posited that democratisation and the return to constitutional rule will provide good governance, social justice, social integration and egalitarianism. However, agitations for a restructuring of "the new federalism," especially with regard to the creation of more States and local governments as well as the constitutional status of resource endowments of the different ethnic nationalities, continued unabated. The agitations became more acute as civilian rule (2nd Republic 1979 to 1983) was short-lived and the

4. In addition to references to Decrees and legal instruments such as the 1979, 1989 and 1999 Constitutions as well as the development plan documents, the general thrust of academic works was that of approval of military rule as an instrument or social force for the transformation of federalism and nation-building. For example, S.E. Oyovbaire, *Federalism in Nigeria: A Study in the Development of the Nigerian State*, (London: Macmillan, 1985); J.I. Elaigwu, "The Military and State Building: federal – State Relations in Nigeria's Military Federalism," in A.B. Akinyemi, P.D. Cole, and W. Ofonagoro (eds), *Readings on Federalism* (Lagos: NIIA, 1979), pp. 155 – 181; and J.I Elaigwu, P.C. Logams and H.S. Galadima (eds), *Federalism and Nation Building in Nigeria* (Abuja: National Council on Inter-Governmental Relations, 1994).

country returned to further military rule for almost fifteen years between 1984 and 1999.

The excruciating experience of military rule, particularly under the regime of Sani Abacha threw open the Pandora's Box of the need to restructure the new Nigerian federation. The experience became not just limited to the reactionism of the Igbo nationality but also to the nationalities of the Niger-Delta and quite interestingly, to those of the South-West which appeared to have received the worst face of Sani Abacha's brutal dictatorship. These phenomena provided a heightened articulation for revision of Nigerian federalism. In fact, revisionism became a national agenda. The vocabulary of discourse on Nigerian federalism also began to shift ground from centripetal terms to centrifugal concepts and claims. With the end to military rule in sight from the second half of 1998 to the inauguration of the 4th Republic in May 1999 and since the period after May 1999, the entire federal edifice became a contested terrain as to whether the inherited "new federalism" should continue to persist and be acceptable to the component nationalities of the country, or whether it was necessary to properly negotiate the terms of agreement so as to provide new foundations for Nigerian federalism and statecraft.[5]

The argument of this chapter is that Nigerian federalism requires fundamental rethinking and, indeed, revision. The revision should entail the assertion by the nationality stakeholders of the federation as reflected in their cumulative experiences since the federal system was formally established by the 1954 Lyttleton Constitution. Revision implies freedom for the nationality stakeholders to negotiate new

5. The agitations originally took the form of a demand by individual actors and communities for a Sovereign National Conference or a Conference of Nationalities with constituent powers. The struggle against the tyrannical military regime of Sani Abacha provided wide acceptability and indeed legitimacy for the demand. The return to democracy under the 4th Republic and the 1999 Constitution has added more fillip to the demand as pent-up grievances now possess democratic space to structure themselves under proper leadership. See, for example, the editorial opinion of the Guardian Newspaper of December 6, 1999, p. 20: "The Lugardian Amalgamation of 1914 which brought Nigeria into being was not the outcome of free negotiation amongst the nationalities and principalities of the time. The condition of internal colonialism will not change unless there is an open platform for all nationalities and interest groups to discuss and agree on the best way of living together in unity and harmony."

foundations for the system; to negotiate how much autonomy and resource endowments of the constituent nationalities should be surrendered to the Federal Government and how much to retain for the States and local governments. Revision should provide a new structural framework for the balance of power. Military regimes had had the effect of de-fedearalisation of the inherited colonial state. The return to a regime of civilian governance and to Constitutionalism should provide for the democratisation of federalism and for re-federalisation of governance.

Current Reactions to Nigerian Federalism

The foundations of Nigerian federalism as constituted in the 1954 Constitution were highly unsettled. The foundations were not inclusive of all the nationality stakeholders of the emergent nation state. Between 1914 when the Nigerian colonial state was consummated and 1954 when the federal framework was inaugurated, the country was conceptualised by the colonial power to have been founded upon a tripod of the three big ethic nationalities, namely: Hausa-Fulani, Yoruba and Igbo. These three nationalities were however, conceived and perceived as not having equal stakes in the colonial state. For reasons that do not belong to this presentation, colonial favouritism upheld the stakes of the Hausa-Fulani in the North as being much higher than each of the two other ethnic stakeholders, the Yoruba and the Igbo, and indeed of the Igbo and Yoruba combined.[6] The pattern of ethnic nationality configuration was complemented by the emerging political process as dominated by the political party system. The 1954 Constitution was underlined by a political process in which three political parties each dominated by the three ethnic nationalities held up and advanced the stakes of each region; that is to say, Hausa-Fulani and the Northern Peoples Congress fostered the North, the Yoruba and the Action Group dominated the West, while the Igbo and the National Council for Nigeria and the Cameroons (NCNC) controlled the East.

6. For a historical appreciation of this view point, see J.S. Coleman, Nigeria: *Background to Nationalism* (Berkeley: University of California Press, 1958); and E. Osaghae, *Crippled Giant: Nigeria Since Independence,* (London: Hurst and Co., 1998), pp. 1 - 30.

The above characterisation of the foundations of Nigerian federalism brazenly ignored or assumed away the interests and stakes of an array of minority nationalities located concretely in the middle belt (North) in the Mid-West (West) and in the Rivers, Calabar and Ogoja geo-political areas (East). This element of the untenable foundations Nigerian federalism gave rise to strident agitations by minority nationalities against the unfolding process at the constitutional conferences for independence between 1954 and 1959. By way of response to the agitations, the colonial power established a Commission under Henry Willink to investigate the facts and fears of ethnic minorities and to suggest ways of allaying them. But, having established the facts and fears of the ethnic minorities, the Willink Commission's Report failed to redress these problems in foundational terms. As a consequence, the problems of the foundations of Nigerian federalism persisted. Again, not an issue to be pursued in this presentation, the Northern and Eastern political forces conspired successfully against their Western rivals to create a Mid-West Region for the Mid-Western ethnic minorities. But this was a matter of political jobbery and spite against the Western Region rather than an attempt to redress properly the foundations of Nigerian federalism.[7]

Agitations for remediation of the foundations of Nigerian federalism continued unabated as indicated earlier in this chapter. Military regimes found it expedient to satisfy the objectives of military rule and crisis management by restructuring the federation into 12 states in 1967, 19 states in 1976, 21 states in 1987, 30 states in 1991, and into 36 states in 1996. If the issue were to be re-opened today, the restructuring would perhaps accommodate additional states. However, the important point of interest is that, structurally, Nigerian federalism has not established satisfactory foundations for itself.

One other important element of interest in the foundations of Nigerian federalism is the political economy of the country. The articulation of production and distribution was originally to satisfy the objectives of colonisation and colonial rule, and after independence, it was and has been, for the satisfaction of the post-colonial political

7. This matter has been copiously researched and documented in the literature on Nigerian federalism, but as an example, see S.E. Oyovbaire, *Federalism in Nigeria, op. cit.*

system as dominated by the Federal Government. In all of this, the concreteness of the plural nationality stakeholders has been consigned to the periphery of the political economy. This characteristic has created civil agitations and political activism against the proper functioning of Nigerian federalism. The fact of prolonged military rule starting from January 1966 to 1999 with a break of only four years of civil rule between 1979 and 1983 (the second Republic), compounded the political economy of federalism in Nigeria. Human and civil rights were not only abused but communal rights were similarly degraded and neglected. Occasionally, communities were brutally assaulted by a predatory federal centre. Consequently, rather than federalism growing and fostering the development and advancement of social and community rights, it actually became a pain to, and a problem for civil society and ethnic nationalities. This was the picture of Nigerian federalism by mid-1999 when the military disengaged from governance and civil rule was restored in the country.

Current reactions to Nigerian federalism revolve around issues of community exploitation, social injustice, poverty and neglect by government as well as the frustration of individuals and social groups occasioned by bad governance. These issues are not new to the Nigerian political process. But the events of 1993 involving the annulment of the presidential election of June 12 provided a new environmental impetus to the reactions against the operation of federalism. As resistance against the tyranny of military rule, the struggle to restore democracy in Nigeria took on the format of a struggle against "the new Nigerian federalism" so as to tame or trim down the undue dominance and painful over-bearance of the federal centre over the constituent units of the federation.

The case of the Niger-Delta predated the contemporary situation. However, the period since 1993 provided an additional fertile environment for the communities of the Niger-Delta to articulate their pent-up demands and resist exploitation of their natural resources in the form of extractive revenues from petroleum for the development of the other communities of Nigeria. The struggle for proper federalism was symbolised by the struggle in the Niger-Delta.

Arising from the frustration of the tyranny of the Sani-Abacha military regime, the Yoruba nationality which for many years had been comfortable with the functioning of the Nigerian federalism curiously

took up an irredentist struggle against the federalist statecraft. For them it was as much a struggle for democracy as it is for a restructuring of the country so as to provide "home rule" for the Yoruba nationality.

In the case of the Igbo nationality, the issue of social injustice arising from the collapse of the Biafran secessionist project had continued to stay on their agenda. Igbo elites as well as Igbo masses had never been tired of drawing attention to the absence of proper accommodation for them since the end of the civil war either in the form of employment and economic opportunities or their inherently human and group freedom as well as constitutional rights to settle down in any part of the country for peaceful transaction of business. The Igbo nationality had always, therefore, been interested in the issue of restructuring the Nigerian federation.

Reactions from the North to the "new Nigerian federalism" had been less than clear in terms of whether or not, a restructured federation would be of benefit to them. The popular and age-old perception of the Nigerian political process had been that the North had been the unduly dominant beneficiary of federal resources. Whether this perception was correct or wrong is not the point of interest. It was however, always argued that the North was more comfortable in a strong centralised federalism in which the Northern ruling classes would continue to exercise political dominance. But by the second half of 1999, incipient reactions from the core North (generally taken as the "Islamic North") appeared to have become interested in the agenda of restructuring the "new federalism." Specifically, the issue of religion and the constitutional right to institutionalise the legal precepts of the dominant religion in a state became a manipulative scheme for the core North in its own strategy for restructuring the "new federalism."

The argument for a review of Nigerian federalism derives from the reactions to the "new federalism." It is also against this background that we can now point at certain elements of the 1999 Constitution which in our view should be revisited in order to provide for possibilities of a healthier framework for a new balance of political power in Nigeria.

The 1999 Constitution

The major constriction of the 1999 Constitution against federalism is its unificatory character. This is not unique to the 1999 Constitution; it has

been a characteristic of most government documents, policies and programmes since the civil war. The unificatory feature of the Constitution was a carry-over from the 1979 Constitution. The Constitution was produced with fundamentally wrong assumptions that the problems of unity and social integration of the country were already settled. These assumptions were even much more boldly stated in the post-civil war Development Plan documents. In fact, as indicated earlier on in this chapter Nigeria's "new federalism" used to be thought of as a *settled ingredient* of contemporary governance; and, therefore, it was regarded as a "no-go" area for reform or re-negotiation. With hindsight and the benefit of the current reactions to Nigerian federalism, the unificatory feature of the 1999 Constitution can in fact pass as institutional injustice for the healthy operation of federalism in Nigeria. The document is written with no provision for the principle of self-determination for either the constituent nationalities or for the component States of the federation. Of the 320 provisions in the 1999 Constitution only 77 are devoted to the States and local governments. The entire document provides enormous limitations or constraints to the exercise of autonomous power by the component States. The ethnic nationalities are even worse off. One humorous element is the Seventh Schedule on the Oath of Office. In a highly plural society containing nationalities with varied customs and traditions, it appears a matter of constitutional humour for all major public or political office-holders from local governments through the States to the centre to subscribe to a uniform Oath of Office.

Other elements which call for review in the Constitution are provisions on Customary Law and the Sharia. While the history leading to such provisions can be appreciated, there appears to be no federalist logic in not allowing each State to establish institutions for the practice of its own Customary Laws including the provisions for Sharia or elements of the Islamic Legal System. The provision for such mundane issues of custom and tradition in a federal constitution has encouraged traditional rulers to demand provision for themselves in a federation which is also republican. The point is that there is really little or no reason for this kind of provision in the Constitution of a Federal Republic. Customary matters should be left out of a federal constitution or be consigned to the residual legislative domain.

The revision of the Constitution ought to provide more rights to the States. One attempt to do so in the 1999 Constitution is the provision for the status of local governments by which the local government system is considered a creation of the States. Yet the States themselves are identified and defined in the Constitution by the local governments composing each State. What this means is that local governments remain a federal constitutional matter. If the States were to create new local governments, such an act will require an amendment of the Constitution. In the same way, the earlier development of the local government system as the third-tier of government has become extremely blurred in the 1999 Constitution. There is need for clarity in the definition of the limited autonomy of the local government system within the jurisdiction of the States.

In the Second Schedule to the Constitution dealing with legislative powers, there is the need to revisit certain items in the exclusive legislative list. Example of such items should include "borrowing of monies within and outside of Nigeria for the purpose of the federation or any state;" "universal registration of births and deaths throughout Nigeria," labour matters "including trade unions, industrial relations" etc. and the item on the establishment of "Police and other government security services." In a proper federation with a large measure of autonomy provided for the component units based on freedom and rights of the people, items such as the ones illustrated here need not be on the legislative list exclusive to the Federal Government.

Perhaps the more compelling need to revise the 1999 Constitution is with regard to the pooling together of the resources of the federation under the Federal Government and the distribution of the resources subsequently. A federal system pre-supposes differences in endowments and differences in the use of the endowments by the component units. In the "old Nigerian federalism," that is, between 1954 and 1966, there were clear constitutional provisions for the principles of derivation which meant that the revenues from resource endowments from the component units were distributed in such a way that substantial proportions of such revenues were returned to the States of origin. The unificatory feature of the 1999 Constitution has tended to assume away the principles of fiscal federalism. Although, section 162 of the Constitution makes provision for a minimum of 13 per cent of revenues to be returned to the States of origin of the natural resources from

which certain revenues were obtained, it remains a contested issue, especially with regard to the petroleum industry where so much devastation has taken place, for a period of over fifty years, to the communities of the companies' operation.

Conclusion

We have drawn attention to the unsettled foundations of Nigerian federalism. We have also drawn attention to the dynamics of social forces over the years to the detriment of the component units of the federal system by the over-dominance of the Federal Government. We have argued for a revision of the 1999 Constitution. We are not concerned with the modality of the exercise of review or revision. We have only attempted to draw attention to the fact that the "new federalism" no longer holds in the contemporary Nigerian political landscape. We would like to conclude by quoting the view-point articulated by President Olusegun Obasanjo in his post-imprisonment publication before he was elected President. According to him, for the constituent units making up the federation, he "would like to see a clause for self determination and a self determination process to be included in the Constitution. A self determination clause will always make the operators of the Constitution conscious of the need to perceive the spirit and the letters of the Constitution."[8]

8. O. Obasanjo, *This Animal Called Man* (Abeokuta: ALF Publications, 1999) pp. 214 - 215.

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NIGERIAN CONSTITUTIONAL SCHEME ON THE SHARING OF REVENUE RESOURCES AND ITS IMPLEMENTATION: AN ASSESSMENT

by

I. A. Ayua
(Director-General,
Nigerian Institute of Advanced Legal Studies, Lagos)

Introduction

The constitutional history of Nigeria presents a paradox. Although some of the major constitutional systems generally acclaimed worldwide as models in nation building have been tried in this nation, almost forty years after independence, Nigeria can hardly be said to be out of the woods. In the face of the massive failures of successive governments in the country to provide the right remedies to the myriad of problems which confront her peoples, Nigeria's great potential for growth and rapid transformation remains unfulfilled. There is, for instance, acute and widespread poverty (the President has said 60 per cent of the Nigerian population live below the poverty line), civil strife, communal restlessness, rising inflation, falling growth and declining real incomes. Delivery of public services has been rather poor. Until the advent of the current civilian administration, the country was in a state of despair and despondency, with the erosion of the people's confidence in their leadership, the institutions of government and at times, even in the nation itself.

In spite of these problems the nation has nonetheless, managed to survive. A generation of men and women that has gone through such great trials and painful experiences, must have seized every opportunity to rescue and move their country forward. The first step in this direction is to identify the national problems, analyse them and fashion out appropriate remedies through adequate and sustainable policies. After all, solutions to problems are usually the consequences of rational analyses.

One of these problems has been the concept of federalism and/or its administration. There are many who feel that something is seriously wrong with the Nigerian concept of federalism and indeed the way the Federal Government operates in the country. How deep, or profound is the problem? Does it require major constitutional changes or is it amenable to adjustments borne out of improved perceptions of politics or changes in culture and political leadership?

In the history of Nigeria, one issue that has touched off many major political/legal controversies at times bordering on violent upheavals is Revenue sharing which is a fundamental issue in federalism.The sharing of revenue resources between the Federal Government and the States and the States *inter se* is, in the words of Professor Nwabueze, "almost like a matter of life and death, exciting their deepest concern and their strongest emotions. Hence the intensity of the question concerning it."[1] The situation has been exacerbated of recent by the Niger-Delta crisis manifesting in unspeakable atrocities and the chorus of disapproval from the States about the acute inadequacy of revenue resources transferred to them from the Federation Account for the running of their governments. The implications of this state of affairs for National Unity and cohesion as well as National Security and Welfare cannot be underestimated.

It is, indeed against this background that this chapter assesses the Nigerian Constitutional Scheme on the Sharing of Revenue Resources and its Implementation. The chapter examines several separate but inter-related issues, in seven parts. Following on the introduction which provides a background to the discussion in the state of the nation, Part 1 traces the evolution of the Federal System in Nigeria bringing out the various forces that have shaped its present character both politically and fiscally. Part 2 deals with the general problems of fiscal federalism in a context within which to appreciate the trends in the sharing of Revenue Resources in Nigeria which are examined in Part 3 and intended to serve as a warning as the nation once more attempts to embark upon another exercise of constitutional reform. Part 4 examines the present scheme of distribution of Revenue Resources under the 1999 Constitution bringing out the distinguishing features of Nigeria's fiscal

1. Nwabueze B.O., *Federalism In Nigeria Under the Presidential Constitution* (Sweet & Maxwell, London 1983), at p. 181.

arrangements. Part 5 takes a look at the Constitutional Scheme in operation and in doing so, relies on the Central Bank of Nigeria (CBN) data on Federally Collected Revenue and its disbursement while highlighting appropriate deductions. Part 6 does an assessment of the Constitutional Scheme and its implementation using some World Bank Reports on Nigeria in order to provide a deeper insight into the actual problems and prospects of Nigeria's fiscal federalism. In rounding up the discussion in Part 7, the chapter makes suggestions for the way forward.

Evolution of the Federal System in Nigeria

Much has been written about Nigeria as a pluralistic society. It is indeed a very diverse country, a tapestry quilt. This is a country of different ethnic and religious backgrounds. These differences are enhanced by the separation and concentration of the respective ethnic groups in different regions of the country. In other words the Nigerian society lacks homogeneity.

It is in response to the complex nature of the Nigerian society that Nigeria has always used the Constitution as a tool for nation-building. The creation of Nigeria was the result of a series of constitutional acts, ranging from British imposed Constitutions of the colonial era, through the 1960 Independence Constitution, the 1963 Republican Constitution and finally to the 1979 Presidential Constitution which metamorphosed through two other draft Constitutions into the current 1999 Constitution.

Constitutional conferences were held in Nigeria in 1954, 1957, 1958 and 1960 culminating in the granting of political independence on the 1st of October, 1960. The major problem at these Constitutional Conferences was how to convert such a diverse and composite society into one united political community. Accordingly, the country settled for federalism as the only solution to her constitutional and political problems. But the federal structure that initially emerged was imbalanced with the Northern Region being bigger than all the other regions put together. Another problem was the fact that the three (later four) regions were not ethnically homogeneous. Each of them contained ethnic minorities that were agitating for their own separate regions.

The 1960 Independence Constitution, which was essentially a mixture of federalism and the Westminster Parliamentary system, in

response to these turbulent politico-constitutional problems, adopted two solutions: First, a list of Fundamental Rights was incorporated into the Constitution to guarantee and protect the political, civil, cultural, religious and educational rights of minority ethnic groups within the regions even though these rights were to be enjoyed by every citizen without discrimination. Second, a number of institutional and constitutional arrangements were devised to protect ethnic minorities. It was also the fears of minority ethnic groups over possible victimization by the majority ethnic groups that led, for instance, to the deregionalization of the Nigerian Police Force and its replacement by a single Federal Police Force administered by a Police Council with Federal and Regional representation.

The constitutional provisions and institutional arrangements, as important as they were in nation-building, did not however significantly affect the overall balance of advantage, in matters of socio-economic development and public service appointments in the regions during this period and so the demand for the creation of states continued unabated.

The 1963 Republican Constitution continued with the basic principles, policies and institutional arrangements under the 1960 Constitution to bring about a sense of belonging for all groups of the Nigerian Society but these were not considered far reaching enough.

There were a number of reasons for the failure of this Constitution. The chief of which was, of course, the confrontational Parliamentary system which was an unnecessary and unproductive hindrance to nation building due to our cultural trait of making politics contentious and fractious. The framework of regional government and their parliamentary style of operations helped to reinforce the divisions within the society. The idea of federalism under the Republican Constitution as was practised in Nigeria was greater autonomy both politically and financially for the regions and minimal powers to the Central Government, thereby allowing the tail to wag the dog.[2] Ultimately, the centrifugal forces asserted themselves with the perpetration and intensification of ethnic politics leading towards social and political instability as well as tension in the body politic.

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2. J. Isawa Elaigwu, "Federal-State Relations In Nigeria's New Federalism: A Review of the Draft Constitution" (unpublished manuscript, March 1977), at p. 6

The military cashed in on the weak political system and took over the Government. Ostensibly to ensure political stability and reduce the strong ethnic tension in the country between the initial regional governments, in particular to solve the problem of domination of one region over others as well as to allay the fears of the minority groups, the military, embarked on a structural reorganization of the country by creating twelve states in place of the former regions in 1967, subsequently raising this number to 19, then 30 and finally 36. The idea was not to have monolithic blocks in the North, West and East as was the case in the past, thereby hopefully, undermining monopolization of power and increasing the political influence of every ethnic group in the country. However, the impact of state creation has been greater in some areas than in others as many of the states in such areas do cluster together in terms of past regional ties thereby defeating the original intention or objective of the restructuring exercise. Consequently, Nigeria continues to be haunted by past political ills.

Interestingly, the structural reorganization of the country into many states has meant the ascendancy of the Federal government over the States both politically and financially to strengthen its position as a coordinating agency which represents all the units for the purposes of holding the country together and moving it forward politically, socially and economically. In this connection, the Federal Military Government took the lion's share of the national revenue which had been boosted by the huge earnings from petroleum thereby, in effect, weakening the state governments.

The constitutional ideas of the Military Government inevitably impacted in no small measure on the making of the 1979 Presidential Constitution, which had radically reshaped the concept of Nigerian federalism. What the country ended up with is clearly a different kind of federalism from that practised under earlier Constitutions.[3]

Thus, the provisions of the 1979 Nigerian Constitution governing Federal-State relations are the product of the peculiar socio-politico-economic situation that came into existence in Nigeria after the Civil War. In particular, those matters which were considered to be of common and general importance and from which people from the

3. See James S. Read, "The New Constitution of Nigeria 1979: The Washington Model:" *Journal of African Law* 1979 Vol. 23 No.2 at pp. 140 - 141.

different states can benefit in a concerted and common action were, under the 1979 Constitution, given to the Federal Government. This explains why all minerals, including petroleum in Nigeria are owned by the Federal Government, although such ownership pre-dated the 1979 Constitution.[4]

The point that should be stressed is that every Federal Constitution can have its own innovative and distinguishing features. There is nothing like true federalism or a true federal system. A Federal Constitution may have the tendency of centralization or decentralisation depending on the strength of centripetal or centrifugal forces existing in that country. The important thing is that as much as possible, the distribution of political and financial powers should be such as to permit each tier of government to remain viable in functioning within its assigned sphere of competence.

It should also be appreciated that the Federal idea itself has undergone change globally. The emphasis has shifted from independence to inter-dependence and from mere coordination to active co-operation between the two sets of governments. There is no room today for competitive federalism. It is a luxury Nigeria or any other federal polity for that matter, cannot afford. What is essential is for the two sets of government to cooperate with one another and pool their resources together for the common development of the country. The other interesting change is the increasing tendency towards centralisation of both political and financial power in many Federal polities while hitherto sovereign states have given up their sovereignty to merge into larger Federations for reasons of "power politics, depression politics, welfare politics and the internal combustion engine" to use words of K. C. Wheare,[5] particularly in this age of globalisation.

These are the ideas and forces that underpinned the making of the 1979 Constitution. It was indeed a Constitution that took into consideration the earlier Constitutional experiences in Nigeria and carried the imprints of developments in other African States and

4. See, for instance, the Minerals Acts of 1946 section 3(1) which states that "All minerals in, under or upon any lands in Nigeria and of all rivers, streams and water-courses throughout Nigeria, is and shall be vested in the Federal Government of Nigeria."

5. Wheare, K. C., *Federal Government* (4th ed.), Oxford University Press, 1967, p. 239.

elsewhere. The 1979 Constitution had sought to uphold and consolidate the unity of the country and promote its progress through very innovative and salutary provisions especially in relation to the allocation of public revenue among the component units of the Federation.

Even with all these provisions, the problem cannot be said to have been solved for good. Problems continue to arise from time to time causing tensions in the Nigerian polity. This can be blamed on the standard of administration which has not been inspiring enough and deadly competitions and conflicts of hostile subcultures thereby threatening the unity and indeed the survival of the country. Under these circumstances, two major Constitutional conferences had been held after the 1979 Constitution culminating in the 1989 and 1995 draft Constitutions which in turn led to the enactment of the 1999 Constitution. Interestingly, at these Constitutional conferences it was generally agreed that there was nothing basically wrong with the 1979 Constitution and that it was a good document with the capacity to solve most of our problems and to adapt to the changes and challenges of modern times. It is for this reason that the 1999 Constitution is basically a rehash of the 1979 Constitution with some tinkering as no Constitution can indeed be a perfect and an ideal document.

Notwithstanding all these Constitutional developments in Nigeria, the country is still faced with the problem of national integration. One cannot deny the presence of fissiparous and disintegrating tendencies in the country. In some quarters, there is the demand for a return to regionalism and the 1960-65 concept of federalism including the allocation of 50-100% of petroleum revenue to the oil producing areas in new Revenue sharing formula. Accordingly, there has been a call for a new Constitution as if Nigeria's problems can only be solved by frequent constitutional amendments.

Be that as it may, these are the various experiences and forces that will, no doubt, impinge on any discussion or analysis of the present Constitutional scheme on sharing of public revenue resources. It is, of course, a subject that cannot meaningfully be discussed without appreciating the complexity and general problems of public finance and its distribution in a federal polity.

General Problems of Fiscal Federalism

The foregoing analysis demonstrates that the planning and management of the fiscal relations between the Federal Government and the States will invariably have to depend on the prevailing concept of the Federalism at a particular period in the society as it is the Federal Constitution that expressly distributes revenue resources and taxing power. The full implications of this proposition will be brought out by examining the general problems of fiscal federalism.

As has already been indicated, the essential feature of every federal polity is the distribution of sovereign powers between the central authority and the constituent units. Accordingly, they operate simultaneously and directly upon the same people and are constitutionally required to perform their distinct functions in relation to them. It follows, therefore, that the financial powers of every federal polity must be distributed between the central government and the component states if the respective political powers are to be meaningful or become a reality. It goes without saying that such distribution is of crucial interest to both sets of government especially in a federation where the national resources are pooled centrally and shared among them. It is, therefore, essential that the centre and each state government must have its own budget with sufficient financial resources to perform its exclusive functions so that the autonomy of either tier of government is not compromised.

This is where the problem really begins. The division of the financial sovereignty of a Federal polity does indeed constitute an intricate and complex problem. As Santhanam has rightly observed,[6] "of all federal problems, the financial relations between the centre and the units are most difficult." Emphasising the same point, Finer has this to say:[7] "financial sovereignty is not sovereignty as it appears from the Constitution but as it exhibits itself in the working."

These views are supported not only by the troubled history of federal finance in the older federations but also by the squabbles and frequent adjustments in the new federations. For instance, it has been

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6. Santhanam, K., *Union-State Relations in India Bombay*: Asia Publishing House, 1963, p. 29.
7. Finer, H. *Theory and Practice of Modern Government*, Vol. 1, 4th ed., Methuen, London, 1961, p. 316.

necessary to have frequent revision of the criteria or principles of allocation of revenue to the States in Nigeria where so far there have been at least sixteen such principles. According to Pius Okigbo, the problem has arisen "from ambivalence of the systems of measurement, the politicization of the bases and the mistrust in the application of the formulae agreed upon."[8] These principles include: derivation, need, even development, national interest, independent revenue, continuity, minimum responsibility of government, financial comparability, population, equality of states, national maximum standards, equality of access to development, absorptive capacity, tax effort, fiscal responsibility and landmass.

These criteria further raise new problems as to the appropriate weight to be attached to each of them and how to resolve the conflicts between the demands of rich or developed states *vis-à-vis* those of the poor or undeveloped ones on the basis of some of these principles.

In the end, there is the real possibility that these principles, as observed by Pius Okigbo, would not be fairly and properly implemented thereby jeopardising or compromising the fundamental principle that division of financial sovereignty must in all essentials, correspond to the distribution of legislative and executive powers in the constitution.

At the time of the sharing of the revenue resources, two divergent motives: the amalgamation motive and the separation motive, for instance, normally come to the fore to be accommodated. Economically well off units (states) insist on allocation of more and more independent resources to them, while units representing backward regions seek their economic salvation in more and more resources being allocated to the general government from which they can claim their equitable share.

The oil producing states, for instance, have even gone to the extent of pressing for the amendment of the Nigerian Constitution with a view to reviewing the ownership and control structure of the mineral resources in the country and the formula for sharing in the minerals wealth in their favour. This epitomizes the separation motive. Those with the amalgamation motive however contend that the Federal Government owns all the minerals which constitute national resources,

8. Pius Okigbo manuscript, "Notes on Revenue Generation and Distribution in a Federation" (unpublished manuscript).

and are as it were, a gift of nature; for which reason, the entire federation should benefit directly and fiscally from the petroleum wealth particularly, given its strategic position as the mainstay of the Nigerian economy. This is without prejudice, of course, to the oil producing areas being appropriately compensated for the ecological pollution and degradation of their environment as well as for providing the congenial climate (though this has not been so of recent) for the development of the oil sector of the economy. It would indeed be unfair to neglect the oil producing communities. These are the conflicting claims that are normally faced in fiscal federalism. These divergent claims must, of course, be considered in good faith and resolved in the spirit of the Constitution and on the principles of live and let live.

It is necessary to point out at this juncture that the ideal of complete equilibrium between the resources and responsibilities of the two sets of government has not always been possible to be achieved in practice. Financially, the central government has proved stronger and has found it possible to support the states by disbursing grants to them. There has been a trend as already mentioned, towards financial centralization in most of the large federations like the United States of America, Australia, India and indeed Nigeria. In each of these Federations, the Constitution allocates extensive and elastic sources of revenue to the Central government and also provides for grants to assist the states in the discharge of specific obligations or for general purposes. The only difference is that with the other federations, the allocation of revenue resources to the units is generally approximate to their constitutional responsibilities. This has not only made the States financially dependent on the centre but has also required the centre to play an effective co-ordinating role in the fiscal affairs of these countries.

Several authors, and commentators have indeed called for the solution of the problem of division of sovereign powers to guarantee the satisfaction of the financial needs of the Constitutional entities established in a Federal polity. This has not always been an easy matter to accomplish to the satisfaction of all. This is due to the complex factors involved such as politics in various forms, and modern economic trends which have all tended to bring about the revolutionary transformation of the structure of federal finance policies in favour of a centralisation policy.

The general problems surrounding the sharing of revenue resources in Federal administrations, no doubt, provide the context in which the trends in the sharing of revenue resources in Nigeria can be examined.

Trends in the Sharing of Revenue Resources in Nigeria

The Colonial Period

The principles of revenue sharing or allocation have varied over time, reflecting the structural reorganisations and other political changes made in the country. During the colonial period, three Commissions were set up on revenue allocation. In 1946, when the country was administered as a unitary system, the Phillipson Commission was set up to determine the allocation of national revenue among the three regions that were established. It operated between 1946 and 1951, using the criteria of derivation and even progress (i.e. even development). Other Revenue allocation commissions operated between 1951-1953 and 1953-1959 known as the Hicks-Phillipson and the Chick Commissions respectively. Thus, revenue allocation was a serious policy issue even before Nigeria formally became a federal polity in 1954. The allocation criteria during this period were principally: derivation; fiscal autonomy and need.

The Post-Independence Period

Between 1958 and 1968, three Revenue Allocation Commissions were established, namely the Raisman (1958), Binns (1964) and Dinns (1968) Commissions. These Commissions operated between 1959 and 1967. The allocation criteria used were: (i) continuity of existing levels of service; (ii) basic responsibility of each regional-government; (iii) population; (iv) balanced development and derivation. Interestingly, the Raisman Commission recommended that mineral producing regions should have a lion share of the revenue accruing from the mineral wealth. Accordingly, under the Raisman formula, 50 per cent went to the region of origin, 20 per cent to the Federal Government and 30 per cent to the Distributive Pool Account (DPA) in which the State of origin also shared along with keeping personal income tax and receiving export duty proceeds on their produce. The Binns Revenue Allocation Commission was established in 1964. It was simply a continuation of the Raisman Commission. Immediately thereafter there

was the Dinns Revenue Commission, 1968 whose suggested criterion was national integration which was, however, rejected.

The Military and the Oil Boom Period

With the rapid increase in oil revenues, the region of origin prospered with substantial surpluses whilst the other regions stagnated in revenue generation. The situation was further worsened by the structural reorganisation of the country into twelve states as well as the secession of Biafra which led to the Civil War of 1967 to 1970.

Against this background, between 1967 and 1975, the Military introduced significant changes to the Revenue Allocation formula they had inherited from the civilians. There were basically four problems as identified by Professor Oyovbaire [9] which the Federal Military Government had to contend with. One of these problems was the glaring disparity in the social and welfare responsibilities of the new states and the basis of their finances. In Professor Oyovbaire's analysis,[10] the revenue yielding base of the new states was small as compared to that of the parent regions. It also differed widely among them. This situation could only be remedied by either restructuring the expenditure of the States through a transfer of certain functions to the centre or by giving more revenue to the states. The Federal Government took the first option by taking over of some activities previously assigned to the States (e.g. primary education and agriculture, road network system and broadcasting) and increased the dependence of the state governments on revenue collected by and distributed through the centre. The other problem, according to him,[11] was that the operation of the principle of derivation in revenue allocation tended to tie the finances of each state to the performance not of the overall national economy from year to year but of the productive activities in the State – to the performance of export produce and mining and the State's consumption capacity. Therefore, a fluctuation in earnings from these activities meant a fluctuation of a State's total annual revenue.

9. See S. Egite Oyovbaire, "The Politics of Revenue Allocation" in K. Panter-Bride (ed.) *Soldiers and Oil: The Political Transformation of Nigeria*, Frank Cass London, 1978.
10. *Ibid.*
11. *Ibid.*

Thirdly, the system gave rise to vast unequal amounts of revenue which accrued to the States. Thus, the financial receipts of well-placed states were not necessarily related to their share of the national population, size of territory, capacity to foster development or existing commitments on social overheads. Hence, according to Professor Oyovbaire, the principle of derivation tended to accentuate still further, the existing imbalances of the national economy. It thus stifled the growth of a political consensus and healthy development of the federal polity in the period before 1970.[12] As Adedeji has similarly observed:[13]

> "...the derivation principle bedevilled the development of a rational and equitable system of revenue allocation. It poisoned inter-governmental relationships and... exacerbated inter-regional rivalry and conflict. Perhaps more than any other single factor it hampered the development of a sense of national unity and common citizenship in Nigeria."

And as he further elaborated, "the whole financial arrangements have inhibited the development of an effective, development-oriented national fiscal policy" while "the country's leaders who mapped out the Constitution and its fiscal system drew up a charter for regional obscurantism rather than a fiscal system designed for economy, efficiency, and equity. Inflexibility and instability have been built into the fiscal system."[14] No doubt, these were authoritative commentaries on the revenue allocation system inherited by the military which were very persuasive then as indeed they are today.

It was therefore no wonder that between 1970 and 1979, the Federal Military government made very substantial alterations to the system of revenue allocation. On the whole, the principle of derivation suffered a major setback especially as it applied to mineral resources. In 1970, under Decree No. 13 of that year, (backdated to 1969) the formula for sharing of mining rents and royalties became 50 per cent to the DPA, 45 per cent to the State of derivation and 5 per cent to the

12. *Ibid.*
13. A.Adedeji: *Nigerian Federal Finance* (London, Hutchinson, 1969) at p. 254.
14. *Ibid.*

Federal Government. Four other major changes touching on excise duties on tobacco, export duties, import duties and the basis of sharing the DPA were also introduced. These changes considerably enhanced the financial strength of the Federal Government *vis-à-vis* the States and enlarged the revenue transferred to the DPA. They also introduced some measure of fiscal equality among the States.

The above changes were reinforced in 1971 by the Federal Government's distinction between revenue from on-shore and off-shore production, taking 100 per cent of off-shore revenue itself thereby denuding the principle of derivation of much of its effect on the finances of the oil producing states.

In 1973, the Federal Military Government took yet another important step to restructure the system of revenue allocation by abolishing ownership and control of marketing boards by the State Governments. The previous allocation of 100 per cent of export taxes to the State Governments were consequently abolished. The system of fiscal federalism was further restructured in regard to personal income taxation. The Uniform Tax Decree No. 7 of 1975 introduced Uniform Tax rates and reliefs throughout the whole country. Both the collection and retention of personal income tax receipts remained under state jurisdiction. With the massive increase in oil revenues as a result of the OPEC price rise of 1973, in 1975 under the Constitution (Financial Provisions etc) Decree No. 6 of that year, the share of on-shore revenue paid to the State of origin was reduced to 20 per cent, while the Federal Government's entire share, on and off-shore, was to be paid in the DPA. The formula for allocating the proceeds of the Pool Account remained unchanged.

The Military continued with finding solutions to the complex problem of Revenue Allocation in Nigeria up to 1979. The Aboyade Committee recommended among other things, that local governments should be accepted as having a right to a statutory share of national financial resources. This recommendation was adopted by the Government and it was so enshrined in the Constitution. Hitherto, under various Constitutions, Revenue allocation was solely a matter between the Federal Government and the states (Regions) as the position of the local governments was derived from that of the States. One would have thought that the acceptance of the Aboyade Committee recommendation on the status of the local government in

the revenue allocation scheme was the right thing to do. Okigbo takes a different view. For him, the old system which tied the finances of the local governments to the apron strings of the state was preferable. In his words:[15]

> "There are two main levels of division of the revenues in a Federal System between the Federation and the States and among the States. The introduction of the local governments into the formula for allocation from the Federation Account should be seen clearly as an error. The local governments should be seen for what they are: a creation of the States and not of the Federal Government. The basis of allocation to the local governments in a State should be left to the State and covered in the Constitution of the State rather than in the National constitution. It is clearly, in my view, bad law and bad politics to treat the local governments as a so-called third tier of government."

This argument ignores the central importance of the local governments in the Nigerian constitutional scheme. Local Governments are the administrations that are nearest to the people, whose programmes impact directly and immediately on the lives of the masses and should therefore and must indeed have guaranteed access to the national revenue resources without being abandoned to the whims and caprices of State governments. Moreover, there is only one Constitution for the entire country as presently, we do not have State Constitutions.

Be that as it may, finally in 1979, the derivation principle was dropped altogether. In its place, a special account was established for mineral producing areas. The Federal Government, however, continued to receive a greater share in the allocation of revenue.

This historical analysis shows how the restructuring of the allocation of revenue resources has helped to strengthen the position of the Federal Government *vis-à-vis* the States with more resources at the disposal of the Federal Government. Thus, the States have become largely dependent upon federally collected taxes and this dependence continues to raise very serious political issues. The Federation we now

15. Pius Okigbo, *op. cit.*, at p. 201.

have, as has already been pointed out, is a completely different kind of Federation from that of 1964-65. Unlike the 1970 amendments, those of 1975 made the role of the DPA decisive in the revenue allocation system. However, the adequacy of the formula for sharing the Pool Account continues to provoke criticism.

The period between 1967 and 1979 saw profound changes in the structure of authority over sources of revenue in the direction of rationality and equity. At the time, it was generally agreed that the changes fostered a much better and healthier growth of the Federal polity and economy. These reforms were, however, made easier by the buoyancy of the total national revenue resources as a result of the oil boom and the military way of doing things which ignored all disagreements.

The reforms formed the basis of the 1979 Constitution on the sharing of National revenue resources among the tiers of governments. The Constitution required all revenues collected by the Government of the Federation to be deposited into the Federation account for distribution to the three levels of government. Exceptions were made for proceeds from personal income tax levied on the armed forces, the police force, residents of the Federal Capital Territory (FCT) and Overseas employees of the Ministry of External Affairs. It also contained provisions for grants-in-aid to States that required financial assistance. On the whole, the machinery for the sharing of the National revenue resources was quite flexible. The only problem, if it were a problem at all, was the concentration of fiscal power at the centre.

With the advent of civilian rule, in October 1979, after a lot of conflicts including litigation[16] with intense debates in the National Assembly, extensive lobbying and complicated maneuvers, a new revenue allocation arrangement was enacted into law under the Allocation of Revenue Act No. 1 of 1982. This arrangement gave the Federal Government 55 per cent, States 30.5 per cent, Local Governments 10 per cent while a total of 4.5 per cent went to the oil producing communities made up as follows: (1 per cent for ecological problems caused by oil production; 2 per cent based on derivation principle and 1.5 per cent directly for the development of mineral

16. *See Attorney General of Bendel State v. Attorney General of the Federation and 22 ors* (1982) 3 N.C.L.R. 1.

producing areas).[17] This enhanced to some extent, the financial position of the States while also providing some respite to the oil producing areas after the serious financial handicaps they had experienced under the military. Consequently, with increasing protestation from the oil producing communities about the lack of development of their areas, the Federal Government in 1992 established the Oil Minerals Producing Areas Development Commission (OMPADEC) with the mandate "to address the difficulties and sufferings of inhabitants of the Oil Producing Areas of Nigeria." This was indeed a laudable initiative. However, in the end, it was bogged down with corruption and mismanagement without substantially achieving the goals for which it was established.[18]

Distribution of Revenue Resources Under the 1999 Constitution

Almost all the provisions in the 1979 Constitution including those on revenue allocation have been retained in the 1999 Constitution. The constitutional allocation of revenue between the Federal and State Governments as well as the Local Government Councils under the 1999 Constitution is contained in Sections 162-168 and in items A and D of Paragraph 11 in the Second Schedule.

The following are the salient features of the fiscal arrangement between the Federation and State Governments as well as Local Government Councils:

Sharing of Revenue Resources through the Distributable Pool Account

Section 162 of the 1999 Constitution provides for a common pool of financial resources (called "the Federation Account") which is to be distributed among the Federal and State Governments and the Local Government Councils in each State, on such terms and in such manner as may be prescribed by the National Assembly. Although this mechanism may look flexible, it is indeed not so if the other provision under section 162(2) dealing with the role of the National Assembly and

17. See, also "The Price of Oil - Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities" in *Human Rights Watch*, New York-Watshingon-London-Brussels (1999) at pp. 44-45.
18. *Ibid.*

the Revenue Mobilization Allocation and Fiscal Commission (a novel provision not found in the 1979 Constitution) are taken into account.

It (i.e. section 162(2) provides that:

> "(2) The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density.
> Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources."

Clearly, the necessary intendment is to assuage or pacify the feelings of the oil producing areas which are violently agitating either against the ownership of the minerals by the Federal Government or for the lion's share of the mineral revenues. Although the allocation of 13 per cent to the State of origin returns the principle of derivation to the earlier scheme of revenue allocation,[19] it has, however, introduced rigidity and inflexibility into the system, by making revision of the principles of allocation or the weight to be attached to such principles very difficult to come by if and when the need arises. This is because the problem of Federal finance is complicated and so the issue of a sharing formula or allocation principles are ephemeral matters which can easily prove unsatisfactory or deficient sooner or later in the process of the interplay of political and economic forces. For this reason, it is unwise to incorporate a rigid fiscal system in the Constitution as it may have to be amended from time to time to reflect changes in the political system. As Okigbo has aptly illustrated the point:

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19. *Ibid.*

> "... the formula for sharing the revenues between the Centre and the Regions and among the Regions should not be enshrined in the Constitution because it has to be revisited from time to time in the light of the prevailing circumstances. It becomes extremely cumbersome to modify the formula once it is entrenched in the Constitution since such modification can only be achieved through a Constitutional amendment."[20]

The problem of the Niger-Delta region could equally be solved by the adoption of a flexible system as was the case under the 1979 Constitution and/or as has been done in India through their constitutional provision for federal grants. The Indian Constitution provides for two different kinds of federal grants: specific grants and grants of a general character. The category that immediately concerns us here is the specific grant. Under this category, the government is required to make grants to some specific states to enable them to meet the cost of such schemes of development as may be undertaken by them with the approval of the Union government for the purpose of promoting the welfare of the Scheduled Tribes or raising the level of administration of the Scheduled Areas. A similar provision can be inserted into our Constitution specifically authorising the Federal Government to make grants to the mineral producing areas like the Niger-Delta region to enable them meet the cost of development along the lines of the new body the Obasanjo Government is proposing. Allocating 13 per cent of oil revenue without tying this to specific schemes of development, would hardly benefit the communities.[21]

What remains to be considered is Section 162(5) which routes the share of the Local Governments from the Federation Account through the States and accordingly, subsection 6 thereof requires such (local governments) share to be paid into the State Joint Local Government Account which shall be distributed to the Local Governments on such terms and, in such manner as may be prescribed by the National Assembly. Certainly, this procedure for transferring revenue to the Local Governments will operate to their disadvantage as States are most

20. Pius Okigbo, *op. cit.*,
21. "The Price of Oil" in *Human Rights Watch*, *op. cit.*, at p. 49.

likely to tamper with such funds. The previous system where the funds were sent directly to the Local Governments is preferable in the light of previous experience.

Distribution of Taxing Power

The Federal and State Governments have been given exclusive powers to impose taxes in their respective spheres. One of the features of the fiscal arrangement in Nigeria is therefore that there is no concurrent power of taxation. The Constitution allocates extensive and elastic sources of tax revenue specifically to the Federal Government such as Petroleum Profits Tax, Companies Income Tax, Customs and Excise, etc. leaving the States with a residuary taxing power which does not provide considerable scope for the development of their financial resources.

Distribution of Income from Taxation

The general rule of federal constitutions is that the income or proceeds of a tax belong to the authority that levies it. There are however exceptions to this general rule under the 1999 Constitution. Thus, proceeds of many taxes put in the Centre are either exclusively given to the States (- these include Capital Gains Tax, Personal Income Tax, including taxation of dividends, taxation of documents or transactions by way of stamp duties (see section 163 of the 1999 Constitution) - or they are shared between the Federal and State Governments and Local Government Councils, (e.g. Value Added Tax (VAT). The reason for assigning these taxes to the Federal Government is that uniformity of legislation is desirable and necessary throughout Nigeria. This represents the most flexible scheme of revenue sharing between the centre and the states.

It has, however, been thought that even after the distribution of income from taxation, state revenues may not be sufficient to cope with their responsibilities. For this reason, further arrangement has been made for statutory grants-in-aid and Loans by the Federal Government to the States.

Federal Grants-in-Aid of State Revenue

In addition to what states will get through statutory allocation and shared taxes, the 1999 Constitution provides for Federal Grants to the

States. Thus, Section 164(1) provides that "The Federation may make grants to a state to supplement the revenue of that State in such sum and subject to such terms and conditions as may be prescribed by the National Assembly." These are grants of a general character. The purpose of the grants-in-aid of state revenue is to augment state resources for those states that find themselves in financial trouble. The system of federal grants is an integral part of the financial organisation of almost every Federal State. As one expert has put it:[22]

> "The constitutional scheme for grants-in-aid is one of the techniques for making inter-governmental financial adjustments and minimising the disparities in social services among the different states. The need for grants arises because the economies of the regions in a Federation differ from one another in ways which have an important bearing on the relative capacity of the several state Governments to provide service."

It is, therefore, necessary to correct the disparity in services to the people of different states through grants-in-aid as this is essential for the smooth functioning of the Federal system. One must therefore agree with Dr. Jain when he says that[23] "to leave a poor state to its own resources will either result in condemning its people to a low level of service or to an unduly high incidence of taxation. Such a result is bound to create jealousies and tensions in the body politic."

Federal Loans to States

Although Section 166(1) of the 1999 Constitution deals specifically with set-off, it evidently empowers the Federal Government to grant loans to the states. Thus, the Federal government can provide short, medium and long term loans to states. This will undoubtedly seem to have converted the relationship of Federal Government and States into that of creditor and borrower. It is, however, intended to assist states that are in financial difficulties who may be in need of assistance. The only

22. Jain, M.P. "Anomalies in the Scheme of Fiscal Need Grants in India." In Jain, S.N. and Others (ed) *The Union and the States*, Delhi.
23. *Ibid.*

problem here is that with poor states, their statutory allocations would certainly be depleted by payments made to the Federal Government towards the repayment of such loans.

The constitutional scheme on the sharing of revenue resources, between the Federation and the States appears to be based on one fundamental assumption, namely that the Central or Federal revenues are to be surplus whilst the state revenues are expected to be insufficient. It is largely for this reason that the Constitution provides for devolution or transfer of revenue from the centre to the states under these heads so as to assist states in distress as already explained. It remains now to see how this scheme has worked in practice.

The Constitutional Scheme in Operation

The practical working of the Constitutional Scheme will be illustrated by data obtained from the Central Bank of Nigeria (CBN) on the total Government Consolidated Revenue covering a period of two decades, year by year, to wit: 1980 - 1989 and 1990 - 1998. Apart from showing the revenue profile which has been separated into Tax and Non-Tax revenue, the data contains invaluable additional information relating to revenue allocation, Federal Government retained revenue, state and local governments' revenue allocations.

Table No. 1 (a) & (b) and Table No. 2 (a) & (b) reveal the following interesting points. First, as regards tax efforts by the Government at different periods, between 1980-1983 (the period of civilian rule), the total sum of federally collected revenue was on the decline. The military from 1984 onwards reversed this trend with only the year 1986 being the exception: the year 1986 posted a figure lower than that of 1985. Indeed, from the year 1989, there appears to be astronomical annual increases in federally collected revenue, sometimes going up to about a 100% increase as in the years 1988 and 1989, 1989 and 1990 and 1994 and 1995. Petroleum revenues largely accounted for these increases with the Customs and Excise duties, amounting to a distant second.

As earlier mentioned, the Federally collected revenue is broadly classified into Tax and Non-Tax revenue. Between these two broad sources, the following facts emerge especially as regards the comparative elasticity and potentiality for the growth of different tax resources allocated to the Federal government and the states –

Table 1(a): Total Government Consolidated Revenue (N Million) (1985 – 1989)

Sources	1980	1981	1982	1983	1984
Total Federally Collected Revenue	15,355.2	13,433.1	11,508.6	10,546.7	11,312.1
Tax Revenue	11,078.7	9,197.2	7,807.3	6,330.5	7,223.4
Petroleum Profit Tax	8,564.3	6,325.8	4,846.4	3,746.9	4,761.4
Company Income Tax	579.2	403.0	550.0	561.5	787.2
Custom & Excise Duties	1,813.5	2,325.8	2,336.0	1,984.1	1,616.0
Value-added Tax (VAT)	-	-	-	-	-
State Tax Revenue	121.7	142.6	74.9	38.0	58.8
Local Government Non-Tax Revenue					
Non-Tax Revenue	4,276.5	4,235.9	3,701.3	4,216.2	4,088.7
Crude Oil Exports /Domestic Crude Sales	3,789.0	2,238.6	2,968.5	3,506.1	3,507.8
Federal Govt. Independent Revenue 2/	487.5	1,997.3	732.8	710.1	580.9
Others 3/	-	-	-	-	-
State Non-Tax Revenue	N/A	N/A	N/A	N/A	N/A
Local Government Non-Tax Revenue	N/A	N/A	N/A	N/A	N/A
Allocation to:	14,746.5	10,182.8	9,884.9	9,798.6	10,672.4
Federation Account 4/	14,746.5	10,182.8	9,884.9	9,798.6	10,672.4
VAT Pool Account	-	-	-	-	-
AFEM Surplus Account	-	-	-	-	-
Petroleum Trust Fund	-	-	-	-	-
JVC Payments Account	-	-	-	-	-
External Debt Service Funds	-	-	-	-	-
National Priority Projects Funds	-	-	-	-	-
Others 5/	-	-	-	-	-
Federal Government Retained Revenue	12,993.3	7,511.6	5,819.1	6,272.0	7,267.2
Federation Account Share	12,505.8	5,514.3	5,086.3	5,561.9	6,686.3
Value-added Tax Share (VAT)	-	-	-	-	-
Federal Government Independent Revenue	487.5	1,997.3	732.8	710.1	580.9
PTF	-	-	-	-	-
National Priority Projects	-	-	-	-	-
External Debt Service Funds	-	-	-	-	-
AFEM Surplus Intervention Fund	-	-	-	-	-
Grants	-	-	-	-	-
Others 6/	-	-	-	-	-
State Government Revenue Allocation					
Federation Account Share	3,817.1	5,965.7	5,232.5	4,844.5	4,503.5
Value-added Tax Share (VAT)	-	-	-	-	-
Local Government Revenue Allocation	-	-	-	-	-
Federation Account Share	-	-	-	-	-
Value-added Tax Share (VAT)	-	-	-	-	-
State Allocation	-	-	-	-	-
Memorandum Items					
% of Federal Tax Revenue to Total Revenue	71.4	67.4	67.2	59.7	63.3
% of State Tax Revenue to Total Revenue	0.8	1.1	0.7	0.4	0.5

Table 1(b): Total Government Consolidated Revenue (N Million) (1985 – 1989)

Sources	1985	1986	1987	1988	1989
Total Federally Collected Revenue	16,634.5	14,456.4	27,335.1	29,775.5	55,472.7
Tax Revenue	11,482.9	9,502.3	19,234.5	16,216.0	19,930.2
Petroleum Profit Tax	6,711.0	4,811.0	12,504.0	6,814.4	10,598.1
Company Income Tax	1,004.3	1,102.5	1,235.2	1,550.8	1,914.3
Custom & Excise Duties	2,183.5	1,728.2	3.540.8	5,672.0	5,815.5
Value-added Tax (VAT)	-	-	-	-	-
State Tax Revenue	1,584.1	1,860.6	1,954.5	2,178.8	1,602.3
Local Government Non-Tax Revenue					
Non-Tax Revenue	5,151.6	4,954.1	8,100.6	13,559.5	35,542.5
Crude Oil Exports/Domestic Crude Sales	4,212.7	3,296.3	6,523.0	13,017.3	28,532.4
Federal Govt. Independent Revenue 2/	938.9	433.7	407.6	540.5	938.0
Others 3/	-	1,224.1	1,170.0	1.7	6,072.1
State Non-Tax Revenue	N/A	N/A	N/A	N/A	N/A
Local Government Non-Tax Revenue	N/A	N/A	N/A	N/A	N/A
Allocation to:	13,750.2	11,868.3	24,692.2	26,770.3	46,860.3
Federation Account 4/	13,750.2	11,868.3	24,692.2	26,770.3	46,860.3
VAT Pool Account	-	-	-	-	-
AFEM Surplus Account	-	-	-	-	-
Petroleum Trust Fund	-	-	-	-	-
JVC Paymenis Account	-	-	-	-	-
External Debt Service Funds	-	-	-	-	-
National Priority Projects Funds	-	-	-	-	-
Others 5/	-	-	-	-	-
Federal Government Retained Revenue	10,001.4	7,969.4	16,129.0	15,588.6	25,893.6
Federation Account Share	9,062.5	6,311.6	14,551.4	15,046.4	18,752.1
Value-added Tax Share (VAT)	-	-	-	-	-
Federal Government Independent Revenue	938.9	433.7	407.6	540.5	938.0
PTF	-	-	-	-	-
National Priority Projects	-	-	-	-	-
External Debt Service Funds	-	-	-	-	-
AFEM Surplus Intervention Fund	-	-	-	-	-
Grants	-	-	-	-	-
Others 6/	-	1,224.1	1,170.0	1.7	6,072.1
State Government Revenue Allocation					
Federation Account Share	3,260.8	2,843.8	6,197.1	9,181.3	9,899.8
Value-added Tax Share (VAT)	-	-	-	-	-
Local Government Revenue Allocation	-	-	-	-	-
Federation Account Share	-	-	-	-	-
Value-added Tax Share (VAT)	-	-	-	-	-
State Allocation	-	-	-	-	-
Memorandum Items					
% of Federal Tax Revenue to Total Revenue	69.5	52.9	63.2	47.1	33.0
% of State Tax Revenue to Total Revenue	9.5	12.9	7.2	7.3	2.9

Table 2: (a) Total Government Consolidated Revenue (N Million) (1990 - 1994)

Sources	1990	1991	1992	1993	1984
Total Federally Collected Revenue	100,864.1	104,468.2	196,102.9	198,755.2	209,193.9
Tax Revenue	41,308.9	57,377.3	78,598.4	90,233.9	87,916.0
Petroleum Profit Tax	26,909.0	38,615.9	51,476.7	59,207.6	42,802.7
Company Income Tax	2,997.3	3,827.9	5,417.2	9,554.1	12,274.8
Custom & Excise Duties	8,640.9	11,456.9	16,054.8	15,486.4	18,294.6
Value-Added Tax (VAT)	-	-	-	-	7,260.8
State Tax Revenue	2,761.7	3,181.2	5,244.7	4,950.2	6,077.2
Local Government Non-Tax Revenue	-	295.4	405.0	1,035.6	1,205.9
Non-Tax Revenue	59,555.2	47,090.9	117,504.5	108,521.3	121,277.9
Crude Oil Exports/Domestic Crude Sales	44,978.1	44,050.5	112,601.4	102,894.8	117,389.7
Federal Govt. Independent Revenue 2/	1,724.0	3,040.4	4,903.1	5,626.5	3,888.2
Others 3/	12,853.1	-	-	-	-
State Non-Tax Revenue	N/A	N/A	N/A	5,351.3	4,840.6
Local Government Non-Tax Revenue	N/A	N/A	N/A	N/A	N/A
Allocation to:	84,735.4	97,951.2	173,942.1	187,142.9	194,362.7
Federation Account 4/	68,064.2	75,600.3	125,255.7	131,195.9	115,698.2
VAT Pool Account	-	-	-	-	7,260.8
AFEM Surplus Account	-	-	-	-	-
Petroleum Trust Fund	-	-	-	-	9,957.5s
JVC Payments Account	16,671.2	22,350.9	48,686.4	55,947.0	61,446.2
External Debt Service Funds	-	-	-	-	-
National Priority Projects Funds	-	-	-	-	-
Others 5/	-	-	-	-	-
Federal Government Retained Revenue	38,152.1	30,829.2	53,264.9	126,071.2	132,242.4
Federation Account Share	23,575.0	27,788.8	38,240.0	51,797.7	53,661.0
Value-Added Tax Share (VAT)	-	-	-	-	1,452.2
Federal Government Independent Revenue	1,724.0	3,040.4	4,903.1	5,626.5	3,888.2
PTF	-	-	-	-	9,957.5
National Priority Projects	-	-	-	55,947.0	61,446.2
External Debt Service Funds	-	-	-	-	-
AFEM Surplus Intervention Fund	-	-	-	-	-
Grants	-	-	-	-	-
Others 6/	12,853.1	-	10,121.8	12,700.0	11,794.8
State Government Revenue Allocation					
Federation Account Share	16,378.8	19,742.2	24,497.3	27,660.6	29,006.8
Value-Added Tax Share (VAT)	-	-	-	-	5,026.0
Local Government Revenue Allocation					
Federation Account Share	-	3,489.4	7,003.7	18,316.4	17,321.3
Value-Added Tax Share (VAT)	-	0.0	00	0.0	0.0
State Allocation	-	177.8	129.5	253.1	466.4
Memorandum Items					
% of Federal Tax Revenue to Total Revenue	38.2	51.9	37.4	42.9	39.1
% of State Tax Revenue to Total Revenue	2.7	3.3	2.9	3.0	3.5

Sources: Central Bank of Nigeria.

Table 2 (b) Total Government Consolidated Revenue (N Million) (1995 – 1998)

Sources	1995	1996	1997	1998
Total Federally Collected Revenue	472,525.4	535,426.5	593,883.7	476,802.2
Tax Revenue	135,399.3	165,732.6	225,996.2	185,509.5
Petroleum Profit Tax	42,857.9	42,496.1	91,923.6	44,450.1
Company Income Tax	21,878.3	22,000.0	26,000.0	33,315.3
Custom & Excise Duties	37,364.0	55,000.0	63,000.0	57,683.0
Value-Added Tax (VAT)	20,761.0	31,000.0	34,000.0	36,867.7
State Tax Revenue	10,427.3	13,209.4	8,565.7	9,861.8
Local Government Non-Tax Revenue	2,110.8	2,027.1	2,506.9	3,331.6
Non-Tax Revenue	337,126.1	369,693.9	367,887.5	291,292.7
Crude Oil Exports/Domestic Crude Sales	281,689.7	326,693.9	324,887.5	245,082.2
Federal Govt. Independent Revenue 2/	20,436.4	3,407.0	8,339.9	11,431.6
Others 3/	35,000.00	39,593.0	34,660.1	34,778.9
State Non-Tax Revenue	7,383.0	8,242.0	5,339.6	6,147.6
Local Government Non-Tax Revenue	N/A	N/A	N/A	N/A
Allocation to:	439,226.3	517,190.0	578,568.6	452,177.2
Federation Account 4/	170,622.9	179,000.0	208,000.0	257,331.4
VAT Pool Account	20,436.4	31,000.0	34,000.0	36,867.7
AFEM Surplus Account	79,645.3	103,190.0	130,811.1	0.0
Petroleum Trust Fund	35,000.0	42,000.0	37,757.5	34,778.8
JVC Payments Account	45,000.0	39,000.0	45,000.0	54,988.9
External Debt Service Funds	44,000.0	44,000.0	44,000.0	40,323.9
National Priority Projects Funds	26,000.0	44,000.0	44,000.0	14,665.0
Others 5/	18,621.7	35,000.0	35,000.0	13,221.5
Federal Government Retained Revenue	249,768.1	325,144.0	351,262.3	310,174.0
Federation Account Share	78,569.3	81,056.0	101,000.0	124,572.9
Value-Added Tax Share (VAT)	7,437.8	10,746.0	12,238.7	9,413.8
Federal Government Independent Revenue	20,436.4	3,407.0	8,339.9	3,447.8
PTF	35,000.0	41,935.0	37,757.5	34,778.8
National Priority Projects	26,000.0	44,000.0	44,000.0	13,778.8
External Debt Service Funds	44,000.0	41,285.2	32,924.1	27,995.0
AFEM Surplus Intervention Fund	38,000.0	62,000.0	47,002.1	-
Grants	-	2,000.0	2,000.0	-
Others 6/	-	38,714.8	66,000.0	96,765.7
State Government Revenue Allocation				
Federation Account Share	38,671.5	40,619.1	50,902.5	65,542.0
Value-Added Tax Share (VAT)	6,256.9	11,380.4	13,905.3	16,009.4
Local Government Revenue Allocation				
Federation Account Share	17,875.5	16,569.7	20,443.3	30,620.9
Value-Added Tax Share (VAT)	3,558.1	4,581.7	7,515.0	10,170.8
State Allocation	625.4	691.1	578.9	750.4
Memorandum Items				
% of Federal Tax Revenue to Total Revenue	26.4	28.5	36.6	36.8
% of State Tax Revenue to Total Revenue	2.7	2.8	1.9	2.8

Sources: Central Bank of Nigeria.

(i) Between 1980 and 1988, and also in 1991, tax revenue accounted for more of the Federally collected revenue than the non-tax revenue (although this latter source included crude oil exports and domestic crude sales). For the years 1989, 1990 and 1992 to 1998, this trend was reversed, and this was in spite of the introduction of the VAT in 1994;

(ii) It was only from 1993 that state non-tax revenue started being reflected in the federally collected revenue;

(iii) It was only in 1991 that local government tax revenue started being reflected in the Federally collected revenue profile. It was also in that year that local governments started enjoying direct allocation from the federal government;

(iv) If petroleum profit tax is, however, added to crude oil exports/domestic crude sales, then the oil sector in Nigeria remains the main stay of the economy as the main source of revenue;

(v) The contribution of Customs and Excise duties to the Federally Collected revenue recorded a lull between 1980 and 1990. It, however, picked up between 1992 and 1994. Between 1995 to 1998, it had more than doubled;

(vi) Despite the general lowering of income tax rate for companies over the years, the overall contribution of this source to total revenue has, fairly, been on the increase;

(vii) The contribution of VAT has increased over the years since its take-off in 1994.

From the CBN data given in the two tables, the percentage contribution of the State tax revenue to total revenue has been generally low

(peaking only in 1986 at 12.9%) as compared with that of the Federal tax revenue.

In spite of this, as can be seen from the figures in the tables, allocation to the States has increased especially since 1987. Local Governments, since 1991, have also enjoyed an increased annual allocation. This shows how inadequate state resources would be for meeting state expenses if they were to be left on their own.

Another interesting revelation from the CBN data on the federally collected revenue and its disbursement is that, although the Constitution makes provisions for federal grants to the states to augment state resources, such grants have only been made for two years, i.e. 1996 and 1997 respectively thereby shortchanging the states.

An Assessment of the Constitutional Scheme and Its Implementation

As the foregoing analysis has demonstrated, the long experience of the Nigerian Federal Polity with Military regime against the background of the country's accumulated political and economic crises has had great effect on the scheme of distribution of revenue resources between the Federal Government and the States. Inevitably, these factors have contributed towards centralisation of financial power.

The lot of the state governments has not been a particularly happy one, as they operate under serious handicaps. It is because their share of the statutory allocation and their taxes are not sufficient to prosecute their development programmes and provide the necessary social services that the Constitution has devised other avenues through which the Federal Government can transfer revenue resources to the state governments. This flexible scheme has not worked satisfactorily for a number of reasons.

First, there had been leakages of oil revenues.[24] Not all oil revenues found their way into the Federation Account, even though under the Constitution, federally collected revenues are to be deposited into Federation Account. Some of the oil revenues were diverted into oil dedicated accounts which were earmarked for priority projects.[25]

24. World Bank, *Nigeria: Federal Public Expenditure Review* (Report No. 1447-UN 1 1996), at p. 12.

25. *Ibid.*

Additional leakage also occurred in the conversion of the foreign exchange receipts from oil into Naira for deposit into the Federation Account. In 1992, the loss of Naira-denominated oil receipts was estimated to be 16.5 billion Naira or 954 million US dollars. Although under the Constitution, all funds in the Federation accounts should be distributed to the three levels of government and the various special funds in accordance with formally agreed statutory shares,[26] this did not happen. Some funds intended for distribution to the state and local governments were borrowed by the Federal Government. For the year 1992, this amounted to 5.3 billion Naira.[27]

These illegal or unconstitutional practices are most disturbing from the point of views of states and local governments as they unfairly augmented the revenue of the Federal Government at the expense of the state and local governments share of the Federation Account. For instance, between 1986 and 1993, federally retained revenues were the equivalent of an average of 57 per cent of federally collected revenues, as against the statutory share of 48.5 per cent, excluding independent federal revenues,[28] as can be seen in Table 3.

Table 3: Federally Retained Revenues, 1986 – 93

	1986	1987	1988	1989	1990	1991	1992	1993
Total (Naira Billions)	11.3	16.6	16.1	31.5	56.6	69.7	99.1	107.4
Percent of Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
A. Federal share of federation account	55.9	87.7	91.6	57.1	41.8	38.7	38.6	48.2
B. Federal share of value-added tax								
C. Independently collected revenues	3.8	2.5	3.7	4.5	6.2	4.6	12.3	8.9
D. Other/extra-budgetary	40.3	9.8	4.8	38.4	52.0	56.7	49.1	42.9
1. Stabilization account	0.0	0.0	0.0	24.2	18.1	15.5	23.5	11.0
2. Dedicated account drawings	1.4	2.7	4.8	7.2	7.6	9.9	13.4	14.5
3. Other federal claims on revenues	38.9	7.1	0.0	7.0	26.2	31.3	12.2	17.4
Effective federal share of collected revenues (percent)	70	62	54	55	59	61	54	53

a. Includes only the federal share of total stabilization account drawings. Federal drawings in excess of the federal share are recorded as part of financing.

Sources: Federal Ministry of Finance, Office of the AGF, CBN, and staff estimate.

The poor financial position of the states has been exacerbated by the general non- provision of federal grants which under the Constitution are required to be made to assist states in distress. In India, Australia

26. *Ibid*, at p. 13.
27. *Ibid*, at p. 14.
28. *Ibid.*, at p. 16.

and Switzerland, frequent use has been made of federal grants to assist states to undertake and carry out various important tasks. In India, for example, the Finance Commission has worked out (at different times), a wide range of criteria to ensure fairness and efficiency in the provision and use of federal grants which are essential for the smooth functioning of the Federal System. These criteria range from the fiscal needs of the states or bridging the gap between the ordinary revenues of the states and their nominal inescapable expenditure, or as an instrument for reducing regional disparities or narrowing the disparities in social services between states to enabling states to meet special burdens on their finances because of their peculiar circumstances or indeed matters of national concern.

As has been shown, Nigeria has not actually developed its system of Federal grants to states which under the Constitution are required to address the problem of insufficiency of state finances to cope with the expanding area of assigned services. Usually, these services involve the expenditure of huge amounts of money. Most States and Local Governments in Nigeria today are unviable. Although an independent body, the Revenue Mobilisation, Allocation and Fiscal Commission has been established with the responsibility for *inter alia*, monitoring the accruals to and disbursement of revenue from the Federation Account as well as reviewing, from time to time, the revenue allocation formulae and principles in operation to ensure conformity with changing realities, it has not been able either to check the abuses of the Federal Government or to provide the expertise for tackling the complex issues of public finance in order to ensure a fair and efficient federal system. So far, it has not fulfilled the role expected of it.

The consequence of this state of affairs is that the states have to depend on the Federal Government for their financial requirements as if legally, they lacked financial sovereignty. The constitutional scheme on sharing of revenue resources has been designed in such a flexible and elaborate way that the Federal Government and the States, as constitutional entities, are guaranteed the satisfaction of their respective financial needs, notwithstanding the pre-eminent position of the Federal Government. Consequently, this chronic dependence of the States on Federal revenue, has created a sense of financial irresponsibility in the States. For instance, the tax efforts of the states to generate additional revenue except perhaps Lagos State are rather very low, to say the

least. No serious concern is shown in this direction, even though residuary taxing power has been vested in the states. Concomitant with this is the lack of prudent management of revenue resources made available to the states. As the World Bank Report on Nigeria has stated:[29]

> "At the state and local levels, records are poorly kept and do not account for funds transferred from the Federal government. There is also little evidence of taxpayer concern over the quantity or quality of services, possibly because local taxes contribute little to revenues. Attempts to keep track of state and local finances are made more difficult by the creation of new states and local government..."

The unfortunate consequence of these shortcomings is that the states have been turned into either permanent beggars or debtors of the Federal government.

Conclusion

This chapter has discussed the various influences that have impacted on the current constitutional scheme on sharing of revenue resources. Although the arrangements for revenue allocation are mostly flexible, their actual implementation has generated discontent among the states. This is more a problem with the operators than with the scheme of the Constitution. They have not played their role as they should. Generally, there have been several instances of violation of the Constitution in this particular area as well as serious omissions due to either indifference, ignorance, or lack of expertise to take advantage of the flexible mechanisms in the Constitution to address the complex problems of public finance and its distribution in a highly heterogenous society like Nigeria.

The problem generally with Nigeria is not a lack of revenue resources but the management of these resources, the quality of

29. World Bank, *Nigeria: Poverty in the Midst of Plenty - The Challenges of Growth with Inclusion. A World Bank Poverty Assessment* (Report No. 14733-UNI 1996) at p. xii.

governance – in particular the lack of transparency and accountability – as well as the lack of a spirit of "live and let live "or" "give and take." For instance, between 1973 and 1993, about US$200 million was invested in the country, with two-thirds of this coming from the Federal Government. Yet, there is very little to show for such massive investment.[30] There has been so much over-spending and extra-budgetary spending that approved budgets governed less than half of the total expenditure from 1991 to 1993 and also in 1998. Today, the issue of fiscal federalism has become acutely problematic in Nigeria, largely because of these factors and not really the basic scheme on sharing of revenue resources.[31]

Nigeria is today at "crossroads." A choice has to be made between improving the welfare of the population and moving the country forward socially, technologically and economically or allowing the situation to deteriorate further in which case the irreversible consequences of continuing drift would drastically and catastrophically alter our national future.[32] These underlying problems cannot simply be wished or decreed away no matter how sophisticated the constitutional mechanism is. The country simply cannot continue in this manner.

As the aforementioned World Bank Report on Nigeria has rightly observed,[33] "poverty is pervasive to differing degrees – in all three regions, and within all states" and goes further to state that "The challenge for Nigeria is not one of improving one sector or region at the expense of another, or of introducing policy distortions and inefficiencies in resource allocation to benefit one group which in the past has led to increased poverty for others, but to adopt growth and social service oriented policies that will enable all its inhabitants to improve their welfare."

All those factors such as regional disparities in combination with the differential impact of economic and social policies that have accentuated poverty in some areas more than others are still as prevalent as they were when the present scheme on distribution of revenue resources was devised. Taking care of the unevenness among

30. World Bank, *Nigeria: Federal Public Expenditure Review*, *op. cit.*, at p. 1.
31. *Ibid.*, at p. iv.
32. *Ibid.*, at p. i.
33. World Bank: *Poverty in the Midst of Plenty: The Challenges of Growth with Inclusion op. cit.* at p. 1.

the states in Nigeria still remains an important policy matter in the sharing of national revenue resources. Accordingly, the centralising consideration seems to be still important. In the ongoing discourse, the demand should not be for any structural change but rather for meaningful fiscal adjustment in the basic scheme of the Constitution. After all, *Abusus non tolit usum* (that is, the abuse of a thing does not abrogate its proper use). Thus, all devices employed in the past by the Federal Government (such as the use of the dedicated oil accounts, stabilisation accounts, and first charges) which had effectively kept the federal share of federally collected revenues between 53 per cent and 61 per cent in the last several years[34] should be eliminated if already this has not been done.[35] This would release revenue formerly accruing only to the Federal Government to the Federation Account to be shared with state and local governments thereby increasing their share of the national revenue.

Concomitant with this, those functions that had randomly been surrendered to the Federal Government which are best handled at State and Local Government levels, because of fiscal considerations, should be returned to them. This would then justify increasing State and Local Government shares of the Federation Account.

The other effective means of augmenting the resources of the states is the optimum exploitation of revenue possibilities so that they can execute their socio-economic programmes without complete dependence on revenue from the Federation Account.

Finally, Governments at Federal, State and Local levels must adopt policies of effective economic management which require fiscal discipline and good governance. This would eliminate waste, mismanagement and corruption and thereby make the constitutional scheme on sharing of revenue resources a veritable tool for addressing the complex and difficult problems of fiscal federalism.

The Constitution should empower the Federal Government to intervene in cases of massive financial mismanagement or irresponsibility in a state which is likely to lead to the collapse of its constitutional machinery of government. The same power of

34. World Bank: *Nigeria: Federal Public Expenditure Review*, *op. cit.*, at p. xiv.
35. The present Government has taken steps to eliminate all these devices and has also promised to look into the revenue sharing formula.

intervention should be given to the State Government in the case of financial irresponsibility by the Local Government Councils.

The only way forward therefore lies in implementing these suggestions and not on embarking on a radical alteration of the scheme on sharing of revenue resources as embodied in the Nigerian Constitution as such an approach is not justified by the analysis made in this chapter.

7

REDUCING THE RISK OF DIVIDED AND FAILED GOVERNMENT

by

Oyelowo Oyewo
(Associate Professor, Faculty of Law, University of Lagos)

Introduction

On May 29, 1999, a new constitutional democracy, under the Executive Presidency of Chief Olusegun Obasanjo, was established in Nigeria. This Fourth Republic is founded upon the Constitution of the Federal Republic of Nigeria, 1999. A Decree promulgated by the Abubakar regime, which brought the 1999 Constitution into force clearly represented it as the necessary amendment of the 1979 Constitution.[1] It is, therefore, not surprising that the principle of legislative – executive – judicial separation of powers, and the system of federalism in the division of powers between autonomous tiers of governments, are replicated as some of the limitations on government under the 1999 Constitution.

The Constitution-making efforts of transitional programmes of the Babangida and Abacha regimes had produced the "still – born" 1989 Constitution and 1995 Draft Constitution respectively, wherein constitutional engineering and reforms of the constitutional structure of the 1979 Constitution were undertaken.[2] These reforms were based on

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1. Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 1999. The last recital is as follows: "AND WHEREAS, it is necessary in accordance with the programme on transition to civil rule for *the Constitution of the Federal Republic of Nigeria 1979 after necessary amendments and approval by the provisional Ruling Council to be promulgated into a new Constitution for the Federal Republic of Nigeria in order to give the same force of law with effect from 29th May 1999; (Italics mine).*

2. See the Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1989 Section 2, to which the 1989 Constitution was scheduled (hereinafter 1989 Constitution). See also the Report of The Constitutional Conference containing the Draft Constitution Vol. 1. 1995 (hereinafter the "1995 Constitution")

the assumption that the effectiveness of government can be impaired when the bargaining and rivalry between the arms of governments and tiers of government, degenerate, as they often do, into confrontation, stalemate, divided and/or failed government as was witnessed during the Second Republic (1979 - 1983) based on the 1979 Constitution.[3]

No sooner had the 1999 Constitution come into operation than question began to be raised as to its legitimacy, effectiveness and autochtony.[4] As if to bear this out, the National Government of President Olusegun Obasanjo has had to deal with conflicts with the National Assembly, on its policies and exercise of executive power within spheres that implicate legislative initiatives.[5] Even at the state government level, the Anambra State Government, led by Dr. Mbadinuju, experienced severe tests of democratic resilience arising from intra executive conflicts on the one hand and inter executive and legislative conflicts on the other hand.[6] The most extreme challenge of a failed government arose in the debacle of the investigation and call for the impeachment of Governor Bola Tinubu of Lagos State by the State House of Assembly.[7] One must not also forget the intra legislative conflicts and failure of leadership experienced by the House of Assembly arising from the allegations of forged certificates against the former Speaker, Alhaji Salisu Buhari, which culminated in his

3. Report of the Political Bureau, 1987 Federal Government Printers, pp 71 - 73 at para. 6.007,89 - 97 at paras, 7.004, 7.009, 7.001,7.013 - 7.020. "In Kaduna, impeachment was successfully used to remove the Governor. In Kano State the Deputy Governor suffered the same fate. In both cases, impeachment procedure was embarked upon for "political misconduct" very much against the spirit of the Constitution.

4. *The Guardian* Newspaper of June 24, 1999, p. 4 "Constitutional Amendment," July 5, 1999, p. 19. "Rage over diluted Constitution;" July 20, 1999 back page, Caution on "Constitutional Amendment" Uwais CJN.

5. Decisions of the executive to transfer the Headquarters of some federal government agencies back to Lagos, was followed by a legislative censure of the executive policy. See *The Guardian* Newspaper of August 20, 1999, pp. 1 & 4 "House is not slow" reporting a press conference of the Speaker of the House of Representatives Alhaji Na'aba on their relationship with the Executive.

6. See *Daily Champion* Newspaper of June 19, 1999 "The Anambra Crisis" pp. 11,12,25, and 29; *The Guardian* Newspaper of July 5, 1999 "Mbadinuju Emeka's Embrace" p. 7.

7. *The Guardian* Newspaper of September 22, 1999 front page "Lagos Assembly probe charges against Tinubu."

resignation.[8] There is also the crisis of leadership in the Senate that has resulted in the exit of Senators Evans Ewerem and Chuba Okadigbo respectively as Senate president.

It is being canvassed that the 1999 Constitution, just like the 1979 Constitution failed to provide for the modified presidential system, with a balance of power, influence, and responsibility based on effective participation in the governmental process by the executive and the other branches of government as well as the different autonomous governments, on the one hand, and an active and politically conscious electorate on the other.[9]

The focus of this chapter is to examine the risk of divided and/or failed government under the presidential system of government within the purview of the 1999 Constitution. A comparative analysis of the relevant constitutional provisions with earlier Nigerian Constitutions and other foreign Constitutions with relevant practices bearing on the issues will be undertaken, with the aim of proffering suggestions on how to reduce the identifiable risks.

Clarification of Terms

Governance involves the use of power by the different arms of government for the common good and national development. Modern governments employ mechanisms designed to achieve interactions, inter dependence and checks and balances, such as, the concept of separation of powers, to structure the relationship between the arms of government. Conceptually, it is aimed at preventing the arbitrariness, dictatorship and corruption that unified government such as monarchical, totalitarian and dictatorial governments portends. On the other side of the spectrum is the potential for divided, or polarised and failed government arising from the practice of separation of powers even under a constitutional democracy. This is the paradox of a divided and/or failed government as its seed is sown in the celebrated doctrine of separation of powers in a constitutional democracy.[10]

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8. *The Guardian Newspaper* of July 20, 1999, front page.
9. Report of the Political Bureau (*supra*) at p. 92 para. 7.014.
10. I wish to acknowledge the contributions of Late Dr. Adesina Sambo whose comments and critique at the presentation of this paper improved my understanding of the topic.

"When government is divided, then, the normal and healthy partisan confrontation that occurs during debates in every democratic legislature spills over into confrontation between the branches of the government, which may render it immobile."[11] Differences or conflicts of opinion between functionaries or organs of government are, however, not confrontation, where the opinions are genuinely held, and have a reasonable and rational basis.[12] Disagreement with an opinion or measure without reasonable or rational ground or on mere partisan grounds amounts to confrontation which can lead to a divided government. Divided government may however, be necessary sometimes to enable the arms of government resolve their differences in objectives and agenda.

Failed government may be equated to failure of leadership or dearth of dynamism in elected representatives. According to James Sundquist, all governments descend into periods of ineffectiveness when for any of a wide range of causes leadership fails, public confidence is lost, and conflicts within the government deepen and remain unresolved.[13] He identifies five categories of circumstances in which a Chief Executive and his government may lose his capacity to lead the country yet could not be removed from office under the Constitution,[14] viz:

(i) a pattern or criminal conduct that clearly stems from the president's office yet cannot be traced to the president personally;

(ii) a pattern of abuse of power for personal or partisan ends that is corruptive yet not specifically in violation of any criminal statute;

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11. James, L. Sundquist, *Constitutional Reform and Effective Government*, 1986 (The Brookings Institution Washington, D.C.) Chapter 4 at p. 75.
12. B. O. Nwabueze, *Nigeria's Presidential Constitution 1979 – 83* (1985) (Longman) Chapter 8 pp. 175, 179 at 176.
13. *Op. cit.* Chapter 6 at 135.
14. *Op. cit.* at 138 - 139.

(iii) the mental or emotional breakdown of a president that is not clear and provable enough to be grounds for declaring him disabled under the Constitution;

(iv) a general and irredeemable loss of public confidence in the president;

(v) a systematic deadlock between the executive and legislative branches so severe as to cripple the capacity of the government to cope with crisis.

The fifth category has featured the most in Nigeria's nascent democracy under President Olusegun Obasanjo.

Whilst a failed government may be overcome by the dissolution of government or vote of no confidence, under a parliamentary system, it is only the impeachment option that is the safeguard under the presidential system where the president is elected for a fixed term. It will be recalled that in the Second Republic (1979 – 1983) the impeachment option was employed by the Kaduna State legislative Assembly against the elected governor, when the executive and the legislature of the state was faced with a systemic deadlock.

Nigerian's unique position in relation to the risk of divided and failed government must be appreciated against the background of certain characteristics of our nation arising from our constitutional history. Nigeria's presidential system was adopted subsequent to a long history of parliamentary practice. Nigeria's federalism devolved from a previously unitary system. Nigeria has not evolved a durable political party system, thus, ethnic and religious partisanship is rife. The forceful emergence of the unconstitutional phenomenon of military coup d'etat as a means of changing government whether or not it is divided or has failed, and the resultant erosion of constitutional institutions and the civil society under her different military administration.[15]

15. These attributes distinguished Nigeria's from the United States of America constitutional System which is a Presidential System within a federal structure. The British Parliamentary System is practised within a unitary System with well established political parties. India's is a parliamentary system of government within a federal system and a multi-party system evolved over time without the

Divided Government

The origins of the constitutional structure of the Presidential system of government have been traced to the American Constitution, with its focus on the degree to which various governmental arrangements conform with, or threaten to undermine either the independence and integrity of each of the branches or levels of government. Or the ability of each to fulfil its mission in checking the others so as to preserve their interdependence without which independence can become domination.[16] This structure is based on the concept of separation of powers into the legislative, executive, judicial arms and the practice of federalism based on federal state division of powers.[17] The 1999 Constitution clearly re-established the clear separation of powers, of the legislature, executive and the judiciary. The executive and the legislature are constitutionally structured to interact and check and balance themselves.[18] In practice this potentially results in face-off and confrontation between the two arms of government. Confrontations have been common between the President Obasanjo led federal executive and the National Assembly.

How then can the situation be managed to prevent a divided or failed government? Apart from this horizontal phenomenon of divided and/or failed government, there is the potential for confrontation between the central government and the member states within a federation like Nigeria. The spectra of a vertical phenomenon of divided and/or failed government is manifest in the recent adoption of the Sharia legal system by some Northern States following the example of Zamfara State. Confrontations between the State of the Niger Delta and the central government over the control of the petroleum resources.

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intervention of military coups even in the face of deadlocked and/or divided and/or failed governments, which have been resolved through the constitutional and democratic means of elections, votes of no confidence, coalitions, or multi-partisanship.

16. Lawrence Tribe, *American Constitutional Law* Foundation Press, New York, 1988, Chapter 2 pp. 18 - 20.
17. On the evolution of separation of powers, see Friedrich "Separation of Powers" *13 Encyc. Soc. SC.* (1934), 663 - 666. On the evolution of federalism ideas, see Eleazar "Federalism" *5 Int'l Encyc. Soc. SC.* (1968) 361–365.
18. Abiola Ojo, "Separation of Powers in a Presidential System of Government." *Public Law (1981)* 105. See Sections 4,5 & 6 of 1979 Constitution and 1999 Constitution.

Whether vertical or horizontal, the issue of managing the factors that portend divided and/or failed government in Nigeria is not only legal or constitutional. The focus of this Chapter however, is on how the law, particularly, constitutional law, deals with it.

Divided Legislature and Executive

One of the hallmarks of the Presidential system of government is the independence of the legislature from the executive. The 1999 Constitution clearly vests the legislative powers of the federation in the National Assembly.[19] Membership of the National Assembly, either the Senate or the House of Representative, cannot be combined with that of the executive or the judiciary as specified by section 68(1)(d) & (e) of the 1999 Constitution.[20] The effect of the provision was amply demonstrated in the events that followed the nomination of Senator Udoma Udo Udoma as a Federal Minister, which would have resulted in his forfeiting his seat had he been sworn in as a Minister, and thereby losing his leverage for a more Senior Ministerial position. His refusal to be sworn in was based on the constitutional provision that will automatically render the seat vacant.

This independence of the legislature distinguishes the presidential system from the parliamentary system, in which the members of the executive are recruited from the legislature. Section 67(2) of the 1999 Constitution also conditions the attendance of the ministers of the federation in the legislature upon the invitation of either House of the National Assembly.[21]

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19. Section 4 of the 1979 Constitution which specifically vested legislative powers in the National Assembly and the State House of Assembly, at the federal and state levels respectively, has become a re-occurring feature of all the subsequent constitution making efforts notably the 1989, 1995 and 1999 Constitutions. Section 4 forms part of the triumvarate provisions of sections 4, 5 and 6 that expressly established the principle of separation of powers.
20. See also sections 63 and 64 of the 1979 Constitution.
21. In practice, the Committees of the legislative House may also invite the Minister or the Executive to appear before it and explain matters within its legislative competence. Members of the Executive must see this as an opportunity to articulate executive policies, instead of the present attitude of seeing the invitation as a confrontation or sanction by the legislature. The reluctance of certain Ministers under the Obasanjo administration to respond to these invitations must, therefore, be discouraged by the President.

One of the merits of an independent legislature is the role it is enabled to perform as a check upon the executive arm, through their constitutional interaction as equals. The legislature is freed from the control of the executive, as the reverse is the case in a parliamentary system.[22] This independence of the legislature may, in operation, necessarily result in friction, conflicts and confrontation with the executive. The Obasanjo presidency had come in conflict with the National Assembly, on its Ministerial nominees, ambassadorial nominees and postings, the supplementary budget, the relocation of some agencies and parastatals from Abuja to their original headquarters in Lagos and other executive/legislative interactions.

The Political Bureau in its proposals for the reform of the legislature recommended, *inter alia,* that ministers and commissioners be made non-voting members of legislative houses.[23] Though the 1989 Constitution in sections 65 and 66 appeared to have rejected the recommendations of the Political Bureau, maintaining instead, the position under sections 63 and 64 of the 1979 Constitution, the Constitutional Conference, (1994 - 1995) revisited the issue and recommended that it was innovative to allow members of the legislature to retain their seats over when appointed as Ministers.[24] This innovation found expression in section 71(d) of the 1995 draft Constitution, under which appointment as minister was omitted as a ground upon which a member should vacate his/her seat in the legislature.

The independence of the legislature may result in propensities for confrontation, deadlock, divided government and crisis. During the Second Republic, the National Party of Nigeria (NPN) controlled national executive, under the leadership of President Shehu Shagari, without a corresponding overwhelming majority of that party in the National Assembly. The executive had to deal with the problem of a confrontational independent legislature through a cooperational agreement between President Shagari's NPN and the Nigerian Peoples

22. Under the Parliamentary System, the Prime Minister is the leader of his party, both in the executive and the legislature and together with his cabinet they keep control of the legislature.

23. Report of the Political Bureau (1987 Federal Government Printers) p. 91 paragraph, 7.011 (XIII, and (IX). It also recommended a unicameral legislature at both the state and federal levels.

24. Report of the Constitutional Conference Vol. 1 1995 p. 17.

Party (NPP). Presently, President Olusegun Obasanjo's Peoples Democratic Party (PDP enjoys a significant majority in both the Senate and the House of Representatives. The question then is whether the key to forestalling a divided government arising from the independence of the legislature is derivable from constitutional provisions that accommodate the membership of the legislators in the executive or a provision that ensures that the Chief executive's party maintains an overwhelming majority in the legislative House? The current "face-off" between the Speaker of the House of Representatives, Alhaji Ghali Na'aba, with the executive headed by President Obasanjo, although both are of the PDP may reflect the negative kind of confrontation that causes divided and/or failed government.

Commenting on the phenomenon of divided government in recent American constitutional history, James Sundquist, considered four approaches to remedy the trend. The aim of these four approaches being to make provision for the Chief Executive's party to maintain an overwhelming majority in both Houses of the Congress.[25] He identified the problem of an "opposition legislature," a situation in which the majority party in the legislature is different from that of the ruling party in the executive as being accountable for the divided government under Presidents Ford, Reagan, Bush and Clinton.

Professor Nwabueze's observation on the "opposition legislature" during the Second Republic i.e that the danger of opposition from purely partisan motives is certainly greater in Nigeria because of immaturity and lack of a due sense of responsibility in the use of power on the part of many members of the legislature, and also because of the prevalent attitude towards politics as a kind of feud between opposing groups, is also revealing. He concludes, however, that in spite of this danger, an opposition majority in the legislature is healthy for Nigeria in its new experiment of constitutional government.[26]

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25. *Constitutional Reform and Effective Government* (*supra*) at p.83. The four approaches are (i) simply making ticket-splitting impossible (ii) replying on a change in the ballot formal and (iii) in the electoral schedule to encourage straight-ticket voting (iv) assure the President a congressional majority by arbitrarily assigning his party additional Senate and House seats to outnumber the opposition.
26. *Nigeria's Presidential Constitution* 1979 – 83 *supra* pp. 178 – 179.

Our current experience in constitutional democracy especially, in the relationship of the state legislative House of Assembly buttresses the fact that a divided government can be forestalled where, the majority party in the legislature and the executive are the same. In the most recent controversy arising from the investigation of the Lagos State Chief Executive, Governor Bola Tinubu of the Alliance for Democracy Party (A.D), by the A.D dominated State House of Assembly, the independence of the legislature was called into question when the Assembly found the Governor blameless of any misconduct. Thus, in order to forestall a divided government, the legislature must not abdicate its role as an independent arm of government. However, the potentials for the exercise of the legislative law-making powers, investigative powers and impeachment powers as real or threatened checks on the executive will always raise the risk of confrontation and crisis.

The proposition for constitutional reform that allows members of the legislature appointed as ministers to maintain their seats in the legislature that is, injecting a characteristic of the parliamentary system into the presidential system poses a threat to the independence of the legislature. Section 71(d) of the 1995 draft Constitution falls short of the full membership of all the ministers in the executive, an aspect of a system termed parliamentary-presidentialism,[27] thus, raising the problem of creating classes of members in both the executive and the legislature, of a select group that belong to both arms of government.

In our view, the reform proposal of the Political Bureau which allows all ministers, non-voting participatory privileges in the proceedings of the legislature is to be preferred. It should allow for inter-branch and non-partisan interrelationship and co-operation that will forestall the risk of a divided government, especially, where there is an opposition legislature.

The Executive Powers in Relation to the Other Branches of Government

The executive powers of the federation are vested in the President and those of the State in the Governor by virtue of section 5(1) & (2) of the

27. Oyelowo Oyewo "Presidentialism in a Two-Party State: The Nigerian Experiment" (1988) *Nig. J. Contemp. Law*, Vol. 15, 98 - 110.

1999 Constitution respectively. The powers extend to the execution and maintenance of the Constitution and the laws of the National Assembly (for the President) and the House of Assembly (for the Governors).[28]

The exercise of the executive powers may be pursuant to specific grants delimited by the Constitution.[29] Apart from these specific grants, the executive claims inherent powers without specific statutory enablement to do all things for the peace order and good government in the interest of the nation.[30] It is in the exercise of these powers that the executive comes into confrontation with the other arms of government, especially the legislature.

In Nigeria, due to the periods of military rule that have preceded our constitutional democracies, the executive arm usually claims the same extent of executive powers of the Military Head of State and his governors/administrators.[31] President Obasanjo been accused of being over bearing in the style of the military. Understandably, because of his military background as a former Military Head of State, the constitutional limitations of the concept of separation of powers, may be perceived as not being appreciated by his presidency. This attitude resulted in friction between the President and the National Assembly, when the legislature was accused of being too slow in passing bills initiated by the executive, this in turn led to the exchange of accusations between the PDP dominated National Assembly and the Presidency.

The National Assembly was reprimanded by the President for overstepping its bounds in the separation of powers, in the aftermath of the Senate Contract scandal in the Senate arising from the Report of the Senator Kuta Investigational Panel (2000). The House of Representatives responded with a vote of no confidence motion, even when the Constitution did not provide for a vote of no confidence.

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28. This was an innovation of the 1979 Constitution.
29. On the "Stewardship Theory" of Theodore Roosevelt, "Implied Authority" of Alexander Hamilton, see the U.S. Supreme Court decisions in *Myers v. United States* 272 U.S. 52, 118 (1926) and *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952). For a full discussion of the inherent powers, see Laurence Tribe *supra* chapter 4 at 210 – 213.
30. *Eshugbayi Eleko v. Government of Nigeria* (1931) A.C. 662; *Jideonwo & Ors v. Governor of Bendel State & Ors*, (1981) 1 NCLR, *Oteri & Ors v. Awhinawhi & Anor*, (1982) 3 NCLR 680.
31. This claim was rejected by the Supreme Court of Nigeria in *Attorney-General, Ogun State v. Attorney-General of the Federation* (1982) 3 NCLR 166.

A main area of conflict which results in the exercise of the executive veto,[32] relates to the question of who has the initiative in law-making or policy making or contract award within the government. This is most apparent where the executive and the legislature are controlled by two or more political parties.[33] The Anti-corruption Bill and the Niger Delta Development Commission (NDDC) Bills were tied up in legislative scrutiny deliberations and processes which the executive viewed as impediments in the execution of their policies. What happens when the bills are passed to the presidency in terms that are so watered down as to be different from the version envisioned and proposed by the executive? Is the president to veto such a bill, as the presidents in America are prone to do,[34] or is he to pass the bill in the watered down version? The kernel of these questions is the issue of accountability to the electorate for the version of the bill that is passed into law.[35]

There are certain functions of the executive such as appointments (section 14 7(2), 154,171(4)) removals (section 157), implementation of treaties (section 12) deployment of the armed forces (sections 5(5), 218 and 219), that are to be exercised subject to confirmation by the legislature or legislation or regulations of the legislature.[36] The appointment of Ministers and Commissioners always raises some tension between the two arms of government, especially, with the Senate in the case of Ministerial appointments where the confirmation proceedings take place. It is interesting to note that the Political Bureau

32. See sections 58(4) & ((5), 59(4) & (5) of and 100(4) & (5) of 1999 Constitution, the power of the Chief Executive to refuse to assent to a bill which can only be overridden by a 2/3 majority of the legislature.
33. For each Political Party will want to claim the success of a legislative initiative and pass on the blame for its failure. This is one of the reasons for partisanship in the political process which causes divided government.
34. United States, President Gerald Ford exercised his veto no fewer than 63 times in his 29 months tenure.
35. Through the democratic process, the people must evaluate the performances of their states representatives in the legislature as well as their Chief Executive.
36. These are the checks and the balances, the corollary of the principle of separation of powers, adopted in the 1999 Constitution.

favoured the abolition of the Senate when it recommended a unicameral legislature at both the national and state levels.[37]

It must be emphasised that the quality of states rationale that forms the basis of the composition of the Senate coupled with the age and maturity of its members, makes it eminently more suited to the constitutional roles vested in it alone, instead of the House of Representatives. It is therefore, recommended that the National Assembly should enact a law or pass a resolution on the appointment procedure to specifically enunciate the way and manner in which the President should propose nominees for ministerial and other appointments, as well as the procedure and manner for the individual or collective confirmation of such nominees. This will ease the tension and the propensity for tension, accusation and crisis that usually accompany such appointments.

The President, as Chief Executive and Commander-in-Chief has, usually, spearheaded policy formulation and implementation in foreign relations of the country with other nations. This, it has been argued, is based upon the principle of sovereignty which he exercises on behalf of the state.[38] Thus, legislative supervision or checks on the executive in foreign relations, the making of international agreements and treaty making, have not really been as close to the constitutional scheme that requires legislative checks and balances. It is however, necessary in Nigeria for the legislature to be alive to its responsibilities to review all existing international agreements and treaties as may affect our domestic policies, since most of them were entered into by military regimes that were neither representative nor democratic.[39]

The President's powers as Commander-in-Chief in control of the operations and deployment of the Armed Forces in Nigeria, are usually deemed to flow from the sovereign powers and the policy making roles of the Executive. Nigerian military personnel are currently serving with the Monitoring Group of the Economic Community of West Africa

37. Report of the Political Bureau (*supra*) at p. 91 para. 7, see also the Report of the Constitution Review Committee (1988) Vol. 11 Chapter V.
38. Laurence Tribe *op. cit.* 219 - 230 at 219.
39. Especially, those that were not enacted into law by Decree.

(ECOMOG) in Sierra Leone and Liberia.[40] What has been the role of the legislature in checking the potential for military adventurism by the executive. In the United States, Congress passed the War Powers Resolution which describes the exclusive circumstances under which the President can introduced American forces into hostilities without the declaration of war.[41] Significantly, the Resolution provides that presidential authority to use military force "shall not be inferred" from any law, treaty, or appropriation unless it "specifically authorizes" such use and "states that it is intended to constitute specific – authorization within the meaning of this joint resolution.[42]

The executive powers of rule-making and the exercise of delegated powers constitutes a veritable source of over reaching its limits and unsettling the separation of powers from the legislature or even the checks and balance in the interplay of powers and functions, In Nigeria, during Military rule, there were several Decrees and Edicts made by the absolutist and totalitarian nature of military regimes but which cannot exist under a constitutional democracy. In section 315(4) of the 1999 Constitution, the President and the Governor are given wide powers to make such modifications to "existing laws" which were in force before the coming into force of the Constitution, as may be necessary to bring them into conformity with the provisions of the Constitution.[43] This executively modified "existing laws" are then deemed to be Acts or Laws of the National Assembly or State Houses of Assembly as the case may be. This seemingly expediently delegated legislative power is nothing short of an abdication of legislative power and must be expunged from the Constitution. The modification of the "existing laws," which are products of military usurpation of sovereign powers from the representatives of the people and subversion of the pre-existing Constitution, can only be justifiably undertaken by the legislature under a constitutional democracy.

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40. Section 5(5), 1999 Constitution requires the President to seek the consent of the Senate after actual comoat engagement of deployed members of the armed forces outside Nigeria.
41. Only pursuant to (1) a declaration of war, (2) specific statutory authorisation or (3) a national emergency created by an attack upon the United States.
42. War Powers Resolution 1973, 87 555,58(a)(1), (2), It is recommended that this provision be incorporated in our Constitution.
43. Including all Edicts and Decrees.

Most Decrees and Edicts that constitute the bulk of the laws in force in the country, commonly constitute enabling laws for the exercise of rule-making powers or delegation of powers by the executive.[44] Though one is not quarrelling with the practice of delegated powers, the legislature must however, keep a rein on the exercise of such powers by the executive. The United States administrative law has several legislative mechanisms, such as the legislative veto (declared unconstitutional in I.N.S. v. Chadha[45]), report and wait provisions, and the Administrative Procedure Act, *inter alia*, to supervise and control the exercise of delegated powers by the executive.[46] It is therefore, recommended that the legislature (Federal and State must enact Administrative Rules Procedure Statutes) to keep its constitutional control on law making powers.

Quite obviously, the propensity for the aggrandizement of power is more characteristic of the executive than the other branches of government. The dynamism of the executive must, of necessity be matched by the legislature which must be able to contain over-zealousness or failure of leadership. These extremes will be examined under the sub-head of failed government, as it goes beyond the phenomenon of a divided government.

The Judiciary and the Other Branches of Government

The judicial power to review the acts of the other branches of government, clearly specified in Section 6(6) of the 1999 Constitution has been traced to the United States decision of Chief Justice Marshall in *Marbury v. Madison*.[47] The judiciary is certainly the least susceptible to confrontation of the three arms of government, for the basic reason that its proceedings and exercise of judicial powers, have to be

44. Delegated powers enable the executive to make rules, regulations and other forms of subsidiary legislation that have the same force of law as laws enacted by the legislature. See Oyelowo Oyewo "Impact of Delegated Legislation on Administrative Justice" in *A Blue Print for Nigerian Laws*, Prof. A.O. Obilade (ed) Faculty of Law, University of Lagos 1995 (1st ed); Iluyomade and Eka *Nigerian Administrative Law: Cases and Materials*, University of Ife Press, Ile-Ife 1980.

45. 462 U.S. 919 (1983).

46. Iluyomade and Eka *op. cit.*

47. S.U. 8 (1 Cranch) 137 (1803); Laurence Tribe *op. cit.* Chapter 3 at pp. 23 - 26.

initiated by interested parties. However, because of its role as the arbiter in all matters relating to the Constitution and the government, its independence and impartiality brings it into conflict with the other arms, especially, the executive. Its decisions may, in fact either avert or precipitate constitutional crisis, divided and or failed government. The most apt example in Nigeria was the impact of court decisions on the interim National Government (ING) and the demise of that government in 1993.

The Constitution grants unto the other arms of government, control over the judiciary in the appointment and removal of judges (chapter VII 1999 Constitution) the funding, jurisdiction, and enforcement of judgements of the courts, especially the executive.

During the Second Republic, Chief Executives, especially State Governors, interfered unduly with the independence of the judiciary, especially in the exercise of the power of removal of judges.[48] The Constitutional Conference (1994 - 1995) recommended the creation of a new institution, the National Judicial Council, to coordinate the appointment, promotion, funding and maintenance of standards in the judiciary throughout the country.[49] This innovation which was not in the 1979 Constitution was incorporated into the 1999 Constitution in section 153(1) and chapter VII dealing with the judicature. The National Judicial Council performs the functions once performed by the Federal Judicial Service Commission under sections 140(d) and 178(d) of the 1979 Constitution. Interestingly, the Federal and State Judicial Service Commissions are retained under the 1999 Constitution, but with subordinated roles to perform in the appointment and removal of judges as they now recommend to the National Judicial Council which now recommends to the appointor, either the President or the Governor.[50]

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48. For an account of the abuse of this power by Governor Goni of Borno State pursuant of section 256 of the 1979 Constitution in the removal of Justice Kalu Anyah, then Chief judge of Borno State, see B.O. Nwabueze *op. cit.* at 274 - 279, and 320 - 323.

49. *Report* of the Constitutional Conference containing the Draft Constitution Vol. 1, 1995 5, p. 18, sections 154 (f), 3rd Sch. Part 1 para. F, chapter VII.....indicature.

50. 3rd Schedule, Part 1 para. F in the National Judicial Council compared with para. E on the Federal Judicial Service Commission and the 3rd Schedule Part II para. C on the State Judicial Service Commission.

To say the least, this arrangement is against the principles of federalism as it over-arches the powers of the national (federal) government over that of the state governments. In many respects it may be seen as a suspect innovation, against the background of the known agenda behind the 1995 Constitution, which was drafted to suit the self-succession bid of Late Gen. Abacha. It ought then to be deleted from the Constitution.

In order to enable the judiciary function independently, the judicial Service Commissions of the federation and states must be composed in a more eclectic manner. The provisions of the 1979 Constitution on the composition of the commission,[51] tilt the balance too much in favour of executive nominees. It is recommended that more independent nominees of the Nigerian Bar Association and the National Council of States be included in the Commission to improve its independence.

The judiciary is the only arm of government without direct access to the Consolidated Revenue Funds, or any enforcement agents of its own. A self accounting judiciary, with the Chief Justice or Chief Judge of a State as the Chief Accounting Officer would be better suited to promoting the independence of the judiciary.

Issues relating to the independence of the judiciary directly bear upon its suitability in determining constitutional or political matters, especially, those involving the other arms of government and the political class. An innovative design of the draft Constitution 1995 was the creation of constitutional courts, to deal with such matters[52] affecting constitutional rights and interpretation of the Constitution. The Obasanjo administration has shown a preference for a political process or option in solving national problems as opposed to the legal or judicial process or option that was commonly employed under the Shagari administration. It is our view that the existence of a Constitutional Court, specially constituted with the injection of non-judicial personnel, such as accomplished academics, members of the practicing Bar and distinguished citizens, will offer a more result-oriented judicial process than the presently existing judicial structure. South Africa has successfully and admirably integrated the Constitutional Court into its legal system. The Constitutional Court will

51. Section 140, 3rd Sch. Part I Para. D and Part II Para. D.
52. Sections 248, 250 and 251 of the 1995 Draft Constitution.

be more appropriate for dealing with most issues affecting the politico-constitutional relationships of the arms of government.

Federalism, Separation of Powers and Divided Government

It was Professor Abiola Ojo who propounded the theory of the tripartite meaning of the principle of separation of powers, under the 1979 Constitution thus: (i) traditional meaning of the doctrine; (ii) Federalism and separation of powers, and (iii) Presidentialism and Separation of powers.[53] Under the 1979 Constitution, the interplay of power at different levels of government during the Second Republic witnessed the confrontational and coercive federalism, that pitched the NPN controlled federal government against non-NPN states, especially those controlled by the Unity Party of Nigeria (UPN) and the Peoples Redemption Party (PRP).[54]

Confrontations between the federal and state governments relate to the perceived over-powering legislative and executive competence of the federal government in relation to the State governments. The 1995 draft Constitution substantially reviewed the division of powers and created three legislative lists namely: the federal legislative list, the concurrent list, and the state legislative list. Ideally one will suggest the American Constitutional approach of just one enumerated list for the federal powers with all other matters being left to the state and local governments.

One of the most debated constitutional issues under the present constitutional democracy is the restructuring of our federal system, or what is generally termed the national question. To resolve the problems of manifest in the operation of our federal system through constitutional amendment will require a restructuring which it is doubtful the legislature will be able to pass through the amendment procedure of sections 8 and 9 of the 1999 Constitution.[55]

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53. Abiola Ojo "Separation of Powers in a Presidential System of Government" *Public Law*, Spring 1981, 105 - 115.

54. B.O. Nwabueze, *Nigeria's Presidential Constitution* 1979–1983 (*supra*) pp. 73-88.

55. A political restructuring of the federation away from the constitutional structure based on states is the zoning principle which zones the country into 6 geo-political zones of: North-West, North-East, North-Central, South-West, South-East and South-South.

Failed Government

Nigeria has witnessed the overthrow of different constitutional governments on the grounds of their ineffectiveness, deadlock, inept leadership and failure to discharge the obligations and responsibilities of government.[56] It can hardly be disputed that executive leadership can fail, that the Chief Executive can, early in his term be shown up as inadequate to lead the country and fulfil the heavy responsibilities of his office.[57] The parliamentary system safeguards against failed government, with the power in the parliament to remove its prime minister, at any time and for any reason. The presidential system possesses no true safeguard against executive failure, as the president is elected for a fixed term.

How can the presidential Constitution, therefore, reconstitute a failed government?

Safety Valves Against Failed Government

(1) ***The Impeachment Process***

Section 143 and 188 of the 1999 Constitution provide for the removal of the President or Vice-President and the Governor or Deputy-Governor from office.[58] These provisions stipulate the impeachment procedures which are not judicial proceedings that are subject to judicial review.[59] The basis for impeachment is being guilty of "gross misconduct in the performance of the functions of his office." "Gross misconduct means a grave violation or breach of the provisions of the Constitution or a misconduct of such nature as amounts, in the opinion of the National Assembly or State House of Assembly to gross misconduct.[60]

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56. Anthony Kirk-Greene, "The Remedial Imperatives of the Nigerian Constitution, 1922 - 1992" in *Transition without End,* Diamond, Kirk-Greene and Oyediran (editors) Vantage Publishers International (1997) pp. 3 - 32 at 16 - 23.
57. The Constitution Drafting Committee (C.D.C) (1977/78) recommended the Presidential system because of the dynamism in the executive president.
58. Max Nduaguibe "Impeachment and Ouster of Judicial Review in Nigeria" (1986) 1 *Calabar Law Journal 1.*
59. *Ibid.*
60. Sections 143 and 188 of 1999 Constitution. Does this embrace "political misconduct?"

The American experience has shown that the removal of the president cannot be concluded without some degree of bi-partisan support. The most recent, President Clinton's impeachment proceedings, which motion was passed by the House of Representatives, did not have the requisite bi-partisan support in the Senate as to his misconduct in the Monica Lewinsky affair. However, where the President or Chief Executive is involved in the commission of a crime, as was the case with United States President Nixon's impeachment proceedings, it will be easy to muster bi-partisan support.[61]

The celebrated cases[62] arising from the impeachment of the Kaduna State Governor, Balarabe Musa of the PRP in the Second Republic reveal that the impeachment was successful because of the almost total control of the State House of Assembly by the NPN legislators. This reasoning in reverse, must explain why the investigation proceedings and threat of impeachment against Governor Bola Tinubu, of Lagos State on allegations of false declaration and false claims of certificates terminated in favour of governor Tinubu. Should the impeachment clause be broadened by the addition of some broad term such as maladministration? (words suggested at the American Constitutional Convention). Would this save the nation from a failed government, in the face of a corrupt, inept and inefficient leadership, as was the case during the Second Republic?

The Political Bureau recommended that the impeachment procedure should be subjected to judicial review.[63] This, in our view, will defeat the effectiveness of that instrument which is a part of the political process to reconstitute a failed government. It also recommended a broader definition of what constitutes gross misconduct.[64] This recommendation is supported as being likely to bring more clarity to the impeachment process. The impeachment process can therefore, not deal with failure of government that

61. President Nixon resigned to aviod being impeached.
62. *Musa v. Hamza & Ors*, (1982) 3 NCLR 439; *Musa v. Speaker, Kaduna State House of Assembly & Anor* (1982) 3 NCLR 450; *Musa v. Kaduna State House of Assembly & Ors*. (1982) 3 NCLR 463.
63. *Supra* at...para. 7 11 (VII).
64. *Ibid.*

does not involve gross misconduct, unless the legislature can achieve the reguisite majority to complete the procedure,[65] which may then require bi-partisan support.

(2) ***Cabinet Resolution on Grounds of Permanent Incapacity***
This provision was introduced by Section 133 of the 1979 Constitution, and retained in section 144 of the 1999 Constitution. It protects the nation against a medically unfit president. The example of the Russian President, Boris Yeltsin, who spent the better part of his presidency battling with severe ill-health may reveal how difficult it is to apply the medical incapacity. The clause which must be of narrow application protects the nation against such medical mishap. The Late Gen. Sani Abacha's health problem that led to "cardiac arrest," arguably could have necessitated the application of this clause in his own interest and that of the nation. The safeguards in the procedure such as, the involvement of a panel of medical experts, reduce the risk of abuse.

(3) ***Special Elections***
A simple system for calling a new presidential election, pursuant to an impeachment motion, which will allow the people to decide has been proposed for the United States.[66] The calling of the election will be initiated by the legislature. However, the election will apply to both the executive and the legislature. Designing a special election provision also requires selection from a range of alternatives on each feature of the system.

(4) ***Referenda***
A follow up on the suggestion for special elections is direct approval of the electorate by referendum. This may be used where gross maladministration, that does not amount to "gross-misconduct," an impeachment act, occurs. These include a huge

65. The impeachment process against President Bill Clinton failed because the Republicans and the Democrats in the Senate voted along party lines failing to achieve the bi-partisan support needed to remove the President.
66. James Sundquist *supra* at 140 - 161.

drain on foreign reserves, budget deficit, or corrupt governance as was experienced during the Second Republic.

This may be a much more flexible device to check executive or legislative excesses by the electorate.

(5) *Reform of the Political Parties*

According to V.O Key, Jr. for "government to function, the obstructions of the constitutional mechanism must be overcome, and it is the party that casts a web, at times weak, at times strong, over the disperse organs of government and gives them a semblance of unity."[67]

The pre-and-post independence role of party politics in governance in Nigeria has been central to bi-partisan or confrontational governments. The power clashes between the executive and the legislature in government and between the federal and state governments were drawn along party lines.[68] Consequently, section 220 of the still born 1989 Constitution created a two-party state. The recognised political parties were two, the Social Democratic Party (SDP) and the National Republican Convention (NRC). This was a departure from the multi-party system that had hitherto been the norm in Nigeria. The annulment of the June 12, 1993 Presidential Elections led to the final demise of the Third Republic, the 1989 Constitution and the two-party state experiment. The 1999 Constitution in Section 221 reverted back to the multi-party system of the 1979 Constitution. The reform of the Political Parties, focuses on both the party-in-government and the party-outside-government. The PDP, the party in government, the political level of the national administration, now attracts "decampees" from other parties, especially the All Peoples Party (APP) and the Alliance for Democracy (AD), The success of the PDP at the polls suggests its organisational prowess and dynamism. This has also raised the possibility of a one-party system in Nigeria.

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67. V.O. Key Jr. *Politics, Parties and Pressure Groups* 5th ed.(Crowell, 1964) p. 656.
68. Babafemi Badejo "Party Formation and Competition" in *Transition Without End* (*supra*) pp. 177 - 203.

The evolution of parties in Nigeria shows a tendency towards the party-in-government against the parties-outside-the government. A proclivity towards a two-party system.[69] During the Presidential elections of 1999, the AD and APP formed an alliance with the possibility of a merger, thus, raising the question as to whether or not Nigeria is more suited to the constitutional adoption of a two-party state.

The Independent National Electoral Commission (INEC)[70] should be able to lay down the rules for the reformation of political parties, as the legislators may not be easily disposed to initiating such reforms, especially were such INEC initiated reforms are in line with its constitutional powers under sections 222, 225, and 226 of the 1999 Constitution.

Military Coups and Failed Government

The Political Bureau observed that at "the time of its intervention in Nigerian's political affairs in 1966, there was apparent confidence that the army, among the major elite groups in the country, possessed the right credentials to redirect and rebuild the nation along lines that would be beneficial to the generality of the people of the country.[71] The military coups and intervention in politics legitimised the use of violence or threat of it, as an instrument for changing a government in Africa.[72] Does the military coup, therefore, offer an acceptable alternative[73] to reconvening a failed government?

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69. Oyelowo Oyewo "Presidentialism in a Two-Party" *supra*.
70. Established under section 153 of the 1999 Constitution.
71. *Supra* at pp. 26–28, 148–150. "From the Nigerian experience, there does not seem to have been any successful military take-over that did not occur with some degree of popular acceptance. This suggests that people accepted military rule as a way of salvaging the country from total collapse, a kind of stop-gap measure through which to right the wrongs created by i.e. defective system and a bad leadership, (at p. 149).
72. In the seven years from 1964 to 1971, a total of twenty-nine African countries experienced successful coups excluding abortive or attempted coups.
73. The fear of a reoccurrence of military coups after transition to constitutional democracy is real in Africa, as "there has been no exit without an encore." See A.H.M. Kirk-Greene, *Stay By Your Radios: Documentation for a Study of Military Government in Tropical Africa*, Leiden, 1981, p. 11.

The praetorianism of military rule, which is "the absence of effective political institutions capable of mediating, refining and moderating group political action,"[74] as was experienced under the Babangida and Abacha regimes, makes it highly unsuitable for reconstituting a failed government. Can military coups be outlawed? Larry Diamond, is of the view that "any legislation outlawing coups is so much pie-in-the-sky," as it "is axiomatic in Africa now, after thirty years of continual *coups d'etat*, that the Military will intervene whenever it wants to intervene."[75] The 1995 draft Constitution, in section 1(3) contained a coup outlawing provision which authorizes the prosecution of a successful coup-plotter after constitutional and Democratic Government is re-established. For obvious reasons of self-preservation, the military that usually promulgates the Constitution into law deleted such an anti-coup clauses. It is, therefore, not surprising that such a provision is omitted in the 1999 Constitution. We recommend the inclusion of an anti-coup clause in our Constitution, with more precise and definitive language that is capable of clear and unambiguous interpretation for its enforcement. The issue of its enforcement will depend on the political will. As President Olusegun Obasanjo has demonstrated, the political will will not always be lacking,[76] in dealing with the armed forces.

It must be noted that the new wave of political thought is on globalization of accountability. It is therefore, possible for several anti-coup devices to be institutionalized in our politico-constitutional system. The globalization of accountability system will not compromise the sovereignty of the state.[77] Thus, it will be possible for the present

74. Samuel P. Huntington, *Political Order in a Changing Societies*, 1968 (New Haven, Yale University Press) p. 168. The Nigerian military politics is a culture and supporting socio-political structure of prebendalism (the systematic abuse of state office and resources for individual and group gain). See Richard Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* 1987 (Cambridge, Cambridge University Press) p. 67.

75. "Remedial Imperatives of the Nigerian Constitution" *supra* at p. 24.

76. See *Tell Magazine*, of June 28, 1999 "Obasanjo's Coup." He retired most of the "politician officers."

77. Marvin S. Soroos, *Beyond Sovereignty: The Challenge of Global Policy*, 1986 (Columbia, University of Carolina Press); Seyom Brown, *New Forces, Old forces, and the Future of World Politics*, 1995 (Harper Collins College Publishers).

constitutional government to enter into binding international agreements or protocols that will compel the World Bank, IMF and other such International Financial Institutions to deny to any military regime arising from a coup d'etat to supplant a constitutional government, new financial lines or sources of funds, to prosecute its agenda.

In the domestic forum, the National Assembly can pass legislation, resolutions and such other legislative initiatives, as will deny recognition, honours, emoluments or other pre-requisites of office, to military rulers who participate in coups and the resultant military regimes. It is only the process of constitutional democracy that offers a viable alternative to reconstituting a failed government. Accordingly, Military coups must be eradicated in Nigeria and Africa.

Recommendations and Conclusion

The risk of divided and failed government poses a threat to all democratic nations as the politico-constitutional history of the United States, Great Britain, Italy, India and Israel have shown. The threat of such risk is even more real as the Nigerian constitutional experience discussed above has shown. In the light of these observations therefore, our conclusion reiterates the following recommendations already discussed above.

(1) Reform the membership of the legislative Houses, to enable the members of the executive, to attend as non-voting members.

(2) The legislature and the executive to always focus on achieving bi-partisan inter-branch system of operation in order to reduce the risk of divided and failed government. This recommendation will be related to proposals for reform of the political parties.

(3) Legislation should be passed on inter-branch relations on the procedure for the exercise of powers of appointments, war powers, spending powers, and such other powers.

(4) The executive powers of the President and Governor to modify existing laws must be amended and properly vested in the legislature.

(5) The National Judicial Council should be abolished and the Federal and State Judicial Service Commissions retained and revert back to their functions under the 1979 Constitution. The composition of the membership of the Commissions should also be made more eclectic.

(6) The judiciary should be made self accounting and really independent to properly discharge its functions.

(7) The Federal/State structure and spheres of competence must be reformed to have a real federal system.

(8) The impeachment procedure must be reviewed and other alternatives for reconstituting a failed government should be considered.

(9) Military coups should be eradicated through several means including its being constitutionally outlawed, legislation punishing coup plotters, international agreements based on globalization of accountability.

(10) Reform of the political parties and the political system in order to evolve a vibrant political system that will reduce the risk of divided and failed government should be pursued.

In conclusion it must be noted that the Constitution itself, however, perfect cannot avoid the failure of government, if the operators do not possess the democratic spirit to envision the Constitution into a living and vibrant democratic society. For the "letter kills, it is the spirit that gives life."

8

FUNDAMENTAL HUMAN RIGHTS AND CORRESPONDING CIVIC OBLIGATIONS UNDER THE 1999 CONSTITUTION

by

Onye Gye-Wado
(Office of the Deputy Governor, Nasarawa State, Lafia)

Introduction

The debate on human rights will continue to elicit careful examination of the issues involved as well as evoke some passion. Having just emerged from the traumatic experience of military rule, there is the further need to appropriately locate the debate within the context of the emergence of the democratic space as well as the constitutional regime. Both are situations which no meaningful discourse on human rights can avoid. First is the fact that the Constitution is the basic law of the land; from which no derogation is permissible except within the context contemplated by the Constitution itself. The 1999 Constitution provides for the regime of human rights in two situations. There are fundamental rights under Chapter IV of the said Constitution. These fundamental rights are justiceable and any person may seek redress from the appropriate authority if there is a breach or likelihood of breach. There is the other arm that draws vitality from Chapter II of the 1999 Constitution. These provisions are not ordinarily justiceable, but any appropriate functionary of government with responsibility to uphold, defend and protect the Constitution has a duty to observe and enforce the observance of these rights.[1] Otherwise, there is the likelihood of both judicial and political processes aimed at enforcing the observance of the provisions of Chapter II.

Given the level of democratisation going on, it is apt to note that some of these rights have direct bearing on the process. Specifically, civil and political rights pertain to the democratic dispensation, while economic, social and cultural rights provide the enabling environment

1. Section 13 of the 1999 Constitution.

for both the enjoyment of civil and political rights as well as the flourishing of democracy and its processes. Participants and commentators on the democratic process should necessarily provide the basis for making the process desirable by encouraging the realisation of these rights. Besides, the flourishing of democracy requires some measure of tolerance which corresponds with the fact that rights are not ordinarily absolute and should not be enjoyed to the detriment of the rights of others.

In the main, the human rights regime will remain as topical even in the twenty-first Century. New situations are developing which are also engendering new rights. New thoughts are being developed to cope with new situations and processes. In this regard, globalisation and the information technology highway are continually offering new challenges that the new millenium should properly address. While the general discourse on human rights should respond to these new developments, the primary focus of this chapter is to address the human rights regime within the specific Nigerian context. Be that as it may, a general understanding of the regime is also apt.

Understanding Human Rights[2]

Topical as the human rights regime is, it has not been susceptible to any agreed definition! It has benefited more from the different discourses which have brought out its province from the various perspectives. Perhaps, what, therefore, needs to be done is to identify some of the key issues involved in the debate on human rights and to highlight the extent to which they are relevant in the contemporary human rights dispensation.

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2. On human rights generally, see Gye-Wado, O: "Human Rights and Reconstruction in Africa;" in Ayua, I.A (ed): *Law Justice and the Nigerian Society*, Lagos: NIALS, 1995 p. 175; Eze, O. C. Human Rights in Africa Lagos: NIIA, 1984; Chapter One; Shirji, I *The Concept of Human Rights* in Africa London: CODESRIA, 1989; Buergenthal, T: *International Human Rights* St. Paul: West Publishing Co. 1995; Vasak, K(ed): *The International Dimension of Human Rights* Paris: Greenwood Press, 1982; Welch, C & Meltzer,R (eds)*: Human Rights and Development in Africa* Albany: SUNY Press, 1984; Quashigah, K. "The Philosophical Bases of Human Rights and its Relation to Africa: A Critique" (1992) *JHRLP* Vol. 2 Nos 1&2; p. 22.

Realising the difficulty associated with the definition of human rights, it has become prevalent to discuss human rights as inalienable, inherent, indivisible and interdependent. This categorisation is derivable, in the main, from the natural law conception of rights, Inherent from the context that every person is endowed with such rights deriving from his or her humanity. For instance, the right to life is inherent in every person since it is this life that gives meaning to the right of existence. This right, of course, becomes limited by the penal system of most countries which qualify the right to life by the death penalty, There is, however, a current movement for the elimination of the death penalty. Even those states that have such penal provisions have become very cautious in their implementation to the extent of non-action when such sentence has been passed. Little sense is made when the right to life is subjected to the penal provision of the death sentence which in essence is a very severe limitation on the right to life.

The essence of the natural law synthesis is to impose a measure of immutability, with the consequence that any breach shall be challenged with the possibility of redress. What has remained very clear is that all these rights have an interconnecting logic that sustains them as a whole. However, the degree of breach of a right also determines the extent to which any other right might also be affected. In the final analysis, an inquiry that seeks to establish the proper province of human rights must go beyond the adjectival sense in which these rights are categorised.

A classification of rights that has been most often used is that of civil, political, economic, social and cultural rights. Given the interdependent nature of human rights generally, some of these rights fall between these various classifications, For instance, freedom of association as a civil right is as much a political, economic, social and cultural right. It is on the basis of association that some form of political activity can be carried out, just as it is only within the aggregate of the community that social and cultural rights are realisable. How else would it be possible to unionize if freedom of association is extinguished?

In order to concretely address the problems associated with the proper understanding of the regime of human rights, the United Nations

adopted two convenants in 1966[3] in further elaboration of the Universal Declaration of Human Rights, 1948. With the realisation that civil and political rights were easily more realisable, the International Covenant on Economic, Social and Cultural Rights 1966 was also adopted to be realised in a progressive manner. This is because it requires the intervention of states to provide the material conditions for its enjoyment. Even then, the International Covenant on Civil and Political Rights 1966, was also subject to non-ratification by majority of states despite the entrenchment of such rights in their national Constitutions. These rights, as entrenched in most national Constitutions, are referred to as fundamental rights with corresponding national enforcement procedures.

A number of theoretical positions have been thrown up for the purpose of constructing the proper province of human rights. One approach that has influenced the discourse on human rights has been the traditional approach that relies on the natural law synthesis. It proceeds from the understanding that these are rights that have been bestowed on human beings because of their nature. These rights are also considered to be divine, immutable and inalienable. Consequently, it falls on all to respect them and no effort should be made to breach or abridge the rights. The traditional approach has coincided with the liberal ethos of Western societies and it places a lot of emphasis on civil and political rights. The liberty of the individual enables him or her to exploit his or her potentials for the benefit of the larger society. Less emphasis is, therefore, placed on the community. With the Bolshevik Revolution of 1917 in the erstwhile Soviet Union, socialism became a very prominent theoretical and ideological tool. Socialism asserts that the material condition determines societal responses and rights can only emerge and be enjoyed within a given society. Additionally, rights will ordinarily remain mere potentialities and it would require governmental action to transform such rights into social reality. In essence, a capitalist society will necessarily engender those rights that sustain the exploitation of the majority by the few privileged members of the society. The right to property and the celebration of the individual becomes a dominant logic in a capitalist society. On the contrary, socialism asserts a collectivity

3. The International Covenant on Civil and Political Rights 1966; and The International Covenant on Economic, Social and Cultural Rights, 1966.

as well as providing the material conditions for the enjoyment of rights, The socialist approach has found a ready ally in the Third World in which there is a rejection of excessive individualism for the community as well as greater emphasis on economic, social and cultural rights.

The province of learning has continued to expand and other extending paradigms have also emerged. One such paradigm that became dominant in the course of the United Nations effort at drawing up the Universal Declaration of Human Rights was the relativism debate.[4] The thrust of the debate is whether rules of human rights are of universal character or are relative to and determined by the social millieu in which they are applied and enforced. The reality of the international system is the aggregation of states. Each of these States determines its legal system with the consequence that each state may choose the rules of human rights that are realisable within its jurisdiction. Equally true of the international system is the fact that states have continued to develop agreed principles and rules on certain issues of international concern. It is in this context that the United Nations has continued to place on its agenda, questions of human rights and to develop agreed principles and rules. Beginning with the Universal Declaration of Human Rights in 1948, the United Nations has adopted a number of other human rights instruments that are of international relevance and application. Before these agreed principles and rules emerge, however, States have the latitude to develop their own rules as appropriate. In the final analysis, it is clear that human rights as a concept is universal. While some of the basic attributes of the concept are being continually developed, some are still certainly relative to each state or social millieu.

In order to resolve some of these contending paradigms, Kasel Vasak developed the generational theory.[5] For Vasak, there are three generations of human rights. The first generation is libertarian in nature. It will appear that greater accent was placed on this category of rights in the early articulation of human rights. This category of rights has also been entrenched in most national constitutions as fundamental rights, What has always been contentious about these rights at the

4. Maduagwu, V.O. *Human Rights: Universalism Versus Relativism*, International Press Organisation, 1987.
5. Vasak, K. *A 30-Year Struggle*, UNESCO Courier, 1977; p. 29.

national level has been their observance, particularly by governments. Consequently, there have been derogations that have led to dictatorship and unwarranted abuse of power although, most governments normally make pious declarations of their commitment to these rights and the sanctity of the human person.

The second generation of rights is egalitarian in nature and deals mainly with economic, social and cultural rights. This generation of rights materially affects the standard of living of the citizens and it is at this level that governmental intervention becomes rather imperative, Finally, the third generation of rights relates to solidarity among the comity of nations. This category deals with the interdependence of states and their enduring common interests. It is at this cooperative level that human rights become meaningful to the global community. The challenges of the next millenium make the demand of the solidarity of rights imperative so as to cope with excessive nationalism. With increasing globalisation, the organised world community has to come to terms with the demands of the common heritage of mankind. While the articulation of these generations of rights by Vasak would seem to be a celebration of 'liberty, equality and solidarity,' slogans of the French revolution, it has also served as a useful paradigm for reconciling the competing approaches.

In the final analysis, there can be no doubt about the universality of the concept of human rights. What has remained contentious is the level of latitude that states exercise in the determination of the basic assumptions and ingredients of these rights. It also brings to the fore the reality of states and their locus in the international system as well as the various levels of responsibilities of such states as determined by their national legal systems.

Fundamental Rights in Nigeria

The development and entrenchment of fundamental rights in Nigeria is a paradox of sorts. While colonialism and colonial administration lasted in the country, regard for the rights of the citizenry was limited. In fact, colonialism could not have entrenched fundamental rights because the very essence and logic of colonialism is the denial of the rights of

the colonised people.[6] Consequently, it only became an item on the colonial agenda at its twilight. The Willinks Commission[7] was set up to address the fears of the minority ethnic nationalities. Its recommendations eventually became entrenched in the Constitution as fundamental rights. Since the enactment of the Independence Constitution of 1960, fundamental rights provisions have become an enduring feature of subsequent constitutions.

From 1979, the Constitutions of Nigeria[8] introduced the provision of non- justiceable economic, social and cultural rights under the Fundamental Objectives and Directive Principles of State Policy in Chapter II. Although the Constitution makes them non-justiceable, it is still possible to hold government functionaries responsible for non-compliance with the provisions of Chapter II. If the essence of any right lies in its enjoyment and compliance with the same, then their non-justiceability has not substantially abridged the rights so entrenched, except to the extent that they cannot be specifically litigated upon and enforced as in Chapter IV of the said Constitutions (i.e. the entrenched fundamental human rights provisions).

Chapter IV of the 1999 Constitution deals with Fundamental Rights which are essentially civil and political rights. Chapter IV is a motley of rights, ranging from the right to life, fair hearing, freedom of expression and the press to the right to acquire and own immovable property anywhere in Nigeria, among others. Beside providing for these rights, the 1999 Constitution, like the others before it, has also provided for the appropriate machinery for the realisation and enforcement of these rights. In this regard, any person who alleges any breach or even likely contravention of his rights may seek redress in a high court.[9] Section 46 has been frequently resorted to by persons in the enforcement of their fundamental rights. Additionally, the Constitution

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6. Gye Wado, O. "Rethinking Namibian Independence: The Regime of Reparations and International Law", *Abia State University Law Journal*, Vol. 5, No. 1 (1998), p. 79; *Africa, Reparations and International Law*, NIIA, Vol. 19, No. 1 (1993), p. 115.
7. The Willink Commission was set up by the colonial administration in 1958 to address the fears of minorities. It recommended, among others, the incorporation of fundamental rights in the Constitution.
8. i.e. 1979, 1989 and 1999
9. Section 46(1) 1999 Constitution.

also directs the National Assembly to make provisions for rendering financial assistance to indigent persons whose rights have been infringed upon. It further directs that in those circumstances, such infringement must be substantial and the need for financial assistance, real.[10]

It should however be noted that these rights are not absolute and may be derogated from in two specific circumstances:

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons.[11]

During any period of emergency proclaimed by the President in accordance with section 305 of the Constitution, the National Assembly may also make laws that allow for measures that may derogate from the provisions of Chapter IV. There is the added proviso that any such measures taken must be reasonably justifiable in dealing with the emergency.[12]

Chapter IV is virtually a repetition of the rights as entrenched in the earlier constitutions. Specifically, these are:

(a) the right to life;[13]
(b) the right to dignity of human persons;[14]
(c) the right to personal liberty;[15]
(d) the right to fair hearing;[16]
(e) the right to private and family life;[17]
(f) the right to freedom of thought, conscience and religion;[18]

10. Section 46(4)(b)(i) & (ii).
11. Section 45(1) (a) & (b).
12. Section 45(2).
13. Section 33.
14. Section 35.
15. Section 35.
16. Section 36.
17. Section 37.
18. Section 38.

(g) the right to freedom of expression and the press;[19]
(h) the right to peaceful assembly and association;[20]
(i) the right to freedom of movement;[21]
(i) the right to freedom from discrimination;[22] and
(k) the right to acquire and own immovable property anywhere in Nigeria.[23]

While the Constitution endows every person with some of these rights, some are limited only to citizens. Only citizens are consequently entitled to the right to private and family life, the right to freedom of movement, the right to freedom from discrimination and the right to acquire and own immovable property anywhere in Nigeria.

The fundamental rights provisions in the 1999 Constitution are also similar to those in the African Charter on Human and Peoples Rights that was incorporated into the Nigerian legal system in 1983.[24] This raises the old question of the proper construction of Section 12 of the Constitution. An act of the National Assembly for the implementation of a treaty is like any other law and is therefore subject to the supremacy of the Constitution. However, the process of its passage in respect of implementing a treaty whose subject matter is not on the Exclusive Legislative List is more tedious as it requires ratification by 'a majority of all the Houses of Assembly in the Federation![25] The more serious issue is the status of the economic, social and cultural rights in the African Charter incorporated into our laws in 1983? This is particularly important as the Constitution was promulgated in 1999. Although some of the provisions of the African Charter are also in Chapter II of the Constitution, unlike the fundamental rights in Chapter IV, these economic, social and cultural rights of the African Charter

19. Section 39.
20. Section 40.
21. Section 41.
22. Section 42.
23. Secion 43.
24. See the African Charter on Human and Peoples Rights (Ratification and Enforcement Act) Cap. 10, LFN 1990; with a commencement date of 17th March, 1983.
25. Section 12(3). Note that this is not as tedious a process as that required for an Act designed for the creation of a new State.

Act are not enforceable because of their non-justiceability. Though individuals are unable to realise these rights at the municipal level, certainly the state can be called upon to fulfil its international obligations. In this regard, the enforcement machinery at the international level can be relied upon.

Civic Obligations

One of the innovations in the contemporary development of the rules of human rights in Africa is the imposition of duties on those who are entitled to enjoy any rights. This is derivable from the African tradition and values that individuals have responsibilities to the community in which they are members. More generally, where there is a right, there is a duty. In the particular circumstance, a person is endowed with both rights and duties. While some of these duties are inferable from the general legal system, the 1999 Constitution is also specific about the duties of the citizen. It should be noted that these duties are attachable to citizens only; any other person within the nation's territory is, therefore, not under any obligation to carry out such duties.

Section 24 of the Constitution imposes six general duties on the citizen. First, a citizen has the duty to abide by the Constitution, respect its ideals and institutions, the National Flag, the National Anthem, the National Pledge and legitimate authorities.[26]

The Constitution is the basic law and the duty to abide by its provisions should not be taken for granted. Citizenship[27] flows from the Constitution and every citizen should, therefore, not be selective of which laws to abide with, and any selection should not in any way affect the Constitution. This raises questions as to whether the judicial system of the *Shariah* can be introduced in Nigeria when section 10 of the Constitution is unambiguous about the prohibition of any state religion. Certainly, abiding by the Constitution excludes the adoption of state religions. Similarly worrisome is the attitude of citizens towards the flag or anthem purportedly in response to the shortcomings of government. Certainly, some distinction ought to be drawn between the state and the government and appropriate responses directed at the relevant institutions. The second duty of the citizen is to help to

26. Section 24(a).
27. See Chapter III.

enhance the power, prestige and good name of Nigeria, defend Nigeria[28] and render such national service as may be required.

The reality of citizenship and therefore nationality, at the international level allows people to assert and demand the protection of a particular State. It follows that everything should be done to enhance the image of such a State. Additionally, citizens should also defend the interests of the State. With regards to national service, section 315(5)(a) retains the National Youth Service Corps (NYSC) Scheme and its enabling statute.

Every citizen has the duty to respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood.[29] This duty brings out the community spirit of citizens. The need for an ordered society makes it necessary for citizens to respect the rights and interests of others.

Fourthly, every citizen has a duty to make positive and useful contribution to the advancement, progress and well-being of the community where he resides.[30] This duty to the community must be distinguished from affiliation and duty to one's ethnic nationality. Community in this context should be construed to relate to an area and should not necessarily be determined by ethnicity.

Unless there is peace and security, development and progress in the society is normally hampered. Section 24(e) therefore imposes the duty for the maintenance of law and order on every citizen in terms of rendering assistance to appropriate and lawful agencies. Finally, a duty to declare one's income and[31] pay taxes are imposed on every citizen.

Although not specifically included in either Chapter II or IV of the Constitution, public officers are further subjected to a duty to declare their assets before assumption of duty. This is intended to ensure and monitor the transparency and accountability of public officers. While it is desirable that public officers declare their assets, appropriate authorities must be strengthened to cope with the intricacies of such

28. Section 24(b).
29. Section 24(c).
30. Section 24(d).
31. Section 24(f).

declarations, otherwise, the exercise may, in itself, provide a basis for what is intended to be avoided.

At the continental level, the African Charter also imposes some duties.[32] According to the terms of the Charter since incorporated into the municipal legal system, such duties as those towards the family and which promote the duty to African values and unity should be seen as complementary to section 24 of the 1999 Constitution.

The 1999 Constitution is now a subject of intense debate on issues ranging from the manner of its promulgation to some of its basic provisions. The responsibility of citizens is to articulate the issues and employ the institutional arrangements for addressing these issues as little will be achieved from uncoordinated responses. In the main, the civic obligations of citizens are not exclusively constitutional. There are other societal demands that positively impact on the constitutional regime. While noting the obligations imposed by the Constitution, it is the totality of these obligations, constitutional and otherwise, that should be given due consideration in order to strengthen the bond of unity and brotherhood.

Conclusion

The history of the 1999 Constitution has been part of the problems associated with the Constitution. Popular opinion has been expressed as to whether or not, Nigerians ever thought of and adopted any Constitution as such. However, the reality of the then extant military rule should be seen as the existing legal regime with little or no capacity for the normal processes for the promulgation of a Constitution.

It is in this context that it can be better appreciated why Chapter IV has remained at the level of civil and political rights; as the first generation of rights. Having experimented with Chapter 11 under the 1979 Constitution, subsequent constitutional developments should take into consideration the second and third generation of rights. In this way, the Constitution would be responding to contemporary dispensation and Nigeria would, similarly be fulfilling its international obligations.

32. Articles 27-29 African Charter on Human and Peoples Rights.

The civic obligations of individuals have always been reflected in strict legal terms or as moral injects which the society imposses, In both respects, there is need for individuals to rise up to the challenges of responsibility that will positively impact on the national psyche.

Given the fact that no dispensation is perfect, the 1999 Constitution offers Nigerians and any other interested persons, a working document that should form the basis of further elaboration of the demands of rights and obligations.

9

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY WITHIN THE FRAMEWORK OF A LIBERAL ECONOMY

by

Etanibi E.O. Alemika
(Department of Sociology, Faculty of Social Sciences, University of Jos)

Introduction

Constitution-making is a pastime in Nigeria.[1] In the last fifty-five years, at least twelve different constitutions and pseudo-constitutions have been made in the country by the British colonialists and post colonial civilian and military rulers.[2] An important symbolic and ideological innovation in Nigerian constitutions since 1979 is the introduction of a chapter, entitled *Fundamental Objectives and Directive Principles of State Policy*.[3] This innovation represents an

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1. See E.E.O. Alemika (1995) "Political and Economic Tendencies of the 1995 Nigerian Draft Constitution." Paper presented at the Workshop on the 1995 Draft Constitution, organised by the Faculty of Law, University of Benin at the Edo State House of Assembly, Benin, September 4 -5, 1995.
2. These are colonial constitutions (Richards 1946, Macpherson 1951; and Lyttleton 1954); civilian constitutions (1960, 1963, 1979, 1989, 1995, 1999), and military Constitutions (1966; 1975; 1984, 1985,1993). The constitutions were classified as colonial, civilian and military on the basis of which type of rulers were expected to operate them. Only the 1963 Constitution was reasonably crafted by Nigerian civilian rulers. Others were crafted under the supervision of either colonial and military rulers. The 1989 Constitution was never given effect as a result of perennial postponement of handing-over of government to civilians in 1990 and 1992, and the subsequent annulment of the presidential election held on June 12, 1993. The 1995 Constitution produced by the 1994-1995 National Constitutional Conference and amended by the Abacha regime was not promulgated before the death of General Sani Abacha in June 1998. The 1999 Constitution of the Federal Republic of Nigeria, largely a rehash of the 1979 Constitution was promulgated by the military regime of General Abdul-Salam Abubakar.
3. Chapter 2 of the 1979 and 1999 Constitutions as well as chapter 2 of the 1989 Constitution that never came into effect, and chapter 2 of the draft 1995

explicit acknowledgment of the ends of government and the responsibility of the state to the citizens. The terms "Fundamental objectives" and "directive principles" draw attention to the symbolic and ideological significance of the provisions in chapter two of the country's Constitutions during the past two decades.

The symbolic significance of the provisions is that government is portrayed as a relationship of rights and duty, a social contract between those who govern and those who are governed. Thus, the citizen is not a property of the ruler (as in the slave and feudal systems) but rather a free citizen who submits himself/herself to be governed under certain conditions. This raises the issue of consent and legitimacy as basis of submission or loyalty to a government. While consent to political domination may precede an appraisal of the performance of the state or regime, legitimacy is conferred on the basis of performance of the state or regime.[4] Evaluation of performance is not necessarily rational or objective, the individual's attribution of legitimacy to a government is dependent on his/her subjective evaluation of the extent to which the state has or is promoting interests he or she believes to be important.

The ideological significance of the provisions lies in the affirmation of the security and welfare of the citizens as the primary ends of government, thereby portraying government as an agent of common good, as a responsive, responsible and accountable government. This image serves an ideological role, a means of securing consent and legitimacy from the citizens. Thus, the `fundamental objectives and directive principles of state policy' in the Nigerian Constitution serve symbolic and ideological purposes more than give

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Constitution bore the title fundamental objectives and directive principles of state policy. The contents were largely similar, except that since 1989, there has been increasing emphasis on the duty of the citizen in order to balance what some people considered to be an articulation of state responsibilities without reciprocal duties from the citizens.

4. Consent and legitimacy may be accorded the state while a regime, a particular government, may be denied both. This indeed is usually the case in stable democracies. The basis of the state is not questioned but rather the vision and performance of a particular regime. The crisis in politically unstable nations such as Nigeria is that the basis for the state is questioned and as a result regimes do not enjoy the consent of important segments of society. In our circumstance both the state and regimes suffer from legitimization crises.

concrete effect to the security and welfare of the citizens.[5] This chapter analyses why this is so and offers proposals for moving the provisions beyond symbolism and rhetoric to concrete implementation and experience.

Conceptual Issues and Analytical Framework

A Constitution is a political and legal document that spells out the form and scope of the powers of the state. In practical terms, a constitution (1) defines the territory and population to which it applies; (2) prescribes the sovereign power in the State; (3) defines the mode, powers and functions of government; (4) establishes organs of government; (5) defines the nature, powers and functions of organs of government as well as the relationships among them; (6) determines the obligations and rights of citizens, and (7) determines the relationships among the state, government, civil society, and citizens.

According to Laski:

> "The modern state is a territorial society divided into government and subjects claiming, within its allotted physical area, a supremacy over all other institutions. It is in fact the final legal depository of the social will. It sets the perspective of all other organizations."[6]

This definition points to both the spatial and power elements of the state. It must be recognised that the modern man and woman live their lives within a state of varying degrees of stability. The idea of liberal economy conjures contradictory images. The primary principle of liberal economy is "that in the ordering of our affairs we should make

5. The provisions in chapter two, fundamental and substantive as they are, cannot be claimed as an entitlement because they are not justiciable . They are mere promises and do not constitute a contract between the citizen and the state. Paradoxically, it is the enforcement of the provisions that can truly earn the state both consent and legitimacy from the vast majority of the citizens.

6. Harold J. Laski, *A Grammar of Politics* 5th edition, London: (1967) George Allen and Unwin, p. 21.

as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion..."[7]

Liberalism has both political and economic dimensions. On the political level, liberalism entails a democratic framework in which individuals are presumed to be equal- one man/woman one vote – irrespective of socio-economic inequalities between citizens. Liberal economic principle favours minimum government, especially non-interference of the government in the economy beyond creating a conducive environment for the maximization of profit. This emphasis prompts the Marxists to describe the liberal state as an instrument of the ruling class, essentially the owners of capital who exploit the labour and other resources of society to maximize profit. Nigeria's 1999 Constitution, like the previous Constitutions in the country, creates a liberal *free enterprise* economy and a liberal `*democratic*' polity. The existence of, or adherence to, a Constitution does not necessarily bring about a democratic polity. This is because a Constitution may indeed create a socialist democracy, capitalist democracy, social democracy, monarchy, apartheid, plutocracy, military domination, diarchy, etc.

The chapter[8] `*Fundamental Objectives and Directive Principles of State Policy*' contains twelve sections as follows:

13. Fundamental obligations of the Government.
14. The Government and the people.
15. Political objectives.
16. Economic objectives.
17. Social objectives.
18. Educational objectives.
19. Foreign policy objectives.
20. Environmental objectives.
21. Directive on Nigerian cultures.
22. Obligation of the mass media.
23. National ethics.
24. Duties of the citizen.

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7. F.A. Hayek, *The Road to Serfdom* London: (1979) Routledge and Kegan Paul, p.13.
8. Chapter II of the *Constitutional of the Federal Republic of Nigeria*, 1999.

We will adopt a practical method of analysing the provisions by simply examining each provision, identifying their significance as well as problems of implementation under the present political economy an *inefficient, underdeveloped and corruption-ridden free enterprise economy and undemocratic polity* – in the country.

Fundamental Obligations of the Government

Section 13 sets out the fundamental obligations of the Government to the citizens thus:

> "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 the Constitution."

This section enjoins all organs and officials of government to adhere to the provisions of that Chapter of the Constitution. However, no punishment is specified for non-compliance. The non-justiciability of the provisions implies that there is no mechanism for alleging violation. Without such allegations, it is not clear how violations will be identified and dealt with. It may perhaps be argued that a violation of the chapter may be addressed as a violation of the oath of office. This may be an ingenuous way of giving effect to the provisions of the chapter by the citizens. But this option may in fact not be feasible, because if on examining a grievance, it is discovered that it has to do with the provisions of Chapter II, the grievance may be dismissed to the extent that the provisions are not justiciable. This raises the question of the significance of constitutional provisions that are not subject to enforcement. The National Conference Committee on Fundamental Rights and Directive Principles of State Policy, and Press Freedom, debated whether or not to delete the chapter from the Constitution, because none of its provisions constitute a legal right, and:

> "... because any provision that is not justiciable should not be made part of the Constitution. However, there was another argument that since the provisions of Chapter II are ideals which the Government and the people of Nigeria

should strive to attain, the Chapter should be retained in the Constitution."[9]

The National Assembly should develop indices of adherence to the provisions and measurement of performance with regards to each of the provisions. The annual appropriation bill should contain reports on these. Another option may be the institutionlization of an annual `State of the Nation Address' to be delivered by the President to the country. The Address should contain government's self-assessment of its compliance with and promotion of the ideals and provisions in Chapter II. The National Assembly, academia, and civil society organizations should be able to debate and respond to the Address. State governments should also submit to the same process.

Relationship Between the Government and the People

A true test of democracy is the relationship between the government and the citizens. The envisaged relationship is described in section 14 of the Constitution thus:

> **14.**_(1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.
>
> (2) It is hereby, accordingly declared that:
>
> (a) sovereignty belongs to the people of Nigeria from whom government through the Constitution derives all its powers and authority;
>
> (b) *the security and welfare of the people shall be the primary purpose of government;* and
>
> (c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.

9. *Report of the Constitutional Conference containing the Resolution and Recommendations*, Vol. II, 1995.

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethic or other sectional groups in that Government or in any of its agencies.

(4) The composition of the Government of a state, a localgovernment council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the federation.

These provisions constitute an explicit contract between the government and the citizens. It is instructive that the provision ascribes *sovereignty* to the citizens rather than the government. This has implications for the repressive tradition in the country that treats the citizens as enemies of government whenever there is a popular struggle for justice, accountability and efficient management of Nigeria's resources. When such a struggle threatens the security of a regime or a particular dictator, the regime usurps the sovereign power of the people and treats its security of tenure as synonymous with national security. Critics are hounded, harassed, jailed and sometimes assassinated. Hopefully, under emergent civil rule and in accordance with the constitutional provisions, government will begin to see itself as an agency of the citizens.

The provisions of section 14(2) are particularly important, because they acknowledge the sovereignty of the people; define the primary responsibility of the government as the promotion of the security and welfare of the citizens, and guarantee the participation of the citizens in

their government. However, there are no explicit guidelines as to the consequences of violation of these provisions by a government. Our history shows that top ranking government officials would rather usurp power by means of coups and electoral fraud/violence than wait to be conferred with power by the citizens. The 1998/1999 elections were no different, in terms of widespread electoral fraud, non-compliance with elementary principles of democratic electoral processes pertaining to the conduct of free and fair primary elections. Did circumstances in which primaries were denied and candidates imposed on the electorate not amount to usurpation of the sovereignty of the people? On the issue of the security and welfare of the citizens, is it not our experience in this country that the rulers tend to be more concerned about their own welfare and security than the security and well-being of the citizens? Professor Nwabueze has observed with respect to security in the country, that:

> "... we hear so much about state security - network of state security organizations... spread all over the place, large numbers of people detained without trial for reasons of state security and vast sums of money appropriated and spent to maintain it. State security looms so large not so much because the Nigerian state, its ordered existence, safely and territorial integrity face any real threat of danger, either from within or without, as because the personal safety of those in control of the state and the security of their offices are regarded by them as synonymous with the security of the state."[10]

How can a leader claim to be promoting the security of citizens when he is shielded from the lived experiences of the people. At points of probable contact between the rulers and the citizen, the latter is harassed and driven away by siren and security personnel. Security is not limited to protection from physical harm but also to security from oppression and exploitation, from want and avoidable morbidity and mortality. Security and welfare are interwoven. However, the Nigerian

10. Ben, O. Nwabueze *Social Security in Nigeria* Lagos; Nigerian Institute of Advanced Legal Studies, (1989) p. 1

state is often more concerned with "spending on welfare" than "providing social welfare services" for the citizens. Here again, as Professor Nwabueze argued:

> "... little or nothing is known, said or done about social security, about how to secure the individual against want, poverty, destitution, disease and idleness which may be thrust upon him by the varied hazards and vicissitudes of social life, notably loss or suspension of income or means of sustenance resulting from sickness, maternity, accident injury, invalidity, old-age, death of breadwinner or unemployment... The pre-occupation with state security and the neglect of economic security of the individual clearly manifest a distortion in our priorities. The economic security of the individual is or should be of far greater concern to the government and society than the security of the state... Paradoxically, whatever threat of danger that faces the Nigerian state today stems more from the absence of economic security, particularly economic insecurity arising from mass unemployment."[11]

Subsections 3 - 4 of section 14 of the Constitution provide for Federal, State and Local characters. This implies that appointments and employment must reflect the diversity of the territory in order to promote a sense of belonging and loyalty. Ideally, these provisions should not constitute any problem if organizations have no history of lopsided appointments and employment due to factors such as uneven supply of potential employees by the constituent groups. The Federal Character Commission was created to address these concerns. This is a practical approach, provided that national interest is not compromised in order to attain an overnight proportional representation among the various groups at the various levels of government.

Political Objectives

The political objectives of the Constitution in section 15 of Chapter 2 of the Constitution can be summarized as (1) giving concrete expression to

11. *Ibid*, pp. 1 - 2.

the idea of citizenship by ensuring national integration, free mobility, full residential rights and a feeling of `being at home' anywhere in the country; (2) securing participation of citizens in society and fostering loyalty to the nation, and (3) abolition of corrupt practices and abuse of power. The provisions state that:

15. (1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.

(3) For the purpose of promoting national integration, it shall be the duty of the state to:

(a) provide adequate facilities for and encourage free mobility of people, goods and services throughout the federation;

(b) secure full residence rights for every citizen in all parts of the federation;

(c) encourage inter-marriage among persons from different places of origin, or of the different ethnic or linguistic association or ties; and

(d) promote or encourage the formation of association that cut across ethnic, linguistic, religious or other sectional barriers.

(4) The state shall foster a feeling of belonging and involvement among the various peoples of the federation, to the end that loyalty to the nation shall override sectional loyalties.

(5) The state shall abolish all corrupt practices and abuse of power.

The problems addressed by these provisions are no doubt critical to the continuing existence of our nation.

What is Nigerian citizenship worth?

Many Nigerians who live and work, even in Federal establishments such as the universities in States other than theirs are subjected to injustice, discrimination and acts of wickedness for being *non-indigenes*. People in power often support such wicked acts as denying an individual an appointment as the head of the organization for which he has worked for decades, on the ground that such positions should be held by *indigenes*. Should Nigeria not establish a framework for residency rather than indigeneship as a basis for responsibility and rights in the relationship between the State and citizens? No one says a non-indigene should be made a traditional ruler. But why should a non-indigene pay his taxes, rates and development levies to a state where his children are not entitled to admission and employment in the state's schools and institutions? These are the reasons why patriotism and loyalty are difficult to mobilise in Nigeria. Government still has to show concrete evidence that it really wants a united and integrated Nigeria.

A lot of the problems in many universities today are attributable to government's policies of locality, indigeneship and catchment areas as they affect employment, appointment, training, promotion, and deployment. Many states interpret these to mean that they own federal universities established on their own land and see it as their duty to exclude non-indigenes from such institutions. State machinery is used to harass and disqualify highly qualified candidates vying for positions in universities in order to ensure the enthronement of far less qualified, competent and experienced indigenes. Consequently, many hardworking, competent, committed and experienced academics are denied appointment, promotion and service. The crises of leadership and falling academic and moral standards in the universities is, in part the result of these trends. In those circumstances, mediocre staff are favoured; they in turn reproduce mediocre persons, they are very intolerant and tend to pull down institutional standards to their own

level. Similar problems exist in other federal and state agencies. The provision for federal character can further worsen this trend, if the government fails to appoint people with a national horizon as Commissioners in the Commission. The Federal Government should emphasise equality of opportunity rather than equality of outcomes irrespective of differential efforts. Thus federal character need not become a simple arithmetic exercise beyond the recruitment stage for, once in service, everyone should earn his/her appointment and promotion.

The provision for the abolition of corruption and abuse of power is important. However, no concrete and effective means have been established for the purpose. The requirement of the Code of Conduct Bureau that public officers from level 10 should declare their assets every four years, seems rather burdensome. Perhaps, such requirements should be applicable to specific posts in the public service. For example, in what way is a classroom teacher at the primary, secondary and tertiary levels likely to embezzle public funds? The rather wide scope of the Bureau's responsibility probably accounts for the difficulties it encounters in performing its duties. Perhaps, the category of those who should declare their assets can be narrowed. Every public officer should, however, be liable to investigation by the Bureau if a complaint of corruption is laid against such officer under oath by an identifiable citizen. The government must improve the remuneration, working conditions and retirement benefits of public officers as a more realistic measure for curbing official corruption. Access to efficient social services (education, health, etc.) should be improved, as a means of promoting the security and welfare of the citizens.

Economic Objectives

The Constitution provides for several important objectives that are critical to the attainment of development, security, welfare, justice, stability and unity in Nigeria. The country operates a capitalist economic system, notwithstanding its underdevelopment and distortion. Indeed, because of the underdevelopment and distortion of capitalism in the country, the nation has suffered its worst consequences without enjoying its benefits. Since 1979, the framers of Nigerians Constitutions, have recognised the popular struggle for an economic

system which enhances the efficiency, equity and welfare of the citizens rather than the prevailing system which dispossesses the vast majority to enrich a few. The introduction of the Structural Adjustment Programme (SAP) in 1986 by General Ibrahim Babangida aggravated economic decline, poverty, injustice and inequality. Many of the provisions on the economic objectives were designed to manage and defuse the struggle for greater economic justice in the country. These provisions entrenched a liberal capitalist economy by coating it with the following welfarist economic management provisions:

> **16.** (1) The state shall, within the context of the ideals and objectives for which provisions are made in this Constitution:
>
> (a) harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy;
>
> (b) control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;
>
> (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;
>
> (d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.
>
> (2) The State shall direct its policy towards ensuring:
>
> (a) the promotion of a planned and balanced development;

(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

(c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and

(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

(3) A body shall be set up by an act of the National Assembly which shall have power:

(a) to review, from time to time the ownership and control of business enterprises operating in Nigeria and make recommendations to the president on the same; and

(b) to administer any law for the regulation of the ownership and control of such enterprises.

The liberal political economy that the country has adopted and more importantly, the economic agenda of successive Nigerian governments during the past fifteen years run contrary to the provisions of this section. The provisions anticipate active participation of the government in the economy, contrary to the present war by Vision 2010 seers, local and international capitalists to chase the government out of business, in order to enthrone the reign of market forces. While the government is canvassing privatisation, commercialisation and withdrawal of government from the economic sphere, these provisions actually expect greater involvement by the government. How will a government control the economy for maximum welfare when it is relinquishing its interests in the strategic sectors or selling public wealth to private individuals? Is

maximisation of profit not the engine of the liberal/capitalist economy? In a capitalist system, how is a government going to control the distribution of wealth to "secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity?" How is the government going to promote planned and balanced economic development where it is only marginally involved, or when it has relinquished the role of economic management to the market forces? How is the government to redistribute income and prevent concentration of wealth in the hands of a few when it has conceded to wealth distribution by the market forces? The tension between these provisions and capitalism are so fundamental that they cannot be resolved. In the end, the provisions are mere smokescreen.

Subsection 3 mandates the National Assembly to set up a regulating body to periodically review the ownership and control of business enterprises operating in Nigeria. It is important that the agency be set up without further delay, to regulate anti-trust activities, prevent monopolies and prohibit exploitative and arbitrary charges for goods and services by private and public enterprises. These may be feasible if patriotic and knowledgeable people are appointed to manage such an organisation.

There is no doubt that the Nigerian government, the political and economic power-holders, with the support of the IMF and World Bank will continue to promote capitalism in the country for some years to come. To that extent, the more substantive provisions in this section cannot be realised. It is also doubtful whether they were ever expected to be realised by the power-holders. That is why the provisions are not legal rights but specifically made unjusticiable. In effect, the value of the chapter is to create a symbolic and ideological portrait of the Nigerian State and government as caring and responsive to the primary duties of any government - to secure the safety, freedom and welfare of *the citizens*.

Social and Educational Objectives

Sections 17 and 18 of the Constitution state the social and educational objectives. These address issues that are salient to the social worth of citizens. These sections state that:

17._(1) The state social order is founded on ideas of freedom, equality and justice.

(2) in furtherance of the social order:

(a) every citizen shall have equality of rights, obligation and opportunities before the law;

(b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;

(c) governmental actions shall be humane;

(d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and

(e) the independence, impartiality and integrity of the courts of law, and easy accessibility thereto shall be secured and maintained.

(3) The state shall direct its policy towards ensuring that:

(a) all citizens, without discrimination on any group what soever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

(c) the health, safety and welfare of all persons in employment are safe guarded and not endangered or abused;

(d) there are adequate medical and health facilities for all persons;

(e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;

(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect;

(g) provision is made for public assistance in deserving cases or other conditions of need; and

(h) the evolution and promotion of family life is encouraged.

18. (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

(2) Government shall promote science and technology.

(3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide:

(a) free, compulsory and universal primary education;

(b) free secondary education;

(c) free university education; and

(d) free adult literacy programme.

If these provisions are pursued with a reasonable degree of seriousness by the government, we will expect that within a generation, most of the problems associated with injustice, ethnicity, discrimination, oppression, mass poverty, exploitation of labour, neglect of the handicap and the elderly, inhuman conditions of work, family disorganisation, scientific and technological backwardness and illiteracy will be drastically reduced. And if these provisions are given

deserved priority and concrete implementation, the national ethics defined in section 23, as "Discipline, Integrity, Dignity of Labour, Social Justice, Religious Tolerance, Self-reliance and Patriotism" will be engraved on the minds of, and internalised by every Nigerian. As at now, there are no structures on the ground to suggest that the government will work towards the realisation of these objectives. It must also be recognised that the implementation of some of them requires a productive economy that is technology-driven and free from corruption, as well as a stable and democratic polity. Many of the social and educational ideals run counter to the workings of a liberal political economy. The educational sector is in shambles and if serious action is not taken, standards already achieved by the 1970s may not be restored in this generation due to maladministration, institutionalised mediocrity, corruption, nepotism, discrimination and bad policies in the education sector, especially at the university level. Government needs to demonstrate that it means business and will not allow personal, selfish and parochial interests to take precedence over national interest. It is suggested that the government constitute a panel of highly respected academics, including some of the Vice-Chancellors of the 1970s, to screen and thoroughly review the appointment of the incumbent Vice-Chancellors with a view to removing those improperly appointed and those who are incompetent, or undermine justice, academic standards and excellence, the statutes and rules governing appointments and promotions and the operations of the universities in general. It is also suggested that the same panel screen all the appointments and promotions of all staff of the university with a view to restoring standards, excellence and integrity. Finally, the overhead costs being expended on universities administration now should be drastically reduced in favour of teaching and research, by introducing efficient service delivery and information management system.

Foreign Objectives

A nation's foreign policy and its implementation are affected by the country's level of economic development, political stability and social cohesion. The Constitution outlines broad foreign policy objectives as follow:

19. The foreign policy objectives shall be:

(a) promotion and protection of the national interest;

(b) promotion of African integration and support for African unity;

(c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations;

(d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, meditation, conciliation, arbitration and adjudication; and

(e) promotion of a just world economic order.

The range of goals are desirable, but limited. A clear omission is the relationship with Africans in Diaspora. Nigeria is the most populous African nation. To a large extent, every African in Diaspora should be able to relate to Nigeria as his/her second home. If any such African seeks to acquire Nigerian citizenship, he/she should be able to do so with minimum difficulty. Another omission is the absence of commitment to the security of Nigerian citizens in foreign countries. The lackadaisical attitude of the government and Nigerian Embassies to the plight of Nigerian citizens in foreign countries cheapen Nigerian citizenship in the eyes of foreigners and undermine patriotism among Nigerians. It must be observed that the appointment of a Minister for African and Economic Integration by the Obasanjo administration accords with the country's foreign policy emphasis on Africa.

Environmental and Cultural Objectives

Sections 20 and 21 respectively contain the provisions on environmental and cultural objectives, namely:

20. The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

21. The State shall:

(a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter;

(b) encourage development of technological and scientific studies which enhance cultural values.

Nigerian is blessed by nature with diverse environmental and natural resources. These have not been properly managed. Some are being exploited without regard to environmental degradation and resource renewal. In some other cases, the resources are not developed for appropriate benefits such as tourism, recreation and income generation. Successive environmental policies have not adequately taken care of the degradation that follows exploitation of environmental and natural resources. The policies have also not given adequate consideration to renewal of renewable resources such as forest resources, nor to land reclamation where mining activities have taken place. The ecological degradation in the Niger Delta is partly the result of non-implementation of relevant policies. The government needs to take measures necessary for the realization of these objectives.

The Directive on Nigerian cultures in section 21, though desirable is rather vague and scanty. The nation needs to develop all Nigerian languages and dialects, on equal basis rather than impose a few on the vast majority. A good beginning is to identify and support the development of orthography for all the languages and dialects that are currently being assimilated – in an imperialistic manner – by major languages that are relatively more developed in these respects. If this is done, cultural pride will be restored to millions of culturally oppressed and disoriented Nigerians. The National Assembly can sponsor universities to conduct research to determine the number of languages and dialects in each of the States of the Federation and provide support for their development.

Obligation of the Mass Media
The Constitution provides in section 22 that:

> "The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the Government to the people."

The press cannot discharge this obligation if the government fails to enact a "freedom of information law" to guarantee the right to know. Since colonial times, hiding under the oath of secrecy, civil servants and senior government officials normally hinder the free flow of information to the press and researchers. The National Assembly should abrogate the Secrecy Act and enact a new law to specify more rational management of information in the country.

Duties of the Citizens
The final section of Chapter II dealing with the Fundamental Objectives and Directive Principles of State Policy, deals with the duties of the citizens. The Constitution provides, in section 24, that:

> It shall be the duty of every citizen to:
>
> (a) abide by this Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge and legitimate authorities;
>
> (b) help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required;
>
> (c) respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood;

(d) make positive and useful contribution to the advancement, progress and well being of the community where he resides;

(e) render assistance to appropriate and lawful agencies in the maintenance of law and order; and

(f) declare his income honestly to appropriate and lawful agencies and pay his tax promptly.

No good and patriotic citizen will disagree with the idea that citizenship entails rights and responsibilities. What has been a problem is the tendency for the government to heap responsibilities on citizens and abdicate its own responsibilities. This has been the source of the crisis of legitimacy for the State as well as its inability to command the loyalty of all citizens at all times. The loud proclamation by the political and economic power-holders, that has become commonplace in Nigeria, that the government should not be expected to do everything for the citizens – the government should not be expected to provide education, provide uninterrupted electricity, provide health care services, provide telecommunication, provide security and police the nation, provide water, provide shelter, etc. for the citizens, underscores this. It further leads one to ask: what then are the responsibilities of the Nigerian government and reasons for the existence of a government? More provocative ideologies of free enterprise and a racketeering political economy in Nigeria proclaim that telephones, cars, air travel, etc. are not for the poor! This prompted the observation that the Nigerian state is an omnipotent and omniscient but omni-absent state. It is a powerful and all-knowing state that is never present to discharge its responsibilities to the citizens. In order to correct this problem, the state must be compelled to demonstrate annually, that its activities indeed meet with the Fundamental Objectives and Directive Principle of State Policy. In this regard, the National Assembly can enact appropriate laws to give effect to making the government accountable to the nation for its compliance with the provisions of Chapter II of the Constitution.

Conclusion

This chapter has appraised the provisions of Chapter II of the Constitution which deal with the Fundamental Objectives and Directive Principles of State Policy. Overall, the provisions are ideals. They are symbolic and ideological expressions of what governance and life in Nigeria should be, not what they are. There is no evidence to suggest that the rulers seriously expect or wish to bridge the gap between the "ideal" and the reality. Nigerians must not be contented with mere forms of democracy in the form of civil rule. Our goal should be substantive democracy and good governance that guarantee the sovereignty of the people and the security and welfare of all citizens. In that sense, therefore, the struggle for democracy and good governance must continue.

10

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY WITHIN THE FRAMEWORK OF A LIBERAL ECONOMY: A NOTE

by

Jadesola O. Akande
(Professor of Law & Executive Director, Women, Law and Development Centre, Nigeria)

Introduction

One of the significant innovations of the Constitution of the Federal Republic of Nigeria 1979 was the inclusion of the chapter on Fundamental Objectives and Directive Principles of State Policy, an idea probably borrowed from India. Because of the novelty of the chapter, the Constitution Drafting Committee thought it expedient to define the terms "fundamental objectives" and "directive principles" thus: Fundamental Objectives are the "directive principles" laid down by the policies which are expected to be pursued in the efforts of the nation to realise the national ideals[1]

The rationale for the provisions is that "governments in developing countries have tended to be preoccupied with power and its material perquisites with scant regard for political ideals as to how society can be organised and ruled to the best advantage of all." This rationale is of special relevance to the Nigerian polity whose cardinal features are the "heterogeneity of the society, the increasing gap between the rich and the poor, the growing cleavage between the social groupings all of which combine to confuse the nation and bedevil the concerted march to orderly progress."[2] Presumably the same reasons have justified the retention of this chapter in the 1999 Constitution.

It must be pointed out that Nigeria's multi-ethnicity and heterogeneity dictated the federal option in the first place. However, contemptuous disregard of the federal structure and flagrant violations

1. Report of the Constitution Drafting Committee, 1978.
2. See *Archbishop Olubunmi Okogie (Trustee of Roman Catholic Schools and Ors. v. Attorney-General of Lagos State* (1981) 1 NCLR 218.

of the fundamental guarantees in earlier Constitutions resulted in the civil war which brought the nation to the edge of a precipice in 1966. Unfortunately, the nation subsequently had only four years between 1979 and 1983 to test the efficacy of the provisions before the military returned to rule Nigeria for another sixteen years.

The provisions of the fundamental objectives and directive principles of state policy are not justicable. Therefore, it would appear that the duty and responsibility on all organs of government "to conform, to observe and apply them"[3] is limited to the extent that the judiciary cannot enforce any of the provisions. Accordingly, the executive does not necessarily have to comply with any of the provisions unless and until the legislature has enacted specific laws for their enforcement.

Contents of the Objectives

CHAPTER II
FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

Fundamental Objectives and Directive Principles of State Policy

13. "It shall be the duty and responsibility of all organs of government, and of all authorities and person, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this chapter of this Constitution."

The Government and the People

14. (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

(2) It is hereby, accordingly, declared that:

(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;

3. *Section* 13 of the Constitution of the Federal Republic of Nigeria, 1999.

(b) The security and welfare of the people shall be the primary purpose of government; and

(c) The participation by the people in their government shall be ensured in accordance with the provisions of the Constitution;

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, hereby, ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies;

(4) The composition of the Government of a State, a local government council, or any of the agencies of such government or Council, and the conduct of the affairs of the Government council or such agencies shall be carried out in such a manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the Federation;

Political Objectives

15. (1) The motto of the Federal Republic of Nigeria shall be: Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst, discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association of ties shall be prohibited.

(3) For the purpose of promoting National Integration, it shall be the duty of the State to:

(a) provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation;

(b) secure full residence rights for every citizen in all parts of the Federation;

(c) encourage inter-marriage among persons from different places of origin, or of different religions, ethnic or linguistic association;

(d) promote or encourage the formation of associations that cut across ethnic, linguistic, religions or other sectional barriers;

(4) The State shall foster a feeling of belonging and of involvement among the various peoples of the federation, to the end that loyalty to the nation shall override sectional loyalties.

(5) The State shall abolish all corrupt practices and abuse of power.

Economic Objectives

16. (1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution:

(a) harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy;

(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

(c) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

(2) The State shall direct its policy towards ensuring:

(a) the promotion of a planned and balanced economic development;

(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

(c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and

(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wages, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

(3) A body shall be set up by an Act of the National Assembly, which shall have power:

(a) to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and

(b) to administer any law for the regulation of the ownership and control of such enterprises;

(4) For the purposes of subsection (1) of this section:

(a) the reference to the "major sectors of the economy" shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National assembly to be managed and operated exclusively by the government of the Federation; and until a resolution to the contrary is made by the National Assembly, economic activities being

operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other cooperation or company, shall be deemed to be major sectors of the economy;

(b) "economic activities" include activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and

(c) "participate" includes the rendering of services and supplying of goods.

Social Objectives

17. (1) The State social order is founded on ideals of social objectives freedom, equality and justice.

(2) In furtherance of the social order:

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

(b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;

(c) governmental actions shall be humane;

(d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and

(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

(3) The State shall direct its policy towards ensuring that:

(a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

(c) the health, safety and welfare of all persons employment are safeguarded and not endangered or abused;

(d) there are adequate medical and health facilities for person;

(e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;

(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and materials neglect;

(g) provision is made for public assistance in deserving cases or other conditions of need; and

(h) the evolution and promotion of family life is encouraged.

Educational Objectives

18. (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

(2) Government shall promote science and technology

(3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide:

(a) free, compulsory and universal primary education;
(b) free secondary education;

(c) free university education; and

(d) free adult literacy programme

Foreign Policy Objectives

19. The foreign policy objectives shall be:

(a) promotion and protection of the nation interest;

(b) promotion of African integration and support for African unity;

(c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations;

(d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; and

(e) promotion of a just world economic order

Environmental Objectives

20. The State shall protection and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

Organising Society for the Best Advantage of All

The post independence Nigerian State has operated, apart from the independence Constitution, other Constitutions designed as part of the political transition to civil rule project of departing dictatorial military regimes. Each new Constitution[4] engineered by our military rulers progressively strengthened the central government while practically making dependants of states and local governments. In the course of

4. Nigerian Constitutions of 1979, 1989 and 1995.

these transitions, only the ruling elite - both military and civilian - benefited immensely from the lopsided political structure. The ordinary citizen everywhere in the country became worse off. The elite class produced so many millionaires and billionaires, many of whom had no visible source of wealth other than government appointments and patronage. It is this same elite that would demand the retention of the existing political structure because it guarantees Nigeria's continued existence as a strong nation, as if that existence translates to equal opportunity and access to the spoils of office for all citizens.

In a recent statement issued by the Africa Fund on the new Nigerian democratic experience, the US based group observed: "now the Nigerian people confront a new set of challenges to their young democracy. An economy ruined by corruption and mismanagement must somehow be restarted to provide jobs and economic opportunity to the tens of millions of people mired in poverty. Schools and hospitals abandoned by the Generals must be rebuilt, re-stocked and reopened. A nation deeply divided along regional, religious and ethnic lines must find new unity and a renewed sense of natural purpose." It is within this context that the provisions of chapter II need to be reassessed.

Sovereignty of the People

It is within this context that sections 13 and 14 already quoted are basically innocuous because they merely restate accepted practices of constitutionalism, such as the Supremacy of the Constitution and the fact that ultimate authority should reside in the people. In an environment of extreme poverty and preponderant illiteracy, the sovereignty that belongs to the people may actually lie with less than the majority of the electorate from whom the Constitution derives its authority. Theoretically, there is adult suffrage with the principle of "one man, one vote" enshrined in the Constitution. In practical terms, however, this may be far from realisation and reality.

Fair and Equitable Treatment for All

Section 14(3) draws attention to the need for ensuring fair and equitable treatment for all the component states and ethnic groups in the country. This provision is a double - edged sword. It could ensure the protection of the rights of the various communities because no few States or combination of a few ethnic groups is allowed to dominate the

government to the exclusion of others. Accordingly, all Nigerians should by this provision, have a sense of belonging. On the other hand, however, the evolution of national loyalty may be retarded by playing up the role of sectional representation in the conduct of the affairs of the state. With this provision, it is quite possible that a situation in which a person's ethnic or linguistic affiliation is the primary definition of the merit of an individual is being created. This can be equated to the attitude of those who regard a man's racial identity as the basis of evaluating him as a human being.

The term "federal character" is defined[5] as follows:

> "Federal character of Nigeria" refers to the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14(3) and (4) of this Constitution."

notwithstanding the diversities of ethnic origin, culture, language or religion which it is their desire to nourish, harness to the enrichment of the Federal Republic of Nigeria.

It follows then that the "Federal character of Nigeria" which is no more than the culmination of the operative forces of multi-ethnicity, has been accepted as the basic principle that should guide governmental action at all levels. However, if ethnic and State considerations have to be the salient factors in determining public appointments, it is more than likely that hankering after power and high Federal offices would lead to inordinate and aggressive identification with the ethnic group or the state to the detriment of higher loyalty to the nation. The operation of this stipulation in practical terms can be seen in the appointments of ministers and special advisers in the Obasanjo cabinet.

Particular effort has been made to include a member from each of the component 36 States of Federation and the Federal Capital Territory. The sort of problem that can be generated is evidenced in the selection of career diplomats. The exercise was bedeviled by

5. Section 318 of the 1999 Constitution.

accusations from Senators whose States were not reflected in the List.[6] Indeed, in criticising the list forwarded to the Senate for approval in the first place, one of the grounds was that it did not reflect the equity of Federal Character.

Socio Political Economy

Of specific and particular relevance to the issue of a liberal economy are sections 16, 17 and 18 (already quoted) dealing with the economic, social and educational objectives. The state of Nigeria's socio-political economy is definitely far from that envisaged by these sections. The nation is blessed with abundant human resources. However, these resources have not only been misplaced, they have also been mismanaged for personal accumulation.

Economic Problems

The nation's economic problems have been reinforced by several factors.[7] Some of these include the Structural Adjustment Programme (SAP) of the late 1980s and its attendant political ideology of political repression, There was also the economic ideology of unfettered liberal marketism leading to diagnostic deregulation and privatisation, import liberalisation and massive currency devaluation. There is the added trauma of corrupt accumulation made possible through the endless nature of previous transition to civil rule programmes of some erstwhile military regimes. In the Babangida era alone, this programme (1992/94) was estimated to have gulped over ₦20 billion. The staggering corrupt accumulation of over $7 billion by the Abacha regime finally put paid to the economic survival of the nation.

The economic crises has been prolonged and aggravated by gross mismanagement and has thrown up one highly visible interest which is in direct conflict with the fundamental objectives; this is to be found in the masses of dehumanised and impoverished Nigerians in the working class and the traumatised members of the disappearing or extinct middle class. The fact is that the predominant avenue for achieving economic interest is the control of state power. The owners and controllers of

6. Record of proceedings of Senate.
7. Bade Onimode: "Economic and Democratic Transition" in *A Political Economy of African Crisis* (1989) London 2nd ed.

indigenous enterprises, - foreign and state, - need state power for promoting their projects of capital accumulation – both legitimately and corruptly.

Deregulation and liberalisation lead to privatisation, which should provide avenues for the redistribution of wealth. However, military and other state officials and owners of foreign enterprises have actually been cornered by foreigners, in spite of the report of the Technical Committee on Privatisation and Commercialisation which stated that military officers had bought 80% of the privtised enterprises.

Liberalisation has removed the barrier of foreign owners' exports of Nigeria – hence the present import dumping. It has made Nigerian labour cheap and docile; at least until this democratic dispensation. Meanwhile, the larger Nigerian populace has been losing enormously. The oil boom of the 1970s has become a source of doom to the majority of Nigerians whose real wages and real incomes have fallen by over 70% since 1986. Local manufactures have been losing out to foreign manufacturers as import liberalisation has almost wiped out trade protection for local infant industries. Hence, the concentration of wealth in the hands of a few individuals or groups. It must be noted that the definition of "major sectors of the economy in the Constitution is sufficiently wide to enable government assume any degree of control over the economy of the nation.

Social Problems

The current loud demand for a restructuring of the nation derives partly from the unfair distribution of the country's oil wealth, which constitutes almost 90% of total income accruable to the Federation Account. In the "winner-takes-all" political game, the groups that monopolised political-military power also monopolised the oil wealth and the benefits derived therefrom. This oil marginalisation was perfected under the fiscal unitarism facilitated by the unified command structure of the different military dictatorships that once held sway in Nigeria. This monopoly of the oil wealth has led to the current crisis in the Niger-Delta and the chronic fiscal crisis of the states. In this connection, there is need to revisit the principle of derivation in revenue allocation. But beyond the need for fiscal restructuring lies the more fundamental issue of social restructuring.

Accordingly, there is still need to correct the lopsided allocation of powers between the federal government and the component states. In a true federal structure, the states must have sufficient control over their internal affairs and sufficient autonomy to address localised problems, so that they will have not only the power but also the resources to correct injustices between social classes and groups.

The political horizon has been so unstable that even the current democratic dispensation is seen by many as a transition towards true democracy. This democratic transition will not be completed and the political terrain stable until the issue of political marginalisation of the broad masses has been corrected. The concentration of the wealth of the nation in a few hands is antithetical to the exercise of political power.

Corruption

A spill-off from a public-sector dominated economy which engenders uneven distribution of resources and unequal access to economic opportunities is corruption. A recent Report[8] lists Nigeria as the World's fifth most corrupt nation. President Olusegun Obasanjo himself once underscored the endemic nature of this malaise in our society when he gave a graphic example of a government agency having to give gratification to a government official to facilitate the release of government subvention! The attempt being made to address the problem, through the passing of an Anti-Corruption Act generated so much controversy both in the public arena and in the National Assembly when the draft bill was forwarded to the legislature that the impression was that Nigerians were not anxious to improve their rating in the world corruption chart. The Fundamental Objectives and ideals of State Policy enjoin the State to take all steps to discourage corruption. It would seem, however, that desirable though it is to have a controlling statute, it is even more desirable to create an environment in which it will be difficult for corruption to thrive. One way of achieving this is by providing the basic necessities of life for the maximum number of the citizens of the country.

8. Transparency International (an International Anti-Corruption NGO).

Globalisation

One cannot discuss the liberalisation of economy without averting to the issue of globalisation of the economy. Globalisation can have both a positive and negative effect. When it operates in such a way as to become another conduit pipe for the subordination of the developing countries to the advantage of the economically and technologically developed countries, then it is bound to defeat all attempts at the implementation of the idealistic objectives and directive principles of state policy such as are provided in Chapter II of the Constitution.

Conclusion

The development of human resources is central to sustainable development. Worthwhile development must tend towards social democracy with strong welfare components and be geared towards support for marginalised groups and classes. This calls for a paradigm shift in the management of the nation's economy. Clearly, the paradigm of unfettered capitalism, deregulation and a free market without a people-centred approach has not worked. Putting people first is the global slogan for human development in the present times. People and their basic needs for food, water, shelter, healthcare, education and adequate transportation are the abiding priorities for economic policies. The enactment of constitutional provisions that transpose these basic needs into "ideals" would seem to be politicising issues, which ought to be the fundamental human rights of all citizens.

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TRANSPARENCY, ACCOUNTABILITY AND GOOD GOVERNANCE UNDER THE 1999 CONSTITUTION

by

Bolaji Owasanoye
(Associate Research Professor,
Nigerian Institute of Advanced Legal Studies)

Introduction

The thrust of this paper is to investigate three related concepts in a democratic polity, i.e. transparency, accountability and good governance. Each of these concepts could be the subject of separate inquiries even though they are related. If we recognise good governance as an ideal then we can easily understand how the first two concepts help us to achieve that ideal. An ideal good governance is described thus:

> "Now [good] governance goes beyond just addressing corruption. It's the whole relationship between government and the private sector. It's creating accountability and transparency and openness. It's creating a legal and judicial system that works. It's assuring that contracts are respected, that there is contract sanity, that the terms can't be changed midstream, when there are disputes, they can be taken to a court and be resolved in a fair-minded way."[1]

Transparency as a concept in public office may simply be described as a commitment by all public and government institutions to be open and transparent in their policies and actions. In particular, public officers should be ready to give reasons for their actions but may restrict information when public interest demands it. Accountability on the other hand may be simply described as the responsibility of the

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1. "Legislative Agenda for Good Governance in Nigeria 1999-2004" (Huri-Laws 1999) quoting US Under Secretary of State for Economic, Business and Agricultural Affairs.

same public officers and institutions to the people they purport to serve. In particular, it includes a willingness to submit to scrutiny appropriate to the office. Taken together and if commitedly implemented, we can say that respect for these two concepts is good governance in its most rudimentary form. In other words, transparency, accountability and good governance are inseparable.

In view of the importance of transparency and accountability to good governance, the constitutional concept of separation of powers lays the foundation for the realisation of this ideal. The fact that each organ of government serves as a check on the other is supposed to enhance good governance. For example, under the 1999 Constitution there are specific mechanisms which have been included to ensure transparency and accountability and ultimately good governance.

The Challenge of Good Governance: The Fundamental Objectives and Directive Principles of State Policy

It has been argued that the inclusion of the fundamental objectives and directive principles of state policies in the Constitution is good. Though not justiciable, at least they state the aims and objectives of the people. As Nwabueze puts it, "it is unheard of for the constitution of a Club, trade or professional association, or village or town union not to state the aims and objectives of the association."[2] How much more the Constitution of the people. Further quoting Wole Soyinka, he propounds that there is no other definition of a nation than a unit of humanity bound together by common ideology.[3] In effect, the fundamental objectives are the aims and objectives of the "Nigerian Association."

Unfortunately, the non-justiciability of the ideals diminish their relevance and importance in the Constitution, inclusion of the principles in the oaths of allegiance notwithstanding. In fact, the President, Governors, Ministers/Special Advisers all the members of the legislature all swear to preserve the objectives but arguably not to implement them. Achievement of the ideals of these principles represent the best tenets of good governance that any nation may desire.

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2. B. O. Nwabueze *Ideas and Facts in Constitution Making,* (Spectrum Books, 1993), at p. 261.
3. *Ibid.*

Enumerated in Chapter II of the Constitution, covering Sections 12 to 24, the principles detail the fundamental obligations of government and the basis of its relationship with the people, the political, economic, social, educational, foreign policy and environmental objectives.[4]

Furthermore, the ideals detail the directive on Nigerian culture, obligation of the mass media, national ethics and finally duties of the citizens.

As ideals, they are ideal but do not go beyond that. However, it cannot be denied that these principles set a parameter for the attainment of good governance. The political will and economic wherewithal to implement the objectives remain the challenge for the polity.

Separation of Powers

The clear constitutional division of powers amongst the organs of state under sections 4, 5 and 6 of the 1999 Constitution for the legislature, executive and judiciary respectively lays the foundation for good governance. Section 4(8) precludes the legislature from using its law making powers to enact a law which ousts the jurisdiction of the courts or a tribunal established by law. In this regard, the legislature may not fetter the court in order to prevent a judicial investigation of its activities or motives. As was rightly observed by an expert in this area:

> "If (therefore) the legislature were to have the last word on the meaning of the Constitution, with respect to its own powers, the position will have been reached that every legislative act will have automatically to be accepted as within the Constitution and valid."[5]

The separation of the judiciary from the other two arms of government is, therefore, important not only for the protection of individual liberty but also to guarantee transparency and accountability. Reciprocally, the judiciary cannot make laws to suit itself rather, it can only interpret the law, although the jurisprudential debate that the judiciary makes laws while pretending to interpret continues.

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4. The latter is a recent addition being absent in the 1979 Constitution
5. B. O. Nwabueze: *Ideas and Facts in Constitution Making* (Spectrum Books Ltd), 1993, at pp. 190-191.

The Executive is unique in that it is the major initiator and executor of public policies. Consequently, it is the power house of governance and the most targeted in the event of criticism on the lack of good governance. The Executive's overbearing influence in the polity has attracted criticism that it stultifies or attempts to stultify the other two branches from maximising their constitutional roles. For example, there are allegations that the Executive deliberately underfunds the other two arms in a bid to undermine their effectiveness. Recently, maverick politician and Senator, Arthur Nzeribe purportedly prepared a motion to impeach the current Senate President, Evan Enwerem for several reasons, one of which is the fact that he allows the Executive to undermine the Legislature. The opportunity for abuse of power extends beyond the Executive's attempt to stultify but also to corruptly enrich its members. Consequently, demand for transparency and accountability is more related, or so it seems, to the executive than to the other two branches.

The report of the Political Bureau commissioned by the Babangida government had this to say:

> "... the chief executive [President] should be fully accountable as the Chief administrator of government even though he has to operate through a complex of individuals, councils, agencies and commissions. Because of the need for the chief executive to be legally and morally responsible for government actions, all those attached to the executive office, including the various units they head, should be regarded as assisting him in the various areas of administration especially, policy development and execution."[6]

Co-operative Government

In support of the age-long principle of separation of powers, there is another constitutional principle which is becoming increasingly popular. This is the principle of co-operative government. This evolving principle is best expressed in the South African Constitution. Under the

6. *Report of the Political Bureau*, March 1987 at p. 97.

South African Constitution[7] Chapter 3 details the principle of co-operative government. Section 41(1)(h) of the Constitution provides:

> "All spheres of government and all organs of state within each sphere must...
>
> (h) co-operate with one another in mutual trust and good faith by:
>
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;
> (iii) informing one another of, and consulting one another on matters of common interest;
> (iv) co-ordinating their actions and legislation with one another;
> (v) adhering to agreed procedures; and
> (vi) avoiding legal proceedings against one another.

This provision appeals not only to the principal organs of state but also the component units. As reflected in section 41(1)(h)(iv), the component units are expected to co-ordinate their actions and legislations with one another. In effect, one state is not expected to pass a law which will jeopardise the interest of the other. The provision is a frank reflection of the symbiotic relationship which exists amongst organs of government. It is in the stability of one that the strength of the other lies.

Earlier, under section 41(1)(c) of the same South African Constitution, organs of state are obliged to provide effective, transparent, accountable and coherent government for the Republic as a whole. In this objective, they are required to co-operate with one another as detailed above. It is suggested that any proposed amendment of the 1999 Nigerian Constitution should take account of this evolving principle of co-operative government married with the objectives of transparency, accountability and good governance.

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7. Act 108 of 1996.

Legislative Power of Investigation and Control Over Public Funds

The first constitutional mechanism for assuring transparency and accountability is the power of investigation and control over public fund. The Legislature's power to conduct investigation is associated with its power and control over public funds in part 3 of Chapter V of the Constitution. Under sections 88 and 128 of the 1999 Constitution, the National and State Houses of Assembly respectively have power to investigate or direct that an investigation be conducted into:

(a) any matter or thing with respect to which it has power to make laws and

(b) the conduct of affairs of any person, authority, ministry or government department charged, or intended to be charged, with the duty of or responsibility for –

(i) executing or administering laws enacted by the National Assembly, and

(ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly.

Exactly these same words were used under sections 82 and 120 of the 1979 Constitution.

In reserving this very important power for the legislature, the Constitution Drafting Committee of the 1979 Constitution said:

> "Legislature must inform themselves of how existing laws are administered and what defects show up on the administration of laws. When they make law, they are as a rule dealing with political, economic or social problems which exist or are likely to arise and they must be fully informed about more problems."[8]

In consequence of this understanding, the legislature possesses a *unique* tool to ensure transparency, accountability and good governance

8. *Report of Political Bureau, op. cit.*

provided it is mature and appreciates this critical role. In this regard, the legislature can summon the executive to brief it on any activity of government or it may set up in-house investigative panels or have discussions with government officials. The power of the legislature here is to investigate not to attempt to execute the laws or descend into the implementation arena. This is a common area of conflict between the executive and legislature. An associated issue in this regard is the constitutional power of the Senate to confirm appointments to some public offices. Recently, the Nigerian Senate was reported to have requested that it be consulted before the nominations were drawn. This is unnecessary as its power is to confirm or reject the list, not to have any direct input in its preparation. Again, the executive recently carried out some of its constitutional functions like the directive that certain parastatals be relocated. The National Assembly reportedly passed a resolution to reverse it. These examples show that there is need for tutelage for all actors in democratic governance and principles of separation of powers and the emerging concepts of co-operative government. Whereas it is commendable that the three arms of government interact closely for good governance, constitutionality must still be maintained while areas of friction can be dealt with through behind-the-scene political moves.

Two important areas where the legislature is generally accused of not being transparent but corrupt is in widely reported demand for gratification before their constitutional duties are carried out. Duties like approval of appropriation bills, confirmation of appointment etc. are always attended by rumours of "settlement" by the Executive before any action is carried out. The second area which seems to have been taken care of by the 1999 Constitution is in the remuneration of the members of the legislature. Section 70 of the 1999 Constitution provides that the members shall receive such salary as the Revenue Mobilisation Allocation and Fiscal Commission may decide. This committee was inaugurated about three months into the life of the present civilian government, therefore, it is not certain if it has made any determination on the salary of the legislature. If not, they may have been without remuneration for about five months. This type of situation is bound to promote corruption.

In the second republic, the legislature had the power to fix the remuneration of the President and some other republic officers but the

Constitution was silent on their own remuneration. They decided to fix their remuneration in defiance of advice from the executive. As a result of this experience, the Political Bureau recommended that another body fix their own remuneration. This is what section 70 of the 1999 Constitution takes care of.

A strong limiting factor to the potent use of the power of investigation is a corrupt legislature. Desperation to gain victory at the polls pushes members of the legislature to bribe the electorate. Once "successful" the members' moral authority to transparency and accountability naturally diminishes and their use of this legal authority to check corruption and ensure good governance is weak. Where a legislature is predominantly composed of such characters much should not be expected from them in terms of transparency or the promotion of good government. As one writer noted of the National Assembly of 1983, "a thoroughly corrupt National Assembly bereft of commitment to good governance increased the impoverishment of the masses.[9]

Public Audit and Accounts Provisions

The public audit and accounts provisions of the Constitution are important mechanisms to promote transparency, accountability and good governance. Section 85 provides that there shall be an Auditor-General of the Federation. His appointment by the President on the recommendation of the Federal Civil Service Commission is subject to the confirmation of the Senate. The Auditor-General is constitutionally obliged to report to the National Assembly on the audit of the public accounts of the federation. He has power to conduct periodic checks of government statutory corporations, commissions, authorities, agencies including the person and bodies established by Act of the National Assembly.[10] In order to guarantee his independence in the execution of this assignment the Auditor-General is protected from control or direction of any authority or person.[11] In spite of this vital accountability mechanism, the role of the Auditor-General in ensuring transparency and accountability in governance is not felt much. The

9. Ogban Ogban-Iyam "The National Assembly, Corruption and Democratisation" in *Corruption and Democratisation in Nigeria* (ed). Alex Gboyega (Frederich Ebert Foundation, 1995) at p. 29.
10. Section 85(5)
11. Section 85(6).

pervasive corruption in the polity makes nonsense of these provisions because the accounts upon which the Auditor-General relies are submitted by the various bodies he is to spot-check. These statutory bodies retain external auditors from the list prescribed by the Auditor-General but the independence of the selected external auditors is either compromised by gratification because they want to retain the clients or their report is inadequate, being based upon documents shown to them only. It would, therefore, appear that the most potent tool of the Auditor-General is the periodic check provision of section 85(4). Spot checks on government ministries and parastatals will yield more, rather than reliance upon the accounts submitted by the affected agencies.

Although the Auditor-General is obliged to submit his report to the National Assembly there is no constitutional requirement that the report should be made public. Taking a cue from s.188(3) of the South African Constitution, the Auditor-General is bound to make public all reports compiled by him. This is a vital omission in the 1999 Constitution. The report of the Auditor-General should be made public as soon as it is submitted to the National Assembly. The Assembly's debate and treatment of the report should also be made public. Similar provisions are retained for the states in sections 125 and 126 of the Constitution.

Code of Conduct

Section 172 of the 1999 Constitution obliges a person in the public service of the Federation to observe and conform to the code of conduct. Public service is widely defined in section 318 to mean service of the Federation in any capacity in respect of the government of the Federation. Implementation of the code of conduct remains the greatest challenge to transparency and accountability in Nigeria. The Fifth Schedule enumerates the code of conduct for public officers in Nigeria. The code includes avoidance of conflict between personal interest and official duty, prohibition from receiving emoluments from two public jobs, prohibition of engagement in private business, profession or trade while in full time public service, prohibition of maintaining foreign accounts by the President and his Vice, the Governors and their Deputies, Ministers, Commissioners, members of the National and State Houses of Assembly and such other public officers provided by law.

By far, the most popular and the most contentious of the code of conduct are the provision on the declaration of assets and accepting gifts or benefits in kind, respectively. Para 11 of the code of conduct obliges all public officers to declare their assets. This is in addition to specific provisions directed at members of the National Assembly.[12] State Houses of Assembly,[13] the President,[14] the Vice President,[15] Ministers,[16] Special Advisers[17] and all other presidential appointments,[18] Judicial officers.[19] The provision on declaration of assets is useful but insufficient to promote accountability and transparency because the Code of Conduct Bureau is only obliged to make declarations available for inspection by any citizen on terms and conditions as the National Assembly may describe.[20] This provision encourages the Bureau to bureaucratise the process and effectively frustrate any interested party. The Constitution ought to be amended to the effect that the declarations should be published in prominent national newspapers especially as regards the assets of senior members of the executive, the legislature and the judiciary. Such assets should also be posted in the Bureau's website on the internet which it must of necessity have. Furthermore, it should be possible to ask for information from the Bureau via e-mail and other electronic formats. To do this, the Bureau must be well funded and well staffed. The Constitution already encourages it to have offices in all states of the Federation for effective performance of its duties.

The provision on acceptance of gift and benefits otherwise popularly referred to as bribes or official corruption is a more complicated issue. Paragraph 6 of Part I of the Fifth Schedule on the Code of Conduct for Public Officers provides –

12. Section 52(1).
13. Section 94(1).
14. Section 140(1).
15. Section 142(2).
16. Section 149.
17. Section 152.
18. Section 172 and para. 11 of Part I of the Fifth Schedule.
19. Section 290.
20. Para 3(c), Part I of Third Schedule.

(1) "A public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties.

(2) For the purposes of sub-paragraph (1) of this paragraph, the receipt by a public officer of any gifts or benefits from commercial firm, business enterprise or persons who have contracts with the government shall be presumed to have been received in contravention of the said sub-paragraph unless the contrary is proved.

(3) A public officer shall only accept gifts or benefits from relatives or personal friends to such extent and on such occasions as are recognised by custom. Provided, that any gift or donation to a public officer on any public or ceremonial occasion shall be treated as a gift to the appropriate institution represented by the public officer and accordingly, the mere acceptance or receipt of any such gift shall not be treated as a contravention of this provision."

To complement the above, paragraph 8 provides that no person shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favour or the discharge in his favour of the public officers' duties, while paragraph 9 follows by prohibiting abuse of power.

These apparently salutary provisions are not new. In fact, they are lifted verbatim from the 1979 Constitution where they were an innovation. The Code of Conduct Bureau which was to enforce these ideals failed woefully under the Second Republic to do so. One of the reasons attributed to this failure was the deliberate design of the then President and the National Assembly who vacillated to activate the Bureau in order to allow them loot the treasury and recoup election expenses.[21]

21. *Report of the Political Bureau* 1987 at p. 218.

Salutary provisions such as these do not work in developing countries because corruption by its very nature is private and surreptitious. This is why the proposal of President Olusegun Obasanjo to establish an independent agency with wider powers alongside the Code of Conduct Bureau to tackle corruption is welcome. By the endemic nature of corruption, it cannot be controlled by a single agency like the Code of Conduct Bureau supported by the Code of Conduct Tribunal although the starting point for a government committed to fighting corruption using the Constitution as it is to strengthen the Bureau and the Tribunal. There is no point lamenting the ineffectiveness of the Bureau at this point because as is widely acknowledged, Nigeria is the second most corrupt country in the world, following Cameroon, therefore, anything less than radical measures would not even chip the tip of the iceberg of corruption.

I recommend that the proposal of President Obasanjo for a separate anti-corruption agency should be supported because, to quote an expert on this area:

> "endemic corruption cannot be controlled unless a system of multiple overlapping agencies of horizontal accountability is reinforced by vertical accountability – by the electorate and civil society – and external accountability in the form of rigorous donor scrutiny and political conditionality."[22]

The Code of Conduct Bureau as it is and the proposed Anti-Corruption Commission must be strengthened and insulated so that they are not subverted by the very actors they are supposed to control. To say that corruption is perhaps the greatest threat to democracy and good governance is stating the obvious. It hinders economic development, exacerbates inequality, desecrates the rule of law and stability of democratic regimes.[23] Corruption killed the second republic and subsequent military regimes. Therefore, it must be tackled if this regime is to survive.

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22. "Controlling Endemic Corruption in Nigeria," extract by Huri-Laws based on concept paper by Prof. Larry Diamond.
23. *Ibid.*

In this crusade, the office of the Attorney-General of the Federation is important. To underscore the point, the A-G is himself in the vanguard with the President. However, the A-G has adopted an unorthodox style for a Chief Law Officer, i.e. moral appeal. Unfortunately, people, least of all Nigerians, do not respond to moral appeals, but rather to incentive structures. Moral appeals by political, religious, ethnic and community leaders, civil society organisations and the international community can only be useful for a reinforcement of a broad based institutional campaign against corruption.

In particular, we must tackle frontally political and bureaucratic corruption both of which are extremely rewarding. From experience, these two go with abuse of power. Only recently, the Brigadier-General Oluwole Rotimi Panel on Federal Government Land, sitting in Lagos was informed by a business woman of how her home in Victoria Island, Lagos was demolished by the former Minister of Works and Housing, Major General Abdulkarim Adisa because she could not pay a bribe of N5 million. This is merely a recent but reported case of abuse of power by a public officer. The woman was later put in Federal Government Guest House and has been there for about four years, living at government expense!

In some countries, the mere exposure of this transaction is enough to permanently destroy General Adisa's social standing and force the present Governor of Nasarawa State who has been associated with it to resign. But in Nigeria where corruption is practically admired and rhetorically condemned, this exposure is unlikely to bring social ostracism and disgrace. Many public officers (present and past) have by abuse of power become so massively rich that they wield enormous social and political power and have become a threat to the stability of the polity. In essence, therefore, we should not rely on social disgrace in this crusade. Many corrupt Nigerians are past the feeling of shame.

Under the present socio-political and economic arrangement, many factors fuel corruption. These include needless state regulation and discretionary control of the economy in some areas such as the use of monopolies like NEPA and NITEL to provide infrastructures like eletricity and telephones respectively; the use of principles of federal character to impose mediocres and incompetents in public office; the absence of social security etc. The prevalence of incompetent and corrupt judicial officers and a generally undermined system of

administration of justice diminishes the resolve and number of people courageous enough to fight the system. The payment of low wages in the public service far below the cost of living automatically promotes official corruption.

Administrative Accountability

Another particular area of problem is administrative accountability by the representatives of the executive, i.e. the civil servants. Accountability at this level may be defined as an official's responsibility to his or her superiors for the performance of regular duties. The ultimate responsibility is that of the superiors for the performance of regular duties. It is at this level that the rot in public administration of many developing countries begin. Civil servants in Nigeria in particular do not appear to have a sense of accountability to the public. At another level, civil servants deliberately distort government policy in application where it does not favour them or they apply laws unfavourable to their interest in a manner which undermines good governance. In other countries of the world, there are public management reforms going on which are measured by service delivery. In the private sector, it is called Total Quality Management (TQM). It is based on a system of client charter and modern performance appraisal systems.[24] Where the public service does not deliver to the public its claims to serve, then it is a failure.

Role of the Civil Society

No transparency and accountability mechanism will work without a virile civil society to monitor politicians and public servants. What is needful for good governance is a responsible leadership and enlightened followership. Since politicians are accountable to the people, one of the potent tools in the hands of an enlightened electorate is the power of recall. Sections 69 and 110 deal with recall of members of National and State Houses of Assembly respectively. Section 69 provides:

24. Charles Polidano and David Hume "No Magic Wands: Accountability and Governance in Developing Countries" *Regional Dialogue*, Vol. 18, No. 2, Autumn 1997.

"A member of Senate or of the House of Representatives may be recalled as such a member if

(a) There is presented to the chairman of Independent National Electoral Commission a petition in that behalf signed by more than one-half of the persons registered to vote in that member's constituency alleging their loss of confidence in that member; and

(b) The petition is thereafter in a referendum conducted by the Independent National Electoral Commission within ninety days of the date of receipt of the petition approved by a simple majority of the votes of the persons registered to vote in that member's constituency."

The principle of recall is said to be based on the belief that the people have an idea of what they want and is "an instrument for deterring dishonourable behaviour by elected public officers for preventing disillussionment by guaranteeing the people's control over those elected to serve them, and for awakening the sensitivity of both the electorate and the elected to public, issues of common concern."[25]

It is, however, doubtful that the power of recall may be used to serve its purpose in the present polity, considering that both the citizenry and the politicians are tainted by corruption. One writer observed that:

"given that corrupt practices taint the election process in Nigeria in the demanding, giving and taking of all forms of bribes, to falsification of register etc., and given that this involves those seeking elective offices, their supporters, their agents, electoral officials, political party officials, security agents, judges, and other government officials, it is unlikely that we will not always have severely corrupt elected

25. *Report of the Political Bureau* at p. 146.

> officials because the electors were also corrupt and did not care for probity and accountability."[26]

The writer concludes:

> "...the Nigerian voter and citizen is not yet at a level of ensuring that his vote is respected and his representatives remain accountable to him. Voters' and citizens' poverty and ignorance have often been advanced to account for this state of affairs, but one suspects that the main reason is rather the corruption of the citizen/voter. Most of those who help to rig election are neither poor nor ignorant of what they do... It would appear that from the studies of the Nigerian voter, that most honest citizens are, so far unorganised, or poorly organised, to oppose malpractice in governance."[27]

An inverse use of the power of recall is playing itself out in Enugu State where a member of the House of Assembly is threatened with recall not for impropriety but for standing for integrity against the political rascality of the Governor. The Governor reportedly "engineered" the member's constituency to threaten him with recall if he does nor behave. Such frivolous use of the power of recall is exactly what the Political Bureau cautioned against.[28] What this tells us is that much cannot yet be expected from a compromised and disorganised populace but the more organised arm of the civil society i.e. the non-governmetal organisations and the press are best placed to expose corruption and abuse of power in governance.

In the heady days of late General Abacha's government many NGO's and media outfits would carefully consider and reconsider the suggestion to fight corruption. But in our new found freedom under the present civil rule we must maximise our freedom in order to stabilise the polity. NGO's and the press can mobilise the citizens from the constituencies of notably corrupt politicians in elected offices, although

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26. Ogban Ogban-Iyam, *op. cit.*
27. *Ibid.*
28. *Op. cit* p. 146.

at the risk of the constituency blindly supporting their own who has gone to bring them their share of the national cake.

That the media and NGO's can play this role is not in doubt because they stood against the despotic government of Abacha with the support of a few principled politicians now described as a rare breed or a vanishing class. This is, however, not to say that the press and the NGOs are not corrupt or susceptible to corruption. As it has been argued :

> "rather than being a force for better governance, civil society may depend on better governance... lack of accountability at the state level will be reflected in a similar lack of accountability with voluntary associations"[29]

But in the scale of things they are better placed to challenge the scourge more than politicians or the wider public. In particular, the press is obliged under section 22 of the Constitution to freely uphold the fundamental objectives and to uphold the responsibility and accountability of the government to the people. In this regard, the press needs no justiciability provision but rather courage, determination and empowerment. However, to discharge its duty, it must have free and unfettered access to information.

The most fertile environment for corruption is one of secrecy where there is no information of underhand despicable deals by public officers. Up till now, an unfortunate heritage from our colonial history enables our civil servants to envelope themselves in a cocoon of secrecy and confidentiality in the name of an Official Secret Act while raping the country blind.

Deregulation of ownership of the electronic media was a vital helpful step towards the role of the press in promoting transparency and accountability. However, the sector must not be castrated by prohibitive fees against private owners while government owned media pay pittance. Only two weeks ago, about 10 prominent private media organisations were suddenly arbitrarily taken off air by the government controlled National Broadcasting Commission on the excuse that they were owing unpaid licence fees. The regressive governments of

29. Polidano and Hulme, *op. cit*

Babangida and Abacha tried unsuccessfully to introduce newspaper registration decree as a shortcut to emasculating the print media. Such strategies must not be encouraged as it denies the press of ability and opportunity to fulfil a much needed constitutional responsibility.

If any public officer feels uncomfortable with private media, it is simply because they are unable to use them to further their own selfish ends. But this is not to say that private media are entirely selfless because experience shows us that under civil rule politicians use private media to attack and run down political opponents but the question is, if you have nothing to hide, why worry?

In concluding this segment, I wish to recommend that in addition to section 22 of the Constitution, we must have a guarantee of access to information for the press. This will assist transparency and accountability in the new polity. For example, the press should have a right to information on the true emoluments of senior public servants, the fringe benefits enjoyed by them, estacodes received for foreign travels, the basis for procurement of capital goods or the award of major contracts etc. The alternative is to leave room for hair brained and wild imaginative journalism, which ultimately does more harm than good. If transparency and accountability are to aid good governance, the press must have ready access to information. The Official Secret Act needs to be repealed or at least radically overhauled, because it does not conform with modern democracies.

Conclusion

Good governance is ultimately about achieving the ideals enumerated in the fundamental objectives and directive principles of state policy. Although some of us argue that the non-justiciability of the objectives render them impotent. This is not to say their justiciability will eliminate corruption. The need for transparency and accountability remains whether or not the objectives are justiciable.

The challenge of governance, especially in developing countries is to eliminate hindrances to achieving the objectives. Pervasive poverty, the prevalence of hangers on, institutional sycophancy and a largely uneducated followership are all contributory factors to this problem. Elite irresponsibility and selfishness completes the cycle.

Of all these factors, the most inimical is poverty. It fuels systematic corruption and is sustained by poorly paid public servants.

The first antidote is adequate pay for public servants. It is only in Nigeria that government pays its senior officers ₦2000.00 as housing allowance but readily pays the landlord ₦250,000.00 where the officer opts for official accommodation.

Secondly, government must move beyond cosmetic approach to transparency and accountability. Although the laws as they are, are inadequate they should at least be followed. Government announces recovery of huge sums of money from public officers but does not bother to prosecute them. Granted that the scourge is endemic, senior persons should at least be prosecuted as examples of their failure as leaders. All the former military administrators who have been found to steal should be jailed with their commissioners and senior directors even if the small fries are ignored. The converse is for us to acknowledge that we have decriminalised corruption.

The world cannot and will not wait for nations which are stultified in their development. A 39 year old child like Nigeria who has refused to stand up let alone walk but continues to crawl sometimes merely inching forward needs not only political and economic therapy but also spiritual therapy. This is perhaps why the Attorney General of the Federation started his crusade from that level because above all things, there must be a commitment of the people for change. A common cliche amongst us on the subject matter of constitutional development is "the problem is not with the constitution but with the operators."

Finally, there is need for massive and sustained public campaign against corruption, but this campaign should not be led by the office of the Attorney-General lest it be assumed that he has abandoned his duty to prosecute for preaching.

12

CIVIL SOCIETY AND THE CONSOLIDATION OF DEMOCRACY IN NIGERIA

by

Aaron T. Gana
(Professor of Political Science and Director, African Centre for Democratic Governance, Jos)

"Civil society does not just exist as a natural component of any society. It has to be constructed, tended, protected and transmitted from generation to generation. Otherwise it may wither and disappear."[1]

"Democracy is not merely desirable, it is necessary. It will not solve all the problems but none of the major problems can be solved without it. Democracy carries the prospects of the emancipatory struggle begun in colonial times and the possibility of Africa's deliverance from a ruling elite which has dishonoured our past and fashioned a present that promises no future except more pain and shame and even more precarious existence. Democracy will empower the ordinary people of Africa and create the political conditions for the much needed development project to take off."[2]

Introduction

The discourse on civil society is premised largely on the assumption of an existential tension between it (civil society) and the state. It is within this theoretical matrix that the role of Non-Governmental Organisations (NGOs) in the developmental discourse emerged. The challenge of

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1. Azarya, C., "Civil Society and Disengagement in Africa," in J.W. Harbeson, D. Rothchild and N. Chazan (eds.) *Civil Society and the State African*. Boulder and London: Lynne Rienner Publishers (1994).
2. Ake, C., "What is the Problem of Ethnicity in Africa" *Transformation* (1993) 22.

theory and praxis in this final phase of the confrontation between destitution and affluence is to evolve a trajectory through which the dialectics of state-civil society relations can traverse in order to avert what appears to be a collision course capable of derailing the democratic/developmental project. To assist in charting such a course is the burden of this chapter. The next section examines the debate in developmental discourses, about the rise and demise of the state in the third world and its displacement by civil society through the NGOs. Section three takes a historical swipe at the etymological and conceptual origins of civil society, while section four focuses on the birth of civil society in Africa. The fifth section focuses on the Nigerian milieu, while the sixth and final section summarises the presentation and peeps into the future of both the debate and of its object: democracy.

State-NGO Relations in Development Discourse

Prior to the first development decade declared by the United Nations, (i.e,1960) very little attention was paid to the phenomenon of associational life in Africa. Most scholarly works focussed on the binary opposites of tradition versus modernity; capitalism versus socialism; and later development versus underdevelopment, with very little said about the contents of these antinomies. Discourses on state/civil society encounters were to trail the social upheavals of the seventies, following the failure of the first UN proclaimed development decade. It was then social scientists in general and political scientists in particular, started shifting their analytical search lights to a more wholistic disentanglement of the social forces at play in the societies of Africa, Asia and Latin America. It was then civil society became a conceptual category deployed to the analysis of these societies. As an inevitable corollary, Non-Governmental Organisations received unintended attention.

At the outset of these discourses, championed by the modernisation paradigm, the state was assumed to be the guardian of the public interest. It was conceived as standing above petty squabbles among social groups, protecting the national interest.[3] This explains why

3. Sanyal, Bishwapriya "Cooperative Autonomy: The Dialectic of State - NGO Relationship in Developing Countries, "Geneva, International Labour Organisation, (1994), p. 9.

virtually every scholar, from the economist and Nobel Laureate, Arthur Lewis, to the sociologist Talcot Parsons and political scientists Lerner, Almond and Coleman, advocated-either explicitly or implicitly the necessity for a strong state. As Sanyal summarised it:

> "the consensus was that a strong state would be autonomous, meaning its power to initiate change in the economic, political and even social domain could not be curbed by any particular social group."[4]

And in its autonomy, the state would be free to pursue the "public interest" which at that point in time was economic growth.

Then came the rude awakening of the 70's when it became clear that the state in Africa and elsewhere in the "Third World" was a liability rather than an asset, nay, perhaps the greatest obstacle to development. Economic development, rather than being broad-based was confined to a few enclaves of growth, surrounded by stagnating and, in some cases, even declining productivity."[5] The picture was grimmer on the political scoreboard, as country after country in these zones of poverty succumbed to one form of authoritarianism or another. This embarrassment was well captured by Sanyal:[6]

> "Sociological, modernization had yet to create the rational man and 'the achieving society.' What's more, ethnic, religious and linguistic conflicts had become the norm in many of these countries."

Thus began the shift, theoretical and analytical, in developmental discourse, in the role assigned to NGOs in the transformation of third world societies. Yet, as Mamdani[7] points out, the discourse on state-NGO relations turned out to be a deafening echo of the old distrust of modernisation theorists for "particularisms" in "traditional society"

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4. *Ibid.*
5. Credited to Seer (1969).
6. Sanyal, *op.cit* p. 13.
7. Mamdani, M. "A Critique of the State and Civil Society Paradigm in Africanist Studies" in Mahamood Mamdani and Ernest Wamba-dia-Wamba (eds) *African Studies in Social Movements and Democracy*, (Dakar, CODESRIA, 1995) p. 612.

which they (those Mamdani classified as society-centrist theorists) caricature as pathological responses to state rationality. For while they (society-centrists) are often "celebratory of the rise of voluntary associations and NGOs, their opposites, (the state-centrists) see African society with its ensemble of "particularisms" as the root cause of the African predicament, because they feed and reproduce the clientist logic in African politics, giving rise to a pervasive corruption which undermines the institutional integrity of the African state. Described as "prebendalism"[8] among other descriptions, these binary combatants prescribe diametrically opposed solutions to the African problem. While the state-centric theorists propose reforms that would free state officials from clientist pressures through increased state autonomy, society-centrist theorists prescribe "democracy" as the antidote to clientism and the debilitating corruption it engenders. While the former "are at best lukewarm to recommendations concerning democratic reforms," the latter are most vociferous in their advocacy of "*perestroika*" in Africa being extended to "glasnost," i.e that economic restructuring must be accompanied by political reforms. "But because of their ignorance of concrete social processes and their blindness to concrete popular struggles" insists Mamdani, "their call for democracy appears more as a prescription arbitrarily forced on the object of analysis than an outcome of concrete analysis of actual social struggles."[9] This then is the ideological context within which the state-NGO dialectics are played out. And this explains, to a large extent, the ideological vacuity of civil society struggles for democracy in Africa, which Ihonvbere bemoans as "another false start"[10] in Africa.

Civil Society in Historical Perspective

For obvious reasons, the concept of civil society has made a very strong re-entry into African political discourse. Civil society together with concepts such as democratic governance or "good governance," to use a phrase which is more appealing to the technocrats of the world

8. Joseph, Richard: *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic,* New York and Cambridge, (1987) p. 17.
9. Mamdani, *loc. cit.*
10. Ihonvbere, Julius, "On the Threshold of Another False Start? A Critical Evaluation of Pro-democracy Movements in Africa" *Journal of Asian and African Studies* Vol. 33 Nos. 1-2: 125-145, (1996) p. 125.

Bank, have become such a powerful and persuasive force that has seen die-hard dictators succumb to the pressures of multi-party, competitive politics and the respect for human rights. And it should be instructive that the re-emergence of the concept has occurred at a time that the so-called "African Renaissance" and the popular agitation for the "second liberation" or the second independence movement is garnering tremendous appeal. Civil society is expected to be the vanguard in this new crusade for enduring change, if not transformation, in the African political economy.

Civil society as a concept, did not come into common usage until the eighteenth century, when a decisive shift took place.[11] Whereas pre-eighteenth century European political theory understood civil society to mean "a type of political association which placed its members under the influence of law, and ensured peaceful order and good government," eighteenth century Europe conceptualized it as the antithesis of the state. First advanced by Thomas Paine, this perspective presents civil society as a "natural condition of freedom, a legitimate arena of defence against the state."[12]

In sharp contrast to Paine was Hegel's conception which saw civil society as a "historically produced sphere of life." Standing between the partriachal family and the universal state, civil society was seen as the product of several processes, prominent among which was the spread of commodity relations and the consolidation of capitalism. Thus civil society was the product of an earlier transition, the real transition: from feudalism to capitalism. This was why both Hegel and Marx routinely equated civil society with bourgeois society. Indeed for Marx, civil society is "the ensemble of contractual relations embedded in the market, the agency defining the character of civil society being the bourgeois society." Gramsci brings the concept closer to our current usage: to him civil society is constituted by "those intermediary and autonomous organizations which function and sometimes flourish in the large and close bounded zone between organized sovereign authority and the family unit."[13]

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11. Mamdani *loc. cit* p. 603. It is said to have appeared in the vocabulary of late Sixteenth Century Europe.
12. *Ibid.*
13. Young, C. "In Search of Civil Society" in J.W. Harbeson, D. Rothchild and N. Chazan (eds), *Civil Society and the African State*, 1994.

In a more direct effort to give character to the activities of organisation alluded to by Gramsci, Bratton[14] suggests that the concept embodies a core of universal beliefs and practices about the legitimation of, and limits to, state power." What emerges is the consensus that the non-state domain and activities, especially of associational life whose goals are either to limit the power of the state or ensure autonomous reproduction of socio-economic and political life constitutes civil society. The theoretical and practical implications of these conceptions as Mamdani[15] points out, are that "neither civil society nor movements within it (including NGOs) can be idealized." Rather they must be subject to "concrete analysis to be understood, because they contain contradictory possibilities.

The essence of "civil as opposed to "political" society is not to supersede the state. Rather, it is to tame and curb the tendencies of the state which seek to take away the basic freedoms and autonomy of individuals and groups. The mission is to seek a constructive engagement with the state, and to challenge it to curb the excesses that seek to contract the social, political and cultural spaces necessary for the realization of the human essence or the dignity of the human person. As Hirschman[16] puts it, civil society excels in an environment in which discontented elements vote for the "voice" option rather than "exit." It should be added that in the final analysis, the relationship between state and civil society is a dialectical and complex one. Indeed, in the Hegelian conception of civil society, it cannot be fully autonomous of the state. And while on the one hand, it is the "soft under belly" of a capitalist society, useful for manufacturing consent and legitimacy for the state, on the other, it can provide the basis for a counter-hegemonical and even revolutionary, challenge to the state.

One tendency in the literature is to assume that the existence of civil society necessarily implies that it can serve the cause of

14. Bratton, M. "Political Liberalisation in Africa in the 1990s: Advances and Setbacks" *Economic Reform in Africa's New Era of Political Liberalisation*, Proceedings of a Workshop for SPA Donors hosted by the Agency for International Development, April 14 - 15, Washington D.C, (1994) p. 52.
15. Mamdani, *op.cit*, p. 604.
16. Hirshman A.O. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States*, Cambridge: Harvard University Press (1970).

democracy and human rights. This view which has a very strong western influence, is found particularly in Bayart's work. For him, it is

> "Society in its relation with the state... in so far as it is in confrontation with the state... the process by which society seeks to 'breach' and counteract the simultaneous 'totalisation' unleashed by the state."[17]

He would go further to suggest that "civil society exists in so far as there is self-consciousness of its existence and of its opposition to the state."

In relation to our present concern, Bayart's work is quite instructive. The only caution here is that in Africa, the relationship between civil society and democratisation is by no means automatic, making the simple dichotomy between state and civil society superfluous.[18] Although this self-consciousness of civil society and its confrontation with the state, as postulated by Bayart, is a critical element in its definition, the outcome of the encounter or engagement cannot be determined *a priori*. Outcomes are ultimately determined by the balance of social forces and other mediatory external factors. This caution is necessary for two reasons. In one sense the mere existence of associational life and non-state activities would not suggest their relevance to the democratic project as the Nigerian experience before now strongly suggests. Thus, we are warned that "the idea of civil society may be theoretically significant but empirically meaningless."[19] In another but yet related sense, civil society can be "uncivil," a point which has been strongly made by Fatton, especially under conditions of

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17. Bayart, J.F : "Civil Society in Africa" in P. Chabal (ed) *Political Domination in Africa: Reflections on the Limits of Power*, Cambridge, Cambridge University Press, (1986).
18. See for example Fatton. R : "Africa in the Age of Democratisation : Civic Limitations of Civil Society" in *African Studies Review*, Vol. 35, No. 2, September, 1995; Beckman B. "The Liberation of Civil Society : Neo-Liberal Ideology and Political Theory" in *Review of African Political Economy*, No. 58, (1993); Mamdani, *loc. cit.*
19. Harbeson, J.W. "Civil Society and Political Renaissance in Africa" in J.W. Harbeson, D. Rothchild and N. Chazaon (eds.) *Civil Society and the African State*, (1994) p. 6.

acute crisis and adjustment as found in contemporary Africa.[20] This caution is necessary, especially for African societies because of the diverse character of civil society and the different tendencies, divisions and tensions within it. As will be shown later, civil society may be expressed in ethnic and religious particularisms.

Another issue which is highlighted by this discussion is that the relationship between civil society on the one hand, and the state on the other, is never static and is subject to changes and reconstitution. Bratton,[21] thus reminds us that state and civil society maintain constantly shifting boundaries. Abutudu[22] shares a similar view in drawing a distinction between civil society "in itself" and civil society "for itself" while recognising that under specific conditions, civil society can be transformed from one level to another. In pre-Revolutionary Russia for example, it used to be said that civil society was "underdeveloped" and "gelatinous," a situation that has now been altered. In similar vein, the active mobilization of civil society in contemporary Nigeria provides evidence that for civil society as for all living organisms, "no condition is permanent."

More often than not, civil society anywhere, is a reflection in the political form, of the cleavages and conflicts of the wider society. This explains why in Africa, civil society tends to acquire particularistic character.[23] It is even more so in the context of economic crisis and adjustment. Bangura[24] and Ake[25] have shown that responses to the authoritarianism of the state thrown up by this process often take ethnic forms. Associational life is thus dominated by traditional, ascriptive and kin-based groups as people attempt to flee from the improvident and increasingly predatory state and seek refuge in kin-based or religious organisations.[26] Some in fact have

20. Fatton, *loc. cit* ; see also Gyimah - Boadi E. "Civil Society in Africa" in *Journal of Democracy*. Vol. 7 No. 2, (1996).
21. Bratton, *loc.cit.*
22. Abutudu, M.I.M. : "The State Civil Society and the Democratisation Process in Nigeria" *CODESRIA Monograph* Series I (1994).
23. Bratton, *op.cit.*
24. Bangura, Y. "Authoritarian Rule and Democracy in Africa: A Theoretical Discourse" in P. Gibbon, Y. Bangura and A. Ofstad (eds) *Authoritarianism, Democracy and Adjustment* Uppsala: The Scandinavian Institute of African Studies, (1992).
25. Ake, C. "What is the Problem of Ethnicity in Africa," *Transformation*, 22 (1993).
26. Gyimah - Boadi, *op.cit.*

argued that we cannot include ethnic and religious associations as a part of civil society because their demands are not only exclusive, but in some instances seek to negate and even annihilate the state itself. This objection is understandable because civil society is expected to lead to the emergence of civility, the notion of a common good on which there is a minimum consensus. The point, however, should be noted that the essence of civil society is to checkmate the excesses and totalising claims of the state. Ethnic and religious social movements that have proliferated were necessitated by the need to secure a social and cultural space from the post-colonial state in decay.

Finally, in the interface between civil society and the state and in advancing the struggle for democracy and human rights, there is need to draw attention to the fact that the existence and vibrancy of civic associations that are not primarily concerned with the public space have some relevance. While bearing in mind the caution that the link between civil society and the democratic agenda is not given, their existence provides a useful point of reference because ultimately, civil society has to be nurtured, as Azarya insists.[27] This task of nurturing civil society is a function of the dialectics of state-NGO relations, especially in the current conjuncture of deep seated crisis in the political economy of Africa.

The point, however, is that people-based and voluntary organisations that have emerged in reaction to the demands of daily existence, either in the form of protecting the members from the totalizing power of the state or to fill the vacuum created by its failure, or even as coping mechanisms to the fall out of the market reform programmes could serve as a school for democracy. They provide the grassroots basis for the recruitment and training of transparent and accountable leadership. For this reason, the question of internal governance of civil society organisations is as important as the objectives they seek to promote. They must therefore be nurtured to cultivate and exhibit such democratic values and culture.

For us in Nigeria, the significance of the concept can be seen in the unprecedented opportunity to redefine the public sphere as both internal and external pressures forced decisive concessions from authoritarian regimes across the continent in the form of multiparty

27. Azarya, *op.cit* p. 96.

politics and a commitment to respect human rights and the preservation of civil and political liberties for the citizens. It is not however correct to suggest that the emergence of civil society as a critical factor in the struggles for democracy and human rights in Africa is a new experience. If anything, some parts of the continent are known to have a tradition of a virile and strong civil society. In particular, her inherently diverse and pluralistic societies have made possible the flourishing of a vibrant and dynamic associational life which has often acted as a check on military rulers who on their own, often embark on programmes of transition to civil rule.[28] Yet, a major paradox of the African political economy is the prolonged and protracted character of military rule in such countries as Nigeria, Ethiopia and Sudan, to mention the most obvious ones. In other words, this strong tradition of civil society was never enough to checkmate the consistent descent into authoritarianism and praetorianism. While the sustenance of military rule itself can be attributed to the failure of civil society, it has had the adverse consequence of decimating the vestiges of civil society and indeed, undermining the basis of such associational life through the militarization of civil life.

However, in the context of a deep economic decline as has been the case since the 1980s and the implementation of the IMF/World Bank inspired orthodox adjustment programmes, there has been a resurgence of civil society and associational life. Although quite a number of these are not necessarily directly related to the democratic project, being thrown up as coping mechanisms in reaction to the hardship occasioned by Structural Adjustment Programmes (SAP), some have emerged in response to the increased authoritarian and totalizing tendencies of the state. In other words, they engage in activities that relate to the expansion of the democratic space.

A central concern of this chapter is to draw attention to the central role of civil society in the struggle for democratic governance and the expansion of the democratic space through respect for human rights and the rule of law in Nigeria. We suggest that it is the engagements of the society with the state that is the key determinant of changes that are currently taking place. It also argues that notwithstanding the transfer of state power from military to civilian

28. Young, *op.cit.*

leaders on May 29, 1999, that alone would not guarantee that gains made in the struggles for democracy and human rights can be sustained if civil society is not strategically repositioned to defend them. A possibility therefore exists of a relapse into authoritarian rule and the re-militarisation of the polity.

Although the journalistic debate on democracy in Nigeria under the Abacha dictatorship presented it as alien to the Nigerian political milieu, the fact remains that the essence of democracy cannot be particularised. Its most elementary defining characteristics include competitive elections, separation of powers, civil, political and, most recently, social and cultural rights. It has even been suggested that democracy can take cognizance of existing traditions and values in the discourse of African democracy. Nevertheless, the idea of democracy, irrespective of the type, has a universal appeal and discernible elements. It requires that people are governed on the basis of their consent and mandate which is freely given. It not only locates power in the people, but additionally implies a government, which is at once elected, responsive and accountable to the people.

Human rights on the other refer to the inalienable rights of the people, ingrained in the notion of humanity and which cannot be eroded by any government on the ground of ideology or the exigency of development as has been the case in much of post-colonial Africa. They include basic rights such as the right to life, to human dignity, to freedom of speech and association. The short hand for this is the concept of civil and political liberties. They are rights which men and women have historically fought for, against powerful and autocratic regimes and have become integral elements of human civilization. They are recognized in historic documents such as the United Nations Declaration of Universal Human Rights (1948), and more recently in the African Charter on Human and Peoples Rights

Several States, including Nigeria, have written these rights into their constitutions and are signatories to a number of international conventions on human rights. One is, however, not unmindful of what has been described by some other writers including Howard as the "culturalist" reaction to the western notions of human rights from the occidental point of view. This rejects the tendency of radical capitalism based on the market to enthrone social minimalism anchored on a "night watchman" notion of the state, possessive individualism,

exhibitionist sexuality, and the tendency to erode and undermine certain traditional values of collectivity and community. Specific provisions of the African Charter on Human and Peoples' Rights appear to defend what is perceived as African values against the West. While Article 27, Clause 1 of the Charter states that: "Every individual shall have duties towards his family and society...," Article 29, Clause I calls on individuals: "To preserve the harmonious development of the family and to work for the cohesion and development of the family; to respect his parents at all times, to maintain them in case of need."

Democracy and human rights are intricately linked to the process of democratization and attempts to institute democratic governance. For instance, the preservation of the dignity of the human person is directly implied in political liberalisation, an essential element of democratisation, which involves breaking the monopoly of the state in the public sphere. They are both implied in the crisis of the African state as well as its resolution. The absence of democracy and the respect for human rights are central to the emergence of the crisis of the post-colonial state as manifested in the 1980s and the 1990s. By the same logic, they are seen as the necessary ingredients for overcoming the crisis. It is no wonder therefore, that the World Bank, which once bank rolled and supported authoritarian regimes has become the high priest of "good governance."

The Explosion of Civil Society in Africa

Alongside the crisis of epic proportions that has confronted the post-colonial state in Africa since the beginning of the 1980s, is the exponential rise in the number and significance of Non-Governmental Organisations (NGO's). The significance of NGOs is measured by the influence they are believed to exert on the citizens of African countries through direct interventions in social and economic life. It is manifested in the sheer number and weight of "Land Rovers," and "Pajeros" that ply the double lanes of Africa's sprawling cities even as they meander through the winding footpaths of rural Africa. They are voluntary private organisations, largely non-profit making, that operate between the domain of private organisations devoted to the pursuit of profit and the formal governmental activities.

The significant point, however, is the timing of the proliferation of NGOs. It coincided with the crisis of the post-colonial state and the

successful pressure mounted on it to implement structural adjustment programmes which deliberately sought to enforce market reforms and roll back the frontiers of the state. Two issues emerge from this historical convergence which tend to give the impression that confrontation is most likely to characterize the relationship between the state and NGOs. To begin with, NGOs are perceived to fill the development vacuum created by a combination of state incapacity as a result of the crisis and the anti-developmental posture foisted by the regime of structural adjustment programs. It is, therefore, not too difficult to understand why NGOs and the state compete for aid resources. Secondly and relatedly, this fits into the project of the anti-state elements who see the state as corrupt, while private organisations are considered more efficient, less corrupt and, therefore, more appealing as instruments of development and intervention in poverty alleviation.

However, the tendency towards confrontation is but one facet and possibility in state-NGO relations. Other possibilities include cooperation, collaboration and even cooperation.[29] In the first place, NGOs form an important segment of civil society which, though in theory is expected to checkmate the totalising power of the state, cannot supplant it. It therefore can only constructively engage the state in the process of democratisation as a "partner." Secondly, although the context of structural adjustment in which NGOs have proliferated correctly attests to the role of civil society in securing some margin of freedom and autonomy for individuals and groups, the state is the ultimate guarantor of civil society. This suggests that the interface between the state and NGOs carry a number of possibilities which need to be explored in order to capture the "synergy" required to blend the comparative advantage of both.[30]

Civil Society and the Struggle for Democracy in Nigeria

The emergence of the state as a major actor in the struggle for democracy and human rights in Nigeria is part of the upsurge of new social movements and the demand for democratic change across the African continent. It is the result of a combination of external and

29. Sanyal *op.cit* p. 19.
30. *Ibid.* p. 44.

internal factors. The external factor which is considered by some as the more decisive factor has to do with the collapse of authoritarian regimes and command societies, led by the Soviet Union and other socialist regimes in Eastern Europe and their consequent replacement with more open and competitive political arrangements. The second, which is internal to Africa, but no less important, relates to pressures and resistance from below against authoritarian regimes (whether military or one-party state) in the context of a massive economic decline and the obvious failure of the modernization project.

Within Nigeria, the renewed vibrancy of associational life is tied to the fundamental changes that have taken place in the Nigerian political economy. This has to do with the era of "revisionism in the political economy," to borrow Timothy Shaw's[31] phrase. It is defined by the massive decline of the economy, and the imposition of neo-liberal market reforms, which we all know as the structural adjustment programme (SAP). The economic and political dynamics associated with SAP led to the growing authoritarianism of the state and the shrinking of democratic possibilities.

Although authoritarian rule was inherent in the different models of accumulation which existed prior to the introduction of SAP,[32] the implementation of the market reform programmes commenced in 1986 increased the authoritarian thrust of the state. This was a result of a number of factors. For example, apart from the fact that it was being implemented by a military dictatorship, SAP policies such as devaluation, removal of subsidies, currency devaluation and inflation had deleterious impact on various social groups. Accordingly, such policies elicited mass opposition, especially from the most vulnerable social groups such as workers, unemployed urban youths, and students who were most adversely affected. As expected, the state responded with repression and violence. It was worsened by the fact that the loyalty of the state implementing market reforms was to the IMF and the World Bank, rather than the people.

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31. Shaw, T. : "Revisionism in Africa Political Economy in the 1990s" in J. Nyangoro and T. Shaw (eds) *Beyond Structural Adjustment in Africa: The Political Economy of Sustainable and Democratic Development*, New York, West Port, Connecticut and London: Praeger, (1992).
32. Bangura, *op.cit.*

Additionally, the authoritarianism that inheres in SAP proved fatal for the political transition programmes, thus making nonsense of the central neo-liberal assumption that market reforms necessarily promote political liberalisation. However, in direct response to increased state repression and violence and the diminishing prospects for democratization was the re-awakening of civil society and associational life. According to Olukoshi,[33] this was responsible for the emergence of a plethora of non-professional, civil associations after 1986, dedicated to the goals of democracy, human rights, the rule of law and public accountability.

The emerging literature on civil society in Nigeria recognizes the fact that building on the tradition of vibrancy of associational life, the authoritarian postures assumed by the state in the wake of the commencement of a market-driven accumulation strategy has led to a massive re-awakening of civil society. While existing ones were sort of re-oriented in challenging the systematic closure of the social and political space, several new ones emerged driven by the same objective.[34] Civil society organisations of students, workers, academics and other professional groups such as lawyers, medical doctors and journalists had always existed and played at different times, the role of watch dog for society, either in the struggle for independence, the basic freedoms and rights of the Nigerian people or in the struggles against neo-colonial policies.

However, the period between 1986 and 1990, barely five years after the commencement of SAP, let to the emergence of a number of civic organisations such as the Civil Liberties Organisation (CLO), the Committee for the Defence of Human Rights (CDHR), Campaign for Democracy (CD), and the Constitutional Rights Project (CRP). There are new organisations of women, youths and market women committed to diverse ends. While some are involved in the broad issues of women empowerment and mobilisation, others are interested in providing coping strategies to the deleterious impact of the adjustment programme. What has happened is a very dramatic situation in which associational life of diverse nature thrives in the different sectors of the

33. Olukoshi, A. "Associational Life," in O. Oyediran *et. al, op. cit.*
34. Abutudu, *op.cit*; Olukoshi, *ibid*; CLO, *Annual Report, A CLO Report on the State of Human Rights in Nigeria*, Lagos, 1994.

Nigerian society, urban and rural. This is the sense in which we speak of the re-emergence of civil society. They seek to harness the vast energy of the Nigerian people in seeking an alternative to the inadequacy of the post-colonial state. They represent genuine movement from below, and committed in varying degrees to the reconstitution of the public sphere. And they fit perfectly well into the search for democracy and development from below. Their new perspective of participatory development and the bottom-top approach tend to capture the return of associational life.

Abutudu[35] has attempted a typology of existing organisations of civil society that are of relevance in the current debate on democratisation and human rights in Nigeria. He identified five broad categories, as follows; (i) professional associations, labour and students; (ii) human rights groups; (iii) primordial groups; (iv) business class; and (v) mutual support and voluntary associations. It has been suggested with specific reference to human rights and pro-democracy associations for example, that the form of challenge they pose to the state, and the specific interests/positions they push present alternatives to the political transition programme initiated by the state. Similarly, students and labour movements have played outstanding roles in checkmating unpopular policies of the state, and building coalitions on broad questions of democracy and human rights. This was quite evident in their response to the annulment of the June 12, 1993 elections.

However, two important issues are raised in the discourse of civil society and it relates to the struggles for democracy and human rights. The first relates to the unevenness in the spread, influence and impact of civil society. While one can see the array of associational life in the south-west axis of the country, the influence diminishes as one moves into the hinterland. This may have to do with the uneven incorporation of the country into the colonial modernization project and the uneven access to western education among the various Nigerian Communities. This is an issue that has to be confronted in our search for a new regime committed to democracy and human rights.

The second has to with what is known as the inability of civil society to articulate a common project in relation to the state leading

35. Abutudu, *ibid.*

some analysts to conclude that the absence of organizational principle implies the non-existence of civil society.[36] Here, we are confronted with the problems of cleavages and contradictory tendencies within the Nigerian social formation. As can be seen from the activities of the Movement for the Survival of the Ogoni People (MOSOP), the Ijaw Youth Congress, the Middle Belt Forum, the Committee of Northern Elders, Afenifere and Ndigbo Eze/Ohana Eze, these tend to articulate different interests which are sometimes difficult to harmonize. Or if one were to recall the infamous role of "the Association for Better Nigeria" led by Arthur Nzeribe and "Youths Earnestly Ask for Abacha" (YEAA) in mobilising against the democratic project, one will agree no less with Marx that the sphere of civil society is the sphere of egoism and self-interest. Again, what this calls attention to is the need for those organisations of civil society committed to democracy and human rights to forge a common front and alliance.

As we grapple with our fledging democratic structures and the defence of civic and political liberties, civil society organisations should embark on a definite strategy of co-ordination at national, regional and zonal levels based on the articulation of a uniform and coherent project in terms of how to relate to the state. In doing so, past experiences must be reviewed. The lessons from such experiences must be internalised as the construction of a genuine democratic order will commence only at the end of what may be termed, "the military-inspired transition programme." There is also need for intensive dialogue and consensus building on basic national issues, especially issues relating to the national question because they are flash points of ethnic and regional particularisms.

It should be an important item on the agenda for civil society organisations to draw up an elaborate programme of mass education of the Nigerian people concerning broad issues of democracy and defence of human rights. Such programmes should target marginalised and excluded social groups such as women and youths who have become apathetic because of previous experiences. Women, youths and workers for instance, should receive particular attention because bringing their issues to the forefront of the political agenda has the immediate effect of raising the democratic content of public discourses.

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36. *Ibid.*

The content should be how they can be mobilised for meaningful participation as key players, instead of limiting their role to periodic voting and merely conferring legitimacy on the electoral process. It is only these groups that can genuinely defend democracy and human rights if they realise the benefits in concrete terms.

There are specific civil society organisations that are most easily amenable to the struggles for democracy and human rights. Associational life of workers, professionals such as those of lawyers and academics, student and religious organisations are good examples. There is ample evidence of this even though the Churches and mosques tend to lag behind in the Nigerian case. Church organisations for example, have a strategic position that cannot be ignored, as the experiences of Zambia, South Africa and Kenya tend to show. They can sponsor coalition building because they do not only have the resources, but enjoy memberships that cut across class and ethnic identities. They also tend to favour neutral mediation functions among contending factions while avoiding partisan identification for fear of dividing their congregations. Furthermore, several of them have experience in promoting community-based planning as a result of the ideological shift in the developmentalist discourse which forced the contraction of the public domain.[37]

Conclusion

That the crisis of development in post-colonial Africa has produced both intellectual and praxeological responses of significance is undeniable. On the former, both scholarly and journalistic debates and commentaries in academic journals, magazines and newspapers rejecting the authoritarian model of development, no matter how benevolent, have been inundating. At the level of praxis, the sovereign national conference mode for dethroning military and single party dictatorships have become part of Africa's legacy. This is primarily the legacy bequeathed by civil society organisations, particularly those whose mission are decidedly political. But there is no room for assigning primacy to NGO's whose mission is either the political or economic empowerment of civil society, for neither would have

37. Azarya, *op.cit.*

achieved the level of success in forcing the retreat of the authoritarian state in Africa.

The critical issue in the struggle to expand the political space is the conception of the democratic order for which civil society is engaged in a permanent engagement with the state. What kind of democracy is civil society in Nigeria struggling to enthrone? The truth is that very little attention is being paid to the form and content of the democratic order for which human rights and democracy movements have taken up arms with Africa's dictators. The character of Nigeria's emerging democracy is instructive in this respect. The tragedy of Nigeria's "transition without end" of the protracted period of military rule was the recycling of not only the discredited elements of the political class, but, even more dangerous to the survival of civil society was the strategic repositioning of elements who provided succour for Nigeria's most brutal military dictators. That these new men now control the critical institution-the legislature-even in a liberal democratic order, is cause for alarm. Not even the opportunists among the political class who joined democracy organisations to terminate the Abacha terror machine have the slightest chance of advancing the cause for which they risked their lives, if at all they understood the issues at stake. What this suggests is the possibility that civil society organisations in Africa generally and in Nigeria in particular, are yet to be intellectually empowered to articulate a vision of democracy consistent with the yearnings of the masses of poverty-stricken children, women and men that constitute civil society.

There are strong indications that we are engaged in a transition from authoritarian rule to one based on democratic governance, commitment to human rights and the rule of law. Without democracy, there can be neither peace nor development. The fundamental question is, therefore, how the gains of democracy can be sustained and the culture of democratic governance deepened. Here lies the importance of civil society, especially in the context in which we are confronted with a political class that has neither internalised the values of democracy nor taken the democratic project seriously. It is a class riddled with internal contradictions and is, therefore, organisationally weak, while opportunism and the desire to win power at all cost have remained its hallmark.

However, for civil society, it must take the issues of organisation, capacity building and the evolution of a common project very seriously. In doing so, it must equally seek to come to terms with the challenge of transiting from operating in an environment marked by despotism and authoritarianism to one in which political liberalisation has been enthroned. This necessarily involves a programme of principled and constructive engagement with the state to avoid co-optation into the state project, while building strategic alliance with democratic forces in the political society and the military to defend and sustain democracy.

13

THE ROLE OF POLITICAL PARTIES IN A PRESIDENTIAL SYSTEM

by

Kyari Tijani
(Director, Centre for Tran-Saharan Studies (CTSS), University of Maiduguri)

Introduction

Maurice Duverger had defined political parties as "organized opinion." By this he means the members of a political party are psychologically and ideologically linked from top to bottom, laterally and vertically; from followership to leadership-and vice-versa. They empathise with each other.

Being a meticulous political scientist, Duverger, however, has cautioned that this is not in fact correct. He has observed for instance, that the party "inside" parliament is not exactly the same as the party "outside" parliament. He further points out that there is indeed more in common between elected representatives of the party in power and of the opposition parties inside parliament, than is the case between these members and the membership of their respective parties "outside" parliament, as these parliamentarians go about wheeling and dealing with the executive over bills to be passed, budgets to be approved and projects to be funded. We in Nigeria need not be told that "lobbying" has such a special meaning in Nigeria!

Even as Duverger correctly reverses himself about political parties being "organized opinion," let us not forget that he is in fact talking of political parties which arose from the searing conditions of the Industrial Revolution in Europe; a Europe which, as Olusanya has argued, has been able to tear the blinkers and clear the cob-webs off peoples eyes and minds, as a result of the exhilarating experiences of the Enlightenment Years; a Europe in which people, from their respective experiences and considerations of their circumstances and life-chances, have learnt to take reasonable and meaningful stands on

issues; have learnt to make rational choices and decisions, as we would say in the jargon of political science.

In Nigeria, reality reveals quite a different picture. This is not to say that the Nigerian masses have not learnt to make rational decisions and rational choices. Far from it. If nothing else, the Nigerian masses are well-known for their gusto and ebullience in all matters, especially those that are political. Why they make the choices they make ranging from complete apathy to heart-breaking anarchy, can, in most cases be traced to this perception and conception of rationality. Just to refer to two galling examples. The choice of the Northern leaders in 1953 for the postponement of independence from "immediately" to "as soon as practicable," was not because of irrationality or lack of political awareness. Similarly, the refusal of most Northerners to lionise Ken Saro Wiwa and/or Moshood Abiola for the June 12, 1993 Election is not because northerners are dumb or political nit-wits. Indeed, these positions are not even necessarily structured into North-South positions. It is therefore, both instructive and imperative for Nigerians to read the minds of one another positively, with mutual respect, if we are to avoid horrendous mistakes and unnecessary skirmishes for the future.

All this is in fact to say that the emergence of political parties, their relations to their respective constituencies, and their role in the polity in Nigeria are very complex matters. Suffice it to say that except for only a few of the political parties, current or extinct, most of the parties are the creation of those call "combination number" politicians-politicians, who would want to find the "right numbers" so that the doors of the State House will open and they can get in and loot!

Having said so, what then is the role of the political parties in the presidential system of governance which Nigeria has tried to emulate since its adoption in the historic Constitution of 1979?

Some Conceptual and Theoretical Issues

First and foremost, we must accept that political parties are a necessary attribute of the democratic process. They are the vehicles that convert democratic aspirations into concrete objectives. We are assuming here that there is no argument that we all "like" democracy. David Held has spoken of the ubiquitousness and acceptability of democracy, when he said:

> ...nearly everyone today says they are democrats no matter whether their views are on the left, centre or right... Political regimes of all kinds in, for instance, Western Europe, the Eastern bloc and Latin America claim to be democracies. Yet what each of these regimes says and does is radically different.

If we are all democrats, then how do we relate to the political process in our country so that our particular view of democracy prevails, and our respective goals and aspirations are actualised?

Here, the concept of civil society is particularly important. Contrary to popular belief in Nigeria, civil society does not simply mean the non-military in society. In other words, it does not mean the "civilian" or more precisely in Nigerian military parlance, "bloody civilians." In process terms, John W. Harbesan defines civil society as "those working understanding concerning the basic rules of the political game or structure of the state [which] emerge from within society and the economy at large," as a society grapples with the problems of its existence. Differing from Hegel, Harbeson states categorically that, "... in substantive terms, civil society typically refers to the points of agreement on what those working rules should be."

In practical terms, Harbeson recognises as "civil society" only that part of the population who, as "individuals, groups and associations" form "part of the political order," and only " to the extent that they seek to participate in those processes" which make "binding choices in social values." In other words, those who consciously and effectively seek to determine the outcome of political contests as policies worth their own while.

By Harbeson's definition, the great world of our alienated masses who have learnt to distrust politicians and who have come to shun politics, are not, therefore, categorised as being within civil society. Those that are, use political parties as the vehicles par excellence for their action.

Thus stated, the very fact that in Nigeria even the entire political class constitutes a very "small" minority is a problem for the legitimacy of governments and relevance of politics, as is known to western liberal democracy.

Despite this problematic, from the point of view of Harbeson, it is the existence and effective functioning of this "civil society" in a polity that makes the critical difference between legitimate rule and rampaging dictatorship. For, as he has rightly pointed out, "multiparty elections do not by themselves produce or sustain democracy." They do not "*institutionalise* broad participation," and in any case, governing elites in Sub-Saharan Africa have been known to have used the process of multiparty election as "one-time-only vehicles through which [they] consolidate their domestic hegemony," by remorselessly dismantling afterwards all other sources of institutionalising liberal democracy until in effect full-blown dictatorship is established in the land. No doubt, in this regard, the Bandas, Kaundas and Biyas in Africa readily come to mind!

This conception of civil society, no doubt readily distinguishes for us the separateness and interdependency between civil society and the state. And for Harbeson, the state is the *de facto* binding organising principle of the political order.

Harbeson says he would follow Eastor by defining "political order" as the principles and processes by which social values are " authoritatively allocated in society," and it is within this framework that "individuals, groups and associations, *to the extent of their participation and effectiveness*, obtain recognition as civil society."

How then, do all these relate to the Nigerian reality, and in particular, help to asses the role of political parties in the presidential system in Nigeria?

Development of Political Parties in Nigeria

Until quite recently, political parties in Nigeria very much reflected Nigerian culture and history. It could hardly be otherwise. For instance, as was indeed the case with the wider world, the emergence of the Nigerian state from the previously established sacred world of Islam and other religious and cultural influences, could not but have influenced political party formation. So also the impact of European influence, and ultimately colonialism, which in the case of Nigeria, seeped slowly and with differing impact from South to North. Indeed, the South and North did not technically become one country until the British colonial power amalgamated them in 1914! An act which to date continue to be decried by some as "the mistake of 1914!" The

emergence of political parties in Nigeria up to a certain stage in time "did not destroy, but only upstaged" these localisms.

For this reason, and especially consequent upon constitutional developments in Nigeria, it is true to say that up to, perhaps the Second Republic (1979-1983), of Nigerian's existence, political parties in Nigeria had taken a regional and ethnic dimension. It is common knowledge that the political parties of the First Republic (1960-1966) were very much so (except perhaps for the Northern Elements Progressive Union-NEPU, which had a distinctly *class* orientation. It was the party for the "talakawas"). In the Second Republic, perhaps driven more by the 1979 "presidential" Constitution than the statutory requirement for national "geographical spread," the political parties began to take a more national outlook. The Great Nigeria Peoples Party (GNPP), founded by a multimillionaire businessman from Borno, the late Alhaji Waziri Ibrahim, had a far wider national appeal and geographical spread, than has been generally acknowledged.

The military interregnum of thirteen years (1966-1979) had also unified the ruling class of Nigeria across ethnic and regional lines. The National Party of Nigeria (NPN) of the Second Republic, for instance, was truly a national party, as far as the composition of its leadership was concerned. The dispensation in the "aborted" Third Republic (1991-1993) was, however, quite deliberately pan-Nigerian, as it was so conceived and created by its architect, the military president. General Ibrahim Badamosi Babangida. He decreed only two political parties, the National Republican Convention (N.R.C) and the Social Democratic Party (S.D.P), respectively. Each of them being, according to General Babangida, ideologically, "a Little to the Right (the NRC) and a Little to the left, (the S.D.P); Nigerians were to join any of the two parties according to their ideological inclinations.

For many reasons, this was quite novel and indeed good, if only because it gave the opportunity to some radical and progressive elements to penetrate at least one of the two parties, the S.D.P, and effect some movement into the otherwise stagnant nature of mainstream politics in Nigeria. Before then, parties were created and controlled entirely by "the rich." In that era, the political parties did not fare much better as the N.R.C. and S. D. P, were still controlled by the rich. Under that dispensation, the military cheated Nigerians by

allowing such persons to use public funds which really belonged to the general populace to effect such control.

The point being made here is that increasingly in Nigeria, and especially now, political parties, far from articulating and aggregating the interests of the generality of their constituents with a view to "authoritatively allocating social value," in favour of this same generality, are very much the vehicles of elite self aggrandizement. An observer of the current dispensation, Muhamud Tukur, captured the scene vividly. Asked by a journalist whether the opposition parties were playing their role, he replied:

> As of now there *(sic)* do not seem to be... not even sure that parties exist. What we have in our politics is essentially groups and individuals seeking patronage, contracts and office.

While this is from an observer, an insider within the President's own party was able to put the point even more starkly. In the feature programme of the Federal Radio Kaduna (English Service) entitled, *The Mandate*, broadcast on the 23rd of February, 1999, the newly elected Chairman of the Peoples Democratic Party (PDP) in Kwara State, in a speech delivered after he had been elected, bluntly stated that his mission would be to unify the various warring factions within their "great party," and then see to it that members got their due reward for their loyalty and contribution to the party. Nothing was said about the due reward of the electorate from this critically placed chieftain of the "great party," much less the development and future prospects of Nigeria.

Here then lies the inescapable distinguishing features between Maurice Duvergers European political parties which he comfortably describes as "organized opinion," and our own contraptions which have been the governing elite's vehicles for self-aggrandizement. Again, exceptions can be made of one or two of the parties that had featured in the 1998/99 experiment, notably the Peoples Redemption Party (PRP) of Alhaji Balarabe Musa and what was the Movement for Democracy and Justice of Alhaji M.D. Yusufu (MDJ), in the run-off to the present dispensation.

The Imperatives of the Presidential System and Political Parties in Nigeria

Nigeria of course inherited the Westminster Parliamentary System from the British, when she gained her Independence on October 1st, 1960. She completely cut her umbilical cord from Britain when she became a Republic in 1963. With the coming into force of the 1979 Constitution, the break with the British parliamentary system took a definitive turn, when Nigeria hoisted upon itself the presidential system, very much like the one practised in the United States of America, with an Executive President, a bicameral National Assembly comprising an Upper House (Senate) and the Lower House (House of Representatives), and an "independent" judiciary.

The presidential system became a model of choice for Nigeria in 1979 because, with so many centrifugal and centripetal forces to contend with within its multi-ethnic, multi-religious and regional diversities, it was imperative that a strong focal point must exist at the centre to ensure cohesion and stability. It is in this respect that the President of the United States of America could be said to have almost imperial powers. In a situation like this the most effective counterbalance apart from the Congress (i.e. the legislature) and the judiciary, is the political party which transmitted the President into his Executive Office.

Here it is significant that the far-sighted but lamentably short-lived head of State, Brigadier-General Murtala Ramat Muhammad (who died on the 13th of February 1976), who inaugurated the Constitution Drafting Committee (CDC) that gave Nigeria its most acceptable constitution so far, i.e. the 1979 Constitution, recognized the importance of political parties in the democratic process. After dismissing the political parties that had hitherto operated in the Nigerian democratic space as nothing more than "purposeless armies organized for fighting election," General Murtala specifically charged the CDC to deliberate and recommend for inclusion in Nigeria's new constitution genuine and truly national parties" that could eliminate, or at least minimise, any baneful practices," of the past party powers.

Accordingly, the Nigerian Constitution of 1979, in its sections 201-209 saw political parties as "the instrument of state policy" and made it incumbent upon political parties, their membership and their

operators, that they concern themselves with actualising the fundamental objectives and Directive Principles of State Policy (Sections 13-22) of the Constitution, in their functioning.

The 1999 Constitution, in its sections 221-229, mentions political parties, but in more negative and technical ways than the 1979 Constitution had done, in its intentions to provide for public service and public welfare. The 1999 Constitution only provides in its section 224 (Aims and Objectives of Political Parties), that party programmes as well as aims and objectives "shall conform with the provisions of Chapter II of this Constitution."

Nowhere has it quite categorically mentioned how, through the mechanisms of the political party, the electorate can enforce this important directive, and/or also deal with a dishonest president, governor, or a recalcitrant assembly.

In the face of what is happening daily in the country and the discordant tunes that emmanate from within each of the political parties including the ruling Peoples Democratic Party (PDP), there is need for those at the helm of affairs to carry the populace along. This would ensure that there is a serious commitment by all to such programmes of the present government as the anti-corruption crusade which fits in really with the aforementioned Fundamental Objectives and Directive Principles of State Policy.

Concluding Remarks

The most important point to note is that Nigerian politicians never seem to bring to the platform of political parties, issues they consider critical for the future of this great country, Nigeria. For instance, if some people had felt so strongly that Nigeria, as we know it, should be "restructured," why did they not create a platform and campaign openly for it, especially as some of us do feel that restructuring *via* a Sovereign National Conference, etc, is just euphemism for breaking up the country? They would have got their match in the open arena of pan-Nigerian political discourse and if they won "fair and square," it is possible they could have had their way!

Having said that, let me conclude by saying that even if the present political parties are not constituted to be, as Maurice Duverger

suggests, they ought, however, to function as "organised opinion." Nigerians would rather live with them than with a military dictatorship that would work with a bunch of faceless and faithless technocrats.

14
THE CONSTITUTION AND NATIONAL SECURITY

by

Alaba Ogunsanwo
(Department of Political Science,
University of Lagos)

"The security and welfare of the people shall be the primary purpose of government." (Section 14(2)(b) of the 1999 Constitution of the Federal Republic of Nigeria).

"Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria." (Section 2(1) 1999 Constitution).

"The Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution." (Section 1(2) 1999 Constitution).

The above quotations represent an appropriate point of departure for our discussion of the subject of national security and the 1999 Constitution of the Federal Republic of Nigeria. Being a derivative of the 1979 Constitution which resulted from a public debate and the deliberations of the Constituent Assembly, it is clear to us what the intendment of the writers of the Constitution was on the issue of national security. It is a person centred expression which is reinforced by the assertion in section 14(2)(a) that: "Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority." The tree of the indivisibility and indissolubility of our country has already been watered by the blood and sweat of our compatriots in a ruinous civil war and there are

sections of the Constitution designed to ensure that governmental actions promote commitment and loyalty to the country.[1]

State power is shared between the executive, legislature and the judiciary with individuals placed temporarily in positions of decision making in relation to the allocation of resources and adjudication between institutions and citizens. Since the Constitution ties the concept of security directly to the people's welfare and the existence of the country, those who temporarily occupy positions of authority should always be mindful of this fact which limits what may not and should not be regarded as violation of national security.

Private insults to power holders and government functionaries and their individual interactions with citizens, should not be seen as constituting threats to national security leading to drastic actions against Nigerian citizens. Where an elected politician brings with him into his office the liabilities of a crooked business background, he should not view the concerns of his previous business collaborators as constituting threats to state security requiring the utilisation of the state security apparatus against them.

State structures and institution which are germane to national security, public order and our existence as a country, include the Armed Forces of Nigeria;[2] the Nigeria Police Force;[3] the National Defence Council and the National Security Council.[4] The armed forces have the primary responsibility of defending Nigeria against external aggression, preserving the nation's territorial integrity and participating in the maintenance of internal order when called upon by the civil authorities to do so.

As Commander in Chief of the armed forces, the President constitutionally controls the operational use of the armed forces in and outside Nigeria except that the consent of the National Assembly is required before a declaration of war, a legal act, can be undertaken.[5]

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1. See generally, section 14(3) and (4) (on Federal Character), sections 17 and 23 (on Social Justice), section 42 (on Non-Discrimination) and section 17 (on Fair and Equitable Provision of Amenities).
2. Provided for in sections 217 - 220 of the 1999 Constitution.
3. See sections 214 - 216 of the 1999 Constitution
4. See the Third Schedule Parts G and K respectively.
5. Section 5(4)(a) of the 1999 Constitution.

The approval of the Senate is also required in case our forces are to engage in combat duty abroad.[6]

The constitutional requirement for the involvement of the legislature when our troops have to be deployed on combat duty outside Nigeria, is designed to ensure that no reckless or ill advised President commits Nigeria and the Nigerian people to war without the elected representatives being given the opportunity to debate the issues involved and being convinced that the national interest would be served by the action contemplated. This is not to say that the legislators cannot on some occasions be more hawkish than a Commander in chief who should have access to more realistic facts.

Ours being a federal system with the executive at the state level having full autonomy, the probability of the existence of a threat from the state to the federal government is taken care of in section 5 (3)(a) and (c) of the Constitution which prohibits the impeding or prejudicing by the state of the exercise of the powers of the federation or endangering the continuance of federal government in Nigerian. Based on our historical experience however, it is clear that the framers of the Constitution have ensured that mere fighting between legislators in a state House of Assembly will not lead to a declaration of emergency in that state with the consequent take over of state powers by the Federal Government. Section 305 in its six subsections, deals with the procedure for the declaration of a state of emergency in Nigeria as a whole or in any part of the country. It will be recalled that on the 29th of May, 1962, the then Governor General of the Federation, Dr. Nnamdi Azikiwe, acting on the advice of the Council of Ministers and utilising the powers conferred on him by the Emergency Powers Act of 1961 made thirteen Emergency Powers Regulations for the Western Region of Nigeria to be followed within a few days and weeks by six other binding Regulations dealing with such items as detention of persons, billeting, curfew, advisory tribunal, essential services, misleading reports, processions and meetings, reporting of persons, restriction orders, control of arms and explosives, etc.

At the time that the state of emergency was declared and the regulations made in May 1962, the situation on the ground in Western Nigeria was not five percent as bad as what was to occur in the same

6. Section 5(4)(b), *ibid.*

Region in 1965 when no state of emergency was actually declared by the Federal Government in a situation in which law and order had completely broken down following the massively rigged elections by the political party in power in that region. The consequences of federal inaction at that time are now part of our historical political experience.

Where what is at stake is a disaster or natural calamity affecting part of the country, a declaration of a state of emergency will not be viewed as a political act directed against the government of the state concerned. Indeed such Presidential action will be welcomed as it is supposed to bring with it mobilisation of federal relief resources. This is an area, which still needs to be developed in the country.

Our acceptance of the broad definition of security implies that it is not only overt and direct violent threats to the security of the state that must be considered important. If natural calamities and disasters are not properly handled in a way that conveys the impression that government cares, the affected communities may begin to lose their loyalty to the country and may be willing to look the other way when others embark on acts inimical to state security. The people must be given reason to feel obligated to the state.

Sections 214 to 216 and Schedule Three Parts 1 Paragraphs L and M of the Constitution principally deal with the Nigeria Police Force - the primary state instrument for maintaining public order and ensuring the safety of the citizenry. That the Police force is able to maintain public order and ensure safety in any country is a result of many factors one of which is the general law-abiding nature and comportment of the overwhelming majority of the population most of the time. This leaves the police with having to cope with the minority of the population, which chooses the path of crime. This is an important but often-overlooked fact notwithstanding the ratio of the number of policemen/woman to the population accepted internationally as 1:400.

However, when portions of the police force become partners in crime, the performance of their primary function also becomes seriously compromised. The structure, organisation, composition, training, equipping, deployment and utilisation of the police force as well as the all important available remuneration and welfare package can positively or negatively impact on what the police is able to do for the community of which it is a part. We need not go over the history of policing in this country to see whether or not the provisions of the 1999

Constitution are adequate for the task that needs to be performed. Current public attention is focused on the so called constitutional inability of the State Governors to give binding instruction to the State Commissioners of Police, a situation which if true, is a negation of very the expression that each State Governor is the chief security officer in his state.

Section 215(4) of the Constitution states as follows:

> "Subject to the provisions of this section, the Governor of a State or such Commissioner of the Government of the State as he may authorise in that behalf, may give to the Commissioner of Police of that state such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary, and the Commissioner of Police shall comply with those directions or cause them to be complied with."

This is what the relationship should be between the Governor and the Commissioner of Police. It is expected that there is normal consultation on public safety and matters of public order between the State Governor and the Police Commissioner either on a daily basis or as frequently as the Governor or his designated Commissioner of government would wish. Instructions are passed on during such meetings and are routinely carried out. Our political history however shows that the normal *modus operandi* can and does break down at times when the Commissioner of police elects to request the Governor to refer the matter in question to the President or the Minister of the Government of the Federation as he considers the case to be sensitive.

In so doing, he makes use of the proviso contained in subsection 4 of section 215 of the 1999 Constitution. This is a carry over from the previous Constitutions of the country which current opinion now believes is a negation of the principle of federalism. One vividly recalls a very serious occasion during the Second Republic when the Commissioner of Police in charge of Kano State (which was then being governed by a PRP elected government, a party different from that in control of the central government) declined to carry out the instruction of Governor Abubakar Rimi with the consequent breakdown of public order and loss of life and property. There was also the recent case of

the Shagamu riots in Ogun State during which the Governor had to seek clearance from Abuja before decisive police action was taken. In each case, a competent and confident Commissioner of Police who knows his onions and is alert to his primary responsibility for public order and public safety would not need to wait for the governor's instructions before acting decisively in the right direction. Yes of course there may be the need to call for reinforcement from outside the state but the Police Commissioner should set the machinery in motion instead of giving the impression of reluctance to act or lack of knowledge of what to do.

As a side comment, we can go back to 1965 after the massively rigged election in the Western Region when law and order completely broke down. The extremely cordial political relationship between the regional government headed by Chief S. L. Akintola and the Federal Government of Sir Abubakar Tafawa Balewa, in addition to the existence of the Local Government police which the premier could control at will, did not place him and his government in a position of being able to control the polymorphous violence which broke out in the region. There is therefore more to policing a society than the simple constitutional provision contained in a country's fundamental law.

In the United States, there is police presence or formation at every level of government. There are even campus police in many Universities across the country whose duty is clear to everybody. There is, in addition, the National Guard present in every state under the direct control of the President of the United States which can be called out to enforce federal law in the rare event of the state police being used by the governor to undermine the due process of law or frustrate implementation or execution of the federal courts. Each country has its own historical experience, which shapes the establishment and formation of its police force.

The Nigerian people want to live in an environment that is safe in which they do not have to take the law into their hands by resorting to mob action or justice on suspected thieves and armed robbers. They want to move freely without the fear of not returning home alive as a result of uncontrolled banditry. Those who can build their own houses do not wish to build prison walls around the abode to keep armed robbers out. They would, in the majority, wish to be law abiding if only the results of such behaviour are guaranteed to be positive.

Effective policing alone will however not achieve the above. Indeed the police can achieve nothing without the co-operation of the people. As the Constitution itself says, the security and welfare of the people must be the primary purpose of government and our people must see that a holistic approach is being adopted and applied to matters affecting them before we can begin to see the light at the end of the tunnel a light that is not that of the oncoming train but of a brighter future full of hope. A hungry, brutalised, jobless and unhappy populace can never be easy to govern or police. We must look beyond simply tinkering with the provisions of the Constitution just for the sake of changing things. We need a meaningful devolution of power, responsibilities and resources to the lower levels of government to enable autonomous areas of generating prosperity to develop.

15

NOTES ON THE 1999 CONSTITUTION AND NATIONAL SECURITY

by

Tunji Olagunju
(Political Scientist, Nigerian High Commissioner to the Republic of South Africa)

Introduction

The 1999 Constitution has become the topic of the moment, partly in reaction to the way in which it was promulgated and partly as a reaction to military rule, particularly in that regime's last few years. What cannot be doubted is that the Constitution cannot, and it will never be a document that can satisfy all interests and viewpoints; because of the divergence of opinions as to where Nigeria should be today, the nature and character of military rule and its effects on civil society. The point to stress is that the Constitution was born in an era of crises - both political and socio-economic - and in a period in which constitutional engineering has become suspect in the frame of "a hidden agenda" in the governance of the country. It was put in place at a time when the citizens were cynical, skeptical, less free and greatly confused about the persistence and stability of the nation-state and management of its institutions. The "centre" then was feared not to be able to continue to hold together.[1]

Democracy and security can be considered as two sides of the same coin. On the one hand, democracy is about the rights of the people to vote and be voted for as well as to seek and obtain information, and to disseminate such accordingly. In a liberal democratic system, democracy is about liberty and freedom; about rights and responsibilities as well as obligations. It is also about legal and democratic mechanisms for directing and regulating institutions of

1. This state of affairs has been captured by the ill-defined concept of "marginalisation" which has as many meanings as there are views on the workings of the Nigerian federal construct.

the state. It is about the rule of law and due process in the determination of public affairs. On the other hand, national security is about secrecy, it is about those things government does, even if covertly, in order to protect and secure the interests of the citizens.[2] It is, therefore, critical for the state in the sense of who determines and defines these interests and the threats to them; and on whose behalf the state officials act. What ideological biases inform such definitions and threats? In attempting to answer these questions, it is important to bear in mind that the common link between democracy and national security is the citizen. He is the one that votes and is voted for. He is the one whose ultimate happiness is the responsibility of the state and its security officials. He is the one whose activities – private or public – are being ordered and managed in order to ensure peace and stability. It is his affairs that are being discussed, regulated and adjudicated upon. In short, national security and democracy is about the citizen and how his rights and responsibilities are defined and codified – either by the executive and representative institutions or by the judiciary. Thus, while the citizen is the link between democracy and national security, the Constitution is the document which stipulates the contract between the state and the citizen. Put differently, there exists a reciprocal relationship between the state and its citizens; one in which the state symbolises certain ideas and provides certain material benefits for which, in exchange; the citizens give their loyalty and service. In the same vein, the voters act as the bridge between the Constitution and National Security; the regulation and protection of their affairs being their subject matter.[3]

The Constitution is a social contract document between the government and the people, which spells out the duties and obligations of the parties and their responsibilities. Hence, the Constitution can be viewed as the organic legal foundation of the nation-state. It defines the powers, delegated by the people, to the various arms of government (that is, legislature, judiciary and the executive) as well as the principles and values upon which governance is to be based. Thus, in our practice of democracy, while the Constitution, has been intended to

2. See Ann Rogers, *Secrecy and Power in the British State* (London, Pluto Press, 1997).
3. Buzan, B. *People, States and Fear* 2nd edition, (London, 1991).

be increasingly utilised to build bridges among the citizen and between the people and the State, the experience over the years has tended to indicate the need to draw a distinction between the *process* and *substance* of the Constitution. *Process* may be taken to represent the moment of truth of a nation, substance, on the other hand may be likened to its soul. The process involves the plurality of perceptions and choices on issues which affect the interests of the civil society and their resolutions, which, by and large, influence the substance of the Constitution and its workings. Thus, while the process may confer and enhance legitimacy, the substance tends to confer effectiveness and sacredness on a Constitution.

Our position is that the Constitution exists as a guide to governance and the purpose of governance is the protection of the citizens' dignity and security as well as the protection of the territorial integrity and national independence of the country. The political and civil rights of the citizens must therefore be a major constituent of national security. Indeed, "individual" rather than "community" security[4] should be seen as the focus and the most critical factor in national security: for instance, when a country is ridden with unending internal crises and conflicts, sometimes as a result of bad governance, the citizens, as individuals, will begin to lack faith in the governance of the country and this in turn, will affect the unity of the country. Ultimately, the meaning and operation of national security, itself an ephemeral concept, will also be affected. For example, what is national security in the light of the current circumstances and move to confront some crucial issues affecting the country? What is the relationship between Nigeria's 1999 Constitution and national security? Put differently, to what extent are national security interests adequately provided for and protected in the 1999 Constitution?

One objective of this chapter is to draw attention, not only to the changing nature of national security but also to certain inadequacies in

4. The concept of "nation," "state" or "nation-state" is of course central to this discussion and the place of individuals and community in it. The important point to note, a practical rather than a moral issue, is that the nationality into which one is born or in which one is settled is critical to one's expectation and opportunities in life. On the theory of state, see Dunleary, P and O'Leary, B, *Theories of the State*, 2nd edition (London, 1992) and Hobhouse, L.T. *The Metaphysical Theory of the State: A Criticism*, 6th edition (London, 1960).

the Constitution with regards to the concept of national security. Essentially, we observe that national security in Nigeria has always been military-defined; in the sense of the *physical* security of the territorial state and the curtailing or containing of threats to its territorial integrity and national independence. Such definitions give pride of place and dominance to the maintenance of the state machinery rather than the liberties of the citizens. This definition is rather limited and indeed worrisome in a democratic dispensation because it has not sufficiently taken into account the need for human security in all its aspects. Thus, for the Constitution to be a good instrument for national survival and progress, greater emphasis must be placed on "citizen security." In other words, political and civil liberties must be seen as preconditions. In a constitutional democracy, this entails a contractual obligation between the people and the government.[5]

For the purposes of these observations, let us attempt to briefly explicate the concept of security and citizenship and the constitutional provisions on these. This definitional analysis will be followed by an examination of the political obstacles to national security in Nigeria and how the 1999 Constitution has addressed them. This order of analysis is to draw attention to the fact that, as long as national security remains a physical and military-defined issue, so long will the enduring issues of political and civil liberties remain superficially dealt with in the Constitution. Put another way, the process rather than the substance of a Constitution will continue to assume greater importance in the political discourse of our national problems, thus further contributing to the ill-defined nature of national security and the "secrecy" that envelopes its operation.

National Security Redefined

Ordinarily, security is defined as a state of being secure; that is a state of freedom from apprehension; as well as freedom from danger of risk. It is also a state of psychological confidence in the safety of one's person. Thus, security can mean many things but, in the context of this paper, security is taken to mean the freedom of citizens from apprehension and the creation of a psychological environment in which the citizen feels safe. What makes safe can be in many forms including

5. Buzan, B. *op.cit*, pp.69-82.

military or police presence; so also are sound policies and programmes which guarantee the citizen's social and economic freedoms. Thus, being secured is a situation in which there is no threat to one's survival and the enjoyment of one's liberty and freedom in an environment in which pluralism can thrive. It is a society in which the conditions, chances and the expectations to one's life is secured because political, economic and social liberties are guaranteed.[6]

Until the end of the cold war, security and insecurity had been seen mainly from the perspective of threats and threats curtailment to the territorial state. National security was then synonymous with state security and the interest of the policy formulators and not necessarily with the welfare of the citizens. Thus, the concept of National Security was formulated within a politically biased environment in which interests and threats to such interests were defined and described in the ideological biases of the privileged and educated few. In fact, Nigeria once witnessed a situation in which national security became regime specific because security became defined as an exclusive professional duty of those institutions created to oversee national security.[7] Not surprisingly, a conflict of interest is sure to exist between these operators and the people – between those employed to protect and the protected (the citizen). In a non-democratic setting, the citizens cannot and indeed are incapable of dealing with the domineering powers of such operators. For example, during the Abacha dispensation, the security of an incumbent government became coterminous with the security of the state. There were threats and challenges to individual and sometimes community security that were traceable to the economic and social inadequacies of the environment; others were due to political deprivation and intolerance of political differences; and indeed, a few were due to lack of clear demarcation in policy making between internal and external security. It is to avoid such personal idiosyncrasies that one has argued for a more inclusive definition of national security

6. As *subjects*. The content and scope of security are more exerting and demanding than as *subjects*. In a constitutional democracy, conditions to be met must include a *just* system and respect for individual and democratic rights.

7. The current trial of Al-Mustapha and Co. is likely to provide an interesting commentary of the nature and control of these Agencies. It should lead to a re-examination of their operations and probably an attempt to subject them to democratic surveillance.

so as to take account of the service to the people. Whether or not threats to security are internally or externally sourced, the essential point to note is that national security must take cognisance of the needs of the citizens. It cannot and should not be regime-specific. In short, to be secured requires the protection of national interests against all forms of threats as well as the promotion of all national values in a way of commanding the voluntary assent of the majority of the citizens.[8] Thus, national security operators must see their primary assignment as the defence and protection of the Constitution and laws of Nigeria-including her cultures and institutions, both public and private, in an effort to deliver an improved democracy.

Of course, voluntary assent assumes a minimal emotional acceptance of the national-state as presently constituted as well as an assumed minimal psychological satisfaction of the needs of the citizens. Again, one needs to ask: who is a citizen? Ordinarily, citizenship is always taken to mean the status conferred under laws relating to nationality and immigration; a definition which does not assume a situation of voluntary withdrawal of consent by the governed and disloyalty to the state because of its dictatorial and oppressive activities. In simple terms, this concept of citizenship in the Constitution refers to *who is* and *who can become* a citizen of Nigeria. This definition is not only limiting, it is also mechanical as it fails to take cognisance of the right of the citizens to withdraw consent as a result of perceived misrule and inadequate provision of material support. It also fails to take into consideration, interests and values which have gone beyond the state and have become transnational, for example, political and social rights which have become internationally recognised. Furthermore, the definition fails to stipulate the nature of duties and obligations which should prevail between the citizen and the state. In my view, the concept of citizenship should include, a description of the legal rights and duties which should operate between the citizen and the state as to enable the citizens to form an opinion or judgement on the performance of the governing institutions of the state. The concept must be broadened to refer to a set of principles that ought to appertain between

8. This definition is narrower than the "calabash" proposed in the Kampala Document which also calls for respect for human rights and fundamental freedoms – See *The Kampala Document* (Kampala, May 1991).

the citizens and the state such that the duties, responsibilities and obligations of both parties are spelt out, constitutionally defined and stipulated as well as guaranteed. Such definitions and meanings would make it possible to understand the range of rights and obligations that do and should exist between the citizen and the state, the existence of which should help to define and determine the operation of national security agencies. The absence of such provisions in the era of military rule and indeed in the Constitution can and does pose problems for a nation's security. Put differently, the physical preservation and security of the nation-state must be linked with the survival and satisfaction of the rights and freedoms of the citizens. Because we are in transition, the nature of "threats" to national survival and progress are indeed multiple and given the rather confused and fluid reaction to such "threats" by the citizens it has become imperative to provide legal and democratic mechanisms for its definition in order to ensure public scrutiny and accountability.

For both democracy and national security, the bottom line remains the protection of the interests of the citizens against both internal and external threats. Thus, when we talk about the 1999 Constitution and national security, we directly ask for the extent to which the Constitution provides for the protection of these interests and the extent to which the people and indeed democratic institutions are involved in national security – its definition, its operation and its supervision and control. What are the political problems militating against an enduring Constitution which can also guarantee such security? These are some of the questions that subsequent pages will attempt to answer by examining the provisions of the Constitution on national security, the obstacles towards a redefinition and finally making some suggestions as to the way forward.

Constitutional Provisions on National Security

The Constitution of the Federal Republic of Nigeria (promulgation) Decree 1999 came into force on the 29th of May, 1999. The Constitution, which is supreme and whose provisions "have binding force on all authorities and persons throughout the Federal Republic of Nigeria" was promulgated as part of the process of ending military

rule.[9] The Constitution is essentially an embodiment of the 1979 Constitution of the Federal Republic of Nigeria with some amendments, which were not wholly informed by the report of the Constitution Debate Co-ordinating Committee.

The Constitution does not have any significant provisions on defence and security matters except for the mode of establishment of the institutions and structures of the agencies that deal with them. One explanation for this situation lies in both the discreet and secret nature of security in its militarily-defined sense and, in part, the traditional conception of security as the physical protection of the nation-state. Another explanation can be found in the long absence of competitive, party politics. There are, however, several provisions on some aspects of security. For example, section 14(2)(b) on Fundamental Objectives and Directive Principles of State Policy provides for security both as a means of governance and as an objective. In the words of the Constitution, "the security and welfare of the people shall be the primary purpose of governance."[10] It is also an objective to be attained by all governments. However, this provision is not enforceable in Law; as section 6 (b) (c) of the Constitution makes the fundamental objectives non-justiceable. Section 14 (2) (b) is thus simply, a directive and a metaphysical wish. Consequently, the extent to which the Government can be held responsible for not securing the citizens at a point in time can neither be directly determined by this Constitution, nor pronounced upon in court.

Another example is that the power to make laws for the peace, order and good governance of the federation is vested in the National Assembly and the Houses of Assembly of the States. The Constitution places defence matters under the Exclusive Legislative List and provides for a National Defence Council in the Third Schedule of the Constitution relating to Federal Executive Bodies. The Council comprises the President, Vice President, all the Service Chiefs and other persons that may be appointed as members by the President. The Defence Council has the responsibility of advising the President "on

9. *The Constitution of the Federal Republic of Nigeria 1999* (Lagos, Fed. Government Press, 1999.
10. *Op. cit*, p. 10.

matters relating to the defence of the sovereignty and territorial integrity of Nigeria."[11]

Unlike the membership of the National Defence Council, the National Security Council comprises the President and the Vice President, the Chief of Defence Staff, the Ministers responsible for Internal Affairs, Defence, and Foreign Affairs, as well as the National Security Advicer, the Inspector-General of Police and other person appointed by the President at his discretion. The National Security Council is also an advisory body to the President on matters relating to public security and security agencies established by law. These institutions all work in an advisory capacity and, therefore, places the President as the Chief Security Officer of the nation.[12]

However, a modest beginning at democratic control has been the establishment of Committees of the National Assembly to scrutinise matters relating to Defence and National Security, Including budgetary allocations. The Committees have the power to recommend, and the Assembly to approve, expenditures as well as the power to ask questions and be informed on related subject matters. Nonetheless, one's position is that these powers are limited not only by the nature of the subject but also by the nature and character of our partisan politics. Neither the Committees nor the political parties seek to know the purpose for which funds were utilised nor the quantifiable effectiveness of their utilisation. Furthermore, the public is rarely aware of what constitutes national security, its content and what explanations inform expenditure on this subject.

In short, the process of decision making on national security has become bureaucratised as in legal-national state. Thus decisions on security have become rather arbitrary – only as informed and assessed by agents of the state while controls are exercised within a structure of secrecy. It is a process that is neither informed by public scrutiny nor guided and influenced by the consent of the people. Can we, the representatives of the people-trust the officials? If yes, can national security and national survival be more amenable to democratic participation and control?

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11. *Op. cit.* p. 144.
12. *Op. cit.* p. 146.

Political Obstacles to an Enduring Constitution

The first problem militating against an enduring Constitution is how to evolve a new social contract able to retain individual freedoms while at the same time still surrendering power to the state for the good of the society. Before a democratic culture can begin to develop in the country, individual freedoms must not only be guaranteed but greater participation must be given to the people in the implementation and control of their security. Given the rather restrictive definitional scope of national security, it is not quite a surprise that constitutions which define and manage our nation's security have never been democratically controlled. They were conceived in a colonial past in which sovereignty belonged to the king and in a period in which loyalty and interests were elite defined.[13] Subsequently, in Nigeria, they were military defined.

Moreover, because our constitutional engineering has been mid-wifed by autocratic regimes both in the colonial days and in the post-Independence era, national security has remained the preserve of professional institutions of the state. There was no debate, no consultation and no participation of the people before they were carried out. By implication, therefore, the various individual freedoms (civil, political, social, cultural and economic) could not be guaranteed in practice even if reference is made to them in the Constitution. The truth is that national security can only be effectively guaranteed when it is people-defined, people-oriented and people-implemented. There is, therefore, a need to give it a democratic foundation and broader participation. When the citizenry is involved in the making of national security policy, there will be little difficulty in making it their self-interest to contain threats to national survival. It may be worth while to point out that the 1999 Constitution does not provide for ethnic or community nationality as the basis of the federation; rather the Constitution provide for citizenship. Sections 25-32 of chapter III provide a definition, which assumes that such a citizen of Nigeria, is also a Nigerian national.[14] The individual can, of course, renounce or be deprived of his citizenship and the conditions for doing so are also

13. For an interesting account of how coercive exploitation in conjunction with merchantile capitalism has played a critical role in the creation of nation-states, see Evans, P. *et al* (eds.) *Bringing the State Back In* (Cambridge, C.U.P., 1985) and Gamble, A; *The Free Economy and the Strong State* (Basingstoke, 1988).
14. *Op. cit.* pp. 15-17.

spelt out. However, the Constitution does allow for dual citizenship; a provision which though novel at least, recognises the right of a Nigerian to choose – or even perhaps to voluntarily withdraw consent – as a judgement on the manner he or she is being governed!

While the 1999 Constitution provides for conditions of Nigerian citizenship, it cannot be said to have made adequate provisions for defining the relationship between the state and the citizens. There is no provision or description of legal rights and duties to guide the relationship between the citizens and the state,[15] neither are there stipulated principles. This is a critical area in which the constitutional provisions have been grossly inadequate and which tends to increase the arbitrary powers of security agencies. The absence of such provisions also adversely affects the judiciary in the performance of its assigned role of clarification and interpretative functions.

Apart from the foregoing, there are the political problems of governance and abuse of state power, coupled with the sense of distrust and self-doubt arising therefrom, as well as the problem of the on-going debate on the type and powers of our Federating units. Of course, these problems are, in themselves, a reflection of our efforts at national development which have been fraught with multi-faceted difficulties, the origin of which may, in part, be traceable to abuse of state power by officials.

Concluding Remarks

The 1999 Constitution certainly has some inadequacies. These are, however, products of the confusion which is likely to arise out of a preoccupation with process rather than substance. They are also a bye-product of the unstated political assumptions – be it of the founders of the document or the regime that promulgated it into law – about the

15. Except the novel objective and directive on the obligations of the citizens in section 24 under the non-justiciable fundamental objectives and directive principles of state policy in chapter II. This section sets out a list of duties that the citizen owes. They include the duty to abide by the Constitution, respect its ideals and institution, the National Anthem and flag; the duty to help to enhance the power, prestige and good name of Nigeria and render such national service as may be required; to render assistance to appropriate and lawful agencies in the maintenance of law and order; and to declare his income honestly to appropriate and lawful agencies and pay his tax promptly.

nature and form of the federal structure. For the purpose of arriving at a more meaningful document at any time, the Constitution is to be re-examined and reworked, one's suggestion is that all assumptions and working ideas should be laid open – no matter how dangerous to the well-being of the state, however defined. Where a political elite is short on sincerity as a political value as seems to be the case in Nigeria, a Constitution will not command the legitimacy it is assumed to enjoy.

Secondly, the long period of military rule has, no doubt, compounded and befuddled the problem. On the one hand, a democratic culture has never been the basis of the constitution because neither a colonial nor military government is democratic. Yet there is a dialectic relationship between the need to protect the state and the pervading need to curb its power.[16] The resolution of this, in favour of the rights of the citizen to liberty and freedom, would provide the necessary anti-dote for reducing the "secret" conduct of government and the powers enjoyed by the officials and institutions of state security agencies. Fortunately, the encroachment of the forces of globalisation and liberalisation on the powers of the state may provide the necessary tonic for the creation of a more open and accountable institution. After all, one practical fall-out of globalisation has been the gradual reduction in the loyalty to the nation-state and the increasing enthronement of the concept of individual sovereignty – such rights are now being upheld by transnational institutions and lie beyond the powers of the state. Coupled with this, has been the democratisation of information sources which has a tendency to threaten the "secret nature" of security institutions as well as provoke a redefinition of natural security.

Finally, delivering a better Constitution may in itself depend on creating an environment in which democracy can thrive. Such an environment must not only protect the plurality of views but must, at the same time, guarantee fundamental human rights which are enforceable by law. Such an environment will encourage a more meaningful discourse of national security – which by definition, content and operation is necessarily political.

16. Gill, P: *Politics: Security Intelligence and the Liberal Democratic State* (London, 1993).

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THE AMENDING PROCESS UNDER NIGERIAN LAW AND CONSTITUTIONS: TRENDS, ISSUES, DILEMMAS AND PROCESSES

by

Auwalu H. Yadudu,
(Professor of Law,
Faculty of Law, Bayero University, Kano)

Introduction

"Amendment" is a term tersely defined to mean "...to change or modify for the better. To alter by modification, deletion or addition."[1] The simple object of this chapter is to discuss the ways and means by which Nigerian Constitutions, specifically in this case the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the Constitution), can be modified, altered, or added to. Beyond a mere narrative of the dry constitutional provisions for the alteration of the 1999 Constitution, the discourse is situated in the context of the trends, issues and dilemmas which will pervade the process, judging from precedent and a few hazarded guesses. In other words, the chapter discusses not only the enabling constitutional and statutory provisions but the animating forces which engender or endanger the amending process. In this regard, this chapter is a substantially modified version of an earlier essay.[2]

The legislative power of the federation and of a state is, by virtue of section 4(1) and (6) of the Constitution, vested in the National Assembly and State House of Assembly respectively to make laws for the peace, order and good government in their respective domains. Under the Nigerian legal system, which is common law-based, a piece of legislation could, in the exercise of the powers conferred by the said

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1. Black's *Law Dictionary*, sixth edition, 1990.
2. I refer to my "Constitution-making in Nigeria: Trends, Issues and Perspectives" presented at a National Conference on the 1999 Constitution, organised by the Network for Justice, a Kaduna-based NGO. The essay has been published by both *The Guardian* and *New Nigerian* Newspapers.

section 4, be amended by the authority that has enacted or has power to enact it. Thus the National Assembly can modify, add to or alter or even entirely repeal any Decree promulgated by its immediate predecessor, the Provisional Ruling Council (PRC) and any Act passed by previous National Assemblies or Parliament. There exist laid down procedures, under its Standing Orders, for the National Assembly to enact a Bill to effect the amendment of any existing Laws it is empowered to make.

Under the Constitution and statutory laws, the Superior Courts of Record in Nigeria have inherent judicial powers to interpret all laws in force in the land subject only to limitations imposed by jurisdictional competence. There are two broad Schools of Thought in Nigerian jurisprudence on the issue of whether the judicial power to interpret laws is confined only to declaring what the meaning of the provision in dispute is or whether it extends to amending the provision. The one is characterised as the literalist approach to interpretation while the other is described as the purposive approach. Put another way, the literalists view the exercise of the judicial power to interpret the provision of laws as amounting to no more than trying to discover its meaning and declaring same. The purposive approach, on the other hand, views the judicial authority of discovering the full import of especially the Dworkian "hard cases" as extending to law-making by judicial means. Whichever School one is persuaded by, there is no doubting the fact that judges do, especially in cases where the language is ambiguous or indeterminate, extend the frontiers of the black letters of the law when they interpret them, guided of course by argument of counsel. It must be added also that, unlike under the Westminster system where parliament has, theoretically, the final say in law-making and can, as the popular saying goes, change a man to a woman, courts possess implicit power under our constitution[3] to review, and hence amend, any Act of the National Assembly. Section 1(1) of the Constitution declares its provisions supreme while sub-section 3 empowers courts with

3. See section 6 of the 1999 Constitution. This power is shared by all courts which are creatures of a written constitution, a quality not apparently shared by their counterparts under a parliamentary system or, if at all, to a lesser extent. The quintessential American case of *Marbury vs Madison* 1 Cranch 137, L. ed. 60 (1803) laid down the basic principles which have conferred such power.

authority to invalidate any laws inconsistent with its provisions. Section 6 (1) and (2) vests the judicial power of the federation and state in the specified superior courts of record thereby empowering them to interpret laws and, in the process, amend statutes or even enact case law. To this extent then, it can be said that Nigerian courts possess inherent judicial capacity not only to amend but also to enact laws.

The amendment process described above relates to alteration, modification and addition or deletion that can be effected to ordinary statutory provisions. In the case of the National Assembly, it can be achieved by a fairly simple and not cumbersome method of law-making. In the case of courts, this can be achieved by means of a reasoned judicial decision delivered in open court.

Amending a constitutional provision, however, has its unique procedure clearly defined by the Constitution. Firstly, any bill to change a constitutional provision would need a greater measure of support than the simple majority required to pass ordinary bills. Secondly, even where such a bill obtains the required support at the National Assembly, it would not become effective without the concurrence of a specified number of the constituent parts making up the federation. Thirdly, were such an amendment to receive the endorsement of all the States of the federation, it would still need to meet the litmus test of judicial review and approval, otherwise, it could be declared null and void and of no effect by courts of competent jurisdiction. Section 9 of the Constitution empowers the National Assembly to alter any of its provisions in accordance with the procedure laid down. Section 8 complements this by specifying the unique procedure to follow in amending the Constitution where this will involve boundary adjustment.

The foregoing pages have described very briefly, the amendment process in Nigeria by the two principal actors, namely, the legislative and judicial arms of government under our constitutional and statutory laws and by judicial precedent. These arms do not, however, operate in a vacuum. To properly understand the amendment process in Nigeria, the forces that tend to be at work in initiating a discussion as to which aspects of a law or constitutional provision are in need of amendment and subsequently leading to effecting the amendment need to be considered. There are some discernible patterns and trends as well as

inescapable dilemmas, going by Nigeria's constitutional history, the analyses of which may help for a better understanding of the process.

The purpose of this chapter is essentially to highlight these trends, issues and dilemmas which have attended previous similar constitutional debates and may dominate the on going one on the 1999 Constitution. Constitution-making is taken in this chapter to include the amending process. Thus, the amending process already described above is examined within the concrete setting of the issues, trends and dilemmas that are bound to occupy the attention of all the players.

Some Perspectives

If the frequency of the occasion and intensity of the views canvassed in Nigeria regarding what constitutional document to adopt to govern its polity is a yardstick for measuring the durability, legitimacy, acceptability and workability of such a document, then ours ought to be the most perfect Fundamental Law in Africa. However, compared with the global track record, ours may rival only the democratic and constitutional trials and errors that resulted in the wake of the fledgling Italian post war political experiments.

From the constitutional conferences of the colonial era to the constitutional "drafting", "review", "conferences", "debates" and constituent assemblies of the seventies through the nineties, we have gone through seemingly endless amendment exercises and have had a fair share of constitutional panel beating to get into the Guinness Book of Records. Not content with that feat, Nigeria would seem to want a league of its own.[4]

By all accounts, we are at the threshold of "a grand constitutional debate" in Nigeria. It all began in 1998, although not unexpectedly. Availing themselves of the opportunity, offered over two years ago, when General Abubakar invited the input of the public in his administration's search for the Way Forward. Nigerians at home and abroad offered loud but discordant views on the type of polity they

4. I would concede the point to those who counter this by saying that they would rather have Nigeria start its own league of excessive "jaw-breakers" to competing, however poorly, in the despicable league of those who, unable to resolve political differences by other more peaceful means, resort to violence and genocide. Africa has a fair share of countries in this league.

aspired to have and the constitutional document in which to express it. There were those who called for the convening of a "Sovereign National Conference" to re-negotiate the terms on which to found a new Nigeria. Perhaps motivated by sheer irredentism, ethnic champions clamoured for the restructuring, some insist, reinvention, of the federation on the basis of tribal or ethnic nationalities. These advocates further called for representation to the sovereign national conference to be on the basis of ethnic affiliation and tribal tattoos. There were those who called for a return to the system now popularised as "true federalism." There were others who called for the restructuring of Nigeria into smaller, more manageable geopolitical entities to be clothed with greater autonomy. They were apprehensive of the dire consequences of being saddled with a federation whose constituent units have, over the years, become so fragmented and the central government so bloated and viewed as a menacing monster threatening to devour all. Of course there were the realist politicians who felt that the first principle for survival, following the prolonged, seemingly interminable military misadventure into governance, was to ease out the military. They reasoned that this could be accomplished on terms not too disruptive of the status quo to pave way for a more orderly constitutional re-engineering. A variety of this school advocated the adoption of a "transitional" constitution which would, upon the exit of the military, be subjected to further debate to facilitate the emergence of a truly autocthonous constitution. Yet some other vocal groups called for the formation of a loose confederate arrangement by which the federal government would be stripped of all but a few of its powers to devolve same to either the existing States or the new geopolitical entities.

At the end of the day, Nigerians expressed a resounding preference for the adoption of the 1979 Constitution of the Federal of Republic of Nigeria with necessary amendments. The Constitutional Debate Co-ordinating Committee[5] (CDCC), which the writer was

5. The Constitutional Debate Coordinating Committee was set up in November 1998 by the military regime of General Abulsalam Abubakar under the Chairmanship of Hon. Justice Niki Tobi to "pilot the debate, coordinate and collate views and recommendations canvassed by individuals and groups" regarding the Constitution to be adopted for Nigeria.

privileged to have served on, conveyed this craving of Nigerians in its report to the Provisional Ruling Council (PRC). After series of meetings involving the Federal Executive Council, Council of State and other stakeholders, the Provisional Ruling Council gave in to the request. It promulgated the 1999 Constitution, which is largely a rehash of it incorporating some provisions that were deemed by the promulgating authority to be in accord with developments that had arisen from the 1989 Constitution and the 1995 Draft Constitution.

In the wake of the inauguration of the new civilian administration on the 29th of May, 1999, the discordant clamours for the restructuring of the federation and constitutional re-engineering, which abated somewhat following the successful conduct of the elections, are now re-emerging. A State Governor wants to be empowered to establish his own police force. There are fresh calls for the devolution of more powers and resources to the lower tiers of government. The ubiquitous idea of according the principle of 'derivation' more share of the "national cake" is now being expressed more trenchantly in calls for creation of a "fiscal," as opposed to geopolitical, federation. The purists are wondering if there is not a lie to the opening words of the preamble to the 1999 Constitution which ascribe its authorship to "we, the people" and not the PRC which promulgated it. Perhaps irked by a perception of their emasculated position vis-à-vis the Executive arm of government, some members of the National Assembly, including its leadership, have called for a review of the Constitution on the plausible pretext of purging it of all anti-democratic provisions.[6] Reminded that there are certain things he lacks power to do as he likes, even Mr. President has deemed it convenient to join the chorus call for constitutional review, perhaps to add more muscle to his war chest of munitions in the political power play. Of course, the political parties have reportedly gone ahead to initiate the necessary process to facilitate the review exercise. It must be added that elements within the Non-

6. Senator Idris Abubakar, who moved a motion for the adoption of a resolution to review and amend the 1999 Constitution was widely quoted as expressing their motive. He described the Constitution as the 'product of a rushed process', ... which contains 'inconsistencies, contradictions and abnormalities" that may, if left unchecked, "...negatively affect the quest of Nigerians for an enduring democracy." See *The Guardian* Newspaper, Thursday, September 9, 1999.

Governmental Organisations (NGO) and pro-democracy community have lent support for the review exercise.

Trends

By trends in constitutional debates and amendment process is meant observed tendencies, processes and recurring patterns and inclinations. The tendencies have a long history. In a broad sense, the first written constitution for the nascent Nigerian nation was embodied in an Order-in-Council.[7] By the instrumentality of this order, colonial Britain established the Nigeria Council which was thus viewed as an outright imposition. The nationalists had had no input in its passage. The criticisms which greeted its operation necessitated a rethink on the part of the Colonial office. More appropriately, it accelerated the commencement of the next phase of the involvement of Nigerians in self-governance for it was colonial policy then in vogue to involve the locals in running their own affairs gradually.

The next opportunity offered for Nigerians to amend their Constitution led to the novel introduction of the Constitutional Conferences of the 1940's and 50's by which process the Colonial Office would draw up Constitutional proposals and subject same to debate by regional assemblies, at grassroots level and at the centre. These processes would culminate in the convening of grand Constitutional Conferences at Lancester House in London in 1957 and 1958 which were almost always presided over by the Colonial Secretary. At the end of the exercises, a deal would be struck by which more autonomy would be granted to both central and regional governments.

In preparation for the granting of independence, the decisions reached during the last Constitutional Conference were modified partly by reference to the Report of the Willinck Commission which led to the incorporation of the Chapter on Fundamental Rights in regional and federal constitutions.

From 1960 onward, the trend changed somewhat. The first opportunity offered itself in 1963 when parliamentarians at the centre

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7. See Nigeria Protectorate Order in Council, 1922 and the Nigeria (Legislative Council) Order in Council 1922 for more, see T. O. Elias *Nigeria: The Development of its Laws and Constitution*, Stevens (1967) p. 26.

decided to cut the last apron linking our federation with the British monarchy. They amended the 1960 Constitution to declare Nigeria a Republic by removing the Queen as the Head of State and substituting Her Majesty with a ceremonial President. They accomplished this through the normal parliamentary channels and not by any extra-ordinary means.

The near total domination of the Nigerian polity by the military since independence introduced new trends in Constitution-making in the country. Whenever they felt firmly in control after a take-over and it suited them, the military would declare their intention to quit the political scene within a specified period. This would be followed by the establishment of committees, comprising lawyers, technocrats, high profile politicians, traditional rulers etc., to draw up a draft constitution.[8] It is interesting to note that, apart from the significant departure by the Constitution Drafting Committee (CDC) in 1997 which preferred the Presidential to the Parliamentary System, the "drafting" exercises have all resulted in not-too-radical amendments being proposed for the existing constitution in which some lacunae were detected. The draft would next be subjected to the deliberation of constituent assemblies which comprised elected and nominated representatives. At the end of the exercises, the supreme governing body of the military would sit in judgement over the draft already deliberated upon and adopted, though not without acrimony over recurring contentious issues which often stalled their work. They almost always made additions, deletions and as Chief Rotimi Williams would put it,[9] "mutilating" the product of the Constituent Assemblies. At the end of the day, politics would be played and the nation would then be governed according to the gospel as handed down by these military governing bodies.

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8. These committees are too well known to require reiteration. Suffice it to mention the most prominent among them namely :- the Constitutional Conference of March/May 1967 on the eve of the Civil War, the Constitution Drafting Committee of 1976/77, the Political Bureau of 1985/86, the Constitution Review Committee of 1987/88, the Constitutional Conference of 1994/95, the Constitutional Debate Co-ordinating Committee of 1998, etc.

9. See to his incisive reproach of what the Supreme Military Council of 1978 and the Provisional Ruling Council of 1999 did to the constitutional documents submitted to them by the Constituent Assemblies in his interview published in *Africa Today*. Vol. 5, No. 8, August 1999. He was quoted as describing the 1999 Constitution as a "fake document" at p.12.

The observable trends from the foregoing synoptic description are many.

- First, neither the Chiefs and Emirs, who actively participated in the processes did so claiming or being granted sovereign rights nor did the elected and selected representatives have any pretensions as to the limit of their authority.

- Secondly, for whatever reasons, referendum, a universal means which signifies the imprimatur of popular legitimacy on the fundamental law, was never entertained as a viable or necessary option.

- Thirdly, the basis of representation at all the conferences was by election (be it direct or indirect) or nomination of delegates on behalf of a territorial constituency and ex-officio participation. Ethnicity and tribal affiliation was never a factor.

- It would appear, fourthly, that the movement for constitutional reform was rarely grassroots-based. The vocal, regrettably even in those early days, the partisan and regionally-based press, populist politicians and colonial benevolence provided the impetus.

- Fifthly, military intervention in Nigerian polity and constitution-making processes has, for good or worse, left its indelible mark on all post-independence constitutions.

- Sixth, there has been a recurring display of impatience by partisan politicians and other stakeholders who, faced with seemingly difficult constitutional problems, would either not suffer the rigours of a learning process and permit the dynamic political process to sort things out nor even let the judiciary do its job by pronouncing on the proper import of a provision in the constitution or defining the limit of the powers exercisable by any contending party to a dispute. In this regard, it would seem that the military have tended to be the more impatient in handling the learning curve.

- Seventh, the amendment processes and exercises have tended to be haphazard with no long-term view, being largely dictated on the spur of the moment and influenced by the incumbency factor. It is amazing how, despite this, the provisions of the 1979 Constitution has enjoyed a significant measure of stability and longevity.

- Perhaps owing to the recurrence of military intervention, a distinct constitutional jurisprudence, crafted through judicial ingenuity and deft political engineering, has not quite emerged as has happened in India, for instance.

- Lastly, it is arguable that the same elbow room or leeway left by the British which enabled parliamentarians in 1963 to amend the Constitution to found a republic also is available even within the purview of all the constitutions mid-wifed by the military. Whether the political will exists to accomplish a similar or even greater feat by the contemporary political class remains to be seen.

The Issues

Next is to highlight those issues which would or may be the bone of contention during the forthcoming constitutional amendment process and the debates which will animate it. By issues we refer to those constitutional matters which are either unresolved, or partially resolved and have thus remained contentious and recurrent. The term also connotes fresh matters which have, in the past, or will, by their novelty, generate intense public interest and controversy. Included in this definition are other matters which, emboldened by their hard-worn freedom and supremacy, the political class may wish to explore with a view to fashioning a constitution that they can truly call their own. Only then will they feel satisfied that the Constitution will not be telling a 'blatant lie' in its preamble since it can trace its paternity and pedigree to "We the people." The issues are highlighted in no particular order of importance, notoriety or amenability to controversy. The purpose, as presumptuous as it may sound, is to set the agenda for the debate in the

hope of provoking discussions. To many, however, these issues may seem too academic or opinionated.[10]

True Federalism or Devolution of Powers

There appears to be a general agreement across the land that the existing federal arrangement is not desirable. It is forcefully asserted that so much power is concentrated in the centre which appears to be the main cause of intense competition to control it. However, the agreement ends there. There are as many views as to what to do to dilute this as there are ethnic groups in Nigeria. Some have called for genuine efforts to address this by stripping the federal government of many of its powers and devolving same on the lower tiers of government through a rigorous and purposeful re-examination and re-allocation of the legislative list in terms of variety and content in favour of the lower tiers. Others insist on a return to true federalism. Even then, the particulars which would make up such a federation are in sharp dispute.

Be that as it may, we should expect fresh proposals which would attack the federal structure enshrined under sections 2 and 3 of the Constitution. Already one commentator has suggested the restructuring of Nigeria into no more than six regions based on geopolitical considerations.[11] Similarly section 4 of the 1999 Constitution read in conjunction with the Second Schedule to the Constitution, which have together defined the legislative powers of the federation and of states and delimited the competence of each in a legislative list, have already

10. This writes shudders to express an opinion these days lest is misunderstood as either offering an apologia for his many roles or setting himself up as a one-man opposition or, worse still, being labelled a sycophant looking for another job, should the view sound nice to the ears of the powers-that-be or their cronies. Be that as it may, it is the writer's hope that he will be taken up on any view he may have expressed on its own terms in the exercise of his fundamental human rights as a Nigerian citizen and *not simply because he made it*.

11. Dr. Suleman Kumo, a legal practitioner based in Kano, presented a widely-publicised paper in which he spelt out his scheme at a National Conference organised by the Network for Justice in Kaduna.. In fairness, these ideas of restructuring Nigeria into smaller geopolitical entities did not receive first mention in Kumo's paper. Dr. Alex Ekwueme, Nigeria's former Vice-President, was an ardent advocate of this view at the Constitutional Conference of 1994/1995, though they differ in matters of detail. And he had a large following then.

caught the public attention and the ire of many. The list has been described by less charitable commentators as enshrining a unitary, as opposed to, a federal arrangement. It will be interesting to watch it redrawn.

It may be noted that members of the 1994/95 Constitutional Conference had attempted to tinker with the List with some limited success. The Devolution of Powers Committee did also produce an equally interesting report with recommendations on how to go about devolving more autonomy to the lower tiers of government, although many may consider their effort as not having gone the whole distance.[12]

Restructuring the Federation

There have been loud and trenchant calls for the restructuring of the federation and redefining the terms of the association of the various nationalities and geopolitical entities making it up. There are those who advocate that we should not even shy away from discussing various scenarios for the peaceful break-up of the Nigerian nation should we fail to agree on new terms of our association. The contending views are as many and varied as the press have rather selectively ventilated them. It remains to be seen whether the occasion will be seized to voice them once more or, assuming these were merely the loud rhetorics of those who had hitherto felt left out in the scheme of things, they will now abate given their 'perceived' gains and the promises held out for them by the incumbent administration. Or whether, as with military regimes, those under whose auspices the debate will be conducted will declare some no-go areas including this one. [13]

Whatever happens, section 2 of the Constitution, which has decreed Nigeria to be an "... indivisible and indissoluble Sovereign State.." will come up for serious questioning and re-examination.

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12. See the Draft 1995 Constitution and the Report of its Devolution of Powers Committee.
13. It may be recalled that in 1988, President Babangida read the Riot Act to members of the Constituent Assembly while inaugurating the body. He cautioned them that there were certain "agreed ingredients" of our federal arrangement, popularly referred to as the "no-go areas," that they should not bother to touch or seek to alter.

Local Government as A Third Tier of Government

Under the 1989 and 1995 draft constitutions, matters pertaining to the existence, powers, mode of creation and relation to the other tiers as they pertain to the Local Government Councils were clearly defined and constitutionally guaranteed. With our reversion to the terms of the 1979 Constitution, as provided for in the 1999 document, what is on ground in respect of these matters, appears to be at variance with the constitutional provision. By retaining the very imprecise and fluid provisions of section 7 of the 1979 constitution, the 1999 document has created so much uncertainty and left Local Government Councils at the mercy of the State Governors such that there are varying but loud recriminations going on all across the land between the Chief Executives of the two lower tiers.

With developments such as the sacking of "an erring" Chairman of a Local Government Council by the Governor of Kaduna State, an action that has been challenged in court and vehemently condemned by an association of chairmen of Local Government Councils (LGCs), the gaping lacuna that starkly exists in the Constitution will need to be addressed. Perhaps the provisions which pertain to local government councils as provided in the draft constitutions of 1989 and 1995 are worth having a second look at. Moves may be made to amend the Constitution to incorporate the provisions of the Local Government (Basic Constitutional and Transitional Provisions) Decree No 36 of 1998 of the erstwhile military government.

Similarly, moves may be made to revert to the provisions enshrined in the 1989 or 1995 draft constitutions pertaining to the method of creating new local governments as the provisions of the Constitution of 1999 appear to be inadequate and may create divergence of practice across the land. It is more likely that advocates of true federalism will prefer it that way

State Electoral Bodies

The reversion to contents of the 1979 Constitution has re-introduced the need for the establishment of electoral bodies in each State to conduct elections to Local Government Councils (LGCs). It will be recalled that due to its passionate nature as a grass-root matter and having regard to the multi-party polity we operate, no Governor of a State Government was, throughout the currency of the Second Republic, willing to either

(a) establish an electoral body that is fairly representative of all shades of opinion in his state or (b) conduct a fair and transparent election to LGCs which his party may lose with all the attendant implications. Consequently, the questions will be asked if it was a wise idea to entrust the conduct of LGC or any other elections to State Governors or legislators. It would not be surprising to hear agitation for the matter to revert back to the Independent National Electoral Commission from which many expect greater neutrality and transparency.

Thus section 7 and part II (B) of the Third Schedule to the 1999 Constitution may be amended to achieve that purpose. Whether this will go down well with advocates of a return to 'true federalism' is another matter of contention.

Traditional Rulers

In the 1979 Constitution, the institution of traditional rulers was conferred roles at State level via the establishment of the State Council of Chiefs and at federal level through their representation on the National Council of State. The 1989 draft constitution went further to create a Traditional Council at LGC level imbued with advisory powers. The 1995 draft improved this situation further by introducing a Federal Traditional Rulers Council clothed with advisory functions. By administrative fiat, traditional rulers all across the nation were granted the allocation of 5% from the revenue accruing to each LGC in their domain. This has, however, recently been reversed as being unconstitutional. The 1999 Constitution has also reversed all the constitutional "gains" that this institution has made over the years by stripping them of even functions and roles provided for them in the 1979 Constitution. Needless to speculate, the Royal Fathers have cried foul and are currently agitating for the restoration of all these powers and functions. In their considered view, they are required for the performance of their complementary roles in the modern governance of our people, the maintenance of law and order, peace and stability in the society.

This issue is, without doubt, bound to come up for discussion during the constitutional amendment exercise. Amendment proposals which seek, in the minimum, for a return to the provisions of the Draft Constitution of 1989 are likely to be made. Some may even opt for the provisions in the 1995 Draft Constitution. The least the traditional

institution may canvass or settle for would be a return to the 1979 Constitution from which the 1999 Constitution has made some derogation.

Revenue Sharing Formula

The provision of the 1995 Draft Constitution, which fixed a benchmark for derivation in the revenue sharing formula for Nigeria, was incorporated in the 1999 Constitution. In spite, (some would say because) of that, agitation for a greater percentage to be assigned to the principle of derivation remains potent and largely unmet. The incorporation has further fuelled the wider agitation for a fiscal federalism. It is reasonable to anticipate that the matter would be reopened. Although the people of the oil producing areas have been in the vanguard of this agitation and hence the principle is associated with their crusade for equitable returns on the depleting resources extracted from their localities, with all the attendant ecological ravages, the new debate may bring focus and fresh perspectives to other dimensions of the principle of derivation.

Judging by the concerns raised by the diverse interests during the debate on the Bill for the establishment of the Niger-Delta Development Commission (NDDC), many may advocate for another look to be taken at section 162 of the Constitution with a view to amending it to revert to the 1963 Constitution or another formula which embodies fairer terms.

The Sharia Debate

In 1976, the Rotimi Williams-led Constitution Drafting Committee (CDC) proposed the establishment of a Sharia Court of Appeal at state and federal levels. The controversy generated during the proceedings of the 1977/78 Constituent Assembly (CA) resulted in a stalemate and walk-out by Muslims in protest at the manner in which the issue was being handled. The report of the Constituent Assembly was tampered with by the then Supreme Military Council (SMC) which arrived at a compromise by which it retained the provisions for the establishment of the Sharia Court for any State which requires it and created Islamic law divisions, more appropriately, "bench," in both the Court of Appeal and the Supreme Court.

The constitutional debate at the Constituent Assembly of 1988/89 saw a repeat of the stalemate of the 1977/78 only this time because a Committee of the Constituent Assembly, stacked deliberately with more Christian than Muslim members, decided to recommend for the expunging of any and every mention of the word "Sharia Court" from the draft. Again the Armed Forces Ruling Council (AFRC) came to the rescue by withdrawing the issue of the Sharia from the deliberations of the Constituent Assembly. When the 1989 draft was promulgated it reflected the recommendations of the Constitution Review Committee (CRC) which in effect expanded the jurisdiction of the Sharia Court to encompass all civil matters where all the parties are Muslims. It however removed the optional clause contained in the 1979 Constitution according to which, in personal law matters involving a Muslim and a non-Muslim, the court may assume jurisdiction if the parties had requested the court of first instance to adjudicate it in accordance with Islamic law.

Although the 1994/95 Constitutional Conference was not bedevilled by any measure of controversy over the Sharia, the same cannot be said of the 1998 Constitutional Debate Co-ordinating Committee whose recommendation for the retention of the provisions of the 1995 Draft Constitution became a subject of intense controversy. This was orchestrated mainly through press speculation and insinuations to the effect that the PRC, which was deliberating over the document, was being torn apart by the Sharia issue. At the end of the day, the PRC retained the 1979 provisions with the removal of the optional clause referred to above.

The Zamfara model for the introduction of the Sharia at State level and the evident enthusiasm with which it has been received elsewhere, have combined to introduce a whole new dimension to the Sharia debate. Relevant provisions such as sections 1, 38 and 277 of the 1999 Constitution are bound to come up for closer scrutiny in any amending exercise.

Secularism

Although no such word was used in section 10 of the 1979 and 1999 Constitutions, the controversy raged during previous constitution-making exercises since 1979 as to whether Nigeria is a secular or multi-religious state. The press has spread the conventional wisdom to the

effect that Nigeria is a secular state and that the purity of its secularism should, on no account, be contaminated. The controversy over secularism has, in the main, been carried on in abstract terms. When pressed for more particulars on either side of the divide, one gets a litany of things that governments should do or not do to favour either Christianity or Islam to the detriment of the other. In the past, the bone of contention in respect of secularism was always inextricably tied to the Sharia debate.

Whether this time around the debate will resume or not, in the absence of an impending national election and with the Muslim North cut to its proper size and humbled, remains to be seen. Whether the proper questions will be raised and addressed having regard to the place of religion in our polity and public life or whether minds have been made up remains a matter of conjecture and the issues a recurring decimal.

Be that as it may, the preamble to the Constitution, which declares Nigeria to be a sovereign nation "...under God..", and section 10, which prohibits the adoption of a State Religion, will receive more than trifling attention during the amending process. During the 1989 constitutional debate, several attempts were made by the contending parties to propose divergent languages to amplify the text of the section with a view to removing all ambiguities and/or so as to cater for the sensibilities and concerns of the contending parties.

What Process or Method of Constitutional Amendment?

Although there are loud cries and calls for the review and subsequent amendment of the 1999 Constitution and potential issues identified, there would seem to be no clear indications or consensus as to how the amendment process would be pursued. One thing is, however, certain: the political parties have reportedly signified their intention to play a major role in the process. At least two of them have reportedly constituted panels, with one member each from the six geopolitical zones, to prepare its positions. The nation is abuzz with conferences being held with a view to influencing the amendment process.

Similarly, the Senate has publicly come out to indicate how it would proceed. On Wednesday, September 8, 1999, Senator Idris Abubakar, while moving his motion for the review exercise, went public to indicate that the provisions of the Constitution would be

followed in the amendment process. A Committee to initiate the necessary steps for the amendment had been given 3 months within which to report its recommendations which would, in turn, be referred to the State Houses of Assembly for their consideration.[14]

Chiefs Gani Fawehinmi and Rotimi Williams have made some, not unexpectedly, varying proposals on how to proceed. Williams would like to saddle the next National Assembly with power to, within the first twelve months of its inauguration, amend the Constitution with sufficient (60%) but not too large a majority to confer legitimacy on it. By necessary implication, he does not favour having the exercise carried out by the current National Assembly. He also does not endorse the stringent procedures provided under the 1999 Constitution to effect the amendment.

On the other hand, Fawehinmi would not approve of any role for the President in the amendment process. He would rather have the Senate President, in consultation with the Speaker of the House of Representatives, form a Committee, with the approval of each State Assembly, to, in his words, "work out modalities for convening a Constitutional Conference or Sovereign National Conference" to amend the Constitution. He further wants a special, non-party election to be organised to elect representatives, on the basis of the existing 774 LGCs, to form the Sovereign National Conference. He would also want special interest groups to be represented by nomination. He would want the Conference to hold during the currency of the term of the present administration and last for as long as two years. By his prescription, the draft Constitution produced by the conference should be subjected to a referendum for the consideration of the Nigerian people.[15]

There is an emerging but muted position which argues that it is too early to subject the Constitution to any amendment which is at best theoretical and forebodes the danger of needless and distracting acrimony. Advocates of this view caution that we should not tinker too

14. *The Guardian* Newspaper, Thursday, September 9, 1999.
15. See Chief William's interview, *Africa Today*, cited earlier at p.13. See also Chief Fawehinmi's interview in the *Weekly Trust*, Vol. 2, No. 24, August 20, 1999 at p. 9.

quickly with constitutional provisions which we are not so familiar with or have hardly put to practicable test.[16]

With legal minds of the calibre of Chiefs Rotimi and Fawehinmi, the Senate, partisan political parties and other stakeholders, prescribing very divergent views on what procedure to adopt to amend the Constitution, then it becomes clear that this matter is not merely a procedural nuisance. It is a contentious matter of substance which goes to the heart of the matter. The issue in contention is not the content of the amendment alone. Just as important is the procedure to adopt to attain that.

Basis of Representation

In addition to divergence of views as to what procedure to adopt to amend the constitution, the criteria to use to form the amending body is sure to be a matter of contention. The legislative houses, (state and national), will, in a rather self-serving manner, want to arrogate to themselves the exclusive power to carry out the amendment. It must be conceded that they have constitutional backing in this. The political parties are keenly interested. What special mandate they possess over and above the people they speak for is debatable. What role they would assign themselves *vis-à-vis* the elected representatives is not specified. As in the case of the Legislature, the Executive arm does not have a better claim to wanting to perfect the Constitution, aside from its self-seeking motive, than the people who gave them the mandate to govern. Many will fault the Williams and Fawehinmi formulae. Of course there are the ethnic jingoists lurking in the background and insisting that nationalities and tribal affiliations should be the basis of representation. With all these and many more contending views on what should be the basis of representation to the organ which will review and amend the constitution, it is evident that finding an agreeable formula will be a controversial issue that has to be resolved inorder to carry out the amendment and arrive at a document that will enjoy wide acceptance and be truly an expression of the will of "We, the people."

16. To his credit, Senator Dansadau, who appears not to share the enthusiasm of his colleagues, repeated these cautionary words in Kaduna during the Conference on the 1999 Constitution organised by the Network for Justice and in a recent press interview.

Miscellany

There are a cluster of other issues of contention which may attend the next constitutional debate. The never-ending cries of marginalisation continue unabated. Tied to them is the attractive solution of agreeing, preferably reduced to positive constitutional language, to some basic criteria for power sharing to allay the unabated apprehensions of marginalisation and domination. It would not be too surprising if an attempt is made to revisit the constitutional entrenchment of the power sharing formula proposed in the 1995 draft Constitution.

The over-centralised National Judicial Council, which oversees appointment to judicial offices at federal and state levels and even has power to disburse funds meant for the judiciary, has come under attack as being subversive of true federalism. There may, in this wise, be calls for reverting to the position under the 1979 Constitution.

In view of the fact that the regimented and discriminatory rules governing political party registration have been attacked as being anti-choice and undemocratic. Sections 221, 222 and 223 of the 1999 Constitution may also come for re-examination.

Amendment Dilemmas and Possibilities

Given the divergent and uncompromising stands that Nigerians take, mainly informed by ethnic, religious and geographical differences, on most of the foregoing issues and which may come up for consideration during the amendment exercise, it is reasonable to anticipate, based upon an informed guess that the process will be bedevilled by dilemmas. In view also of the stringent constitutional procedure for adopting amendments, there is reasonable apprehension that the political class may not be able to rise above even the most petty of differences to muster the requisite collective political will and consensus to pass Bills for the necessary amendments.

It may well be imagined what positions will be taken by individuals and groups imbued with their biases fed by the North/South, Muslim/Christian, Majority versus Minority ethnic cleavages on any of the following scenarios which will necessitate constitutional amendments:

(a) a revenue sharing formula urging for the allocation of a significantly greater percentage to derivation than is presently the case or a return to the 1963 Constitutional provision;

(b) an attempt to create new local government councils which does not maintain the established balance between North and South or which is skewed in favour of states in the South/South *vis-à-vis* states in the South East, for instance;

(c) a move to modify the relevant provisions of the Constitution to enable any state which desires it to implement the Sharia, Canon law or any legal system of its liking to the fullest extent as is being canvassed by Muslims;

(d) a restructuring arrangement which dissolves the existing Local Government Councils and State governments as presently enshrined in the Constitution;

(e) the redrafting of the preamble to the Constitution to obliterate the mention of God and/or its substitution with the magical word "secular";

(f) a restructuring proposal which seeks to decentralise the command of the Nigerian Armed Forces;

(g) a proposal to return traditional rulers to the roles proposed under the 1995 draft Constitution or provide constitutional protection for the allocation to them of 5% of the revenue accruing to LGCs.

The foregoing scenarios have been given not so much with a view to pessimism. Given the political mood, wide-spread and trenchant agitation on all the issues highlighted, by the interested parties, it is perhaps not too far-fetched to imagine moves being made during the amendment exercise along the lines envisaged.

Pessimistic though the foregoing scenarios may appear, there is however, some optimism that the future for constitutional amendment is not as earth-shaking and certainly not entirely hopeless. The

opportunity to amend a Constitution has in the past and continues to hold bright prospects of many possibilities despite the seemingly irreconcilable differences of the major political players. That future, in our considered opinion, lies more with the judiciary which, given time and political deference, can rise to the occasion to interpret the constitutional provision in an orderly, incremental and wholesome fashion. It is true it cannot do it overnight. The alternative to that may not augur well for the nation's nascent democratic experiment.

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THE AMENDING PROCESS UNDER THE 1999 CONSTITUTION

by

D.I.O. Ewelukwa
(Professor & Dean of Law,
University of Nigeria, Enugu Campus)

To understand the nature and complexity of the amending process of some of modern constitutions it is necessary to discuss and understand the nature of a constitution and its place in a political community. A constitution is a set of rules that determine and regulate the structure, organization and procedure of a corporate entity, such as a political community generally called the state. It is thus the basic law which sets out the fundamental political principles of a state, prescribing or embodying the primary constituent members of the state's machinery of administration together with their powers, functions and procedures. It usually defines the limit of the powers granted, the relationship between one organ and the other and the relationship between each and the individual. In other words, a constitution is a social or political pact or contract of fundamental importance, which determines and prescribes how a community should be organized, politically, and administered to achieve the maximum welfare and happiness of its citizens.

A Constitution may be framed and imposed on a community by a dictator or a dominant group (oligarchy or aristocracy); but it may be framed and adopted by the people themselves. Where framed and imposed by one man or a few it may become a time-bomb liable to explode when exposed to the thousand and one social conflicts in the society, especially when subjected to the demands and pressures of the revolutionary forces. Such an explosion is very likely if the constitution does not have an easy amending process which enables various groups to negotiate among themselves what administrative arrangements are best for them. Where framed and adopted by the people, it takes the form of a contract freely negotiated and adopted by various political, geographical and social (ethnic, cultural, religious and linguistic)

groups in the community. It becomes a set of basic laws or fundamental political principles delicately negotiated and adopted and widely respected and adored. Such a pact so highly treasured by all groups is not to be light-heartedly tampered with or single-handedly modified or altered by any of the contracting parties without stirring up a dust of indignation in the community. Being a delicate balance and harmonization of various interests in the community, the Constitution protects itself from any hasty and ill-considered changes by prescribing a complex and tortuous process of amendment. Such a difficult amending process makes the constitution firm or rigid, not in the sense of barring all forms of changes in the Constitution, but in the sense of delaying any proposed alteration so as to induce deliberation and public debate among the people generally, and the constituent groups.

Rigidity and Flexibility of Constitutions

To discuss meaningfully the various methods by which formal amendments of constitutions may be achieved, we must draw a distinction between amendments by the ordinary method of legislation and amendments by a special process, i.e., a distinction between flexible and rigid constitutions. A flexible constitution can be revoked or amended in precisely the same way as an ordinary law can be repealed or amended; such a constitution is not classified as a fundamental or supreme law of the land, for it is not superior to any other law or to the legislature. Two Constitutions are usually put into this category – the unwritten Constitution of the United Kingdom and the written Constitution of New Zealand. All the other constitutions of the world are classified as rigid although they belong to different degrees of rigidity. Some are relatively more rigid than others, but there is no constitution that is absolutely rigid in the sense that it admits of no change or amendment. Absolute rigidity will set the stage for revolutionary forces to attempt to secure desirable political changes by violent or forcible means. A Constitution must recognise that human conditions are never static, for a society has a life of its own; it grows and decays just as man grows and ages. Its constitution must therefore change from time to time to take account of the changing social and political conditions of the people. Where the Constitution is rigid, there would be a strong tendency to procure changes by informal (judicial and conventional) methods, while flexibility of the constitution would

enable peaceful political and administrative changes to evolve slowly and steadily through formal constitutional changes. A constitution may, however, be flexible on paper but rigid in practice, especially where societal attitude to change is conservative. Hence, in Britain, although the Constitution is flexible, changes are quite slow to the point that often the party in power voluntarily elects to seek the views of the electorate before changing an important aspect of the Constitution. On the other hand, a rigid constitution may be operated in a manner that gives it the appearance of a flexible constitution. This will be the case where the dominant political opinion favours frequent alteration of the constitution. Rigidity of the Constitution has thus been recommended for "a community which is not firmly rooted in tradition or one in which the people are deeply divided by religious, racial or class conflicts."[1] This perhaps, explains why Nigeria has adopted very rigid amending procedures for the purpose of creating new states, adjusting state boundaries and changing human rights guarantees.[2] Rigidity in respect of certain amendments is well nigh absolute. For example, the United States' Constitution provides that no state of the union shall, without its consent, "be deprived of its equal suffrage in the Senate."[3]

Aspects of the Machinery for Constitutional Amendment

One of the most important characteristics of a rigid constitution is its supremacy or superiority over the legislature. Viewed from another angle, it may be said that because the Constitution is a special law and contains fundamental legal principles which the legislature cannot readily amend or change, the legislature cannot reasonably claim to be supreme. Much depends upon the text or the express provisions of the Constitution itself - whether it gives the legislature a free hand, or has prescribed a special process to be followed, in the amendment of its provisions. Where a Constitution prescribes a special amending process, it will surely specify the people or authorities competent to initiate or carry out an amendment; it will also spell out the details of the process by which the amendment can validly be carried out.

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1. Carl J. Friedrich, *Constitutional Government and Democracy*, Revised ed., 1950, p. 1950, p. 139 (Ginn & Co., Boston).
2. The Constitution of the Federation of Nigeria, 1960, section 4(7) & (8).
3. The U.S. Constitution, Art. V.

Who Can Initiate or Carry Out an Amendment?

A constitution is basically a set of legal rules which, in the absence of any special provision to the contrary, may be amended or revoked by another law enacted by the legislature. That is to say that the legislature, acting within the limits or restraints imposed by the Constitution, has the responsibility of amending the Constitution. Subject to the provisions of the constitution, the people themselves, acting directly through a referendum or indirectly through a constituent assembly or convention, may also initiate an amendment or participate actively in the process of carrying out an amendment. The people may be required to approve a given proposal for amendment before it gets to the legislature for enactment into law or to ratify an amendment already enacted by the legislature before it comes into force. It is the responsibility of the constitution to specify what role the people can validly play in an amendment and at what stage in the process. Also, in a federal system, where the interests of various geographical areas and various ethnic and linguistic groups are delicately balanced and counter-balanced, the legislatures of the constituent states may be given a say in the amendments which would affect their interests.

By What Process Can an Amendment be made?

An amendment may be initiated by the legislature and carried out as prescribed by the Constitution. Normally, the amendment proposal will come to the legislature in the form of a bill for a law aimed at effecting the amendment. To carry out the amendment, the legislature may require a simple majority of its members present and voting just as is required for making or amending ordinary legislation. But the power of the legislature to amend may be restricted in various ways. The legislature may be required to have a special quorum of members before proceeding to an amendment and to approve or pass the proposed amendment by a special majority. Where the legislature is bicameral, the two houses of the legislature may be empowered to consider a proposed amendment at a joint session and, possibly, approve or pass it by a specified majority. Again, it may be required that once the legislature receives and formally proposes an amendment, it should be dissolved and an election conducted on the issue of whether or not the amendment should be made. The people are thereby involved in determining by their votes whether or not the amendment

should be carried out. If the new legislature, equipped with the requisite mandates passes the proposed amendment by the constitutionally prescribed majority, the amendment will be made. This type of amending process is found in Belgium and some Scandinavian countries (Denmark, Norway and Sweden). In a federal system, the restriction on the power of the central legislature to amend the Constitution may be further increased by adding that an amendment approved or passed by that legislature would not take effect unless and until it is approved by the legislatures of a specified number or percentage of the states in the union. In Nigeria, an Act of the National Assembly altering certain entrenched provisions of the Constitution "shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the states."[4] Similarly in the United States of America, article 5 of the Constitution provides that an amendment validly proposed by Congress or a special convention called for the purpose shall take effect as part of the Constitution "when ratified by the legislatures of three-fourths of the several states, or by conventions in three fourths thereof."

As stated above, the people may be involved in the process of amending their constitution. Where the principles of initiative are accepted, they may be permitted to initiate or propose an amendment, and their approval in a referendum may be necessary before an amendment approved by the legislature may take effect. Depending on the provisions of a Constitution, an amendment may be initiated by a specific number or percentage of the qualified voters. In Switzerland, 50,000 voters can initiate a proposal for an amendment either of the whole Constitution or of a specific portion of it. If the Federal Assembly endorses the proposal for a total amendment, it proceeds to redraft the Constitution for submission to a referendum. If it opposes the revision, it must nevertheless submit the proposal to the people to decide whether or not the amendment should be made. If the people support the proposal, the Assembly must prepare the draft for submission, first, to the people in a referendum and, then, to the cantons for their views. Again, if 50,000 voters desire the amendment

4. The 1999 Constitution, section 9(3).

of a specific portion of the Constitution, they may submit their proposal in general terms or in the from of a full-dress bill ready for legislative scrutiny. If the Federal Assembly accepts a proposal submitted in general terms, it sees to it that the draft thereof is produced for a referendum; if, on the other hand, it rejects the proposal, it must submit to the people to decide whether or not the amendment is desirable. If the people support the amendment, the Assembly must prepare a suitable draft for submission to a referendum. If the proposal comes in form of a bill which the Assembly accepts, it is at once submitted to the people in a referendum. If the draft is rejected by the Assembly, it must be presented to the people along with an alternative draft prepared by the Assembly so that the people will choose.

The popular initiative is also a device used in some states of the U.S.A. to initiate proposals for constitutional amendments. Five to fifteen percent of the electorate of a given state may initiate moves to amend the state's constitution. The initiative is in some states also used for amending ordinary laws. It has never quite appealed to the framers of the Nigeria's Constitutions. The referendum is more in use in various countries, including Nigeria.[5] Such a direct popular involvement in the process of amendment may be permitted at various stages of an amendment. It may come, as in Belgium or Nigeria, as part of an amendment proposal or, as in some other cases, well after legislative consideration and approval of the proposal. In the latter event, the referendum serves as a ratification of the legislative decision. In Australia, for instance, any law enacted by the central legislature for the amendment of the Constitution will not come into force unless approved by the referendum. An amendment passed by an absolute majority of each House of Parliament must be submitted in each state to a referendum in which the voting is restricted only to those qualified to elect members of the House of Representatives. Also, if any law for the amendment of the Constitution, passed by one House but rejected by the other is again passed by that House after the lapse of three months, it must be submitted to a referendum. If the proposed amendment is

5. See, e.g. section 8 of the 1999 Constitution; section 4(5)(b) of the 1960 Constitution; section 8(1)(b) of the repealed 1979 Constitution; section 9(1)(b) & (3)(b) of the aborted 1989 Constitution; and section 9(1)(b) & (3)(b) of the Draft 1995 Constitution.

approved by a majority of the voters in a majority of the states as well as by a majority of all the electors voting, it becomes law. If such an amendment would affect the rights of any state or its representation in any of the central legislative houses, a majority of the qualified voters of that state must give their support.

Furthermore, an amendment may be proposed or ratified by the people acting through a convention. This is particularly the case in the United States of America. According to article 5 of the U.S. Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments which, in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof."

Delegates to such a convention are usually selected in accordance with the law relating to such convention. The law may give the legislature the power to select the delegates in accordance with a formular laid down for the purpose; but the legislature may be required to constitute the convention in such a manner as to reflect the party representation in the state legislature. The delegates may, of course, be elected by the state or federal constituencies so as to avoid any bias on the part of the local legislators.

The Amending Process in the 1999 Constitution

A well-considered or well-thought out Constitution must of necessity provide for its own amendment. Being human, the framers of such a constitution are not expected to foresee all future eventualities and make adequate provisions for them. As earlier stated, amending processes are usually meant to serve as a door to peaceful changes so as to forestall revolutionary upheavals. Our 1999 Constitution has provided six types of amendment. There are separate procedures for creating new states, for adjusting the boundaries of states, for creating new local government areas and for adjusting the boundaries of local government

areas.[6] There is also a procedure for amending the entrenched provisions, such as the provisions relating to human rights guarantees, to the creation of states and local government areas, or to the adjustment of state or local government boundaries. There is, finally, a procedure for altering any other provision of the Constitution (i.e., not being a provision covered by the amending processes mentioned above). It is significant to note that all forms of amendment are to be initiated only in the central legislature by its members or other designated groups, but never the people or the state legislatures. Secondly, every amendment made by the central legislature must receive the endorsement of the legislative assemblies of two-thirds or a simple majority of the states in order to be valid. Thirdly, the people (i.e., the electorate) are not directly involved in the process of amending the constitution except where the amendment is intended to create a new state or a new local government area in which case the people living in the area to be directly affected by the change will have to express their view thereon in a kind of plebiscite. Fourthly, it is noteworthy that the Constitution does not accept or adopt the provisions of section 4 subsections (7)-(9) of the 1960 Constitution, which provided that any alteration of the Constitution, which would deprive a state of the number of senators or representatives in the Federal legislature to which it is entitled will not take effect unless "a resolution has been passed by each legislative house of that Region signifying consent to its having effect."[7] It seems desirable that the constitutional rights of the states in that respect should be effectively protected.

As stated already, the 1999 Constitution has recognised and provided for six types of amendment - the creation of states, the adjustment of state boundaries, the creation of local government areas, the adjustment of local government boundaries, the alteration of the vital or entrenched provisions of the Constitution and other changes in the Constitution. For our present purpose, we shall lump together and discuss (a) the creation of states and local government areas, and (b) the adjustment of state and local government boundaries. But the other two

6. The 1999 Constitution, section 8.
7. Subsections (7) - (9) of the 1960 Constitution, section 4 were excluded from 1979 Constitution and were not revived or readopted by the 1989 or 1995 Constitution. It is not clear why those provisions did not appeal to the framers of those Constitutions

areas of amendment i.e. the alteration of vital or entrenched provisions and the alteration of other provisions - shall each be considered separately.

The Creation of New States and New Local Government Areas[8]

The process of creating a new state or a new local government area comprises five separate steps as follows: the proposal or request for the creation of the new state or local government area; the approval of the proposal by the people in a referendum; the approval of the result of the referendum by the majority of the states or of the local government council, the approval of the proposal by a resolution of the two Houses of the National Assembly or a resolution of the members of the state's House of Assembly; and, finally, an enactment, central or state, to bring the amendment about.

Step 1: There must be before the National Assembly a request for the creation of a new state or a new local government area. To be effective, a request must be made by not less than two-thirds of those representing the area comprised in the proposed new state or local government area in (a) the Senate and the House of Representatives, (b) the House of Assembly which has jurisdiction over the area; and (c) the local government council which has jurisdiction over the area. Each group should vote separately, and the three must support the proposal with the requisite majority. In the creation of a new local government area only two of the three groups i.e., (b) and (c), are relevant.

Step 2: Once the request or proposal is validly and effectively made, the issue is presented to the people, i.e., the electorate of the area to be carved out as a new state or new local government area. The request will die and become ineffective unless it receives in a referendum the support of "at least two-thirds majority of the people of the area where the demand for creation of the state (or local government area) originated". The voting in the referendum is to be by all the registered

8. The Constitution of the Federal Republic of Nigeria, 1999, section 8(1) and (3).

voters, including non-indigenes resident in the area. Also, every part of the proposed new state or new local government area should participate in the referendum and not just that restricted part or parts where the demand or request actually originated.

Step 3: The result of the referendum must be supported or approved in the case of state creation by a simple majority of all the states in the Federation supported by a simple majority of the members of the House of Assembly or, in the case of the creation of a local government area, by a simple majority of the members of each local government council in a majority of all the local government councils in the state. It is not clear why the approval of the majority of local government councils should be sought. Whereas a state in the union is delicately linked up with other states by a pact or constitution to which it is a party and any change in the membership of the union may affect its vital interests, such as its membership of the central legislature, a local government area in a state is not similarly related to, or linked up with other local government areas. Therefore, their consent or approval is strictly not necessary for the creation of a new local government area.

Step 4: Each House of the National Assembly (for the creation of a new state) or the House of Assembly of the state concerned (for a new local government area) must signify support for the proposal by a resolution supported by a two-thirds majority of its members.

Step 5: Thereupon, a bill for a law to create the new state at the centre or a local government area in a state will begin its life's journey through the legislative houses. If passed by each house in the same way that it passes any other bill for ordinary legislation, the bill upon receiving the requisite assent by the chief executive will become law, changing the Constitution so as to embody the new state or local government area.

Adjustment of State or Local Government Boundaries[9]

The adjustment of boundaries does not go through the same cumbersome process as the creation of a state or local government area. It does not, for instance, require the holding of any referendum to ascertain the choice or will of the people; and it does not require any special majority of the legislative houses to support it effectively. The proposed amendment simply goes through the following processes:-

Step 1: A request for the adjustment must be before the National Assembly or state assembly as the case may be. The request must be supported by the representatives of the area demanding and the area affected by the proposed adjustment in the Senate and House of Representatives. The House of Assembly in respect of the area, and the local government councils in respect of the area or, in the case of local government boundaries, by the representatives of the area concerned in the House of Assembly and local government council in respect of the area.

Step 2: The proposal to adjust state boundaries must have the support of:

(a) a simple majority of the members of each House of the National Assembly; and

(b) a simple majority of the House of Assembly in respect of the area concerned in the case of adjustment of a local government boundary, the proposal must receive the support of a simple majority of the members of the House of Assembly concerned.

Step 3: An Act of the National Assembly or a Law of the State Assembly will thereupon be considered and passed; if it

9. *Ibid.*, section 8(2) & (4).

receives the appropriate assent from the chief executive, it legally brings about the desired adjustment.

It is not quite clear what the Constitution means by "the House of Assembly in respect of the area." Does it require action to be taken by the Houses of Assembly of the two states to be affected by the adjustment of a state boundary, i.e., the assembly of the state from which an area will be detached as well as the assembly of the state to which the area will be transferred? It seems that the two states have real interest in the proposed change and must concur.

Amendment of Vital or Entrenched Provision[10]

For our present purpose, there are two areas of the Constitution recognised as vital and protected from any hasty amendment. These are the amendment provisions (sections 8 and 9) and the human rights provisions (chapter IV or sections 33-46), and they require a special process for amendment. First, there must be a proposal for the desired amendment, which must be approved first, by the votes of not less than four-fifths majority of all the members of each House of the National Assembly and, then, by the resolution of the Houses of "Assembly of not less than two-thirds of all the States. Thereafter, the National Assembly will consider a bill for a law to amend the relevant section or provision of the Constitution. if the bill is passed and given the assent of the Chief executive, it becomes law bringing about the amendment.

Other Amendments[11]

There are other amendments which may not concern the creation of a new state or new local government area, the adjustment of state or local government boundaries, the amendment of the human rights provisions or the modification of the amendment provisions in the Constitution. Such an amendment requires a formal proposal for the amendment (a) supported in each House of the National Assembly by the votes of not less than two-thirds of all the members; and (b) approved by a resolution of the Houses of Assembly of not less than two thirds of all

10. *Ibid.*, section 9(3).
11. *Ibid.*, section 9(2).

the States. It also requires an Act of the National Assembly passed in the same way that a bill for an ordinary enactment is passed.

Informal Amendments to the Constitution

As already stated above, the provisions of a constitution develop and decay in the same manner that the cells of a human body develop and become atrophied. Hence, there is always the need for some amendment of the Constitution. But formal amendments are often difficult, if not impossible, to achieve; yet, the human and other social environments in which the constitution operates are not static but are ever changing. Therefore, even if a Constitution does not provide for any form of change or alteration, changes must necessarily come through informal means, such as judicial interpretation and usage of the people, often called constitutional conventions. The fact is that a Constitution, like any other documented decision or agreement, needs to be interpreted and judiciously applied to concrete situations. It also needs to be updated and adapted to new and changed conditions. The need for rational or dispassionate interpretation and application of the Constitution is particularly emphasised by the fact that human language has not attained that perfection that carefully excludes ambiguity and vagueness in expressions. Therefore, immediately a constitution is promulgated and put into force, the courts and administrative authorities must go into action to inject life and meaning into its various provisions by interpreting them to have definite meaning and application to real situations. One limitation on informal amendments should be noted, however. A change by interpretation or convention must not be clearly opposed to any express provision of the constitution. Therefore, an interpretation or convention must bow or give way to any subsequent formal amendment of the relevant portion of the constitution.

Informal changes are very likely where the constitution remains very rigid in the face of pressing political and economic developments that demand quick or immediate constitutional modification. In some countries like the United States, for instance, wars and threats of war, economic crisis (such as depression and unemployment), natural disasters, industrial and commercial revolutions and the recent upsurge of social welfare ideas have tended to encourage informal constitutional changes so as to strengthen the powers and standing of the central

government. The courts have generally allowed such developments to influence their decisions, and the currents of popular opinions have generally moved in favour of such changes, thereby encouraging the development of usages or conventions in the same direction. Surely, any usage developed by politicians which is not against what the people want will be welcome to the people themselves.

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THE AMENDING PROCESS UNDER THE 1999 CONSTITUTION

by

Maxwell M. Gidado
(Senior Special Assistant to the President on Legal and Constitutional Matters)

Amending the 1999 Constitution

The history of constitution making in Nigeria dates back to the colonial era. The first written Constitution for the country was heavily criticised[1] as having been imposed by the colonial government without any input from the local populace. In the view of some constitutional historians, subsequent attempts at constitution-making tried to take into consideration local opinions or at least had a level of local involvement in them and, therefore, achieved some level of acceptability. The truth of the matter, however, may be that none of those constitutions were really accepted or rejected in the true sense of the word as they all suffered a premature death either through the promulgation of new Constitutions or the suspension by the military adventurists. From the Constitutions of the forties through to those of the nineties, one reccurring decimal is that none of the different Constitutions was ever amended before it was abandoned except, of course, one regards the removal of the Queen of England as the Head of State and substituting her with a ceremonial president under the 1960 Constitution in 1963 by the Parliament as an example of constitutional amendment.

Since this chapter is about amending the Constitution and not constitution-making *per se*, it will not dwell on how the various Constitutions were made but will only observe that their making

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1. See paper presented by Prof. Auwalu H. Yadudu, titled "Constitutional Debate in Nigeria Trends: Issues and Perspectives" at a Conference on the 1999 Constitution of the Federal Republic of Nigeria organised by Network for Justice, 11th - 12th September 1999 at p. 5.

followed a similar pattern from 1960 to 1995.[2] The making of the 1999 Constitution was different in the sense that it did not involve an elaborate[3] process of election of persons to a constitution-making body.

The reasons for this are obvious. For one, the time available for making a Constitution and conducting a democratic election as well as keeping the promise to hand over power to a civilian government was so short that in the best interest of the country, the shortest possible route was the only thing feasible. There had, in addition, been, within a period of twelve years, three exhaustive constitutional debates.

The 1999 Constitution

There have been six Nigerian Constitutions since independence, namely: (i) 1960 (ii) 1963 (iii) 1979 (iv) 1989 (v) 1995 and (vi) the present 1999 Constitution.

The 1999 Constitution is largely the reproduction of the 1979 Constitution with few amendments arising from the addition of about forty articles from the 1995 Abacha Constitution. Like the 1979 Constitution, it was designed under military tutelage and enacted as supreme law of the land by a military decree. It will be recalled that the military government of General Abdusalami Abubakar had appointed the Justice Niki Tobi 24 man Constitution Debate Co-ordination Committee to review the 1995 Constitution and supervise a public debate with regard to the preference of Nigerians. After barely two months of sitting, the Committee handed in its report stating that Nigerians had shown a preference for the 1979 Constitution with relevant amendments.

The 1999 Constitution does have a slightly more acceptable political pedigree than the 1995 Draft Constitution of the Abacha regime. General Abubakar's regime was widely considered by the

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2. There have been six Nigerian Constitutions since independence, namely (i)1960 (ii) 1963 (iii) 1979 (iv) 1989 (v) 1995 and the present 1999 Constitution.
3. Some have suggested that the 1960/63 Constitution is the only true Nigerian Constitution since it involved wide ranging Consultation before it was made. Of course, this is the only selective amnesia since that Constitution suffered as much criticism as the present one and infact led to a *coup de'tat*. See also Professor Sagay's "The 1999 Constitution and Nigeria" a paper presented at the workshop on The 1999 Constitution and the Future of Democracy in Nigeria held in Abuja June – July, 1999.

public to have been committed to genuine democratic transition and did keep its promise to organise elections and hand over to the elected administration. Today, however, the 1999 Constitution is being severally criticised, seriously condemned and scarcely commended. Chief F.R.A. Williams (SAN) has described it as a "fraud." Other Nigerians have even gone to the extent of calling for the outright rejection of the Constitution.

Be that as it may, the fact remains that the 1999 Constitution is already a legally binding document having been promulgated by Decree 24 of 1999. The way forward for it now will be to strive to construct legitimacy for it by the National and State Assemblies. Currently, many Nigerians have not even seen the Constitution. The document should be massively reproduced and circulated with the utmost urgency. Thereafter, a genuine national debate on its contents should be organised and modifications proposed. Accepted modifications can then be passed by the National and State Assemblies as provided for under the Constitution. Some of the new features of the 1999 Constitution include the provisions of section 24 which is one of the most important innovations of the 1999 Constitution. Section 24 not only spells out rights but sets out specific duties for Nigerian citizens thus:

It shall be the duty of every citizen,

(a) to abide by this Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge and legitimate authorities;

(b) help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required;

(c) respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood;

(d) make positive and useful contribution to the advancement, progress and well-being of the community where he resides.

There is also the environmental objectives of the state set out in section 20. This objective to protect and improve the environment reflects increasing concerns over the destruction and degradation of the natural environment.

Section 28 of the Constitution allows for dual citizenship for the first time in Nigerian Public Law. In terms of structures of government, the Constitution provides for the following bodies:

(a) The Federal Character Commission to ensure compliance with the federal character principle;

(b) The Independent National Electoral Commission to register parties and organise elections;

(c) The Revenue Mobilisation, allocation and Fiscal Commission to Monitor the federation Account and review the revenue allocation formula.

The 1999 Constitution is one document that has brought with it a trail of controversy. This is not surprising given the circumstances under which it was made and the events that had preceeded its coming into effect. The agitation for a redefinition of the country through constitutional rather than fratricidal means brought with it an expectation that the constitution making process would live up to the billing of being a radical process that will lay down the *grundnorm* of the country in a novel manner.

To a large extent these expectations are theoretical and uptopian since they are not based on any practical experience from anywhere.

The theory of constitution-making by "the people" has never truly been possible even in model democracies like the United States of America. A few wise and perhaps visionary men have always done the drafting of a Constitution, rather than as many people perceive, have the people do so through their elected representatives. It may be argued that if a document is submitted to the elected representatives of the people it becomes a constitution drafted by them. The only problem with this is usually determining what clothes such elected representatives with the required legitimacy to speak for the people.

It is easy to see then that constitution making is not as pure as some of the critics of the 1999 Constitution appear to suggest. Discourse of Constitutions such as the American Constitution would always reveal a reference to the framers of the Constitution and not the American people who accepted the Constitution. Perhaps it is only the South African Constitution which many can really describe as a Constitution made by the people. In truth, however, despite the wide ranging discussions held on the Constitution before it was made, its populist nature is not absolute neither does it negate the theory that constitutions are not made by the people but are merely accepted by them.

The purpose of this chapter is not to join the constitutional debate on review of the Constitution. It merely examines how the 1999 Constitution can or should be amended. In answering the question on how the Constitution should be amended, one obviously has to determine whether the Constitution should be amended in the first instance.

Background

Corwin the American sage on constitutional Law once wrote in his essay "The Worship of the Constitution"[4] that:

> "The *sine qua non* of democratic government is a feeling of like-mindedness among the members of the community and the mutual confidence which this feeling engenders.
>
> The initial tendency, therefore, of an agricultural democracy, rooted to the soil and deficient in social experience as it inevitably is, will be toward localism. We see this fact in the case of Russia, but it appears no less striking in our own early history as an independent community. Fortunately, there existed in America a considerable group of men whose views and interests passed beyond local boundaries and who were able by well-timed effort to arrest the dissolving tendency of the timed. Their work was the constitution."

4. *Corwin on the Constitution*, Vol. 1 edited by Richard Loss (Cornell University Press Ithaca and London, 1981 at p. 47.

The foregoing words appear to describe Nigeria's present position aptly. He continued:

> "Yet the formal ratification of the constitution was only a commencement, and not an especially propitious one. It was brought about in the face of active opposition which was supported by a widespread surly indifference. In the moderate words of John Adams, `the constitution was extorted from the grinding necessity of a reluctant people.' Hardly, however had the constitution gone into effect than the transforming miracle occurred."[5]

To a large extent some aspects of the foregoing statement applies to our own country. Rather than a transforming miracle, however, we have had a more lasting and persistent opposition to the Constitution, some borne out of genuine disillusionment, others a product of restiveness that demands that they oppose whatever appears fashionable to oppose at the material time. In this latter category will usually be found the most vocal of the constitutional amendment or change advocates. One learned author writing on the American experience said:

> "The country was deeply disturbed by an agitation that centered on none of the real problems and developed a fury over the unreal ones. Most of those who took the lead in dissenting were state' righters, local politicians who saw the new government as a threat to their prerogatives...
>
> The Virginia agitator who was extreme was Patrick Henry.. He ranted against the first words of the preamble. `Who authorizes, "he demanded, `gentlemen to speak the language of we, the people, instead of we, the states."[6]

5. *Ibid*, at p. 4.
6. Redford G. Tugwell, "The Emerging Constitution" (Harper' Magazine Press) at p. 86. (This does sound familiar).

The arguments of current proponents for amendment or change is similar to the above. It usually opens with the rhetoric that the 1999 Constitution is a fraud[7] since it opens with the pronouncement "we the people..." although it was not infact drafted by the elected representatives of the people. Of course some of these people never really have anything against the Constitution apart from this criticism. They are usually unable to state what provisions they consider undesirable for the Nigerian nation and what provisions they would like to see instead. Notwithstanding this criticism of the calls for constitutional change there is indeed some argument in favour of consideration of the need for change.

It is to the voices of reason rather than of passion that we must listen to in considering whether we are ripe for constitutional reform or not. On a general note, however it must be pointed out that the problems that bedevil constitution-making any where in the world also beset to our country. Our circumstance is best understood by this statement:

> "The advocate of federalism has a difficulty inherent in his subject. This, of course is duality. When authority is divided, proprietors of both allocated powers feel themselves challenged to enlarge their shares, and this issue will always be a favourite of politicians. The possibility of creating a cause is attractive because it so easily takes on the characteristic of a crusade. However earnestly the original arrangers may have tried to establish a stable situation, dissatisfaction is apt to gnaw at unhappy minorities. Parties form around them or are held together by their attraction. Only the most disinterested and prescient original arrangement can prevent this sort of division and continuing acrimony. It has never yet happened."[8]

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7. This has been attributed to Chief Rotimi Williams and echoed by Prof. I.E. Sagay, SAN in his paper presented at the workshop on. "The 1999 Constitution and The Future of Democracy in Nigeria," 29th June - 1st July, 1999, Nicon Hilton Abuja at p. 7.
8. Note 6 *supra* at p. 89.

Of the on-going suggestions on what to do with the 1999 Constitution, one of the most favoured is the clamour for a Sovereign National Conference and its more recent modification, a sovereign conference of ethnic nationalities. There is also the call for a constitutional conference by the elected representatives of the people. One fundamental defect in most of these suggestions is that they appear to be thoughts deriving from a hang over of prolonged military rule. Most of the proponents of these views, whilst claiming to be democrats seem to forget that there is an existing Constitution which would render any thing not done according to its provisions void. In view of the calibre of the people advocating this position, it is difficult to explain their actions away on the basis of ignorance.

The only reasonable explanation is that of wanton mischief. It is obvious to the most elementary student of constitutional law that the only way to bring about their suggestions is by subverting the constitution and thereby making the very act of reform illegal.

The only practical way of bringing about some of these methods of changing the constitution short of a *coup de'tat* is by asking the National Assembly to commit suicide. This is because the only way that a sovereign national conference set up to draft a new constitution can be legal would be for the National Assembly to amend the Constitution and transfer its law making function to the said conference. This is a dream. No National Assembly will ever cede its powers in that manner at least not voluntarily. In any event so long as the 1999 Constitution exists such a conference will be an illegal body. The only possible arrangement that can bring about any conference whether sovereign or otherwise would be if such a conference were merely advisory in which case it will be just a jamboree. Accordingly any arrangement for amendment or change of the Constitution outside the provisions of the 1999 Constitution will be null and void and of no effect whatsoever. Change under a democracy must be constitutional.

The Procedure for Amendment

The 1999 Constitution can be amended by the appropriate constitutional procedure. Before we go into how this can be done let us look at the process by which the American Constitution after which our Constitution was modelled has been amended. The first ten amendments to the 1787 American Constitution were proposed in 1789 and adopted

in 810 days i.e. within a period of 2 years. The Eleventh amendment was proposed in 1794 and adopted in 339 days. The twelfth amendment was proposed in 1803 and adopted in 229 days. The thirteenth amendment was proposed in 1865 and adopted in 309 days. The fourteenth amendment was proposed in 1866 and adopted in 768 days. The fifteenth amendment was proposed in 1869 and adopted in 356 days. The sixteenth amendment was proposed in 1909 and adopted in 1278 days.[9] Today the American Constitution has undergone 26 amendments.

Several of the amendments were the outcome of several years of agitation. Apart from these fundamental amendments to the American Constitution, the real amendments to the Constitution have been done by the courts empowered under their Constitution to interpret the Constitution. It is the popular view as articulated by the courts that it has the effect of truly making the American Constitution respond to yearnings of the times. The courts role in this regard has been guided by practical experiences gained over time.

Even where the constitution has been amended by Congress i.e the legislature, it has been shown that this was done only after the peculiar experiences derived from the application of the existing provisions. For instance, the original Constitution did not contain any limitation on the number of terms that a president can serve but had to be changed when it was discovered, as Jefferson said that "indefinite eligibility would in fact be for life and degenerate into an inheritance"[10]

The procedure to be adopted in amending the American Constitution is as provided in Article V thereof. Whenever two-thirds of both Houses of Congress shall deem it necessary propose amendments to the Constitution or on the application of two-thirds of all the several states congress shall call a convention for proposing amendments which shall be ratified by legislatures of three-fourths of the several states.

Chief Justice Marshal, described the American constitutional amendment process as `unwieldy and cumbrous'[11] It has been suggested

9. For further statistics, see *New York Times*, February 21, 1937.
10. Corwin's *The Constitution and What it Means Today* 12th ed., Princeton, Princeton University Press, 1958, Revised by Harold W. Chase 1978 edition.
11. *Ibid* at p. 270.

that this fact has favoured the growth of judicial review, "since it has forced us to rely on the court to keep the Constitution adapted to changing conditions."[12]

Procedure for Amendment under the 1999 Constitution

The procedure for amending the 1999 Constitution is to be found in sections 8 and 9 thereof. These provisions are not very different from what was contained in the 1979 Constitution or the other two Constitutions that were "still born" between 1988 and 1995. Section 9 is a general provision relating to amending every provision of the Constitution apart from the exceptions created thereunder. In substance it provides:

(1) The National Assembly may subject to the provisions of this section alter any of the provisions of this Constitution.

(2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by a resolution of the House of Assembly of not less than two-thirds of all the states.

(3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four - fifths majority of all the members of each of the Houses and also approved by resolution of the House of Assembly of not less than two-thirds of all the states.

12. *Ibid* at p. 271. There is also a suggestion that the amending process is *prima facie* highly undemocratic since an amendment can be made by 38 States containing less than half of the population of the country or can be defeated by 13 states containing less than one-twentieth of the population.

(4) For the purpose of section 8 of this Constitution and of subsections (20 and (3) of this section the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this Constitution.

Section 8 of the Constitution relates to creation of new states and local government areas . Its provisions are more elaborate than even section 9 and require consensus and consultations before a new state or local government can be added to the federation.

It is obvious from the provisions of sections 8 and 9 that the Constitution intends that it be not altered at a whim. It demands consultations. It demands consensus. It also demands determination on the part of whoever is proposing the amendment.

Some people may argue that these stringent conditions will never allow for the amendment of the Constitution. This is far from truth. If indeed the very vocal criticisms of the 1999 Constitution reflect the will of the people, amending the Constitution through constitutional means will not be impossible. All that the elected representatives of the people will suffer will be the inconvenience of serving the nation by going through the safeguards provided in the Constitution the sole purpose of which is to ensure that it is the rule of law that prevails and not the pedestrian views of a tribal demagogues. We must as a nation learn that short cuts are usually not short after all.

If we seek to avoid developing and amending the Constitution through a learning experience of both judicial interpretation and democratic growth, then we must subject ourselves to the rigours of legislature driven alteration and its attendant political grandstanding .

Conclusion

A Constitution as the *grundnorm* of the legal system must be autochthonous. The mode of amending the constitution may differ from country to country, but the underlying factor must be the participation of the people. In our present circumstance, how do we go about the review of the Constitution bearing in mind the need to ensure full participation by all Nigerians?

Chief FRA Williams has advised Nigerians to organise to propose reforms to the contents of the Constitution. Dr. Lateef Adegbite has

called for the election of a Constituent Assembly to be saddled with the duty of reviewing the Constitution. Others have proposed a Sovereign National Conference for the review of the Constitution and carry out a general restructuring of the country. Let us examine these two options. The last two options are not within the contemplation of the 1999 Constitution.

A Constituent Assembly for the review of the Constitution will need to exist side by side with the present National Assembly and the states Houses of Assembly with its members directly elected by the people. It will derive its powers from an enabling law to be enacted by the National Assembly. Its decisions and work will either be submitted to the National Assembly or approved by the people directly in a referendum. As an ad hoc body, it will cease to exist as soon as it finishes its work. But the question is will the National Assembly allow the existence of such a body side by side with it?

The option of a Sovereign National Conference (SNC) is an option that many Nigerians are not ready to even discuss. Due to the propaganda by the Abacha regime, this option is seen by many Nigerians as the surest way to the disintegration of Nigeria. This option is similar to the Constituent Assembly option. The major difference being the sovereign nature of the conference. This implies that the decision taken at SNC will not be subject to ratification by any authority or body. This in effect also means that the National Assembly will have to cede part of its legislative sovereignty as far as the review of the Constitution is concerned. In view of the fact that a lot of Nigerians see this option as a ploy to divide this country, it is going to be difficult to get a consensus.

So what do we do? As already mentioned we are left with the option of using the procedure for amending the Constitution provided for in sections 8 and 9 of the 1999 Constitution. From this procedure, the proposal for amendment which in a case for review should contain all relevant sections to be amended must have been previously agreed to by two-thirds of the States Houses of Assembly which come to twenty-four States. How do we get twenty-four States to agree on a common proposal you may ask? What is material to the Bayelsa State House of Assembly may be the derivation principle, in the revenue allocation formula; this might not necessarily be favoured by Sokoto State or Gombe State. Or should each state send in its proposal and have the

National Assembly decide on the consensus? It is only when all the states have serious inputs into the process that their support can be got.

It should be obvious by now that to ask our legislators to combine the business of Constitution review to their normal legislative duties seems like an impossible mission or at best a time-consuming exercise. Will it be possible to achieve the type of review we want within a short time? The answer is yes. Indeed, the need to amend the Constitution is urgent if we want democracy to survive in this country. There are so many provisions of the Constitution that need revisiting. For a Federal Constitution, a lot of its provisions are unitary in nature. Happily, both the legislature and the executive arms of government in the country have set in motion some machinery for the review of the 1999 Constitution. The Senate recently passed a motion mandating its relevant committees to start the process of review. The House of Representatives has expressed a similar opinion and it can, therefore, be assumed that the National Assembly is favourably disposed to reviewing the Constitution. Similarly, President Obasanjo recently inaugurated a 21 man inter-party Committee on the review of the 1999 Constitution, citing the sustenance of the corporate existence of the nation and the attainment of true federalism as the underlying principles behind the review. The inter-party Committee is to serve as a think tank for assisting in producing a proposed executive amendment bill to the National Assembly. Certainly the die is cast!

General Index

The use of *et. seq.* indicates that the issue continues on subsequent pages of the text. The use of *passim* after a page number indicates that the subject is referred to in scattered passages throughout the text.

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