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**ISSUES ON**  
**CONSTITUTIONAL LAW**

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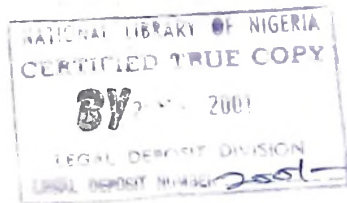
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**ABOABA OMOTESHO**  
**&**  
**ABDU BAWA**





# ISSUES ON CONSTITUTIONAL LAW



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&  
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## FOREWARD

After nearly 30 long and disastrous years of military rule in Nigeria from 1966 to 1999 (less only four wobbly years of civilian interregnum from 1979 to 1983), the culture of constitutionalism in the country has become brutally defaced, degraded and obscured. The return of constitutional government in May 1999 marked a new beginning for virtually everybody-the politicians, the legislators, the students, the academia and all. No wonder that all levels of government – federal, state and local government – the nation has been experiencing a rattling bustle of inter-governmental disputation as to the limits of power and the do's and don'ts of governmental action.

Under these circumstances, it is happy to welcome this collection of essays written by two of my young colleagues, *A. O. Omotesho and Abdu Bawa*. Appropriately titled, *Issues on Constitutional Law*, the authors in ten short essays covered the main issues of constitutional law, which are relevant and topical in the present Nigerian situation. Each chapter of the book is devoted to a particular issue and discusses it in simple, straightforward and analytical style. In this way, the essays are inviting to read and are free from the tedium usually associated with complicated and theoretically abstracted research.

Of the ten essays contained in the book, two (chapters 1 and 3) are authored jointly by *A. O. Omotesho and Abdu Bawa*. These two chapters provide a conceptual and historical framework for constitutional law and constitutionalism in Nigeria. *Abdu Bawa* contributed chapters 2, 9 and 10 in which he identified and reviewed important constitutional concepts, discussed the Legal Effect Of Change Of Government By Extra-constitutional Means and examined some 'constitutional' acts undertaken in Nigeria during the Military Regime. *A. O. Omotesho* wrote the remaining five chapters, which, between them, dwelt on The Utility Of The Fundamental Objectives Provisions and The Concept Of Citizenship Under The 1999 Constitution, The Nature And Practice Of Fundamental Rights, The Nature and Manner of exercise of Legislative and Executive Powers Under The Constitution and The Concept and Scope Of Judicial Independence Under The Constitution. In all these essays, the authors referred to and sometimes summarized some relevant cases.

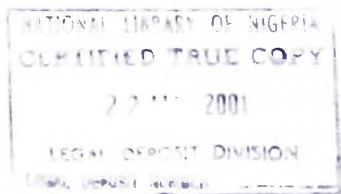
The essays are written primarily for University law students and students in other tertiary institutions studying constitutional law either as a core course or as a required ancillary course. The book thus serves an important need to make academic materials available to such students in these days of harrowing book scarcity in the country. But the essays will also reward reading by politicians and others, including lawyers, who may want or need to read up elements of constitutional law or to brighten their dimming knowledge of rudiments of the subject.

The authors make no claim or pretention to details or exhaustiveness in their treatment of the issues discussed. Any good student therefore committed to excellence will need to consult additional materials. For this reason, the authors themselves have been concerned to provide at the end of each chapter a list of references for further reading.

Finally, I want to put on record my deep appreciation for his effort by A. O. OMOTESHO and A. BAWA and commend the book for gainful reading by those to whom it is addressed.

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12<sup>th</sup> February, 2001



## CHAPTER I

### AN ANALYSIS OF THE DEFINITIONS AND FORMS OF CONSTITUTIONAL LAW

(A. O. Omotesho and Abdu Bawa)

The word Constitution has been variously defined by writers and authors of the subject. Thus, like most concepts the word constitution, defies a single definition owing to the different perceptions of it. The truth of how perceptions colour ones understanding of a concept is interestingly offered in the example of how five blind men whose ambition to see an elephant could only be fulfilled by each touching the different parts of the elephant and therefore describing it from their various feelings of the part touched.

In the perception of Hood Phillips,<sup>1</sup> the word Constitution is used in two different senses the abstract and the concrete sense. In the abstract sense, he said, it is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen.

The author proceed to define a constitution in its concrete sense as the document in which the most important laws of the constitution are authoritatively ordained.

With respect the definition by Hood Phillips in the abstract sense raises no problem as it appears to be in line with the Consensus of most writers or authors of Constitutional law that a constitution seeks to set out the structure and working of the various organs of government as obtained in any given community. The other definition raises the problem of interpretation. If it is interpreted to mean a single document, then it is not all nations of the world that have a Constitution in the form of a single document. In the case of Britain which does not have it embodied in a single document, the definition could embrace it in the sense of the various constitutional documents which can be referred to as important laws that are authoritatively ordained.

According to Oluyede<sup>2</sup> It is an expression, whether in documentary form or unwritten, of legal principles, rules, laws and in some cases, conventions or customs in accordance with which a country is governed and by which its citizens are bound.

<sup>1</sup> O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law*, 6<sup>th</sup> edn. (1978 Sweet & Maxwell) P. 15

<sup>2</sup> P. A. O. Oluyede; *Constitutional Law in Nigerian* 1<sup>st</sup> edn (Evans Brothers; 1992) Page 1

One cannot but agree with the general consensus of writers that a constitution is that supreme law of the land, which defines the structure of the organs of state and the relationship between these organs. With one another on the one hand and with citizens of the state on the other hand.

### RATIONALE FOR A CONSTITUTION

The question that may be asked is why is it necessary to have a Constitution. The answers are not far-fetched. Generally speaking, a Constitutional government defines the scope of the exercise of state powers by those in authority. A constitutional government is predicated upon the notion that governance must be conducted in accordance with the dictates of the law which is a product of the people with whom power lies or by their representatives. Thus a Constitution is desirable for the following reasons.

1. To specify the powers of state organs to avoid arbitrariness e.g. The Specification of executive powers, legislative powers and judicial powers.
2. Ensure accountability of those vested with power to the governed e.g. appropriation of fund.
3. Protection of minorities against the majority rule and need to ensure equality of all e.g. Right to freedom from discrimination.
4. Desire to secure and protect fundamental rights and freedom from state power e.g. Right to freedom of expression.
5. The need or desire to be guided by certain cherished ideals which must be attained for the betterment of the society e.g. The fundamental objectives and directive Principles of State Policy.
6. The desire to break up with the past owing to liberation from colonial rule or because of a war or revolution e.g. The 1960 Constitution; the 1787 American Constitution came into being after the American War of Independence.

The achievement of these goals or desire is the collective responsibility of all the people who have firmly resolved to have the Constitution and must do all that is necessary towards its realization. In this regard, it is pertinent for the Constitution to be Supreme and ensure that it is binding on every authority.

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## SOURCES OF CONSTITUTION

The Sources of Constitutions can be seen as the material evidence from which a constitutional lawyer derives a source of rule on a given subject. Broadly Speaking, a Constitution of any country of the world is either written or unwritten. The sources sometimes depend on whether it is written or unwritten constitution, although as we shall see, they have somewhat become flexible and applicable to both.

1. Statutes or legislations constitute the bulk of the sources and therefore be regarded as a Primary source of Constitution. Examples are The 1999 Nigerian Constitution, The 1787 United States Constitution, The Constitution of the Federal Republic of Germany etc. Apparently this source is in line with written Constitutions. But even in some cases of unwritten Constitutions, there are evidence of some historical documents from which the British Constitution can be gleaned. The British Constitution is regarded as one of the best examples of an Unwritten Constitution. Since there is no book referred to as the Constitution of Great Britain, but there are series of Parliamentary Acts (Legislation) that are Constitutional in nature. Examples are the Petition of Rights 1628, The Bill of Rights 1689, The Act of Union of Scotland 1706, The Parliament Act, 1911 and the Judicature Act, 1925 etc. All these and other such statutes form a veritable source of Unwritten Constitution of Great Britain.
2. Judge-made Law (Case Law) or Precedents) is also another Primary source of Constitution and also cuts across and applicable to both written and unwritten Constitution. The doctrine of Judicial Precedent applies to Constitutional law as well as other branches of law. It is to the effect that a decision of a Superior Court is binding on an inferior or lower Court faced with similar facts and circumstances. Such interpretation of statutes by judges or Constitutional matters therefore becomes a binding rule on others and consequently a Source of law.
3. Conventions: Conventions are rules base on customs and practices that had evolved over a long period of time. A.V. Dicey defines conventions as rules for determining the mode in which the discretionary powers of the Crown (or of ministers servants of the crown) ought to be exercised<sup>3</sup> Expanding on this definition, an

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<sup>3</sup> A. V. Dicey, *Introduction to the study of the Law of the Constitution*, 10<sup>th</sup> edition, 1959 Chapters 14 and 15

author says they represented some understanding, tacitly agreed upon and based on a long practice by which the conduct of the crown, parliament and cabinet was regulated in cases where there were no rules.<sup>4</sup>

Thus a Convention is any binding rule of behaviour accepted as obligatory by those to whom it applies. However, a Convention must be clearly distinguishable from a legal rule. For a rule to qualify as a Convention, it must be accepted as a binding rule and it is only applicable in the absence of a legal rule on the subject. Conventions constitute a quick source of Unwritten Constitution e.g. Britain where the appointment and removal of Prime Minister, the selection of Cabinet Ministers etc all rests upon Convention. As for written Constitutions, Conventions have no place, but many Conventions have been embodied in written Constitutions especially in Commonwealth countries. It is important to point out that even though Conventional rules have no force of law, a breach of it will eventually lead to a breach of law.

4. The Common law which has its origin from Britain and which has been received and applied in many countries of the world is also a rich source of Constitution especially in the Commonwealth countries or other English Speaking nations. In this regard mention must be made of the Principles of Equity which developed subsequently to supplement some of the rigid principles of Common Law. Thus, Common Law and equitable Principles which are Constitutional in nature are also important in considering the Sources of Constitution.
5. Literature which consists of writings of jurists, political thinkers, philosophers, statesmen and other landmark contributions on constitutional issues constitute a vital source of Constitution especially on Constitutional practices and procedures.

#### FORMS OF CONSTITUTION

The Classification of constitution is intended to categorise constitutions according to certain objects or purpose, which they serve, or certain characteristics they possess for realisation of certain objectives.

Conventionally, constitutions are classified into: Written and Unwritten; Rigid and flexible; Supreme and non-Supreme; Federal and Parliamentary and Unitary Presidential; Each of these will be examined in turn.

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<sup>4</sup>Aiye, D. O. *Selected Essays on Nigerian Constitutional Law*, (1979) Ibadan Press Limited P. 1

### (a) **Written and Unwritten**

This classification is said to be very illogical, outdated and unhelpful. It does not seem to serve any useful purpose because there is no country in the world that has no constitution which is wholly written and wholly unwritten.

Britain is often cited as the sole surviving example of a country with a constitution that is unwritten. The truth however, is that there are various Acts of the British parliament which are of constitutional nature. Examples of these are:

- The Magna Carta of 1215
- Petition of Rights of 1628
- The Bill of Rights of 1689
- Act of Settlement of 1700
- Acts Parliament of 1911
- Judicature Act of 1925, etc.

The British constitution is therefore not a written constitution in the sense that the rules of the constitutional law of that country are not embodied in a single document and also because most of the English constitutional rules derive from conventions and usages which are indeed more important than some of the written constitutional rules.

Even where a country has the legal rules of the constitution embodied in one single document, these rules are either supplemented or modified or departed from by constitutional conventions, usages, and practices. Therefore, such constitutions though written in a single document, do not consist of only written legal rules. Indeed, where constitutional conventions have developed, some of them may be more important than the written rules of the constitution.

it is as a result of the foregoing therefore that it is said that this mode of classification does not serve any value; as it does not advance our understanding of different constitutions and their distinctive features.

### (b) **Rigid and Flexible**

This classification owes its origin to Lord Bryce in his book "studies in history and jurisprudence". According to the first, a constitution is rigid when for its formal amendment; a special procedure or machinery is provided. Where the legal process for amendment is the same as that for making ordinary laws, a constitution is described as flexible.

Based on this distinction most of the constitutions of the world barring New Zealand, England and the defunct USSR can be categorized as rigid constitutions. Interestingly, a constitution, which is rigid in outlook, may indeed be quite flexible to amend. Conversely, a constitution, which is flexible theoretically, may actually be rigid to amend in practice.

A typical illustration of the latter is the third Republic Constitution of France. That constitution in theory is flexible in that it required only a simple majority of both houses of the national assembly at a joint sitting for its amendment. However, since both houses 'were never in agreement, any bill emanating from either of the houses be rejected by the other.

Rigidity of the constitution varies from constitution to constitution. Where a special procedure is prescribed, it may be in respect of the voting procedure or it may also be in respect of the bodies that may be associated with the amendment procedure.

Generally, where a special procedure is prescribed, it is either the Legislative sitting separately or in joint session. Where special machinery is prescribed, it may be the ordinary legislature making the amendment in association with other bodies. For example, the 1999 constitution of Nigeria can be amended by 2/3<sup>rd</sup> states. In the case of amendment of the fundamental rights provision and the amending provision itself as well as the provision dealing with creation of states, the National Assembly requires 4/5<sup>th</sup> majority in both houses.

The Australian and New Zealand constitution are the examples of those constitutions where the legislature alone cannot amend the constitution. The approval of the people in referendum is a further requirement.

**Note however, that the fact that a constitution is rigid in outlook should not lead one to conclude that such a constitution is difficult to amend in practice. The rigidity of the constitution in practice would depend upon a variety of factors such as:**

- (i) Whether the constitution is accepted to the most powerful group in the country.
- (ii) Whether the minorities whose rights are protected by the constitution would regard a particular amendment as posing danger to their interests.
- (iii) Where the constitution is the enactment of a foreign power, it may not be acceptable to the people of the country either because of its unsuitability or its variance with the character, attitude and culture of the citizenry. Invariably, such people will seize the first opportunity to tamper with the constitution. Even when the

constitution is rigid in theory, the people working the constitution may be so dynamic in their approach and as such they would keep experimenting with constitution so as to serve their national interest, the higher values and objectives which the people cherish most. For example, the constitution of Switzerland, which is regarded as the most rigid in outlook, has been subjected to frequent amendments because of the adaptability of the people of that country to new situations.

The Austrian constitution, which contains similar amending provisions, has only been subjected to amendment half a dozen times. Therefore in classifying the constitution into rigid and flexible categories, one should have regard to the suitability of the particular constitution for that country.

Remarkably, a constitution even if rigid in theory, may in practice be flexible if the group in power finds it convenient in the pursuit of that group's perpetuation in power. On the other hand, where a constitution is flexible as in the case of New Zealand, its amendment may be highly difficult. This may be the consequence of the political consciousness of the people. Thus, the legislature is compelled to first ascertain public opinion on any proposed amendment before actually embarking upon amending the constitution.

Even where the ordinary law making procedure may amend the constitution, the members of the legislature may indeed, react quite differently when considering the amendment of the constitution.

The foregoing are the external factors that ascribe rigidity to an otherwise flexible constitution.

### (c) Supreme and Non Supreme

A constitution is said to be supreme when the provisions are binding upon every authority established under the constitution including the legislature. The supremacy of a constitution depends upon the extent to which limitation imposed thereby can be enforced in a legal manner.

Where a constitution stipulates the procedure to be adopted in passing a law by the legislature, it is argued that it is not the constitution but the legislature that is supreme. This is because ultimately, it is the legislature that passes the law. It is also contended that any special procedure contained in the constitution does not limit the powers of the legislature and that once the legislature passes a law even without following the special procedure, it is law because the legislature has declared it so.

The supreme court of South African in *Harris V. Danges* and the privy council in the Ceylonese case of *Bribery Commissioner V. Ransinge*, took the view that when the constitution prescribes the form and manner to be followed by the legislature in making a law including a constitutional amendment, the courts reserved the power, to inquire into the question whether the law made by the legislature is in accordance with the formal manner so prescribed where the formal manner so prescribed is not followed, the action of the legislature will be unconstitutional.

In such cases, although the legislature actually passes the law, the formal manner prescribed in the constitution, serves as control on the legislature and therefore to that extent, it is the constitution and not the legislature that is supreme and sovereign.

Note that a constitution, which is rigid, is invariably a supreme constitution because for amending the constitution, the legislature has to follow the special procedure. Note also that a federal constitution must also be supreme. For example, Section 1 (1) of the 1999 Constitution of Nigeria, which provides that:

*"This constitution is supreme and its provisions shall have binding force on all authorities throughout the Federal Republic of Nigeria.*

#### (c) Federal and Unitary

In both the Federal and Unitary constitutions, there exists two levels of government but the distinction between them lies in the manner in which the federal or central government relates to the regional or state government.

A constitution is said to be federal in nature when the two levels of governments are constituted for different purposes such that each exercises powers given to it by the constitution in a manner *independent* and in co-ordination with the other level of government. The relation between the Federal legislature and the state legislature is that of a co-ordinate and not one of subordination.

In a federal constitution, **there** is a division of powers between the central and state government such that the central government is constituted for certain purposes. The government can only exercise those powers conferred on it by the constitution. In exercising their respective powers, both levels of government function independently of each other. The exercise of power by one is not subject to control or approval of the other.

A constitution is Unitary in form when the entire power by law is vested in the central government and the units are created or constituted by the law made by the central legislature. Under a unitary constitution, the powers of the states or units are derived from the central government subject to such conditions as may be imposed by the central government. The existence of the states also depends upon the central government. The exercise of the powers by the state government may also be subjected to approval or supervision by the central authority.

Thus, in a Unitary constitution, there may be two levels of governments exercising different powers. However, the position of the unit viz a viz the central government is that of a subordinate.

According to this classification, the constitutions of America, Canada, Australia, Switzerland, India and Nigeria may be regarded as federal. The Constitution of New Zealand, France and Irish Republic are examples of Unitary constitutions.

#### **(e) Parliamentary and Presidential**

This classification is based upon whether a constitution has incorporated the doctrine of separation of powers. By separation of powers we mean that the power of the state is divided between the legislature, Executive and Judiciary. But for the purpose of classification of constitutions, we are mostly concerned with the division of powers between the Executive and Legislature.

In a parliamentary type of government, the Executive is a part of the Legislature. Ministers who exercise Executive powers, wholly consists of the members of the Legislature who sit, take part in proceeding of the legislature and being answerable to the Legislature, hold their office only so long as they have the confidence or support of the Legislature. If they forfeit the legislative confidence, the council of minister has simply to go.

The entire legislative Business is planned and initiated by the council of Ministers. When they have an absolute majority in their support by the use of party whip and the threat of dissolution of the legislature, they can control the legislature to approve any legislation they initiate.

The executive under this system of government may also get the law making power delegated to it to any extent the legislature may decide.

Under Presidential types of constitution, there is a clear separation of powers between the executive and legislature in that both are directly elected by the people and hold their office for a fixed period of time. The

Executives are answerable to the people and not to the legislature. The Legislature too is not subject to the dissolution power of the Executives although under checks and balances, the executive has been subjected to the control of the legislature under the impeachment process, which the latter can exercise upon specified grounds.

The executive is not part of the legislature nor can they sit or take part in the proceedings of the legislature. The executive may however, send Draft Bills proposing new legislature to the legislature, which may or may not be acted upon.

Although the law making power is vested in the legislature, in practice it has become necessary to delegate subordinate and constitutional law making power to the Executives. This practice the courts had to accept as constitutionally permissible.

#### **REFERENCES FOR FURTHER READING**

O'Hood Phillips & Phillips & Paul Jackson, Constitutional Law & Administrative Law 6<sup>th</sup> edition.

Oluyede, P.A.O. Constitutional Law in Nigeria Evans Brothers

Aihe, D. O. (1979) Selected Essays on Nigerian Constitutional Law

Dicey, A. V. (1959) Introduction to the study of the Law of the Constitution 6<sup>th</sup> edition.

## CHAPTER II

### A REVIEW OF EXISTING CONSTITUTIONAL CONCEPTS

(Abdu Bawa)

The entire hallmark of any Constitutional government is to secure and ensure the protection of human liberty, which is a requirement of any meaningful existence by any society consisting of human beings. In the course of human existence and the development of organized societies, some principles relevant to the development and understanding of Constitutional law have emerged to ensure the achievement of the desired goal of human liberty and to control and restrict the absolute power of the state over the individual. Some of these principles have come to form the basis of some Constitutions. It has therefore become necessary to appreciate the Concepts in the Study of Constitutional law.

#### (a) Separation of Powers

It would appear from all available literature on this subject that the authors are united that this concept developed from the observations and writings of a Jurist, John Locke on the political conditions existing in England by the Seventeenth Century. John Locke in his opinions thought it convenient to confer Legislative and Executive powers on different organs of government and argued that it was wrong to confer on the law makers the powers of executing the law because they might exempt themselves in the process from obedience. The doctrine was further developed by a French Jurist, Montesquieu, who argued that that in every state, there are three kinds of powers, the Legislative, the Executive and the Judicial powers. He was concerned with the preservation of political liberty which in his view can only be found when there is no abuse of power by those in authority and that when the Executive and Legislative powers are united in one of the same person there can be no liberty. Also there is no liberty if the judicial power is not separated from the Legislative and the Executive. He opined further that the extent of the doctrine of separation powers is that political liberty is to be found only when there is no abuse of power, but Constant experience reveals that every man invested with power is liable to abuse it and to carry his authority 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. In fact, to Montesquieu, there would be an end of everything were the same man, or body, whether of the nobles or of the people were to exercise all the three powers. The whole idea behind this concept therefore is that neither the Legislative, Executive nor the Judiciary should exercise the whole or part of another's power, but it does not necessarily exclude influence or control by one over the act of

another. The scope of Legislative power is simple to make laws of general applicability. Executive power refers to the power to execute and administer the law while judicial power is the power to interpret the law and decide disputes between individuals or authority in accordance with the law.

The perception of the concept varies from one democracy to another. The practical usefulness and application of it is best illustrated by the Constitutional history of U.S.A. and Great Britain. The framers of the United States Constitution were very much influenced by the opinions and writings of these philosophers. Under the 1787 United States Constitution, Legislative power is vested in the Congress, consisting of the senate and House of Representatives. The Executive Power is vested in the President and his Cabinet while judicial power is vested in the Supreme Court and other Courts as may be established by the Congress. Each of the organ exist independent of the other's power and control. However, in line with the Concept of checks and balances which is an essential part of the doctrine, the assent of the executive is required for any legislation by the legislative arm, although such assent to bills may be overridden if the Legislature passes the same bill by two-third majority of members. Also in line with this, the Executive, though not answerable to the Legislative organ, could be impeached by same and some executive acts require mandatory ratification by the Legislature. The Judicial organ, though independent their appointment, removal, remuneration, amongst others, is subject to the exercise of power between the Executive and the Legislative organs.

In Great Britain however, the doctrine has not been defined in its strict sense and the partial fusion between the executive and the legislature has reduced the doctrine to mean nothing but independence of the judiciary. This appears to be the position in most English speaking countries where this legacy was mostly inherited at independence.

### **Application of the Doctrine in Nigeria**

All the pre-independent constitutions in Nigeria could not be said to have entrenched the concept of separation of powers. This is so because in the first place, except in few cases, there was hardly any legislative body of elected representatives that was clearly distinguishable from the executive. Secondly, the overriding domination of the Colonial authority and its interests and the fact that they observed the Constitutional provisions only to the extent that it served their interest. In essence, the authority makes the law and executes same. Even the existence of some legislative Councils merely indicated that they only acted on advisory capacity and lacked the **power to legislate**.

The tradition of the British parliamentary System which permitted a fusion of Legislative and Executive powers on the same authority was one of the legacies inherited by Nigeria and entrenched into the 1960 Independent Constitution. This was also the case with the 1963 Constitution. Under the 1963 Constitution, the members of the Executive were usually members of the Legislature, but the Judiciary remained a completely independent body devoid of the membership or influence of the other organs. In the famous case of *LAKANMI & ORS V. A. G. WESTERN STATE*<sup>1</sup> the Supreme Court reiterating the existence of the 3 organs of government under the 1963 Constitution, and asserting the independence of the judiciary declared a decree of the Federal Military Government null and void and as ultra vires their Legislative powers because the decree was nothing short of Legislative judgement and exercise of judicial powers.

Under the various Military Governments in Nigeria, the Concept of Separation of Powers suffered a serious set back and the result of the absence of political liberty was tyranny and oppression.

Under these Military Regimes, a single person was elevated as the embodiment of executive and legislative powers, both at the federal and state levels. One could perceive the oppression and tyranny of the Military extending even to the judicial organ which it formally recognizes a separate as judges were appointed and removed at their mercy.

With the emergence of the Second Republic, Nigerian Constitution followed closely the American model. The 1979 Constitution entrenched the Concept of Separation of Powers with all its essentials of checks and balances. Sections 4, 5, and 6 of the 1979 Constitution clearly vests Legislative, Executive and Judicial powers on the Legislative, Executive and the courts respectively. These provisions have not been altered even slightly by the 1999 Constitution. Thus Section 4 of the 1999 Constitution vests Legislative power on the National Assembly and the House of Assembly for the federation and States respectively. Section 5 vests Executive powers of the federation on the President and his cabinet while that of the State on the Governor and his cabinet. Section 6 vests judicial powers in the courts established by the Constitution.

Since the Constitution contemplates the concept of Separation of Powers, any affront on the powers and functions of the other by another, is null and void and unconstitutional. This was the line of judicial

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<sup>1</sup> (1971) 1 U.I.L.R 201

**decision in such cases. In *ADESANYA V THE PRESIDENT*<sup>2</sup> the Court affirmed the principle of separation of powers and the validity of the act of the Legislature in matters within its competence under the Constitution, i.e. the Confirmation of appointment made by the Executive.**

In the case of *GOVERNOR OF KADUNA STATE V KADUNA STATE HOUSE OF ASSEMBLY*<sup>3</sup> It was held that the House of Assembly had powers to enact any law relating to the local Government while the Governor had the powers to execute them.

In *SENATOR B. C. OKWU V. JOSEPH WAYAS*<sup>4</sup> the Court held that each organ of the three arms of government is independent within its own domain and no one organ has any Supervisory power or control over the Conduct of the affairs of the other unless there has been a violation of any of the Provisions of the 1979 Constitution.

In *OJUKWU V LAGOS STATE GOVERNMENT*<sup>5</sup> the Court held that the action of the state government in evicting the plaintiff from his lodge amounted to an affront on the judicial functions of the Courts as established under section 6 of the 1979 Constitution and thereby a contravention of the principle of separation of powers.

In *BALOGUN V A.G. LAGOS STATE*<sup>6</sup> the Court declared as unconstitutional, null and void, the legislation of the Lagos State House of Assembly which provided that the Governor of the State should create local Government Council contrary to the Constitutional provisions that the creation of Local government pursuant to a state law must be preceded by a judicial enquiry. The provision of the state law thereby amounted to a Usurpation of the judicial function the Court which thereby violated the principle of Separation of Powers.

In *OBIH V. MBAKWE & ORS*<sup>7</sup> the Supreme Court declared, unconstitutional and void a monstrous provision in the electoral Act of 1982 requiring election petitions to be disposed of within 30 days and the Court viewed it as an encroachment of a reckless and overbearing National Assembly.

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<sup>2</sup> (1981) 2 N.C.L.R. 358

<sup>3</sup> (1981) 2 N.C.L.R. 144

<sup>4</sup> (1981) 2 N.C.L.R. 522

<sup>5</sup> (1986) 1 N.W.L.R. (Pt 18) 62

<sup>6</sup> (1981) 2 N.C.L.R. 589

<sup>7</sup>

The Conclusion to be drawn from the foregoing discussion is that the three organs must operate independently and act as a check on one another for good administration.

### (b) The Rule of Law

This rule of law is a concept of great antiquity and it has been a principle of the English Constitution since the middle ages that the rules are subject to law. The struggle between the King and Parliament was over the Supremacy of the law and Parliament relied on the rule of law to justify the contention that the King could not impose taxation without the consent of parliament. The Bill of Rights, 1888 finally confirmed the supremacy of the rule of law and the parliament.

The broad effect of this development revolves around the regularity of the law, the idea that man is governed by law and regulations and not by the caprices of the rulers. Thus the great Greek philosopher Aristotle as far back as 2000BC, preached the rule of law is preferable to the rule of man<sup>8</sup>. In the same vein, another philosopher, John Locke writing in the 17<sup>th</sup> Century opined: Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power created in it, and not be subject to the inconstant, unknown, arbitrary will of another man<sup>9</sup>. And according to one English Philosopher, Bracton, man is governed by law, human or divine and that although the King might not be subject to man, he is subject to God and the Law because it is the law that made him king<sup>10</sup>.

Professor A. V. Dicey was however the first to attempt in a precise legal form, the definition of the rule of law in his lectures at the University of Oxford in 1885<sup>11</sup> According to him, the rule of law is understood in 3 different senses. In the first place, it means that in England, no person can be punished or made to suffer in person or goods except for a distinct breach of law established in ordinary manner before the courts of law. In this sense, it means the predominance or supremacy of law over the authorities and the government. It is therefore contrasted with the exercise of authority arbitrarily or in a discretionary manner. In taking this view, Dicey compared the position in England with that prevailing in Europe in the 17<sup>th</sup> and 18<sup>th</sup> Century where a person could be arrested without authority of law against which he had no remedy.

<sup>8</sup> Ojo, Abiola Constitutional Law and Military Rule in Nigeria (1987), Evans Brothers (Nigeria Publishers) Limited P. 239-241

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Ibid

Secondly, the rule of law means equality before the law and the equal subjection of all classes of people to the ordinary law of the land. In his explanation of this concept, Dicey was contrasting the administrative law system in France with that of the English judicial system. Under the English system, there is no distinction between a private citizen and an official as all were subject to the jurisdiction of the ordinary court. In France, such a distinction exist for an action between two private citizens would lie before the ordinary court while between the private citizen and an official will lie before an administrative tribunal called DROIT ADMINISTRATIF.

Thirdly, the rule of law as understood by Dicey is that he regarded the rights guaranteed in the Constitution of countries (i.e. fundamental rights) as not being derived from those Constitutions per se but are rather rights inherent in the individuals. Hence, in Britain with no written constitution, can also define and enforce these rights through her courts. In other words, the Courts and not the Constitution can better guarantee and enforce these rights.

The exposition of the rule of law by Dicey though valid, has been criticized by authors and writers on the subject. The first criticism is that the first postulation or meaning of rule of law of Dicey does not essentially differ from the second and in that regard, there are only two valid postulations. Secondly, that his exposition of equality before the law does not take cognizance of certain immunities or exemptions attaching to certain state functionaries e.g. President, Governors, Judges, Diplomats etc. Arguably however, the merit of this criticism appeared punctured by the argument that such an exemption is necessary for the proper execution of the duties of this category of people. What more, these privileges cannot be arbitrarily taken and must be conferred and utilized according to law.

Professor Wade emphasizes the role of the Court as the habitat of the rule of law and that where there is transgression of the rule, it is the duty of the court to invalidate the executive action for which role there is the vital need for an independent judiciary. Thus in his view, the rule of law demands:

- (a) That the judiciary should be independent.
- (b) All acts to be valid must be in accordance with the law
- (c) Government activities must be conducted within a framework of defined rules and regulations.
- (d) There should be no undue privileges and discriminations in society; and

- (e) That no one should suffer punishment outside the authority of the law<sup>12</sup>

#### **Application of the Concept of Rule of Law in Nigeria**

The 1999 Constitution like that of 1979 Constitution could be said to be based on the Concept of the rule of law. There are various provisions in both Constitutions which not only enshrine the principle, but also enjoin the operation of the Constitution strictly in accordance with the Concept of the Rule of Law. The preamble to the 1999 Constitution clearly states that one of the objectives of the Constitution is to promote good government and welfare of all persons in our country on the principles of freedom, equality and justice. These are no doubt the pillars upon which the principle of rule of law rests. Section 1 of the 1999 Constitution is a concrete expression of the first principle of rule of law i.e. the absolute supremacy of the law or absence of arbitrary powers. The Constitution has declared itself Supreme and made its provisions binding on all of the persons and authorities created under it. To further reinforce the Supremacy Clause, Section 1 (3) declares all other laws that will be inconsistent with the Constitution as void. One of the modern interpretation of the rule of law is the principle of democracy and the right to participate by the people in the determination of their own destiny. For this purpose, the Constitution has promoted the idea of Universal Adult Suffrage for elections into various political offices established. In other words any citizen above the age of 18 has the right to Vote and that subject to certain exceptions, every citizen above the age of 21 has the right to be voted for into political office.

On the meaning of the concept that a government must be conducted according to law, the foundation stone of the constitution is laid on the concept of Supremacy and Section (2) Prohibit the governing of this country otherwise than in accordance with the provisions of the Constitution. Further and most important to the protection of the rule of Law, Section 6 of the 1999 Constitution confer judicial powers of the federation on the Courts specified under the Section as well as others that may be established either by the National Assembly or the House of Assembly a state in exercise of their Legislative powers.

Other major Constitutional provisions relating to the rule of Law are Chapters 2 and 4, which Contain provisions on fundamental objectives and directive principle of state policy and fundamental human rights respectively. Although the provisions of Chapter 2 are non-justiceable it is a noble ideal idea, which attempts to spell out and comply with some of the philosophical or ideological justification of the state of Nigeria and

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<sup>12</sup> Wade, H.W.R. Administrative Law, 5<sup>th</sup> Edition (Oxford University Press) (1962) p.22

the principles, ideals, goals and objectives of the social and economic order. Chapter 4 of the Constitution is recognition of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 to safeguard these rights. While section 46 of the 1999 Constitution provides for access to Court and remedy for anyone whose rights as contained in Chapter 4 has been infringed or a threatened infringement of it.

The previous constitutions especially the post independent Constitutions, i.e. the 1960, 1963 and especially 1979 Constitutions are all based on the principle of the rule of law as they all contain provisions on supremacy of the Constitution and fundamental rights amongst others. However, the pre-independence Constitutions which can be regarded as a period of imposed Constitutions was greeted with heavy criticism and opposition from inception, the main reason being lack of Consultation of the people which itself negates the principles of rule of law.

#### Judicial Approach

Having perused through the principle of the rule of law within the framework of Nigerian Constitutions, it is evident that the 1999 Constitution which is substantially the same as the 1979 Constitution is founded on the rule of law. Commenting on this Concept, Obaseki J. S. C. in *GOVERNMENT OF LAGOS STATE V OJUKWU*<sup>13</sup> maintained that the Nigerian Constitution (i.e. 1979) is founded on the rule of law, the primary meaning of which is that everything must be done according to Law...

In line with the meaning of the rule of law propounded by Dicey, the Nigerian Courts have upheld in numerous cases, the essence of the rule of law. In *AGBAJE V. C.O.P.*<sup>14</sup> the applicant was wrongly detained by the police and he challenged this in a Court. The Court held that such a detention was unlawful being contrary to the law under which the detaining authority, i.e. the Commissioner was acting.

In *RE MOHAMMED OLAYORI & OTHERS*<sup>15</sup> the Court also held the detention of the applicants as illegal based as it were on no legal authority. It was observed in this thus:

"If we are to live by the rule of law and if we are to have our actions guided and restrained in certain way for the benefit of the society in general and individual members in particular, then whatever status, what

<sup>13</sup> (1986) 1 N.W.L.R. (Pt 18) P. 621 at 638

<sup>14</sup> (1969) 1 N.M.L.R.

<sup>15</sup> (1969) ALL N.L.R. 258

post we hold, we must succumb to the rule of law. The alternative is anarchy and chaos<sup>16</sup>

In *SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS*<sup>17</sup> the plaintiff had been deported on the grounds that he wasn't a citizen of Nigeria based on the fact that since only the Plaintiff's mother was a Kanuri, he was not a citizen. The court held that the constitution makes no distinction between classes of citizenship by birth and therefore the deportation was declared null and void and a violation of his fundamental rights.

In *OJUKWU V LAGOS STATE GOVERNMENT (Supra)* the Court declared null and void the action of the Lagos State Government is dislodging the applicant from his residence without first obtaining a Court order as provided under the relevant law. It illustrates that the executive must obey the rule of law.

In *ORISAKWE V GOVERNOR OF IMO STATE*<sup>18</sup> the Plaintiff was removed as Chief by the Governor under the Chieftaincy and Deposition Law. The Governor however did not comply with the requirements of the Law as to setting up a Commission of Inquiry to investigate the allegations against the Chief. No allegations were made against the Chief and no inquiry was set up before the Governor removed him. It was held that the Governors action was null and void having acted in breach of the Rule of Law.

In *BELLO V SANNI*<sup>19</sup> the plaintiff was removed from his position as Auditor-General, Kaduna State by the Governor. He challenged his removal only pursuant to an address supported by 2/3 majority of the House of Assembly. The Governors action was also held invalid and as contrary to the Rule of Law.

In Nigeria however, it is important to note that before the present constitution became effective the decline in active civil participation in the governance of the country resulting from the chain of military take overs witnessed a decline in the rule of law. The Military decrees which usually suspend and modify certain provisions of the Constitution especially the supremacy Clause permitted flagrant disrespect and abuse of the concept of rule of law enshrined in our Constitution.

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<sup>16</sup> *Ibid*, Page 260

<sup>17</sup> (1982) 3 NCLR 743

<sup>18</sup> (1982) 3 NCLR

<sup>19</sup> (1982) 3 NCLR

It is important to conclude however that the rule of law requires amongst others, that government should govern by laws. This implies that even if the laws are unjust, it must be complied with. It is therefore suggested that the rule be extended in its meaning to include good and just laws as dictated by the period and circumstances of each given nation while bearing in mind the Universality of some laws.

### (c) **Supremacy of Constitution**

In every society, the Ultimate Power or authority lies with the people. It is in the exercise of such power or authority that the constitution is created. Thus, the Constitution is a creation of the people. The Constitution, establishes different organs of government and distribute powers amongst them and also prescribes limitations upon the powers. It is only proper therefore that the law which creates a body cannot stand on the same footing with that body, because the body so created derives its powers from the law creating it, i.e. the Constitution. Also, the very object of the Constitution is to control the exercise of state power and ensure its exercise in accordance with the Constitutional provisions. This object is bound to fail if the authority established under the Constitution ignores its provisions and exercises power in any manner it likes. Thus, the realization of this object requires that the status of the Constitution must be higher than that of the law made by the organ established under the Constitution. The rationale behind the Supremacy of the Constitution was first illustrated in the decision of the United States Supreme Court in *MARBURY V MADISON*<sup>20</sup> where the Court held that the Constitution was a Supreme law and that any ordinary law, which, was inconsistent with it was void.

The Constitutions of some other countries followed this pattern of the United States and contain express provisions to the effect that they are the Supreme laws and nay other Law which, is inconsistent with the Constitutional provision is null and void. The opening provision and section of the 1999 Constitution, i.e. Section 1 contains such express provisions. The Constitution confer powers on the courts to interpret the constitution and to determine in any case as to whether the provision of the Constitution has been violated. The Nigerian Courts have in numerous decisions emphasized the Supremacy of the Constitution.

**In the case of *CHIEF T. A. DOHERTY V SIR A. T. BALEWA*<sup>21</sup> the Court invalidated the provisions of the Commissions and Tribunals of Enquiry**

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<sup>20</sup> (1803) 1 Cr 137

<sup>21</sup> (1961) 1 ALL N.L.R. 604

Act, 1961 as being inconsistent with the 1960 Constitution and therefore null and void.

In *WILLIAMS V. MAJEKODUNMI*<sup>22</sup> The Court appeared to be emphasising the Supremacy of the Constitution by validating the exercise of the powers to declare a State of emergency by the federal parliament and that it was within their power to decide the existence of a state of emergency.

However, with the emergence of the military into the governance of this country in 1966, the earlier decisions of court reveals their conflicting nature as it relates to the Supremacy of the Constitution and Military decrees. In *STATE V NWOGA & OKOYE*<sup>23</sup> The Court asserted the Supremacy of the 1963 Constitution over Military Decrees.

In *ADAMOLEKUN V THE COUNCIL, UNIVERSITY OF IBADAN*<sup>24</sup> The Supreme Court conceded that it could not question the powers of the Federal Military Government in making a decree, but it had jurisdiction to declare any edict void if it is inconsistent with a Decree or a Constitution.

In *JACKSON V GOWON*<sup>25</sup>, the Court declared the provisions of a Decree as invalid and unconstitutional for violating the provisions of Section 22 of the 1963 Constitution.

In the famous decision of *LAKANMI V ATTORNEY GENERAL WESTERN NIGERIA*<sup>26</sup> the Supreme Court held that decree No 45 of 1967 was a Legislative sentence which was null and void as being Ultra Vires the Legislative Competence of the Federal Military Government and unconstitutional. The court asserted the Supremacy of the Constitution over Military decrees. The situation under the Military regime as cases indicate later shows the Supremacy of Decrees over the Constitution. The Supreme Court laid to rest this Conflict in the case of *ATTORNEY GENERAL, ANAMBRA STATE AND 13 ORS V ATTORNEY GENERAL OF THE FEDERATION AND 16 ORS*<sup>27</sup>

Under the Constitutional dispensation however, the line of judicial decisions indicate that Nigeria is not only constitutionally and in theory, a state which emphasises Supremacy of the Constitution, but practically so. In *TONY MOMOH V THE SENATE OF NASS & ORS*<sup>28</sup> the Court

<sup>22</sup> (1962) ALL NLR 413

<sup>23</sup> (1966) E/34/66

<sup>24</sup> (1968) NMLR 253

<sup>25</sup> (1967) 8 NBJ 87

<sup>26</sup> (1971) 1 U.I.L.R. 201

<sup>27</sup> (1990) 2 NWLR (Pt 139) 87

<sup>28</sup> (1981) 1 NCLR 21

declared an Act of the National Assembly as null and void for being inconsistent with Section 42 of the 1979 Constitution.

In *ATTORNEY-GENERAL OF BENDEL STATE V ATTORNEY GENERAL OF THE FEDERATION & ORS*<sup>29</sup> the Supreme Court declared void the Allocation of Revenue (Federation Account) Act of 1981 as inconsistent with the 1979 Constitution and therefore null and void.

This line of reasoning contained in the cases of *BALOGUN V ATTORNEY GENERAL, LAGOS STATE*<sup>30</sup> *JIDEONWO V ATTORNEY GENERAL, BENDEL STATE*,<sup>31</sup> *ADESANYA V PRESIDENT, FEDERAL REPUBLIC OF NIGERIA*<sup>32</sup>

#### (d) Parliamentary Sovereignty

This concept is directly opposed to the Concept of Supremacy of the Constitution. It is a legacy of the British parliamentary system and a feature of most countries with Unwritten Constitutions. It means that the Parliament is the Supreme authority and have absolute jurisdiction in making laws. It is not limited in its powers to legislate either with regards to causes or persons. The history of this concept is traced to the Conflict between the Crown and the Parliament in Britain at the early stages of parliamentary government. The powers of the parliament is so absolute that it cannot be controlled in its discretion and when it errs, it errors can only be rectified by itself. In fact, it is commonly asserted that the parliament can by its powers make a man a woman and vice-versa. The only limitation on the powers of the parliament is that it cannot pass any law, which will have the effect of binding its successors. It is clear from our previous explanations that in Nigeria, the Concept of Constitutional Supremacy applies and not Parliamentary Sovereignty.

#### (e) Federalism

Where a country is very large or culturally diverse, a written constitution has clear advantages. There may be a need to split governmental power between regions and Central authority, but without allowing the center to be able to dominate the local areas. Many Constitutions operate on this basis and they are called Federal Constitutions. The State so created is called a federation.

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<sup>29</sup> (1982) 1 NCLR 1

<sup>30</sup> (1981) 1 NCLR 31

<sup>31</sup> (1981) 1 NCLR 4

<sup>32</sup> (1981) 1 NCLR 236

Federalism, therefore, is an arrangement whereby governmental powers within a country are shared between a Central government and a number of regional government. The sharing should be in such a way that each tier exists as a government separate and independent from others. Each tier of government also operates directly within its territory with a will of its own and an apparatus for the Conduct of its affairs in some matters, exclusive of all others.

There are many forms of federalism. Typically, the Central federal Unit represents the Country on the international level, but for internal purposes, the Constitution allocates some matters to the Central federal government like defence, foreign Affairs, Currency, postal services etc. This is the type obtainable in Nigeria. Another type is where governmental functions are shared by both tiers of government and the Constitution provides which shall prevail. The German federal Constitution is a typical example of this mode of federalism. Another type of federal arrangement is where each component state has its own Constitution and separate Court system. The United States Constitution is a particularly sophisticated example in this respect.

While the various arrangements in federalism are generally similar, there are different principles involved in evaluating the extent of federalism in a given Constitution. The first principle is the autonomy of each tier of government, which necessarily presupposes its separate existence and independence from the Control of the other government(s). the autonomy of each tier of government requires not just the legal and physical existence of government, but that each government must exist not as an appendage of another government, but as an autonomous entity in the sense of being able to exercise its own will in the Conduct of its affairs, i.e. free from direction and control by another government. This point was made clear in the case of *ATTORNEY GENERAL OF OGUN STATE V ATTORNEY GENERAL OF THE FEDERATION*<sup>33</sup> where the Supreme Court affirmed that in the absence of Constitutional authorization, it is a contradiction of this principle for the Central government to lay duties on a state government or to confer functions on it without the Consent of the Chief Executive of the state and vice-versa.

Secondly, the exercise of powers should not be impeded, obstructed or otherwise interfered with by the other government while acting within its own powers. This doctrine refers or rests upon the establishment by the Constitution of the federal and State governments as separate and autonomous governments, and the necessity for the maintenance of

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<sup>33</sup> (1982) 1-2 SC13 or (1982) 3 NCLR 166

their capacity to continue to exercise their respective constitutional function as governments.

Thirdly, the 1999 federal Constitution, governmental powers of federal government are specified and exercised exclusively by it. Concurrent subjects are also specified and the powers are exercised between both the federal and state governments<sup>34</sup>. Each of the levels of government created has its own government elected by the people with independent Legislature and Executive. There is however a single hierarchy of Courts. The Superior Courts or Courts of record have the extensive power of declaring acts null and void if they are unconstitutional by way of encroachment into the power of the other. The rule is that any Legislation must not, under the guise of dealing with one matter encroach upon a forbidden field. Something like that came up for decision by the Supreme Court in *AKWULE AND ORS V THE STATE*<sup>35</sup>. In this case, the first appellant had been convicted by a trial Court for Criminal breach of trust under the Penal Code. He was also convicted of another offence of falsifying Bank Accounts. Being a banker and the offences having been committed in the process of banking transaction, the appellant, mindful of the fact that banking was within the exclusive legislative list of the Central Government challenged the Validity, Constitutionally, of trying him on banking matters under a regional law. The Court held that the regional law i.e. Section 315 Penal Code is Constitutional and Valid as it is not a Legislation in respect of Banks and Banking matters, but merely an incidental provisions in the Penal Code.

Another important aspect of federalism is that any federalism arrangement must be embodied in a Constitution that is Supreme over both the national and the regional governments; a Constitution that binds or obliges the national and regional governments to keep within the terms of the federalism arrangement. These are all features of the 1999 Constitution. In fact Section 2 (2) of the 1999 Constitution clearly provides that the country shall be a federation consisting of states and Federal Capital Territory. Indeed, Nigeria has been a federation since the 1954 Constitution.

As earlier emphasized, in a federal system, the powers of each level is to be exercised exclusively by it and no encroachment except as permitted by the Constitution as in cases of war in the Country or in cases of treaty between the Country and another foreign nation. It is also permitted when any state legislation is unable to function. The extent which a Central government can interfere with the state or

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<sup>34</sup> See Section 4 of the 1999 Constitution

<sup>35</sup> (1963) NNLR 105

regional governments were clearly decided in the cases of *ADEGBENRO V ATTORNEY GENERAL OF THE WESTERN REGION*<sup>36</sup> and *WILLIAMS V. MAJEKODUNMI*<sup>37</sup>

While federalism appears to be a perfect system for Nigeria, in reality there have been various problems attendant to the arrangement. This has been more because the individual states of the federation are not reasonably equal in terms of economic strength. Therefore, there has been over-reliance on the centrally distributable revenue to satisfy financial needs with the result that the independence of the states times appears unreal. Indeed the issue of revenue allocation has been a subject of constant friction leading to litigations as in the case of *ATTORNEY GENERAL OF BENDEL STATE V ATTORNEY GENERAL OF THE FEDERATION AND ORS*<sup>38</sup> where a state Government challenged the legality of a federal Law on Revenue Allocation. These federal principles have also been disturbed by the various Military regimes through Decrees, which provides for the Federal Military Government to make laws in respect of ANY MATTER WHATSOEVER<sup>39</sup>. In addition, states require the Consent of the Federal Military Government to legislate on the Concurrent list. The Constitutions are also amended without the consent of the state governments. The state governors are appointed by the Federal Military Government and can exercise executive powers only as conferred on them by the Federal Military Government. Above all, the Constitution is no longer regarded as Supreme.

<sup>36</sup> (1963) 3 W.L.R. 63 (Privy Council)

<sup>37</sup> (1962) ALL NLR 413 at 415

<sup>38</sup> (1982) 3 N.C.L.R. 1

<sup>39</sup> See for instance Section 2 Decree 107, 1993

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## CHAPTER III

### HISTORICAL DEVELOPMENT OF NIGERIAN CONSTITUTIONAL LAW

(A. O. Omotesho and Abdu Bawa)

#### (a) Background to Constitutionalism

Nigeria began in 1849 with the appointment of Mr. John Breecroft as the British consul to the Bights of Benin and Biafra. The consul whose assignment was the protection of British traders in the coastal areas had his headquarters in Fernando Po.

In 1851, the British bombarded Lagos in order to suppress the flourishing slave trade center built by the Portuguese. This was followed in 1852 by a treaty signed between a British representative, Henry William Bruce and King Akintoye of Lagos for abolition of slave trade, encouragement of legitimate commerce and protection of Christian missionaries.

But the sudden death of King Akintoye in 1853 led to the enthronement of his son Docemo as the successor, King Docemo was unable to stop the flourishing slave trade along the coast of Lagos. Consequently the British Government decided to occupy in order to effect a complete suppressing of slave trade, give great aid and support to the development of lawful commerce and check the aggressive spirit of the king of the neighbouring Dahomey who was dealing in slave trade. Thus, king Docemo was persuaded to cede Lagos to the British crown in 1861. This gave the British their first effective foothold in Nigeria. From Lagos the British sent a number of expeditions to the hinterlands. This led to a declaration of British protectorate over the whole of Yoruba land except Abeokuta. The new protectorate was merged with the colony of Lagos.

Between 1862 –1866, Lagos had its legislative and executive councils. From 1866 – 1874, the settlement of Lagos was merged with other British possession in West Africa to form the West African settlements with the headquarters in Sierra-Leone.

From 1874 - 1886, Lagos and the Gold Coast were separated from the other settlements with the Gold Coast Colony under a Governor based in Accra. By 1886, however, Lagos was re-established as a separate colony with its own Governor, Executive and Legislative Councils. The latter council had power to provide for giving effect to His Majesty's

jurisdiction in the protectorate of Lagos by ordinances, rules and regulations. In the same year the British entrusted the administration of the oil Rivers protectorate hitherto in the charge of British Council to the Royal Niger Company. The company extended its sphere of influence to cover most of the present day Mid-West and Eastern States. Meanwhile Captain Fredrick Lugard had through a series of treaties with natural rulers and military expeditions brought most of Northern Nigeria under British rule.

In 1900, there was the declaration of Protectorate of Southern and Northern Nigeria and the merger of the Oil Rivers protectorate with the protectorate of Southern Nigeria.

By 1906 the colony and protectorate of Lagos was merged with the protectorate of Southern Nigeria.

In 1914, the two protectorates of Southern and Northern Nigeria were amalgamated with Sir Fredrick Lugard as the first Governor-General. After amalgamation, powers of the legislative council were confined to Lagos. The Governor-General was empowered to make laws for the protectorates. Instead of a legislative council for the whole country, an advisory and deliberative council – the Nigerian Council, was established to allow for consultation of local opinion before legislation. The council consisted of 17 officials and 13 unofficial all of whom were nominated by the Governor-General. The unofficial members were nominated by the Governor-General. The unofficial members nominated as follows:

1. Four to represent commercial, shipping, mining and banking interest;
2. The Lagos Chambers of Commerce, the Calabar Chambers of Commerce and the Chambers and Mines appointed one member each.
3. The remaining six represented native populations and they were the Alafin of Oyo, the Emirs of Kano and Sokoto, Hon. C. A. Sapara-Williams, Chief Numa of Warri and Benin Rivers, Chief Henshaw of Calabar.

*The inadequacy of African representations together with the ineffectiveness of the Nigerian council gave rise to the introduction of Clifford's Constitution.*

### (b) The Clifford's Constitution

The constitution established a legislative council for Nigeria but its powers were confined to making laws for Southern Nigeria. The Governor-General retained the power to legislate for Northern Nigeria by means of proclamation.

Under the 1922 constitution, every member of the legislative council could introduce or initiate legislation, but finance bills could only be introduced by the Governor-General. The real importance of the legislative council lay in the fact that it could debate any bill. However, because of the permanent majority of official members it was impossible to defeat the government on any measure. The composition of the legislative council consisted of the Governor-General as president and 46 members made up as follows:

1. 26 Official members
2. 15 Nominated members
3. 4 Elected members from Lagos and 1 from Calabar.

This marked the introduction for the first time ever, of elective principles into Nigerian legislature. The main qualifications for standing election under this constitution were as follows:

- (i) The person should be an adult male British subject;
- (ii) He should possess property qualification of £100 (pounds) per annum.
- (iii) He must be resident in Lagos or Calabar for one year preceding election.

### (c) The Richards Constitution of 1946

The next constitutional milestone was the Richards Constitution. The only significant modification introduced under the Richards constitution was the introduction of regionalism into Nigeria namely: North, East and West with provision for Regional Houses of Assembly and House of Chiefs.

The Richards Constitution established for the first time a legislature for the whole country. The composition of the legislative council consisted of the Governor-General as president; 15 official members; 28 unofficial members. The legislature for the first time contained unofficial majority. The legislative council had the power to legislate for the whole country. The regional assemblies established under the constitution had no real legislative powers of any kind. They were mere advisory bodies. The

conditions for qualification for standing election under the earlier 1922 constitution were preserved.

However, the financial qualification was reduced from £100 (pounds) to £50 (pounds) per annum.

The Executive council under the Richard's constitution was different from the earlier one. For the first time, 4 unofficial Nigerian members were nominated.

#### (d) MacPherson Constitution 1951

The Macpherson Constitution of 1951 was not in fact the effort of Sir John Macpherson. The only justification for referring to it as the Macpherson constitution appears to lie in the fact that the constitution became operational during his regime.

The constitution was designed essentially to avoid the criticism of the Richard's constitution namely: that there was no adequate consultation with the people.

The striking features of the Macpherson constitution included a central legislature called the House of Representatives, a central executive called the Council of Ministers, which was presided over by the Governor.

Legislature and Executive Councils were also established for each of the then 3 regions. The central legislature comprising 136 elected members (34 each from the East and West and 68 from the North) enjoyed a wide legislative power while the regional assemblies legislated only in respect of designated subjects.

It was also a feature of this constitution that no bill of a regional assembly would receive the assent of the Governor until it had been sent to the central executive council for approval.

Election into the regional Houses of Assemblies were indirect. They were conducted through electoral colleges right from the village level until provincial representatives were elected to the regional Houses. The regional Houses themselves act as electoral colleges for elective regional members of the House of Representatives. The main qualification required of electors and candidates was that they were tax payers and satisfied the residential qualification of 12 months residency preceding the election.

#### (e) 1954 Federal Constitution

**This constitution is the product of two conferences held in London in 1953 and in Lagos in 1954 by Nigerian political leaders. The constitution made significant changes in the constitutional equilibrium of the country. Under this constitution, Nigeria became a federation of 3 Regions. The constitution contained 2 legislative lists – the Exclusive and Concurrent lists. With regard to matters in the Concurrent list both Federal and Regional governments could legislate within their specific spheres, and where there was any conflict, the law enacted by the federal government prevailed. All matters not on the lists were residual matters within the legislative competence of the regions.**

The House of Representatives consisted of 184 elected members: (92 from the North, 42 each from the East and West, 2 from Lagos and 6 from Southern Cameroon).

The system of indirect election introduced by the 1951 constitution was discarded for direct election to the regional Houses. The Central Council of Ministers consisted of 10 ministers with 3 ex-officio members – Attorney General, Financial Secretary and Chief Secretary. The ministers were for the first time given departmental responsibilities.

The Civil Service and the judiciary were regionalist and Lagos was separated from the Western Region and constituted the Federal Territory. The Federal Supreme Court was established for Nigeria. High Courts were established for each of the regions and Lagos.

Following the constitutional conferences held in London in 1957, 1958 and 1960, leading to the independence of Nigeria, a constitution contained in British-Nigeria (constitution) order-in-council 1960 was enacted in 1960.

#### (f) The 1960 and 1963 Federal Constitutions

It is generally agreed that both the independence constitution of 1960 and the Republican Constitution of 1963 introduced into Nigeria what is usually referred to as the "Westminster Model" constitutions.

The broad outlines of this model are patterned on the British constitution. It is that system of government in which there is a division of Executive power between a ceremonial Head of State and a Prime Minister. In such a system power in fact rests with the Prime Minister and his cabinet of ministers who are usually collectively and individually responsible to a freely elected legislature of which they must also be members.

The other broad outline of this sort of constitution is the inclusion of fundamental human rights and the limitations of parliamentary sovereignty. The constitution is recognized as the fundamental supreme law. The Supremacy of the constitution also leads to another broad feature namely: the judicial determination of the validity of legislation.

Another feature of the 1960 and 1963 constitutions is the extent to which by use of certain institutional devices, some areas have been insulated from political influence such areas include the electoral commission, an independent judicial service commission of which the Chief Justice was Chairman, an independent police service commission.

Other features are the inclusion in the constitutions of the convention governing particularly the exercise of judicial power, which in Britain remains unwritten, the inclusion of a detailed and justifiable bill of rights.

Perhaps, the more important feature of the Westminster constitutions is the institutionalization of an opposition complete with a recognized leader as well as recognized representation in all committees of parliament, and the right to consultation by the Prime Minister before certain appointments are made.

Many African countries of the commonwealth including Nigeria, found the Westminster model constitution grossly inadequate. The effect of the checks and balances inherent in the system was at best to make the art of governance extremely slow and lacking in direction and drive and at worst to make it impossible. Perennial personality conflicts and other institutional bottlenecks did not render the system to a developing society anxious to deal with the problems of poverty, hunger and illiteracy.

The separation of a Head of Government and Head of State was contrary to African traditional forms of government. The late constitutional affairs Minister in Kenya, Tom Mboya put it this way.

*We are an African State within the African family. This fact must be reflected both in the forms and in the reality of our government... This arrangement (by which you have a constitutional president and someone else as Head of government) is just not understood by our people, it is foreign to them. The historical process by which in other lands Heads of State, whether Kings or Presidents, have become figureheads are not part of our African tradition. So in this respect we politely reject the Westminster Model.*

Against this backdrop, it must be emphasized that the notion of a chief who reigned but did not rule was unimaginable in traditional society. The Chief occupied a place of unique privilege and authority in the tribe. He was absolute monarch in both fact and name.

As for the institutionalized opposition of the Westminster model, this was certainly alien to traditional African society. An organized opposition was looked upon as a rebellious group and treated as such. Consensus was the hallmark of decision making in the traditional society. Such consensus over all issues facing the society was arrived at after long deliberations. It was during such deliberations that an individual could contribute constructive ideas.

The constitutional drafting committee prior to the enactment of the 1999 constitution, set down the rationale for rejecting the Westminster model embodied in the 1970 independence and 1963 Republic Constitutions thus:

*The separation of the Head of State from the Head of Government involves a division between real authority and formal authority. This division is meaningless in the light of African political experience and history. ...*

#### (g) The 1979 Federal Constitution

Many African countries of the commonwealth including Nigeria, took the path of presidentialism because of the inadequacies of the West-Minister model constitutions. In Nigeria, the 1999 constitution came into effect on 1<sup>st</sup> October 1979 after almost 14 years of military rule in the country.

The constitution is unique in the sense that it is a departure from both 1960 and 1963 constitutions. Indeed it may be described as autochthonous since it is indigenous having been made by Nigerian themselves.

The broad outlines of that constitution are its introduction of

1. A presidential democracy based on multi-party system
2. The single executive both at the national and state levels
3. The separation of powers between the three great departments of state – the legislature, the executive and the judiciary.
4. The inclusion of a comprehensive and judicable bill of rights
5. The inclusion of the innovative and optimistic clauses on fundamental objectives and directive principles of State policy.
6. The inclusion of two main legislative lists – exclusive and concurrent legislative lists with residual matters left to the State.

7. Considerable power is granted to the judiciary under the constitution.
8. The constitution also recognized political parties (sections 201 – 209)

Section 122 – 161 deals with the vast executive powers given to the president, whilst section 162 – 172 contain executive powers of Governors in the States. The structure of the central legislature under the 1979 constitution is bi-cameral i.e. the National Assembly consist of 2 houses of equal status namely:

- (i) The Senate with 96 members
- (ii) The House of Representatives with 450 members (sections 43-60 of the constitution).

## THE EVOLUTION OF THE 1999 CONSTITUTION

Since the military struck again in December, 1983 and assumed the mantle of governance, resulting in the termination of the Second Republic, Several attempts have been made by the military to fashion out or evolve an enduring Constitution for Nigeria. Thus, the move towards evolving the present Constitution, i.e. 1999 is traceable to the inauguration in 1986 of the Political Bureau by the then military leader, General Ibrahim B. Babangida (retired), whose main objective as to fashion out a proper, enduring and everlasting political arrangement for Nigeria. Prior to the Political Bureau, Nigeria, had experimented in the first and Second Republics, the two most popular systems of government, i.e. Parliamentary and Presidential respectively. The Political Bureau headed by Retired Justice Coockey, submitted its report in 1987. The Bureau recommended the Presidential arrangement and the retention of Federalism, all as practiced under the Constitution. In furtherance to this, recommendations, a Constitution Review Committee was set up in 1987 to review the 1979 Constitution. Also in that regard, a Constituent Assembly made up of elected and nominated representatives of Nigerians was established in 1988 to ensure the emergence of a new lasting Constitution, acceptable to all Nigerians. The result of all these efforts was the emergence of the 1989 Constitution. This Constitution did not however come into existence as the political arrangement, which was to constitute the basis of its effectiveness collapsed with the failure of the transition programme – that was to usher in the new political system. This was in June, 1993. **The then military administration have attained the peak of the transition with the election into the office of the President conducted, annulled the elections. The chaos and restlessness that followed, ended what would have been regarded to as the third Republic. Thus, the 1989 never saw**

the light of the day. One major area of difference between the 1979 and 1989 Constitution was the entrenchment into the later of the **two Party System** as opposed to the multi-party arrangement of the **1979 Constitution**.

The annulment of the 1993 Presidential elections resulted in a political arrangement that is similar to the 15<sup>th</sup> January, 1966 handover of the governance of this country to the Armed Forces by the then Civilian government by the Acting President Late Sir Nwafor Orizu. In the case of the 1993 handover, however, it was by the military to the Civilians, although in a manner not also within the Contemplation of the 1979 Constitution. It is submitted however that, although the Change was not within the provisions of the 1979 Constitution, the existing grundnorm then was the Constitution (Suspension and modification) Decree No. 17 of 1985<sup>1</sup> and if the change was brought about by a Decree of the Federal Military Government, then to that extent the Interim National Government (ING) which was the arrangement brought into existence as a result of the election crisis of 1993, is valid.

The I.N.G. appeared unable to resolve the problems that arose from the annulment of the June 12, 1993 Presidential elections, and while their mandate was amongst others, to ensure the Conduct of another free and fair elections and return the Country to a democratic rule through a process of election, the Army Struck again and seized power from the I.N.G. which held forth for only 3 months.

The Army took over on 17<sup>th</sup> November, 1993. The new Military regime of General Sani Abacha (now deceased) was unable to contain the various calls and insistence by Nigerians for a democratic rule. It wasted no time in initiating another process of ensuring a return to democracy. The Federal Military Government in 1994 inaugurated the Constitutional Conference, which, resulted in the 1995 Draft Constitution. The draft Constitution was essentially and substantially also based on the 1979 Constitution in terms of the form and structure of government. It recommended a multi-party system and the Creation of more states and local Governments. In 1996, more states and local Government were created to bring the number to the present 36 states while new Local Governments were created to bring the number to the present 768 Local Government Areas in Nigeria.<sup>2</sup>

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<sup>1</sup> The Judiciary of recent has asserted the Supremacy of the Decree over the Constitution as exemplified in numerous cases like A.G. ANAMBRA STATE AND 13 OTHERS V. A. G. FEDERATION AND 16 OTHERS (1990 2 NWLR (Pt 130) 87.

<sup>2</sup> See the Provision of Section 3(1) and (6) of the 1999 Constitution.

The 1995 draft Constitution was eventually enacted as the 1999 Constitution with the demise of Late General Sani Abacha and the emergence of General Abdulsalami Abubakar in May, 1998. The 12 months old regime of General Abdulsalami Abubakar initiated a transition programme. The transition came to an end in May 29, 1999 with the handing over of power to a democratically elected Civilian government of Chief Olusegun Obasanjo and which also marked the effective date of the 1999 Constitution

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## CHAPTER IV

### THE UTILITY OF FUNDAMENTAL OBJECTIVES AND THE CONCEPT OF CITIZENSHIP UNDER THE NIGERIAN CONSTITUTION

(A. O. Omotesho)

#### (a) FUNDAMENTAL OBJECTIVES & DIRECTIVES

##### PRINCIPLE OF STATE POLICY

At one time, it was thought that the state was mainly concerned with the maintenance of law and order and the protection of civil and political liberties. Such a restrictive role of the state is no longer a valid concept. We are, today, living in an era of a welfare state, which seeks to promote the well being of the people. In order to establish such a welfare state, directive principles provide one of the most novel and striking feature in modern constitutional government.

Historically, the republic of Spain took the lead in introducing the concept in its constitution. The idea subsequently found its way into the Irish Constitution of 1937. In 1948, India borrowed the idea into its constitution. In commonwealth Africa, the directive principles of state policy first appeared in the 1960 Republican Constitution of Ghana.

In Nigeria, the 1999 Constitution can be regarded as the very first attempt of introducing Directive principles into our Constitution. Both the 1960 and 1963 constitutions were content with entrenched provisions of Civil and political liberties. They contained no indication of any set goals for the country.

The entire Chapter II of the 1999 Constitution consisting of 10 sections, deal with the fundamental objectives and directive principles of state policy. These cover a wide range of state activities for the realization of noble ideals given in the preamble to the constitution. Strangely enough, the constitution neither defines nor distinguishes the fundamental objectives from the directive principles what is certain is that they contain certain goals to be pursued by the government and its agencies. They also impose certain obligations on the state to take positive action in certain directives in order to promote the welfare of the people.

What then is the rationale behind the objectives and principles?

Hedge and Mukharjea whilst writing on the utility of the principles in the Indian constitution, made the following pertinent remarks, which incidentally, highlight the aim of our own provisions.

"The fundamental rights and the directive principles constitute the conscience of our constitution. The purpose of the fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all.

The purpose of the directive principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such social revolution the constitution seeks to change the structure of the society. It aims at making the masses free in the positive sense.

Without faithfully implementing the Directive principles, it is not possible to achieve the welfare State contemplated by the Constitution"

It is thus, clear from the foregoing, that the principles and objectives stipulate the objectives of the State and the principles, which must guide its policies. They also stipulate the minimum standards required to achieve a just, free and contented society.

At this juncture, a review of some of these objectives will be very illuminating.

### **Political**

Sections 14 and 15 of the constitution conjunctively touch on the political goals of the Nigerian State when it deduced that the Federal Republic of Nigeria should be a state based upon the principles of democracy and social justice. Sovereignty is also vested in the people who are endowed with the right to participate in Government. The need for the reflection of federal character in State Policy is also emphasized.

Consequently, in the composition of the federal government or that of a state, it must be ensured that there is no predominance of persons from a few states or from a few ethnic or other sectional groups. Thus, national unity and integration is elevated over and above sectional and other parochial interests.

### **Economic**

Section 16 enjoins government to ensure the open economic development of the country in order to secure maximum welfare for the good of the people. In order to achieve this goal, the government is given the control of Economic resources of the country.

## **Social**

The social objectives spelt out in section 17 include the provision of social security, the provision of fair living conditions for workers and the protection of the weak.

## **Education**

Section 18 enjoins government to ensure equal opportunity in Educational matter and also promote literacy among the people. To achieve this goal, government is enjoined to provide free and Compulsory Universal primary education immediately and free education at all levels as soon as practicable.

## **Foreign Policy**

Section 19 states that the government should promote international cooperation, combat racial discrimination and promote African Unity.

## **Culture**

In section 20, the government is enjoined to protect and enhance Nigerian culture. The phrase "Nigerian Culture" is not easy to decipher given the very diverse and varying of cultural background of the Nigerian people.

## **Non-justifiability of the objectives and directives**

Evidently, these are ideals and objectives in the best tradition of a welfarist state. However, the most serious source of objection to the whole concept is the fact that these principles and objectives are unjustifiable.

If these objectives are indeed essential to establishing the declined egalitarian state, why is no machinery put in place for enforcing compliances by the organs and agencies of the state?

It should be recalled that section 13 of the constitution provides:

*"It shall be the duty and responsibility of all authorities, and persons exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of that chapter of the constitution!!*

In so far as the legislative and Executive organs are concerned, the fundamental objectives and directive principles can be easily given effect to.

As for the judiciary, it is highly regrettable that section 6 (6) © of the constitution completely insulates the Directives and objectives from judicial review, how then can he judiciary give effect to them?

The Court of Appeal in *OKOGIE V. ATTORNEY-GENERAL*<sup>1</sup> (LAGOS) suggested that the courts through its interpretative jurisdiction, can give effect to the Directives by adopting the view that will be in conformity with the objectives. The thinking of the court is that the entire laws can be brought inline with the objectives through such approach. The limitation of this suggestion becomes very glaring where the courts in a given case, must give a literal interpretation to a statute, which is contrary to the fundamental objectives.

In our view, this dilemma would have been avoided if a clause akin to section 6 (2) of the Republican Constitution of Ghana had been inserted in the 1999 Constitution. The Section provides thus:

"The government shall report to parliament at least once a year all the steps it has taken to ensure the realization of the policy objectives contained in this chapter, and in particular, the realization of a healthy economy, the right to work, the right to good health Care and the right to education."

#### (b) CITIZENSHIP

The legal position of Nigerian citizenship established under the 1960 Constitution remained largely the same under the Republican Constitution that entered into force on 1<sup>st</sup> October, 1963. Even when the military intervened in 1966 by suspending and modifying the existing constitution, the provisions relevant to the Nigerian citizenship remained intact. However, by the time the first presidential constitution was produce in 1979, the provisions relating to the acquisition of the Nigerian citizenship had undergone appreciable modifications. The relevant provisions in the 1999 Constitution were slightly amended by the 1989 Constitution and the 1995 Draft Constitution. Since the 1999 Constitution introduced most of the major innovations, the relevant provisions thereunder will be restate in this lecture; while the subsequent modifications under the succeeding constitutions will be reflected. Under the 1999 Constitutions, there were three main ways by which the citizenship of Nigeria can be acquired. These are:

- (a) By birth – section 23,
- (b) By registration – section 24; and
- (c) By naturalization – section 25.

*In principle these ways did not seem to differ from those under the 1960 and 1963 constitutions.*

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<sup>1</sup> (1981) 2NCLR 218

## **CITIZENSHIP BY BIRTH**

Under the 1999 constitution, the following persons are citizens of Nigeria by birth, namely: -

- (a) Every person born in Nigeria before the date of independence, (i.e., 1<sup>st</sup> October, 1960) either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria: Provided that a person shall not become a citizen of Nigeria by virtue of this section if neither of his parents or any of his grandparents was born in Nigeria.
- (b) Every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and
- (c) Every person born outside Nigeria either of whose parents is a citizen of Nigeria.

### **Citizenship by registration**

- (1) Subject to the provisions of section 26 of the 1999 Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that:
  - (a) He is a person of good character;
  - (b) He has shown a clear intention of his desire to be domiciled in Nigeria; and
  - (c) He has taken the oath of allegiance prescribed in the sixth schedule to the 1999 Constitution.
- (2) The provisions of this section shall apply to:-
  - (a) Any woman who is or has been married to citizen of Nigeria; or
  - (b) Every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

### **Citizenship by naturalization**

- (1) Subject to the provisions of section 26 of the 1999 Constitution, any person who is qualified in accordance with the provisions of this section may apply to the President for the grant of a certificate of naturalization.

- (2) No person shall be qualified to apply for the grant of a certificate of naturalisation, unless he satisfies the President that-
- (a) He is a person of full age and capacity;
  - (b) He is a person of good character;
  - (c) He has shown a clear intention of his desire to be domiciled in Nigeria;
  - (d) He is, in the opinion of the Governor of the State where he is or he proposes to be resident, acceptable to the local community in which he is to live permanently, and has been assimilated into the way of life of Nigerians in that part of the federation;
  - (e) He is a person who has made or is capable of making useful contribution to the advancement, progress and well being of Nigeria;
  - (f) He has taken the oath of allegiance prescribed in the sixth schedule to the 199 Constitution; and
  - (g) He has, immediately preceding the date of his application, either –
    - (i) Resided in Nigeria for continuous period of 15 years; or
    - (ii) Resided in Nigeria continuously for a period of 20 years immediately preceding that period of 12 months has resided in Nigeria for periods amounting in the aggregate to not less than 15 years.

#### **Avoidance of dual citizenship**

- (1) Subject to the other provisions of this section, a person shall forfeit forthwith his Nigerian citizenship if he acquires or retains the citizenship or nationality of a country other than Nigeria;
- (2) Any registration of a person as a citizen of Nigeria or the grant of a certificate of naturalization to a person who is a citizen of a country other than Nigeria at the time of such registration or grant shall be conditional upon effective renunciation of the citizenship or nationality of that other country within a period of not more than 12 months from the date of such registration or grant.
- (3) A citizen of Nigeria by birth shall not forfeit his Nigerian citizenship if, within 12 months of the coming into force of the provisions of this chapter or of his attaining the age of 21 years (whichever is the later) he renounces the citizenship or nationality of any other country which he may possess.

## **Deprivation of citizenship**

- (1) The President may deprive a person, other than a person who is a citizen by birth or by registration, of his citizenship, if he is satisfied that such a person has within a period of 7 years after becoming naturalized been sentenced to imprisonment for a term of not less than 3 years.
- (2) The President shall deprive a person, other than a person who is a citizen of Nigeria by birth, of his citizenship, if he is satisfied from the records of proceedings of a court of law or other tribunal, or after due inquiry in accordance with regulations made by him, that
  - (a) The person has shown himself by act or speech to be disloyal towards the Federal Republic of Nigeria; or
  - (b) The person has, during any war in which Nigeria was engaged, unlawfully traded with the enemy or been engaged in or associated with any business that was in the opinion of the President carried on in such a manner as to assist the enemy of Nigeria in that war, or unlawfully communicated with such enemy to the detriment of or with intent to cause damage to the interest of Nigeria.

## **Persons deemed to be Nigerian citizens**

A parent or grandparent of a person shall be deemed to be a citizen of Nigeria if at the time of the birth of that person such parent or grandparent would have possessed that status by birth if he has been alive on the date of independence, i.e., 1<sup>st</sup> October, 1960.

## **Power to make regulations**

- (1) The President may make regulations not inconsistent with these provisions prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this chapter, and for granting special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship.
- (2) Any regulations made by the President pursuant to the provisions of this section shall be laid before the National Assembly.

Sections 25-31 of the 1989 Constitution adopted more or less verbatim the provisions of the 1999 Constitution relevant to Nigerian citizenship. Similarly, sections 26-32 of the 1995 Draft Constitution adopted the same.

In summary, sections 23 – 29 of the 1999 Constitution, sections 25 – 31 of the 1989 Constitution and section 26 – 32 of the 1995 Draft Constitution are the same. However, in the course of 1992, by a decree, dual citizenship was legally allowed. The Provisional Ruling Council (PRC) adopted the same when it considered and approved the 1995 Draft Constitution. The Provisional Ruling Council decided that it was necessary “to avoid punishing Nigerian children born abroad and encourage free ... mobility of Nigerian citizens”.

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## CHAPTER V

### REFLECTIONS ON THE NATURE OF FUNDAMENTAL RIGHTS

(A. O. Omotesho)

A legal right is that which the law protects and which can be enforced in courts of law. It is the right, which is protected and enforced by the ordinary law of the land. But there exist other rights which stand above the ordinary laws of the land and which are antecedent to the political society itself. These rights are, indeed, primary conditions to any civilized existence in societies governed under a written constitution these rights are not protected, but are also guaranteed by that constitution. These rights are termed fundamental rights because not only are they primary conditions to civilized existence, but while the ordinary laws of the land which can be freely altered or changed by the legislature, they cannot easily be altered by parliament.

#### (a) Human Rights Distinguished from Fundamental Rights

Some writers employ interchangeably the terms 'human rights' and 'fundamental rights'. For the sake of clarity, it is appropriate to note the distinction between both. In this connection it is opposite to refer to the clear distinction drawn by late Justice Idigbe in a paper, which he presented at the All Nigerian Judges Conference in 1982. The learned justice drew the distinction this way:

*It must be pointed out at this stage that those rights which are antecedent to the political society itself do not exist only in societies or states with written constitutions. By their very nature, they exist also in States or political societies without any written constitutions. However, unless their existence or continued existence is guaranteed under the state's constitution they cannot with reference to that particular state or political society, be described as fundamental rights. It is therefore my respective view that a description of these rights as fundamental rights ought to be confined to states or political societies governed by written constitutions.*

It follows from the foregoing, that while all rights enjoyed and asserted by human persons may be described generally as human rights; not all human rights can be termed fundamental rights.

Human rights are as old as society itself for they derive their existence from the need of the human person, as a rational being, to live, develop and realize the essential humanity of the person. Indeed, human rights

are basic conditions to rational and civilized living, and it behoves the state to ensure that the law recognizes many of these rights.

However, history teaches us that human rights do not just happen, and very often, the people have had to struggle and at times, fight for their rights. Throughout history, people in different countries as well as international bodies have asserted and declared solemnly what they believe to be just and suitable content of human rights.

Examples of National declarations of human rights and freedom are:

- 1) The Bill of Rights of England (1689) which established the force of the general law, the supremacy of parliament over the crown, and provided for freedom against imprisonment or detention by the command of the sovereign without good cause.
- 2) The American declaration of independence (1776) which proclaimed equality of man and his unalienable rights to life, liberty and the pursuit of happiness.
- 3) The Declaration of the Rights of Man and of the Citizen adopted by the French National Assembly in (1789) which proclaimed liberty, equality and fraternity of the people

On the international plane, concern for protection of the human rights was triggered off by the horrendous events of the Second World War, which culminated in the systematic elimination of the Jews. This forced humanity to think seriously about human rights. Invariably, the aftermath of the Second World War gave impetus to international human rights movements.

The Universal Declaration of Human Rights, which constitutes the most comprehensive and central document on the course of human rights, was adopted on the 16<sup>th</sup> of December 1948 by the General Assembly of the United Nations.

Regrettably the universal declaration of human rights was not accompanied by an effective system of control such as judicial machinery guaranteeing the effective promotion of these rights. Consequently, the idea of regional organizations gained rapid prominence where states were unable to find general solutions to the problems confronting them in the field of human rights.

The emergent regional organizations were to create a climate conducive to the initiation and development of joint ventures in the field of human

**rights.** Indeed, it would appear that regionalism is the key to the problem of **effective** protection of human rights today.

The **fine** achievements of the **European Convention of Human Rights**, the **American Convention of Human Rights**, as well as the **African Charter on Human and Peoples Rights** and significant milestones in promoting human rights. These efforts cumulatively influenced the constitutional entrenchment of Bill of Rights in emergent states.

#### (b) **Contents of Fundamental Rights I**

The fundamental rights guaranteed in the Independence Constitution of 1960, the Republican Constitution of 1963, and the current Constitution of 1999, are eleven in number. They are entrenched in chapter four of the 1999 Constitution of the Federal Republic of Nigeria and their content is spelt out in Sections 33-46 of the Constitution.

The guaranteed rights to be examined in this lecture are: The Right to life, Right to dignity of human Person, Right to fair hearing and Right to privacy.

#### (i) **Right to Life**

Almost all Constitutions in the civilized world now guarantee the right to life. Section 33 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to life to every person. A cursory look at the section depicts that the word "life" is nowhere defined. The word has not been judiciary interpreted in any Nigerian case that one is aware of. We are therefore necessarily guided by the decisional gloss placed on the word by the American Supreme Court, which is reproduced here for ease of reference.

*By the term here used, something more is meant than mere animal existence. The inhibition against its deprivation, extends to all those limbs and facilities by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the pulling out of an eye or destruction of any other organ of the body through which the soul communicates with the outer world."*

This view of the word "life" by the American Supreme Court is a classic statement, which is accepted in all subsequent judicial decisions. Having positively conferred the right to life on every person, Section 30 of the 1999 Constitution goes on to provide: "No person shall be deprived of life except in the following cases".

First, under Section 33(1), life can be intentionally deprived in the execution of the sentence of a court in respect of a criminal offence for which a person has been adjudged guilty in Nigeria. This limits on Section 33 seriously undermines the right to life in that it leaves it open to the legislature to enact laws providing for the deprivation of life in any case it likes. The courts merely award sentence only when such is prescribed by a law enacted by the legislature.

Second, in Section 33 (2), a person may be justifiably deprived of his life if he dies as a result of the use of such force and in such circumstances as is permitted by law. The use of force must be reasonably necessary in the circumstances spelt out in paragraphs a – c of section 30 (2) namely:

- (a) For the defence of a person from unlawful violence or for the defence of property;
- (b) In order to effect a lawful arrest or prevent an escape from lawful custody; and
- (c) For the purpose of suppression of riot, mutiny or insurrection.

It should be emphasized that the deprivation of life in the circumstances noted above must be reasonably necessary for achieving the objectives contained in paragraphs a-c. By importing the objective test of reasonableness, the courts are unwittingly conferred with wide powers to determine in every given case whether deprivation was reasonably necessary.

Third, if the abridgements to the right to life contained in the limbs to section 33 are not enough, Section 41(2) provides specifically that during an emergency such as in the extreme case of an act of war, the deprivation of life can be justified. See *BELLO V ATTORNEY GENERALE OYO STATE*<sup>1</sup>.

#### (ii) Right to Dignity of the Human Person

This right is guaranteed in section 34 of the 1999 Constitution. After spelling out the right in such general terms in Section 34 (1), the section goes on to specify in paragraphs a-c, certain practices the prohibition of which is necessary to accord respect to human dignity. The inhuman practices mentioned specifically are (a) torture of inhuman or degrading treatment, (b) slavery and servitude, (c) forced or compulsory labour.

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<sup>1</sup>(1986) 5 NNLR 828

In order to appreciate the purport of this provision, it will require that interpretation of some expressions used therein be attempted. The word "dignity" appears very elastic and its content can be determined by reference to the prevailing state of civilization, morals and ethics of the Nigerian Society at any given point in time. What is certain, however, is that the dignity referred to is not that of a highly sensitive person or that of a person with hardened sensibility. It is the dignity of a reasonable man.

The phrase "torture, inhuman or degrading treatment" refers to the well known practice of torturing human beings or doing things offensive to their body, sensibilities and so on.

The word "slavery" refers to the institution of slavery as known in history. The additional word "servitude" is used in the constitution to guard against the possible practice of other species of slavery that might evolve in human relations at different times.

As for the phrase "forced or compulsory labour", it relates to those practices under which persons are subjected through physical coercion to do a particular work under the pains of penalty amount to forced or compulsory labour. These include:

- (a) Any labour required in consequence of the sentence or order of a court.
- (b) Any labour required of members of the Armed Forces or Police or a substituted service for conscientious objectors;
- (c) Any labour required during national calamity for the well being of the community.
- (d) Any labour required that forms part of normal communal or other civil obligation for the welfare of the community or such compulsory service in the armed forces or national service which forms part of the education and training of Nigerian citizens.

In the Nigerian case of *ALHAJI ABIBATU MAGAJI V. BOARD OF CUSTOM & EXCISE*<sup>2</sup>, the court deprecated the crude practice adopted by the respondent in raiding markets as offensive to human dignity.

### (iii) Right to Personal Liberty

This is undoubtedly the most controversial of all the rights guaranteed in chapter four of the 1999 Constitution. Its controversial status derives from the frequency with which its contents are modified and suspended by successive military juntas.

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<sup>2</sup> (1982) NCLR 552

Section 35(1) broadly confers on every person the right to personal liberty. The constitution, however, does not define what constitutes personal liberty. On a cursory look it would appear from the phraseology of the section that it confers solely to freedom from any form of physical or bodily restraint. The premise for such construction can be gleaned from the literal interpretation of the word "liberty" which is qualified by the word "personal".

In *ADEWOLE V. JAKANDE*<sup>3</sup>, the court gave a liberal interpretation of the section when it held inter alia that a circular of the Lagos State Government abolishing private primary schools, infringed upon the liberty of parents to direct the upbringing and education of their children.

There are six grounds listed in section 35 (1) upon which personal liberty can be abridged. These are spelt out in paragraphs a – f thereof and are adumbrated below for ease of reference.

- (a) Personal liberty can be abridged in the execution of a sentence or order of a court where a person has been found guilty of an offence under the criminal law. This exception is meant to facilitate the administration of criminal justice.
- (b) Personal liberty can be abridged also where a person fails to comply with the order of the court or fails to discharge an obligation imposed by law.
- (c) Personal liberty can also be abridged for the purpose of bringing a person before a court upon reasonable suspicion of his having committed an offence or as may be necessary for preventing a person from committing an offence.
- (d) In *EGAJI UJAH V. A-GENERAL BENUE STATE*<sup>4</sup> the court held the view that where the charge before a court does not rest upon reasonable suspicion, a citizen's personal liberty cannot be allowed to be interfered with by the prosecution, especially if there is no reasonable ground to justify that a criminal offence has been committed.
- (e) Persons suffering from infectious or contagious diseases or persons of unsound mind, or drug or alcoholic addicts, or even persons who are vagrants may be deprived of their personal liberty

<sup>3</sup> (1981) 1 NCLR 262

<sup>4</sup> (1982) 3 NCLR 330

for the purpose of their care or treatment or for the protection of the community.

- (f) **Personal liberty** may also be deprived for the purpose of preventing unlawful entry into Nigeria, or effecting expulsion, extradition or other lawful removal from Nigeria.

Aside from the foregoing exceptions, Section 45 (2) provides also that personal liberty can be derogated from during any period of emergency.

Section 35 (2) provides, albeit limitedly, the right from self-incrimination when it states that a person arrested or detained can remain silent until after consultation with a legal practitioner or any other person of his own choice. This provision has been amended by Decree 107 of the 1993 Constitution Suspension and Modification (Decree) by the addition of the words "in Nigeria " of his own choice".

Section 35 (3) – (7) which cumulatively provide for the speedy trial in courts have now been suspended under the first schedule to Decree 107 of 1993.

#### (iv) **Right to Fair Hearing**

Section 36 of the 1999 Constitution deals with the right to fair hearing. The Constitution does not define by the phrase "fair hearing". Notwithstanding this lacuna, it is submitted that the phrase substantially incorporates the common law doctrine of natural justice and its components.

Section 33 draws a distinction between the concept of fair hearing in civil proceedings and criminal proceedings. Section 36(1) – (3) provide for fair hearing in civil proceedings. Section 36 (1) provides:

*In the determination of his civil rights and obligations including any question or determination by or against a government authority, a person shall be entitled to fair hearing within a reasonable time by a court of other tribunals established by law and constituted in such a manner as to secure its independence and impartiality.*

The expression "civil rights and obligations" has not been defined in the Constitution. We are therefore guided by the decisional gloss placed upon an analogous phrase by the Federal Supreme Court in *MERCHANT BANK V. FEDERAL MINISTER OF FINANCE*<sup>5</sup>. In that case, the Federal Supreme Court took the view that the right to licence to do banking business under the Banking Ordinance does not come

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<sup>5</sup> (1961) 1 ALL N.L.R 598

within the meaning of civil right. What can be gleaned from this decision is that Nigerian courts construe the expression rather narrowly as legal rights, thus excluding privileges.

See also the following decisions:

**OBARIOGE V. GOVERNOR OF ONDO STATE<sup>6</sup>**  
**ORISAKWE V. GOVERNOR OF IMO STATE<sup>7</sup>**

On what constitutes a "reasonable time" within the purview of Section 36 (1), it was held in *FALADE V. A-GENERAL LAGOS STATE*<sup>8</sup> that no hard and fast definition of the expression can be preferred. "Reasonable", time, therefore must depend upon the peculiar facts of each case.

Section 36 (4) generally confers the right to fair hearing on an accused in criminal proceedings.

Section 36 (5) – (12) broadly spell out the minimum requirements that must be met in the course of criminal proceedings. See generally *FAWEHINMI V. LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE*<sup>9</sup>

*ANYAH V. A-GENERAL BORNU STATE*<sup>10</sup>

#### (v) Right to Privacy

Section 37 of the 1999 Constitution provides that the privacy citizens, their homes, correspondence, telephone conversation and telegraphic communication, is hereby guaranteed and protected.

It would appear that the rationale for providing for the right to privacy stems from the need to protect the purely private affairs of the individual so as to facilitate the development of the individual to the best possible extent. It is of course recognized that there are certain basic things which are private in nature and which no person would like to reveal to others.

In a legal commentary titled "The right to privacy, "Warren and Brandels is make a strong case for the constitutional guarantee of the right to privacy thus:

*In stantaneous photographs and newspaper enterprise have invaded the scared precincts of private and domestic life and numerous mechanical devices threaten to make good the prediction that what is*

<sup>6</sup> (1982) 3 NCLR 349

<sup>7</sup> (1980) 3 NCLR 743

<sup>8</sup> (1981) 2 NCLR 771

<sup>9</sup> (1982) 3 NCLR 719 47.

<sup>10</sup> (1984) 5 NCLR 401

*whispered in the closet shall be proclaimed from the house tops .... The press is overstepping in every direction the obvious bounds of propriety and of decency.*

Although there is yet no Nigerian decision on the subject it is obvious that if the right to privacy is widely interpreted, it would impinge on the freedom of expression, especially in relation to the press.

It should be pointed out that the right to privacy may be curbed section 45 (1) by a law which is reasonably justifiable in the interest of defence, public safety, public order, public morality or public health, or for protecting the rights and freedoms of other persons.

**(vi) Freedom of Thought, Conscience and Religion**

Section 38 of the 1999 Constitution guarantees the right of everyone to choose his own religion or ideology and to teach same to others, while at the same time not being forced to learn about any religion other than your own. Under normal circumstances, the government does not interfere with this right except where there is a breach of the peace by a preacher.

Section 38 also prohibits secret societies. See *JENEBU ONYE V. ALEYIADEGBUDU*<sup>11</sup>

**(vii) Right to Freedom Of Expression**

This is one of the indices for assessing a democratic society. The rationale for entrenching the right in the Constitution stems from the need to allow everyone in the society to hold any opinion or idea and to communicate the idea to others.

Section 39 (1) of the 1999 Constitution confers the freedom to hold opinions and to receive and impact ideas and information on every person.

Section 39 (2) makes it clear that this freedom includes the right to own, establish and operate any medium for the dissemination of such information, ideas and opinions. However, in respect of radio and television stations, no person other than the Federal or State Governments, or such person as authorized by the President, can own and establish or operate any wireless and television station for any purpose whatsoever.

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<sup>11</sup> (1983) NCLR 492

Section 39 (3) states that the freedom is subject to the limitation as may be imposed by law provided that such restriction is reasonably justifiable in a democratic society:

- (a) For the purpose of preventing disclosure of information received in confidence, or to maintain the authority and independence of the courts or for regulation of wireless broadcasting, television or the exhibition of cinematographic films; or
- (b) for preventing public officers and members of the armed forces from disclosing information.

Aside from the restrictions contained in Section 39, Section 45 of the Constitution permits further restrictions in the interest of defence, public order, security, morality and health.

The scope of the freedom of expression and the permissible restrictions that may be imposed therein have been examined in a plethora of decisions. In *TONY MOMOH V. SENATE*<sup>12</sup>, the then Editor of the Daily Times Newspaper was summoned by the Senate to disclose sources of information contained in the article in which Senators were accused of lobbying for contracts from the Executive arm of Government. The Editor refused to disclose the source of his information on the ground that Section 39 (2) extended the protection contained in Section 39(1) to the content of any medium for the dissemination of information, ideas and opinion which includes publications in newspapers.

The decision in that case reiterated the fact that freedom of the press is no more or less than the freedom of expression of the individual and that the constitution does not recognize any privileged position for the press". The word "press only connotes a medium for imparting information, ideas and opinion of editors and publishers. It is therefore amply covered by the word "medium" used in Section 39.

In *OYEGBAMI V. ATTORNEY-GENERAL FEDERATION*<sup>13</sup>, the Daily Sketch published a story captioned "Armed Robbers kill 2 persons." The Editor was summoned by the Police and asked to disclose the source of the information. The Editor challenged the constitutionality of the Police action under Section 39 of the Constitution. The court held, that the press was one of the pillars of freedom in any nation; that the press report matters of general interest and cannot be compelled to disclose their source of information. The court further held that if editors and reporters are unable rely on the constitutional shield of confidentiality,

<sup>12</sup> (1981) NCLR 105,  
<sup>13</sup> (1982) 3 NCLR 895

the public will be denied the free flow of information. See also *ADIKWU V. FEDERAL HOUSE OF REPRESENTATIVES*<sup>14</sup>

In *ATTORNEY-GENERAL IMO STATE V. UKAEGBU*<sup>15</sup> the defendant, without prior approval of the government attempted to establish a private educational institution called "Imo

Technical University". He commenced the erection of buildings and called for application for admission. The government filed a suit seeking an order of injunction to restrain the defendant from establishing the institution without prior approval of the government. The court held that under section 39 of the Constitution, every citizen has the right to own, establish and operate any medium for the dissemination of information, idea and opinion including any school or institution for that purpose. See also *OKOGIE V. ATTORNEY-GENERAL LAGOS STATE*<sup>16</sup>

It should be noted, however, that the freedom of expression conferred on persons should not be construed as permitting the criticism of government in vitriolic terms such as to incite hatred or disaffection against the government. See generally:

*D.P.P. V. CHIKE OBI*<sup>17</sup>

*R. V. AMALGAMATED PRESS LTD*<sup>18</sup>

#### (viii) Right to Peaceful Assembly and Association

This right is conferred on every person by Section 40 of the Constitution. The right is essential in a democratic society with a multi-party system of constitution. Such right will not be available, for instance, in a one-party state. The section also allows employees or members of a profession to organize themselves into labour or trade union to protect and further their interest.

Note, however, that the right is only in respect of political parties recognized by the Electoral Commission and also that this right cannot be invoked by an elected member in a legislative house to change his party before the next election. Section 40 is subject to any law made in the interest of defence, public safety, and public order. See generally *CHERANCI V. CHERANCI*<sup>19</sup> In this case the question before the court was whether some section of the children and young persons law of the Northern State of Nigeria were void on the grounds of being unconstitutional. The said section prohibited children under fifteen years

<sup>14</sup> (1982) 3 NCLR 194

<sup>15</sup> (1981) 2 NCLR 568

<sup>16</sup> (1981) NCLR 218

<sup>17</sup> (1981) ALNLR 186

<sup>18</sup> (1981) ALNLR 199

<sup>19</sup> (1980) NLR 24

from participating in any political activity and also makes it an offence to admit such under aged in any party as members.

The court refused to hold the said section as an unjustifiable infringement of a fundamental right.

The right conferred in Section 40 may be limited where the Police refuse permit to hold public meetings or procession may lead to commission of some criminal wrongs such as breach of peace, unlawful assembly, rioting and public nuisance.

(ix) **Right to Freedom of Movement**

Section 41(1) confers a general right on every citizen of Nigeria or to reside in any part thereof. It also prohibits the expulsion of any citizen from Nigeria. No citizen may also be refused entry or exist from the country.

Section 41 (2) states that a person's freedom of movement can be restricted in accordance with a law that is reasonably justifiable in a democratic society so as to (a) prevent such person from leaving Nigeria where he has committed or is reasonably suspected of committing crime, and (b) to extradite a person from Nigeria to any country to face trial or to serve a sentence of a court for criminal offence where a treaty of reciprocity exists.

In *SHUGABA DARMA V. FEDERAL MINISTER OF INTERNAL AFFAIRS*<sup>19</sup>, it was held that a Nigerian citizen cannot be deported from Nigeria and that the Immigration Act of 1963, was inconsistent with Section 41 of the 1979 Constitution and is therefore void.

Note that any order curtailing citizens' freedom of movement must be proved to be reasonably justifiable; if it is not, the court would declare it unconstitutional. See *ROTIMI WILLIAMS V. MAJEKODUNMI*<sup>20</sup>

*ADEGBENRO V. ATTORNEY-GENERAL*<sup>21</sup> Note also that freedom of movement can also be restricted in other circumstances. For example, in the case of an infant he can be put in custody for his protection, education or care. A person can be detained to prevent the spread of contagious diseases or for mental illness; alcoholics and drug addicts may also be incarcerated.

For non-citizens or illegal immigrants, they can be detained so as to deport or extradite them.

<sup>19</sup> (Supra)

<sup>20</sup> (1962) 1 ALL 413

<sup>21</sup> (1962) 1 ALL NLR 431

**(x) Right to Freedom From Discrimination**

Section 42 (1) of the 1999 Constitution provides that no citizen of Nigeria should be discriminated against by reason only of belonging to a particular community, ethnic group, place of origin, sex, religion or political opinion.

Section 42 (2) prohibits the subjection of any Nigerian citizen to any disability or deprivation merely by reason of the circumstances of his birth.

Section 42 (3) provides an exception. That is in respect of a law imposing restriction with respect to the appointment of any person to any office under the state or as a member of the Armed Forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any laws in force in Nigeria.

**(xi) Right to Property**

Section 43 of the Constitution gives what may be described as a right to property to citizens in that it prohibits any compulsory acquisition of citizens property except in the manner and for the purpose prescribed by a law.

The Section also gives the individual right for compensation on the property acquired in accordance with a law. See *CHERANCI V. CHERANCI*<sup>21</sup>.

Note that Section 43 (2) (f) contains the doctrine of "Police Power" in that government can take over property that constitutes a menace to public welfare without giving compensation.

**(c) Limitations of Enjoyment of Fundamental Right**

Section 45(1) of the 1999 Constitution states that all rights guaranteed under Sections 37-40 can be derogated and restricted in the interest of defence, public safety, public order, public morality, or public health. Those rights may also be derogated or restricted for the purpose of protecting the rights and freedoms of other persons. The reasonableness of any such restriction can be challenged in court.

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<sup>21</sup> (Supra)

Section 45 (2) states that in the case of those rights guaranteed in sections 33-36 of the Constitution, they can be restricted only in a period of emergency. A period of emergency is defined in Section 45 (3) as any period during which there is in force a proclamation of a state of emergency declared by the President in the exercise of the power conferred on him pursuant to Section 305 of the Constitution.

As it is, almost all the rights mentioned in chapter four of the constitution can be derogated from in accordance with Section 45 by a democratic society".

This expression is quite elastic and may be invariably abused. In practice (at least during civilian dispensations) what one can discern from judicial authorities is that the courts have consistently reiterated that the determination of what is "reasonably justifiable" is the exclusive preserve of the courts. See generally:

CHARANCI V. CHERANCI<sup>23</sup>

DPP V. CHIKE OBI<sup>24</sup> (1961)

WILLIAMS V. MAJEKODUNMI<sup>25</sup>

In the final analysis, the cumulative effect of all the exceptions or derogation is to take away with the left hand what was give with the right. The question one is therefore left with is, is there any real guarantee of the right? Put differently, is it necessary to entrench these rights in the Constitution? Opinions differ on the answer to this question. Some support qualified guarantee because it allows government to discharge its duties or functions. An extreme view is that in developing countries like Nigeria, we do not need Bills of rights and that what is needed is a guarantee to work, food, education, health and shelter.

All in all, even though the entrenched rights may give some false sense by security, it is desirable to still have the rights in the Constitution.

#### (d) The Enforcement of and Remedies for Breach of Fundamental Rights

Section 46 of the 1999 Constitution creates a special jurisdiction for the High Court of a state with regard to the enforcement of fundamental rights. Section 46 (1) provides that any person who alleges that any of the provisions of chapter four has been, is being or likely to be

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<sup>23</sup> (Supra)

<sup>24</sup> (1961) 1 ALL NLR 186

<sup>25</sup> (1962) 1 ALL NLR 413

contravened in any state may apply to a High Court in that state for redress.

This is a very wide provision in that it covers not only cases of actual violations of fundamental rights but also cases of anticipated breach of right. In *OKOGIE V. ATTORNEY GENERAL LAGOS STATE*<sup>26</sup>, the Attorney-General contended inter alia that the right of the plaintiff had not been infringed and consequently, it was premature for him to have instituted the action in court. The court overruled this contention when it held that Section 46 (1) permits a plaintiff to commence proceedings if he fears that his right is likely to get trampled upon.

Section 46 (2) of the Constitution gives the High court original jurisdiction to hear and determine any such application and the court may make such order, issue such writ or give such direction as it may consider appropriate. Undoubtedly, this provision confers a latitude of discretion on the courts to determine the appropriateness of the order to be made.

In Section 46 (3) of the Constitution the Chief Justice of the Federation is empowered to make rules with regard to practice and procedure for the enforcement of fundamental rights. Within three months of the coming into force of the 1979 Constitution, the Chief Justice promulgated the Fundamental Rights (Enforcement Procedure) Rules of 1999.

Section 46 (4) of the Constitution empowers the National Assembly to confer additional powers on the Courts that may be necessary for effective enforcement of the fundamental rights. The sub-section refers to "orders, writs and directives" to be given by the High Court in order to give redress to an aggrieved person. These orders, writs and directives are, however, not specifically spelt out. It is submitted that the constitutional expression refers to the prerogative writs and orders as understood in English law, examples of which include Habeas Corpus, mandamus, Certiorari and Prohibition. This contention finds support in the liberal attitude of the courts in their approach to matters relating to the enforcement of the guaranteed rights.

This liberal approach was successfully articulated by Fatai Williams C.J.N. in *SOKEFUN V. AKINYEMI & ORS*<sup>27</sup> as follows

*"I take the view that because it is so fundamental to the life and liberty and well being of the individual, it should be possible for any person who complains about an alledged infringement of any of his fundamental rights as entrenched in our constitution to canvas the issue*

<sup>26</sup> (1981) 1 NCLR 218

<sup>27</sup> (1980) 5SC1

**of such infringement at any stage of any court proceedings, whether in the trial court or on appeal".**

**At this juncture, it is desirable to discuss briefly these prerogative writs and orders because of their profound importance and relevance in matters related to fundamental rights.**

**(i) Habeas corpus**

This is the swiftest constitutional remedy where the liberty of a citizen is in jeopardy. It is in the nature of an order made by a court directing the person or authority having custody of a person, to produce that person in court or show under what legal authority that person is being detained.

When the detaining authority files a return in response to the writ showing the legal authority for the detention, the court will proceed to determine whether the detention is justifiable or not. Where the detention is justifiable, the immediate order for the release of the detainees is made by the court. See generally:

*LIVERSEIGE V. ANDERSON*<sup>28</sup>;

*AGBAJE V. COMMISSIONER OF POLICE*<sup>29</sup>

**(ii) Mandamus**

This is an order issued by the court to a person or authority having a public duty, to perform that duty in accordance with and in the manner prescribed by law. It will, therefore, only issue to compel the performance of a public duty – that is, a duty imposed by law. The performance of such duty must, however, be mandatory and it will not issue if the performance of the duty is discretionary. See the following:

*R V COMMISSIONER FOR LAGOS AFFAIRS EXPARTE CHERUBIM & SERAPHIM*<sup>30</sup>

*R. V. WESTERN UHROBO RATING AUTHORITY EXPARTE ODJE*<sup>31</sup>

Note that only a person who has a right or interest in the performance of the public duty can apply to court for an order of mandamus. See *BANJO V. ABEOKUTA U.D.C*<sup>70</sup>.

**(iii) Certiorari**

**This is unarguably one of the most effective remedies in constitutional law. It is a writ issued by the High Court to a court of tribunal of subordinate jurisdiction, directing it to send the record of the proceedings**

<sup>28</sup> (1942) AC 206

<sup>29</sup> (1969) NMLR

<sup>30</sup> (1980) 1 LLR 123

<sup>31</sup> (1961) 1 ALL NLR 716

before it for the determination of its legality. The writ can be used to quash or set aside the decision of an inferior court or tribunal where the proceedings before it are patently wrong in law, or are in excess of jurisdiction.

The scope of the writ was examined by Lord Atkin in *R. V. ELECTRICITY COMMISSIONER*<sup>32</sup> thus:

*"Whenever any body or person having legal authority to determine questions affecting the rights of the subject, and having duty to act judicially acts in excess of its powers, it will be subject to the supervisory or controlling jurisdiction of the Kings Bench Division."*

In certiorari, the superior court is not sitting on appeal but merely determines whether the subordinate tribunal has confined it self to the jurisdiction given to it, or whether it has committed an error of law, which is apparent on the face of the record, or whether it has violated any principle of natural justice. If the proceedings are quashed, the matter is referred back to the inferior tribunal for proper adjudication. See:

*BOARD OF EDUCATION V. RICE*<sup>33</sup>

*OKPAKU V. RESIDENT PLATEAU PROVINCE*<sup>34</sup>

*ARZIKA V. GOVERNOR NORTHERN REGION*<sup>35</sup>

#### (iv) Prohibition

This writ is issued by a court to an inferior tribunal of subordinate jurisdiction to discontinue proceedings before it. The requirements of this writ are substantially the same as those certiorari except in one respect – certiorari is issued when the lower court has already concluded except in one respect – certiorari is issued when the lower court has already concluded the case and made a finding, whereas, prohibition is issued before the conclusion of a case. The superior court intervenes to swiftly to correct any illegality so that the subsequent proceedings in the lower court will be conducted in accordance with law.

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<sup>32</sup> (1965) NMLR 295

<sup>33</sup> (1911) AC 179

<sup>34</sup> (1985) N. N. L. R. 5.

<sup>35</sup> (1961) ALL NLR 379

It should be noted that application for both certiorari and prohibition can only be made at the instance of a person who has a legal interest in proceedings before the lower court, or person whose right is adversely affected in any way by the determination of the proceedings in the lower court.

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## CHAPTER VI

### AN OVERVIEW OF LEGISLATIVE POWERS UNDER THE NIGERIAN CONSTITUTION

(A. O. Omotesho)

The legislature is the supreme law-making organ of the state. The National Assembly under the 1999 Constitution is bi-cameral in nature in that it is composed of the Senate and the House of Representatives. The State Legislature is unicameral in nature.

#### (a) Meaning & Scope of Legislative Powers

Legislative power is the power to make laws. In a Federation, this law-making power is usually shared by levels of government, that is, the central and state legislature.

Section 4(1) of the 1999 Constitution vests the legislature powers of the federation on a bicameral legislature collectively referred to as the National Assembly. This assembly comprises two chambers, namely, the Senate and the House of Representatives.

Section 4 (2) of the Constitution empowers the National Assembly to make laws for "the peace, order and good government of the federation or any part thereof". The expression "Peace, order and good" has not been judicially interpreted in Nigeria. Consequently, one can only be guided by the constitution placed on an identical expression contained in the Canadian Constitution of the Judicial Committee of the Privy Council in the case of *RUSSEL V. QUEEN*<sup>1</sup>. In this case, the thrust of the argument was whether an Act of the Canadian Parliament which prohibited the sale of liquor except for some specified purposes was ultra vires the power of parliament. Under the Canadian constitution, civil rights and property holding are matters within the legislative competence of the provinces.

In upholding the validity of the Act of Parliament in question the Privy Council stated, inter alia:

*What Parliament dealing with in legislation of this kind is not a matter in relation to property and civil right but one in relation to public order and safety.*

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<sup>1</sup> (1882) L.R. 7 App. Case 827

*that is the primary matter dealt with and though accidentally the free use of things in which we may have property is interfered with that accidental interference does not alter the order of things.*

From the foregoing passage, what is evident is that the expression "peace, order and good government" is quite fluid and confers a great deal of latitude upon the central legislature. This expression can thus be utilized to expand the powers of the central legislature to any extent.

An attempt is made in Section 4 (3) and (4) to spell out the scope of the legislative competence of the National Assembly. The National Assembly is empowered to legislate exclusively on the sixty-seven (67) items listed in Part One of the Second Schedule to the Constitution.

In respect of the matters contained in part Two of the Second Schedule to the Constitution, both the central and state legislatures may make laws concurrently on those items.

Section 4(5) spells out that where there is any inconsistency between the laws of both legislatures on a concurrent matter that of the central legislature prevails.

Section 4 (6) the legislative powers at the state levels, are vested in the House of Assembly of the state. This Assembly is unicameral in nature with powers to legislate on matters contained in the concurrent legislative list as well as on residual matters.

A cursory look at the provisions of the 1999 constitution shows that the scheme on the distribution of legislative powers between central and state legislatures can only be disturbed in three circumstances:

- (a) If the country is at war, the central legislature gets the competence to legislate on all subjects aside from those contained in the Exclusive list; for the purpose of prosecuting the war (section 11(3).
- (b) The Central Legislature is competent to make laws on a state subject whenever it becomes impossible for any given State House of Assembly to convene or hold its sittings and transact business Section 11(4).
- (c) The Central Legislature is also competent to make laws even in respect of a State subject if it becomes necessary to give effect to a treaty obligation entered into by the Federal Government with a foreign country. Section 12 (3).

(b) **Resolution of Legislature Conflicts Under a Federal Scheme**

In a federation, it is quite a common feature for both the central and state legislatures to make laws on specified subjects within their respective competence and such laws may inadvertently clash on conflict. Conflicts in the manner described above is in-built in every federal arrangement. For the swift resolution thereof, the courts have devised a number of constitutional doctrines; these are:

- (i) The doctrine of pith and substance;
- (ii) Implied powers of doctrine; and
- (iii) Repugnancy or occupied field doctrine. Each is now examined in turn.

(i) **Pith and substance doctrine**

The utility of this doctrine becomes apparent whenever a given legislature makes law on a subject within its competence and which law encroaches upon some aspects of the subject within the competence of another legislature.

This possibility is indeed real since most legislative items are couched in broad outline form with no indication given as to the specific details thereof. Consequently, in order to effectively legislate upon a subject on the list, it may require also that all incidental matters be covered by such legislation.

In so doing, such legislation may unwillingly encroach upon the sphere of influence within the competence of another legislature.

When this kind of situation occurs, the question normally arises as to whether such legislation be declared invalid in so far as it has encroached upon the subject within the competence of the other legislature. What is certain is that if the former attitude were to be adopted by the courts, then obviously a great deal of legislations will get invalidated and the legislature may be unable to function effectively.

The courts therefore devised the pith and substance doctrine to remedy such anomalies. Simply put, the doctrine means that when a law passed by a given legislature is in pith and substance in respect of a subject within its competence, then such a law shall be valid in its entirety notwithstanding that it has incidentally strayed or encroached upon a subject, which is within the legislative competence of another legislature.

The application of this doctrine is clearly exemplified in the case of *RUSSEL V. QUEEN (1882)*. In this case, the appellant who was a bank

official was tried and convicted of the offence of breach of trust under section 315 of the Penal Code (which is a statute enacted by the then Northern region legislature to regulate criminal matters).

The appellant challenged the validity of section 315 of the Penal Code on the ground that the regional legislature had no power to make law in respect of banking which is an item on the exclusive list of the 1963 Constitution. The court clearly rejected the argument and upheld the validity of section 315 of the Penal Code by applying the doctrine of pith and substance.

In coming to its decision, the court found as a fact that in substance, the offence of criminal breach of trust by bankers punishable under Section 315 of the Penal Code was indeed a law in respect of a criminal matter notwithstanding that it encroaches upon banking which is a federal subject. See also *RUSSEL V. QUEEN*.

(ii) Implied power doctrine

This doctrine connotes that where the Constitution expressly confers on the legislature the power to make law on a given subject matter, the scope of the power impliedly extends to all those matters that are necessary for the effectuation of the power conferred.

The doctrine was laid down by the American Supreme Court in *MC CULLOCH V. MARYLAND*<sup>2</sup>. Under the American Constitution, Congress is empowered to legislate in respect of the following:

- (a) Currency and legal tender;
- (b) Collection of federal revenue; and
- (c) Payment of federal funds

In that case, Congress passed a law authorizing of the establishment of a federal bank. The validity of this law was challenged on the ground that the powers of Congress are only those specified in the Constitution and that powers not so specified belong to the states. It was contended that since banking is not one of the specified subjects, the Congress exceeded its legislative competence and encroached upon a state subject.

The American Supreme Court rejected this contention and decided that the Federal law was valid on the ground that the powers expressly granted to the Congress extend to such other matters as are natural and necessary for giving effect to the express power. The establishment of a

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<sup>2</sup> 4 WHEAT 316 (1819)

bank for the deposit of federally collected revenue and for making payment from federal funds was therefore considered essential to a meaningful exercise of the expressly granted powers.

Under the Nigerian Constitution 1999, the implied powers doctrine seems to have been accepted in items 67 and 68 of the exclusive legislative list. The Constitution specifically states that the powers of the federal legislature extends to matters incidental and supplemental to the powers expressly stated in the list. To make it abundantly clear, the Constitution defines incidental and supplemental power to include offences, courts, and the acquisition of land.

### (iii) Repugnancy doctrine

This doctrine is variously referred to as the doctrine of occupied field or covering the field. It emanated from the decisions of Australian and American Courts.

Under the 1999 Constitution both the Federal and State legislatures are competent to make laws in respect of concurrent subjects. Section 4 (5), however, provides that if the state law is inconsistent with the federal law, the state law shall be void.

When the federal legislature has not made law in respect of a given matter, the state law will operate fully. Conflict only arises when both the federal and state legislatures one after the other, make law in respect of the same subject matter. The phrase "to the extent of inconsistency" appearing in section 4(5) of the Constitution would suggest that the state law can be invalidated only when it cannot stand together with the federal law on the given subject.

Literally construed, it is possible for a state law to supplement and fill in the gaps in the federal law and that being the case, both laws can co-exist. Such a literal view was initially taken by the American Supreme Court. The court, however, later changed its view and decided that where the federal legislature has made a law on a concurrent subject with a clear intention from the provisions thereof that its law alone should cover the subject, then any state law even if it is not inconsistent with the federal law will be invalid.

Strictly speaking, the aforesaid view which was elaborated upon by the Australian High Court is not in accordance with the letter of the 1999 Constitution of Nigeria, which only invalidates state laws to the extent of its inconsistency.

Inconsistency between federal and state laws may arise in three different ways:

1. **When** both laws are in actual conflict such as when one **permits an act**, which the other prohibits, naturally, in such a situation, **both laws** cannot stand together.
2. The phraseology of both laws may not be in real conflict yet, inconsistency could, arise in their actual operation. Both laws cannot in such an event also stand together.
3. When the central legislature also enacts a law making its intention quite emphatic that its law alone should occupy the particular field exclusively. In such an event, if the state law enters that field it becomes inconsistent with the federal law in so far as it enters upon the field. This is so even if the terms of the state law are not in direct conflict with the federal enactment.

In *CHIROMA GIRAMBA V. BORNU NATIVE*<sup>3</sup> the Federal Supreme Court applied the doctrine of inconsistency in the first sense considered above namely, actual conflict.

In the case Section 13 of the Federal Supreme Court Ordinance, empowered the Federal Supreme Court to order the unconditional retrial of a case by the High Court, Section 185 of the Criminal Procedure Code of the Northern Region, however, confers jurisdiction to try a case on

the High Court only when the case is committed to it by the Magistrate Court. There was thus a clear conflict between the provisions of Section 185 of the CPC and Section 13 of the Ordinance. This is because when the Supreme Court orders an unconditional retrial by the High Court under Section 185 of the CPC, the High Court would have to send the case to the Magistrate who had the power to even order a discharge. The exercise of such power by the Magistrate be clearly inconsistent with the unconditional order of retrial made on the Supreme Court. On this basis, therefore, Section 185 of the CPC was declared to be unconstitutional in so far as it derogates from the power of the Supreme Court under Section 13 of the Ordinance.

This doctrine was directly considered by the Supreme Court in the case of *ATTORNEY-GENERAL OF OGUN STATE V. ATTORNEY*

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<sup>3</sup> (1961)

**GENERAL OF THE FEDERATION**<sup>4</sup> otherwise known as the public order case.

In this case, the Federal Military Government had passed the Public Order Act of 1979. At the time, the Federal power to make laws in respect of matters not within the exclusive list, subject to order conditions:

- (a) that a state law on a concurrent subject could be made with the prior approval of the Federal Government;
- (b) that any state law which is inconsistent with the federal law will be void.

When the 1979 Constitution came into force, the Public Order Act was an existing law and therefore, it could be adapted by the President or Governors under section 4 of that constitution. The President consequently amended the Act under this adaptioning power. Some of the amendments conflicted with the public order laws of the States.

The validity of the adaptation power of the President was challenged on the ground that the Public Order Act of 1999 was in respect of a concurrent subject. It was argued that being a state subject only the State Governors had power to amend by adaptation.

The Supreme Court rejected this contention by the states by applying the covering the field doctrine. It then ruled that under the 1999 Public Order Act, the Federal Legislature evinced a clear intention that in matters of public order, only the federal law should occupy the field. The court declared all state laws on public order unconstitutional.

It should be noted that word "void" used in Section 4(5) connotes "in operative" or "dormant", such that if the Federal Act is repealed the state law becomes operational forthwith.

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<sup>4</sup>(1982)

## CHAPTER VII

### A REVIEW OF THE SCOPE OF EXECUTIVE POWERS UNDER THE NIGERIAN CONSTITUTION

(A. O. Omotesho)

The phrase 'executive powers' defies any uniform definition. It may simply be described as the power to administer the constitution and the laws of the country. The President, under the 1979 Constitution, is the embodiment of Executive Powers. He epitomises the Executive authority of the Federation. Governors also enjoy similar status in the states.

#### (a) Meaning & Scope

Section 5 (1)(a) of 1999 Constitution vests the Executive Powers of the Federation in the President. The powers may be exercised directly by the President or through the Vice President and Ministers of the government of the Federation, or through officers in the public service of the Federation.

The scope of Executive Powers under the Constitution extends to the execution and maintenance of the Constitution; all law of the National Assembly and all matters within the legislative competence of the National Assembly.

Section 5(2) (a) of the 1999 Constitution similarly vests the Executive Power of a State in the Governor of that state who may exercise the power directly or through his Deputy and Commissioners as well as through officers in the public service of the state. The provision of that section stipulates that the Executive powers of a state cannot be exercised in a manner that will impede or prejudice the exercise of the Executive powers of the Federation or endanger the continuance of a federal government in Nigeria.

The nature of the Executive power under the 1999 Constitution became the subject of litigation in numerous cases. The question that fell to be decided in the cases centred on whether the Executive powers of the Federation or of a State are vested solely in the President or Governor; or whether power is for all purposes, vested in some other authority or body. In *LAWAL KAGOMA V. GOVERNOR KADUNA STATE*<sup>1</sup>, the question was whether the Governor could appoint a commission of inquiry only in compliance with or subject to commission of inquiry law of

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<sup>1</sup> (1982) 3 NCLR 1012

the state empowers the Executive Council of the State to appoint a commission of inquiry to investigate the affairs of local governments.

In this case, the Governor, acting on his executive authority under the Constitution, had appointed a commission of inquiry. Consequently, the constitutionality of his action was challenged. Majority of the Court of Appeal held that under the local government law, only the Executive Council had the power to appoint the commission and not the Governor who is obliged to appoint an Executive Council under section 174 of the 1999 Constitution.

It was felt that since no Executive Council had been set up in Kaduna State, the Governor had not power to institute the commission of inquiry. The President of the Court of Appeal observed that the Governor under the 1979 Constitution is not intended to be a dictator.

The view of the Court of Appeal restricting the power of the Governor was not approved on appeal to the Supreme Court. The Supreme Court took the view that it is the Constitution that has vested the Executive powers in the Governor, which he may exercise directly or through other officials. The court conceded that the legislature may regulate powers but noted that in so doing, the legislature cannot divest the Governors of their constitutional powers.

**(b) Powers and Functions of the President and Governors Under the 1999 Constitution**

Aside from the general vesting of Executive powers in Section 5 of the Constitution, the Constitution also confers certain specific powers on Governors. These include:

**(a) Appointment and removal**

In matters of appointment, the 1999 Constitution has conceded to the President and Governors very limited powers. Appointment to cabinet positions are subject to confirmations of the legislature under Sections 135 and 173 of the Constitution.

Other civil, judicial and police officers are appointable by their respective Service Commissions who also have the power to remove the appointees.

The President's removal powers can only extend to the members of his cabinet, his special advisers and ambassadors. Other Executive bodies have fixed tenures and their removal also could be only subject to legislative approval. (See, for example, Section 144 of the 1979 Constitution). The Executive is not part of the legislature under a

Presidential constitution like the 1979 Constitution. The President and Governors are elected directly by the people for a fixed tenure of four years. They can only be removed from office through impeachment process as prescribed in sections 124 and 164 of the 1999 Constitution.

**The Ministers and Commissioners cannot be members of the legislature. If any of them is a member of the legislature, he is deemed under Section 135(4) to have vacated the seat on such appointment as Minister or Commissioner.**

Since the Executive separated from the legislature under the Constitution, the former cannot partake in the proceedings of the latter. Notwithstanding, the President or Governors may send draft bills and messages to the legislature from time to time. The legislature is however, not bound to consider such executive sponsored measures. Bills passed by the National Assembly or State Houses of Assembly only become law upon being assented to by the President or Governor as the case may be. The President or Governor has 30 days within which to give such assent or to withhold it. Where the Executive assent is withheld the legislature can pass such bill into law by two-thirds majority.

**(b) Powers in relation to foreign affairs**

In matters of foreign relations, the President occupies an enviable position and the courts have generally shown reluctance to interfere with Presidential relations. The President appoints ambassadors after Senatorial confirmation. He negotiates and concludes treaties with foreign nations. However, any treaty concluded by the President shall not have the force of law unless it is enacted into law by the National Assembly.

**(c) Defence Power**

The war powers of the President seem to be considerably limited. The President is the Commander-in-Chief of the Armed Forces. In that capacity he can direct the command of Armed Forces. There are, however, certain constitutional limitations imposed on the exercise of this power by the President.

First, section 5 (3) (a) of the 1999 Constitution states that the President shall not declare a state of war except with the sanction of resolution of the two houses of the National Assembly at a joint sitting.

Second, section 5 (3) (a) of the 1999 Constitution states that the President shall not declare a state of war except with the sanction of resolution of the two houses of the National Assembly at a joint sitting.

In the matter of appointment to defence service, the President is vested with power under Section 198 of the Constitution. This power may, however, be regulated by laws made by the National Assembly.

#### **(d) Emergency Powers**

Section 265 of the 1999 Constitution deals with the emergency powers of the President. Section 265 (3) empowers the President to issue a proclamation of a state of emergency only when the following situations exist:

- (i) When the Federation is at war.
- (ii) When the Federation is in imminent danger of invasion or involvement in a state of war.
- (iii) When there is actual breakdown of public order and public safety in the Federation or any part thereof to such an extent as to require extraordinary measures to restore peace and security.
- (iv) When there is a dear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measure to arrest same.
- (v) When there exists other public danger clearly constituting a treat to the existence of the Federation, or
- (vi) When the President receives a request to do so. Under section 265(4) of the Constitution, a State Governor with the approval of two-thirds majority of the State House of Assembly could request the President to declare emergency in a State. If the Governor fails to make such a request within a reasonable time, the President may declare emergency in such a state if there is breakdown of public order to security.

The President is required to send the National Assembly a copy of the proclamation immediately after it is issued. The declaration of emergency, will expire after two days if the National Assembly is in session or ten days, if not in session – where the National Assembly does not approve he proclamation. Where it approves the proclamation, it will be valid for six months and may thereafter be renewed by a resolution of the National Assembly for another further six months.

#### **(e) Police Powers**

The maintenance of law and order is an item under the concurrent legislative list in the 1979 Constitution. In spite of this, Section 194 of the Constitution provides for the establishment of a single Nigerian Police Force under the control of the central or Federal Government. The Section prohibits the setting up of any other Police Force. consequently, the States cannot establish their own Police Force for the maintenance of peace and order.

Under section 195(1), the Inspector General of Police is appointed by the President under whom the entire Police Force is placed. The President or the Minister in charge of Police Affairs may give lawful directions necessary for the maintenance of public peace and security in any part of the country. Governors enjoy similar powers in the States. However, Police Commissioners in the States are also empowered under the provisions of Section 195(4) to seek directions from the President or Minister in which case they need not comply with the directives of Governors. This provision enables the Police Commissioners to disregard directives from Governors at will once they have the support of the Federal Government.

**(f) Power in relation to Prerogative of mercy**

Section 161(1) of the 1999 Constitution vests in the President power to pardon, commute, or remit sentences imposed on convicts. Similar powers are enjoyed by State Governors in respect of sentences for offences under their state laws.

When pardon is granted, the person is totally absolved in the eyes of the law and his guilt is wiped off. A pardon can be absolute or conditional in nature.

Commutating of sentence connotes that a lesser punishment is substituted in place of the sentence imposed by the court. For example, a death sentence may be reduced to life imprisonment and life imprisonment reduced to a number of years. In the case of remission, the unexpired portion of the sentence is waived and the prisoner is set free. It is usually granted as a result of good conduct in prison.

It is significant that section 161 (2) of the Constitution enjoins the President to exercise the powers in consultation with the Council of State.

**g) Attorney-General's Powers**

Section 160(1) confers certain powers on the Federal Attorney-General. Similar provisions exist in section 191(1) for the Attorney-General of a state. The constitutional powers are exercised by the occupants of the office independently based on their personal judgment rather than under the direction of their Chief Executives.

Section 160(1) vests the Attorney-General with power to:

- (i) **Constitute and undertake criminal proceedings;**

- (ii) Take over and continue any such criminal proceedings that may have been instituted by any other authority or person; or
- (iii) Discontinue at any stage before judgement is delivered in any criminal proceedings.

In section 160(2), the exercise of the power is subject to the following:

- (1) that the power is exercised by the Attorney-General in person or through officers in his department and
- (2) that the power is to be exercised to prevent the abuse of legal process in the public interest.

In *BALA KEFFI V. STATE*<sup>2</sup> the Solicitor-General entered a nolle prosequi at the High Court and the charge was terminated. The father of the victim of the crime filed a suit at the High Court for an order of declaration that the Solicitor-General, in the absence of any delegation of power by the Attorney, was incompetent to exercise the power under Section 191 (1) of the 1979 Constitution and as such the termination of the charge was unconstitutional.

It was contended on behalf of the State that the Solicitor-General could exercise the power since there was no Attorney-General in office at the time. The Court rejected his contention and held that only the Attorney-General could exercise the power in person or by specifically giving instruction to an officer in his department in that regard.

In *STATE V. ADAKOLE*<sup>3</sup>, the Court of Appeal examined the nature of the power of the Attorney-General under section 191 of the Constitution and took the following view:

- (a) that it was wrong to construe section 19(3) to mean that the Attorney-General must expressly give his reasons either orally or in a document filed before the court in entering a nolle prosequi
- (b) that in exercising the power under section 191 of the Constitution, the Attorney-General may be seen as a judicial officer who should be guided by considerations of public interest, justice and avoidance of the abuse of the legal process.

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<sup>2</sup> BALA KEFFI V STATE

<sup>3</sup> (1981) 2 NCLR 410

## CHAPTER VIII

# AN ANALYSIS OF JUDICIAL POWERS AND THE CONCEPT OF JUDICIAL INDEPENDENCE UNDER THE NIGERIAN CONSTITUTION

(A. O. Omotesho)

### (a) Meaning and Scope of Judicial Powers

The term 'judicial power', like other legal concepts, is difficult to define. It may be described as the power, which the state exerts in the administration of public justice in contradistinction from the power it possesses to make laws and the power to execute them.

Most federal constitutions specifically confer judicial powers on the courts. However, there is no uniform set up of the organization of courts in federations. For example, in the United States, there is a dual system of courts. The State Courts are distinct from the Federal Courts. In Nigeria, however, although the judicial power of the Federation is vested in the Federal Courts and that of the State, in State Courts, there is yet one single hierarchy of courts.

Under the 1999 Constitution, the Court of Appeal and the Supreme Court are Federal Courts in the sense that appointment of their judges is made by the Federal Government whereas the judges of State High Courts are appointed by the State Government.

In most federations, Nigeria inclusive, the Supreme court is the apex Court. It is conferred with original as well as appellate jurisdictions. The original jurisdiction is confined to disputes between the federation and States, or between the states interse. In all other respects, the jurisdiction of the apex court is appellate.

The permissible scope of judicial powers under the 1979 Constitution can be deciphered from the contents of section 6(6). The phrase "civil rights and obligations" is capable of being construed widely not only as legal rights but also privileges, freedoms, and liberties. This expression invariably makes the question of locus standi, a precondition for the invocation of judicial powers at the instance of any complainant.

It is instructive that the sub-section also contains the expression "matters between government or authority and any person in Nigeria". The conjunctive reading of this part of the sub-section together with the former (that is, "Civil rights and obligations") would suggest that only a party who demonstrates direct interest in the civil rights and obligations will have a standing in law to invoke judicial power to come to his aid.

On this score, it is commendable that the Supreme Court of Nigeria in *ATTORNEY-GENERAL BENDEL STATE V. ATTORNEY-GENERAL FEDERATION*<sup>1</sup> gave a broad-construction to interest whilst upholding the standing of Bendel State Government in challenging the validity of the revenue Allocation Act passed by the National Assembly ostensibly for non-conformity with the constitutional procedure for enacting laws. The court noted, inter alia, that the plaintiff had an existing right to a particular percentage of revenue allocation; that where such right is sought to be disturbed by a measure purported to be a law of the National Assembly, the aggrieved State can contend that such a measure is not law in accordance with the provisions of the 1979 Constitution. Such a State would in the circumstance have a standing. See generally: *MAIKARFI V. EZEJOKE*<sup>2</sup>; *JIDONWO V. GOVERNOR BENDEL STATE*<sup>3</sup>

(b) Judicial Review

This doctrine is a constitutional contraption devised for the control of abuse of governmental powers. It was propounded by the American Supreme Court in *MABURY V. MADISON*<sup>4</sup>. The doctrine essentially confers on the courts power to pronounce on the constitutional validity or otherwise, of a law enacted by the legislature. The doctrine is conceived of as necessary adjunct to a written constitution. It has been subject to a welter of criticism.

One view is that it is a "veto power" granted to the courts. Evidently, this view is misconceived as what the court does is merely to reject any retrogressive legislation which is inconsistent with the constitution. The doctrine does not elevate the courts to the status of a super-entity.

Another view is that the doctrine negates separation of powers, being a circuitous exercise of legislative power by the courts. Again, this view is misconceived. Aside from pronouncing on the constitutionality of the legislative measure, the courts do not introduce substitutes. Despite the formidable assaults unleashed upon the doctrine, it is crystal clear that it is an indispensable tool in modern constitutional government. The doctrine, however, can only flourish in a country where there is legalism, that is to say, where the courts are given what may be aptly described as freedom of justice.

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<sup>1</sup> (1983)

<sup>2</sup> (1980)

<sup>3</sup> (1980)

<sup>4</sup> (Supra)

Under the 1999 Constitution of Nigeria, judicial review is an implied power and not a substantive power as no specific section of the constitution provides for judicial review. A cursory look at the following constitutional provisions depicts pointedly that judicial review is an implied power under the 1999 constitution.

- (i) Section 1(3) declares unmistakably that any law which is inconsistent with the provisions of the constitution shall be void to the extent of its inconsistency.
- (ii) Section 4(8) provides that the exercise of legislative power shall be amenable to the jurisdiction of the courts and judicial tribunals established by law.
- (iii) Section 6 projects the predominance of the judiciary under the constitution.
- (iv) Lastly, in Section 42, the courts are empowered to pronounce on the constitutionality of any state action and to enforce fundamental rights by making appropriate orders.

Cumulatively, these provisions can be invoked in support of the exercise of judicial review of legislations in Nigeria. Indeed, a plethora of cases exist depicting the utility of the doctrine in Nigerian Courts. See generally:

**ATTORNEY-GENERAL BENDEL V. ATTORNEY-GENERAL  
FEDERATION<sup>5</sup>**

**WILLIAMS V. MAJEKODUNMI<sup>6</sup>**

**ADAMOLEKUN V. COUNCIL OF UNIVERSITY OF IBADAN<sup>7</sup>;  
OLAWOYIN V. COMMISSIONER OF POLICE<sup>8</sup>**

### (c) Statutory Exclusion of Judicial Review

It has now become a fashionable exercise for the legislature to limit the control of the courts in reviewing legislative activities. This is usually done by what is known in constitutional law as ouster clauses. Commendably the judiciary has been unwilling to succumb to these provisions ousting its jurisdiction. Their attitude to these ouster clauses can be gleaned from different cases.

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<sup>5</sup> (Supra)

<sup>6</sup> (1932) ALL NLR 413

<sup>7</sup> (1987) NMLR 87

<sup>8</sup> 2 ALL NLR 203

Before the Military intervention in January 1966, the constitution was supreme law of the land Provisions of ouster clauses were then construed as being contrary to the constitution. For example, in *DOHERTY V. BALEWA*<sup>9</sup>, the Nigerian parliament unwillingly passed the Tribunals of Enquiry Act 1961 providing that nothing done by the Prime Minister or the tribunal in the exercise of their power under the said Act, shall be enquired into by the court of law. This piece of legislation was a direct challenge to the provision of the Independence Constitution. One of those affected by the activities of the tribunal successfully challenged in court, the powers of the Prime Minister under the said Act.

This erstwhile position changed with the coming of the army in January 1966. During military interregnums, deliberate provisions are inserted in Decrees and Edicts ousting the jurisdiction of courts, since such decrees are perceived as supreme. Two schools exist with regard to the judicial attitudes towards ouster clauses. In the first school are those who accept the absoluteness of military decrees and feel helpless. The second school consists of those who believe that in spite of ouster clauses, the courts still have a corrective role to play. Those belonging to the second school do not outwardly question the validity of military legislation but rather, surreptitiously challenge any action done under such legislation that is not in accordance with it.

It would be appropriate to now examine a few cases depicting these judicial attitudes.

(a) Cases showing those who accept absoluteness of decrees.

(i) *EYO V. CHIEF OF STAFF*<sup>10</sup>: The applicant had been ordered to be detained upon a detention order issued under the decree by the respondent. The court came to the conclusion, inter alia, that the detention order could be validly impeached on the ground of uncertainty but, however, proceeded that its jurisdiction was ousted by section 1(2) (b) of the Supremacy and Enforcement of Powers Decree 8 of 1970. The Court in the case ruled that the combined effect of the provisions of Decree No. 2 and No. 13 of 1984 is that on the question of civil liberties, the law courts must as of now, blow muted trumpets.

(ii) *WANG CHIN YAO & ORS V. CHIEF OF STAFF*<sup>11</sup> (SUPREME HEADQUARTERS)

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<sup>9</sup> (1961) ALL NLR 604

<sup>10</sup> (1970)

<sup>11</sup> (Supreme Headquarters)

- (iii) *GANI FAWEHINMI V. T.G.P<sup>12</sup>*: The applicant was detained on the authority of a detention order which specified, inter alia, that he had recently been concerned in acts prejudicial to state security. The order failed to indicate that it was necessary to exercise control over the applicant by reason of the alleged act.

The learned judge found that the detaining authority had not scrupulously complied with the requirements of Section 1 of Decree No. 2 of 1984. Nevertheless, he held that he was precluded by the decree from adjudicating on the matter.

- (iv) *KOMOLAFE V. ATTORNEY-GENERAL FEDERATION* The Federal High Court held that the opinion of the detaining authority that a person has recently been concerned with acts prejudicial to state security cannot be subjected to any scrutiny by the court because the detaining authority is the sole determinant and the degree of certitude cannot be questioned.

(b) Cases showing that courts still have a corrective role to play.

- (i) *ADAMOLEKUN V. GOVERNING COUNCIL OF UNIVERSITY OF IBADAN<sup>13</sup>*: The question posed before the Supreme Court in this case was whether the court had jurisdiction to look or question the authority of decree No. 1 of 1966. The court held that it would be nugatory on the powers of the court not to be able to question the validity of an edict vis-à-vis the promulgation of the decree of the Military Government. The court also held that they could enquire into the provisions of any edict so as to ascertain that such provisions were in line with the Federal Government decree.

- (ii) *TUNJI V. FEDERAL COMMISSIONER FOR ESTABLISHMENT<sup>14</sup>* The plaintiff issued a summons for declaration in court that the exercise by the respondent of his discretionary powers under the pensions regulation was null and void. It was found as a fact that the respondent had taken extraneous matters into consideration. The Supreme Court held that the powers of the court to review an exercise of discretion remains intact even when the repository of the discretionary power had not given any reasons for the manner in which his discretion was exercised.

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<sup>12</sup> (1989)  
<sup>13</sup> (Supra)  
<sup>14</sup> (1985)

- (iii) *STITCH V. ATTORNEY-GENERAL FEDERATION & ORS*<sup>15</sup> The plaintiff challenged the refusal of the Minister of Commerce to issue her with an import licences for her vehicle imported from West Germany. The Supreme Court held that notwithstanding Section 3(2) of the Finance Act 1981, the Court may in appropriate circumstances infer that the respondent had no good reason for his decision especially if he was influenced by extraneous considerations.
- (iv) *MIKE OZEKHOME & 23 ORS V. PRESIDENT*<sup>16</sup> The 1<sup>st</sup> plaintiff acting on behalf of the others detained under Decree No. 2 of 1984, issued a summons for declaration that the applicants cannot be beheld under the decree.

The court held that where a detaining authority fails to comply with some condition precedent in the decree, he goes outside his discretion and to do so would be ultra-vires.

(d) INDEPENDENCE OF JUDICIARY

The importance of maintaining justice is considered fundamental in practically all jurisdictions in the civilized world. This no doubt prompted Schwartz Scholar on this subject, a leading to remark thus:

*The quality of justice depends more upon the quality of those who administer the law than on the content of the law they administer. Unless those appointed to the bench are competent and upright and are free to judge without fear or favour a judicial system no matter how sound its structure may be on paper, is bound to perform badly in practice.*

The phrase "independence" simply connotes that the courts in the discharge of their constitutional functions should not be amenable to the control, interference or direction of the other departments of government. If the courts are afraid of any other department of government, then they can no longer interpret the constitutional impartiality and objectivity in accordance with law.

Independence of the judiciary must never be construed as suggesting that there should be no checks on the courts. Indeed, as a necessity, in order to keep the judge also within the bounds of their powers, the 1999 Constitution provides adequate checks and balances.

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<sup>15</sup> (1986)

<sup>16</sup> (1990)

## **(b) Constitutional Measures Guaranteeing an Independent Judiciary**

The extent to which the 1999 Constitution has tried to make the judiciary independent can be gleaned from the angle of appointment, conditions of service, tenure of office, and removal and immunities/ privileges.

### **(i) Appointment**

Under the 1999 Constitution, the appointment of the judges of Superior Courts is vested in different bodies. In the case of the Chief Justice of Nigeria, Section 211 provides that he is to be appointed by the President in his own discretion. The nomination is, however, subject to Senatorial confirmation. The candidate is constitutionally required to have fifteen years minimum post-call experience. The other judges of the Supreme Court, as well as the President of the Court, are appointed by the President on the recommendation of the Federal Judicial Service Commission as spelt out in Section 211(2) and 218 (1) of the Constitution respectively.

The other judges of the Court of Appeal and Federal High Court are appointed by the President also on the recommendation of the Federal Judicial Service Commission.

In the state, the Chief Judge, the Grand Khadi and the President of the Customary Court of appeal are appointed by the Governor on the recommendation of the State Judicial Service Commission subject to the approval of the House of Assembly. Other judges are appointed by the respective Judicial Service Commissions. See generally sections 235, 241 and 246 of the Constitution.

It can be seen that the Constitution whilst referring on the Executive the power to appoint judges, has provided checks under that power by requiring confirmation in certain cases and the advice of the respective Judicial Service Commission is intended to make the judiciary independent and to see that only competent persons are appointed as judges.

### **(ii) Tenure of office**

Once appointed, judges continue to serve up to the age of 65 years with an option to retire at the age of 60 years. A judge who retires after serving in that capacity for not less than 15 years is entitled to pension for life at a rate equivalent to his last annual salary in addition to any other retirement benefits to which he may be entitled.

Where a judge retires at 65 years with less than 15 years of service, he is entitled to pension for life at a rate pro-rata the number of years of service he rendered or to the pension and other retirement benefit to which he is entitled under his terms and conditions of service if any, whichever is higher. See generally Section 155 of the Constitution.

(iii) **Remuneration/conditions of service**

The salaries of judges are charged on the consolidated revenue fund of the Federation. Even though their salaries are determined by the legislature, they cannot be so altered to the prejudice of the judge after appointment. See generally Sections 78 and 116 of the Constitution.

(iv) **Removal**

Judges can be removed on three grounds spelt out in section 56 of the Constitution: These are:

- (a) for inability to perform their functions;
- (b) for misconduct; and
- (c) for violating the Code of Conduct.

The Chief Executive may remove the Chief Justice of the Federation or the Chief Judge of a State upon the address of the legislature and in other cases, on the recommendation of the Judicial Service Commission. The removal must, however, satisfy the requirement of natural justice. That is to say that the judge concerned should be given adequate hearing and opportunity to make representation against the charges. The case of *KALU ANYAH V. ATTORNEY-GENERAL BORNU STATE*<sup>17</sup> emphasis that the removal of a judge on any of the three

grounds is subject to judicial review by the courts. This therefore serves as sufficient safeguard against arbitrary removal of the judges.

The interposition of the legislature as well as the judicial Service Commission is again intended to provide a check on the misuse of the power of removal by the Executive. From the foregoing, it would appear that the independence of the judiciary depends, to a large extent, upon the respective Judicial Service Commissions.

The composition of the Federal Judicial Service Commission under the 1999 Constitution is such that it could really function independently without succumbing to the influences of the Executive. The Chief Justice, the President of the Court of Appeal and two lawyers from a list

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<sup>17</sup> 3 NCLR 401

of four submitted by the Nigeria Bar Association, and the Attorney-General constitute a majority and could collectively have their say in matters of appointment and removal.

The foregoing may not be true, however, in the case of states in that majority of members of the State Judicial Service Commission are likely to be persons who enjoy the confidence of the Governor.

The commission consists of the Chief Judge, Grand Khadi or President of Customary Court of Appeal, Attorney General, one lawyer and one non-lawyer.

This enables the Governor to make political appointments to the High Court bench if he so desires.

Note that the Constitution (Suspension and Modification) Decree No. 107 of 1993 has introduced some significant changes in respect of the appointment and removal of Judges. Under the decree the Chief Justice is appointed by the Provisional Ruling Council. Other judges of the Supreme Court are appointed by the P.R.C. on the recommendation of a Special Committee, comprising the CJN, President Court of Appeal, and Attorney-General. All other judges of the Court of Appeal, Federal High Court and State High Courts are appointed by the P.R.C. on the advice of the Advisory Judicial Committee.

With regard to removal the Chief Justice and Chief Judges may be removed by the P.R.C. on any of the specified constitutional grounds on the recommendation of the Advisory Judicial Committee. As for all other judges, the P.R.C. could remove them on any of the constitutionally stipulated grounds. The elimination of the A.T.C. from the removal process in respect of the latter category virtually undermines the independence of the judiciary.

#### (v) Immunities/Privileges

Judges of Superior Courts of record in the discharge of their judicial functions are protected from civil liability. They cannot be sued in any court for any act done or order made in the discharge of judicial duties whether or not within the limit of judicial jurisdiction provided that he acted at the time in good faith.

This immunity is not prescribed specifically in the constitution but derives from the various High Court Laws. See for example Section 68 High

Court Law of Western Region of Nigeria Cap. 44 1969. See also  
*BAYO VATAKE*<sup>16</sup>

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<sup>16</sup> (1971) I. U. I. L. R. 403

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## CHAPTER IX

### THE LEGAL CONSEQUENCES OF CHANGE OF GOVERNMENT BY EXTRA-CONSTITUTIONAL MEANS

(A. Bawa)

**The first act of change of government by extra constitutional means in Nigeria** occurred with the handover of power to the armed forces in **January, 1966** and we have since then witnessed a total of 6 military coups in Nigeria.

As a result of the numerous problems confronting the country among which was the Western Region Crisis of 1962 the census and election crisis etc which led to the killing of people and some of the country's leaders especially at regional level, the leadership of the country then constituted decided to handover the administration of the country to the armed forces in order to avert further bloodshed. This singular act of the then civilian administration initiated the armed forces into the politics and administration of Nigeria. This was in January, 1966. By this time, the 1963 Republican Constitution was in force and the question is whether there was in the provision of the constitution anything which empowered the act of the civilian administration in handing over sovereignty to the armed forces? Apparently, there was no provision either in the constitution or any written law, which authorized the act. What then is the constitutional basis of the military governments? The question may be asked as to what is the attitude of the courts, Nigerians and international organizations towards military governments?

Attempts have been made by the judges and authors of constitutional law to offer an interpretation to this act of January, 1966. In fact, the courts have been opportune to decide on the legality or otherwise of the action of the military government as it relates to January, 1966.

The Constitution (suspension and modification) Decree No. 1 1966 was the first Decree that was issued after the handover of January, 1966 and this has been the basis of legality for every act or thing that have been done since 1966. It recognized the existence of the 1963 Republican Constitution, but suspended and modified certain provision of the constitution. The Decree provided that nothing in the constitution shall render any provision of a Decree void to any extent whatsoever. Section 6 of the Decree oust the jurisdiction of the court to entertain any issue as to the validity of the Decree or any other or Edict. In this regard the court in *OGUNLESI V A. G. FEDERATION*<sup>1</sup> upheld the unlimited legislative

competence of the Federal Military Government asserting that Decree can override the Constitution. In *ADAMOLEKUN V THE COUNCIL UNIVERSITY OF IBADAN*<sup>2</sup> court also conceded that it could not question the powers of the Federal Military Government in making a Decree.

However in *STATE V. NWOGA & OKOYE*<sup>3</sup> the court asserted the supremacy of the 1963 constitution over Decree. This line of reasoning also followed the court's decision in *JACKSON V GOWON*<sup>4</sup> the climax of this line of thought that the constitution was supreme over Decree was demonstrated in the famous case of *LAKANMI V. ATTORNEY GENERAL, WESTERN REGION*<sup>5</sup> which emphasized on the supremacy of the constitution. This decision immediately overruled by Decree No. 28, 1970 which asserted that not only the 15<sup>th</sup> January, 1966 handover was a revolution, but also the 29<sup>th</sup> July, 1966 coup was a revolution, both of which changed the legal orders preceding them. The decision in *LAKANMI*'s case has not only been overruled by Decree No. 28 but has been criticized by authors of constitutional law and legal luminaries alike. According Oluyede: "the reasons adduced by the courts in reaching its decision are unconvincing, the court asserted that it was not a revolution, but a rebellion. If it was a mere rebellion, then the government could repel it by using all the law enforcement agencies including the army at its disposal. In as much as the power was handed over to the armed forces, then logically the government had abdicated its power or responsibility since it had failed to carry out its obligation to the country. The government of the federation has no power to handover the administration of the country to the army and since it does not have power, it has nothing to give i.e. *NOMO DAT QUOD NON HABET*<sup>6</sup>

In fact, Oluyede argued further and rightly too that if we do accept the doctrine of necessity which was adduced by the court as a reason for the handover, then the court ought to uphold the validity of Decree No. 45 as a measure of necessary in a state emergency and that in as much as a measure of necessary in a state emergency and that in as much as the Federal Military Government declared a state of emergency then it could promulgate any law which it deems necessary and expedient for the peace, order and good government of Nigeria<sup>7</sup>. Also by the doctrine of necessity, an act which is otherwise unlawful becomes excused, i.e. *NECESSITY CREATES THE LAW (NECESSITAS EST LEX EMPORIS*

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<sup>2</sup> (1965) NMLR 253

<sup>3</sup> (1966) E/4C/66

<sup>4</sup> (1967) 8 NBJ 87

<sup>5</sup> (1971) I.U.L.R. 201

<sup>6</sup> Aibe & Oluyede, Cases & Materials on Constitutional law, (1979) Ibadan Press Limited, P. 65

<sup>7</sup> Ibid

ET LOCI). In other words, necessity supercedes rules and whatever is reasonable and just in such cases is likewise legal.

Although the 1966 take over was unconstitutional and illegal, its effectiveness is determined by the fact that the people of Nigeria, whose behaviour the Federal Military Government has been regulating by means of Decrees have behaved by and large in conformity with the new regime. The efficacy of the changes which have taken place in a new military regime is an essential condition in determining whether a government and its constitution have been over thrown. In addition, historical facts indicate that there are many countries at the moment which derive their origins from revolutions or coups, but have been universally accorded recognition as lawful. Thus, the position of the Federal Military Government can therefore be regarded as lawful since it has effectively waged a civil war against the then Eastern Region and has altogether, effectively administered the government of the federation<sup>8</sup>.

The combined effect of all these is that the January, 1966 take over of power by the military was without doubt a change of legal order. It was a successful coup d'etat or revolution and successful revolutions acquire their own legality and therefore the old legal order was deprived of its validity by a revolution which was contrary to the principle of legitimacy. Rather, due regard is accorded to the effectiveness of the enthroned new legal order or norm after the existing constitution has been annulled. Thus according to Kelsen, "a national legal order begins to be valid as soon as it has become on the whole efficacious and it ceases to be valid as it loses this efficacy the government brought into permanent power by a revolution or coup d'etat is, according to international law, the legitimate government of the state"<sup>9</sup> In the case of *STATE V DOSSO*<sup>10</sup> Munis C. J. said "It sometimes happens however that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution, any such change is called a revolution." The same line of reasoning was given in the case of *UGANDA V COMMISSIONER OF PRISONS*<sup>11</sup> the Prime Minister abolished the constitution of the country and substituted it with a new one which installed him as the Executive President with power to appoint a vice president contrary to the constitution of the country. Udo Udoma J. held that "a revolution occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way i.e. in a way not prescribed by the first order itself. It is in this context irrelevant

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> (1958) 2 PSCR P.180

<sup>11</sup> (1956) EALR 514

whether or not this replacement is effected through a violent uprising against those individuals who so far have been legitimate holders competent to create and mould the legal order.”

In conclusion, one can rightly assert that the Federal Military Government from 1966 to date was neither created nor established by any law or constitution. They have emerged mostly as a result of forcible seizure of power and therefore a change of the legal order. The former grundnorm is deprived of its validity i.e. the 1963 and 1979 constitutions. But by the doctrine of necessity, effectiveness and recognition, they have acquired lawfulness even though they remain unconstitutional. The Federal Military Government, for example has continued to be a member of the U.N.O. O.A.U. etc as sovereign and independent states and members of these organizations regard the Federal Military Government as the lawful government of the federation. It is however important to note that the trend is fast changing as indicated by the non-recognition by international community of the immediate past military government in Cote D'Voire and other emerging military governments.

#### The Impact (Effects) of Military Rule

1. Erosion of the rule of law.
2. Destruction of judicial independence
3. Violations of fundamental rights
4. Interference with personal liberty
5. Denial of citizen's right to self-government
6. Suspension and modification of constitution
7. Unfettered legislative powers of the Federal Military Government
8. Denial of right of access to courts of law.
9. Tribunals replacing and taking over the powers of civil and ordinary courts.

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## CHAPTER X

### AN EXAMINATION OF THE CONSTITUTIONAL ACTS UNDER THE MILITARY DISPENSATION IN NIGERIA

(A. Bawa)

#### LAW MAKING UNDER THE MILITARY

The first military decree was the **Constitution (Suspension and Modification) Decree No. 1 of 1966**. This was the grundnorm under the first military regime of Ironsi and Gowon. The Murtala/Obasanjo regime had as its grundnorm, the **Constitution (Suspension and Modification) Decree No. 32 1975**. This was replaced under the Buhari/Idiagbon regime with **Decree NO. 1, 1984** while the 8 years of military rule under **General Ibrahim Babangida (retired)** had as its grundnorm, **Decree No. 17, 1985** and finally the **Abacha/Abdulsalami administration** had as its basis, **Decree No. 107, 1993**.

At the state level, law making under the military regime is effected through what is referred to as **EDICTS**. Although it is clear from the above that law made by the federal or central government under the military is called Decree while at the state, it is called an edict, the question is who is responsible for legislation or law making under the military? At the state level, the answer is more specific that the Military Governors or Administrators are clearly vested with the responsibility of legislating for their various states.<sup>1</sup> This is the situation under the various military regimes and Decrees referred above. These Decrees all had provisions to the effect that the powers of the military administrator to make laws shall be exercised by means of edicts signed by him. The Administrator therefore is not only the sole signatory to the law, but the sole determinant of what legislation to make. In fact, the Decrees make it clear that an Edict is made when it is signed by the military administrator of the state.

At the federal level, the Decrees all provide that the Federal Military Government (FMG) shall have the powers to make laws for peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever<sup>2</sup> Some of the Decrees provide further to the effect that a Decree is made when it is signed by the Head of the Federal Military Government. The provisions of the Decrees went further to provide that the powers of the Federal Military Government to make laws shall be exercised by means of a decree signed by the Head of the

<sup>1</sup> See Section 2 (2) of Decree 107, 1993

<sup>2</sup> See Section 2 (1) of Decree 107, 1993

to legislate which is then subsequently signed by the head. Who then is the F.M.G.? it is quite logical to accept the argument that the F.M.G. constitute the following bodies: The Supreme Military Council (SMC) as in Decrees No. 1 1966; No 32, 1975, No. 1, 1984 or Armed Forces Ruling Council (AFRC) as in Decree No. 17, 1985 or the Provisional Ruling Council (PRC) as in Decree NO. 107 1993; the Federal Executive Council (FEC) as obtained under all the Decrees and finally, the National Council of State (NCS) as also obtained under the Decrees.

**While** the NCS consists of all the Military Administrators of the states including past heads of state and therefore cannot be concerned with making laws for the country as they are mostly bothered with state issues, the F.E.C. determines and executes the general policies of the FMG within the framework to be determined from time to time by the S.M.C. or AFRC or P.R.C.

Thus, although the F.M.G. as we have earlier agreed consists of these bodies, it is also clear from the functions of the NCS and FEC that they are not directly responsible for law making. The functions of the S.M.C. or AFRC or PRC however indicate that they perform constitutional and legislative functions. In fact, Decree No. 17, 1985 specifically vest the AFRC with the power to make laws for the federation or any part thereof. Under Decree 107, 1993, it is provided that the PRC shall exercise the powers vested in the National Assembly or the F.M.G. by the 1979 Constitution and Decrees<sup>4</sup>.

The decrees of the Military Government all provide for division of power between the federal government and the state in accordance with the legislative list provided for in the constitution. Thus, the classification of subjects into exclusive and concurrent list, the powers which are to be exercised by the federal and state governments is retained under the decrees. They also provide for the unlimited legislative competence of the federal military government. The F.M.G. could legislate on any matter and on any part of Nigeria. Further, a state can only legislate on the concurrent list with the consent of the F.M.G.

The following are the main features of law making under the military:

- (a) Centralised or unitary legislation
- (b) Unlimited legislative powers
- (c) Ouster clauses
- (d) Retrospective laws
- (e) Lack of consultation

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<sup>4</sup> See Section 10 (f) of Decree 107, 1993

## **Executive Power Under the Military**

The various military regimes in Nigeria all vests executive power and authority on the Head of the F.M.G. to be exercised by him in consultation with the S.M.C. (AFRC or PRC). This provision is also provided for under Decree 107, 1993. Section 6 of Decree 107, 1993 vests executive power and authority in the Head of State and Commander in Chief of the Armed Forces and shall be exercised by him in consultation with the PRC. This authority may be exercised by him personally, directly or indirectly with others.

This executive authority is vested on the Head of State with respect of the federation and on the military governors with respect to states. The exercise of executive authority at the state level by the governors is also to be done in consultation with the state executive council.

It would appear that the consultation with the P.R.C. or the like is at the discretion of the Head of State as failure to consult the body can not be legally challenged in any court of law. Section 6 (2) of Decree 107, 1993 clearly brings out the issue and it provides that: "the question whether there has been any consultation with the PRC shall not be inquired into in any court of law". This absolute powers of the Head of State is further enhanced by the Decree which provides that "the powers vested in the president by the 1979 constitution or the F.M.G. or the P.R.C., shall vest in the Head of State. This is found in Section 6 (3) of Decree 107, 1993. The Decree makes the same provision for governors where it provides that "All executive functions which were before this decree exercisable by governor or by officer by Section 5 (2) of the 1979 Constitution, shall be treated as having been delegated to the administrator of each state". The Decree went further to extend the wide scope of the executive power by providing that the executive authority of the Federal Republic of Nigeria shall extend to the execution and maintenance of the constitution (1979) as modified and supplemented by the Decree (107, 1993) or any other decree from 31<sup>st</sup> December, 1983 to 26<sup>th</sup> August, 1993. The reference to the two dates is to indicate the period covered by the 1983 military coup to the day of assumption of power by the Abacha Administration.

## **The Judiciary Under the Military**

The military in Nigeria was in power between 1966 to 1979 and between 1983 to 1999. Under these situations, the constitution, which was in existence prior to their coming into power, is usually suspended in parts and modified. Under Section 6 of the 1979 constitution the powers of

the federation is vested in the courts established under it. This was the same with the 1963 constitution. This provision on judicial powers was usually not tempered with by the successive military regimes because it is not usually among the suspended and modified portions of the constitution. Thus, under the military, judicial powers are still vested in the courts of law established by the constitution, for example Section 6(4) and (5) of the 1979 constitution. Also Section 6 provides for the establishment of other courts not specified therein by the legislative arm. This provision could also be said to back the establishment of tribunals under both a democratic and military regime, but which are more common with the military regimes. The court structure as provided for by Section 6(5) and Section 210 of the 1979 constitution remains the same under the military.

Under the 1999 constitution, the provision of Section 6 remains in pari material with that of the 1979 constitution. Equally, Section 230 of the 1999 constitution is in pari material with Section 210 of the 1979 constitution in terms of the court structure as established therein.

Under the military therefore, the judiciary remains the same in terms of judicial powers and court structure as constitutionally established. However, in the areas of appointment, promotion, discipline and removal of judges, the Decrees of the Military adopt the policy under Decree No. 1 1966, with some differences. Under Decree No. 1, 1966, judicial administration was centralized in the Supreme Military Council (S.M.C.) acting after consultation with the Advisory Judicial Committee (AJC). Under this arrangement, all the judges in Nigeria were to be appointed or dismissed by the S.M.C. after consultation with the A.J.C. This committee comprised the Chief Justice of Nigeria (CJN) as the chairman, Chief Justices of the Regions (later states). Grand Kadhi of the Sharia Courts of Appeal, Attorney General of the Federation and the Solicitor General of the Federation acting as the Secretary of the Committee. The subsequent military governments and the Decrees depart in some important particulars from Decree No. 1, 1966. First the composition of the Advisory Judicial Committee was substantially altered. It has the CJN as Chairman, Attorney General of Federation, Chief Judge of each state and FCT, President of the court of Appeal President of Federal High Court, one Grand Khadi of the Sharia Court of Appeal appointed annually on rotational basis by the P.R.C. from states, one president of the Customary Court of Appeal appointed annually on rotational basis by the P.R.C. from states.<sup>5</sup> The provision of Decree 107, 1993 proceeds to provide that the A.J.C. shall advise the Provisional Ruling Council (PRC) on appointment of Justices of the Court of Appeal,

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<sup>5</sup> See Section 15 of Decree 107, 1993

Chief Judges and Judges of Federal High Court, Chief Judge of High Courts of states and FCT, Grand Khadi and Kadhi is, President and Judges of the Customary Courts of Appeal and on ANY MATTER pertaining to the judiciary that may be referred to the A.J.C. by the P.R.C. Secondly, the subsequent decree unlike Decree 1, 1966 improved the status of the AJC Under Decree No. 1 1966 appointments to judgeship were made by the S.M.C. after consultation with the A.J.C. whereas subsequent decrees as exemplified by Decree 107, 1993 impose a duty on the AJC to advise the P.R.C. before the latter makes an appointment. Thus in the former case, it is not compulsory for consultation with AJC to be made and whether or not such consultation was made can not be questioned since no mandatory duty is imposed. Under the subsequent military regimes however, it is mandatory and can therefore be questioned.

In terms of the removal of justices and judges, the various military decrees as exemplified by 107, 1993 provide that the Chief Justice of Nigeria, Chief Judge of High Court of State, Grand Kadhi of Sharia Court of Appeal, President of a Customary Court of Appeal SHALL be removed by the P.R.C. on the recommendations of the A.J.C. and the removal in all other cases shall be by the P.R.C. only.

It would appear that under the military dispensation, appointment of justices into the Supreme Court is the discretion of the Head of State on the advise of the AJC. This is because Section 15 of Decree 107, 1993 for instance, vests appointment of justices and judges on the P.R.C. to the exclusion of justices of the supreme court. Thus, the issue of who appoints justices of the apex court appears to have been deliberately excluded by decree in order to confer the discretion on the Head of the Federal Military Government. The relevance of the issue of appointment and removal of judicial officers is very crucial in any set up because it is the most relevant consideration in determining the issue of judicial independence and the ability of the court to discharge its functions as constitutionally enshrined without any hindrance. The judiciary is the heart of any government and if the heart fails, then the body collapses. Thus, it is an essential requirement that any form of government requires a Judiciary that is unfettered to discharge its functions successfully.

It must be pointed out however, that the appointment and removal of judicial officers, though most crucial, are not the only determinant factors in considering judicial independence under military rule. A very common feature of the military as it affects the judiciary is the use of OUSTER CLAUSES depriving the courts of the jurisdiction conferred on it constitutionally. This is amply demonstrated by the various judicial decisions. The courts have attempted to question the vires of the F.M.G.

as shown in such earlier decisions as *STATE V NWOGA & OKOYE*<sup>6</sup> *JACKSON V. GOWON*<sup>7</sup> *DOHERTY V. BALEWA*<sup>8</sup>, the climax of which was the decision in *LAKANMI V. A.G. WESTERN NIGERIA*<sup>9</sup> and later decisions of courts as in *UWAIFO V. A.G. BENDEL STATE*<sup>10</sup> *GARBA V. FEDERAL CIVIL SERVICE COMMISSION*<sup>11</sup> and *ATTORNEY GENERAL, ANAMBRA STATE & 13 ORS V ATTORNEY GENERAL OF FEDERATION & 16 ORS*<sup>12</sup>

Also, under the military, there have been cases where due to the unlimited legislative powers of the Federal Military Government, the decrees not only lay down offences and their punishment, but also proceeds to determine guilt and settle issues which normally should have been left to the judicial arm of the government. e.g. confiscation and forfeiture of assets of individuals and institutions in *LAKANMI's* case, several arrest and detention of persons, all without adjudication or through any judicial process.

Furthermore, matters requiring purely personal judicial decisions have been transferred to all kinds of tribunals under the various military rule e.g. Robbery and Fire Arms (Special Provisions) Decree, 1970 or Recovery of Public Property (Special Military Tribunals) Decree No. 3, 1984. One cannot but concede to the assertion that whatever justification exists for the establishment of these tribunals, they were set up to perform what can best be regarded as judicial duties within the competence of the ordinary courts of law. It should be noted further, that in most cases the composition of these various tribunals consist of military men with little or no knowledge of the legal proceedings and are hardly guided by the rules of procedure to ensure a fair trial. It has been argued in some places however, that the military regimes have not affected judicial independence as there is no direct interference in the actual operation or decision making process of the judiciary. The matter, it is further asserted is left to the courage of the judges themselves. This view cited the cases of *AMAKIRI IWOWARI*<sup>13</sup> and *ONABANJO V SPECIAL MILITARY TRIBUNAL, LAGOS ZONE*<sup>14</sup> to support of their

<sup>6</sup> (1966) E/34C/66

<sup>7</sup> (1967) 8 NBJ87

<sup>8</sup> (1961) 1 ALL NLR 604

<sup>9</sup> (1971) 1 U.I.L.R. 20

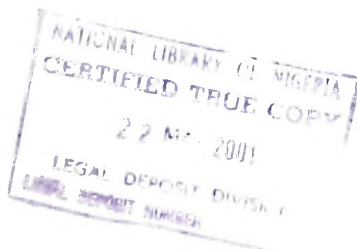
<sup>10</sup> (1982) 7 SC

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<sup>13</sup> PHC/232/73 (Unreported)

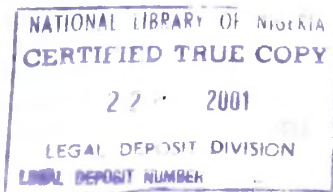
<sup>14</sup> M/106/84 (Unreported)



claim, In **AMAKIRI's** case, the then acting Chief judge of Rivers State exhibiting courage gave judgement to the plaintiff in a claim of damages against the then A.D.C. to the military governor for false imprisonment, assault and battery.

In **ONABANJO's** case, the judge said "it is very doubtful whether the draftman however, ingenious, can effectively and completely oust the jurisdiction of the courts". With respect, it is submitted that this view is most porous and lacks some elements of merit. It is difficult to appreciate how the courts manned by military men performing judicial functions and imposing punishments like the normal courts or courts whose constitutional roles have been curtailed, can be said to be independent. It is further difficult to appreciate how a judicial officer can confidently and independently perform his functions if he could be removed at will by his appointor. The Decree gives room for manipulation of the manner of the appointment and removal of judicial officers manipulation of the manner of appointment and removal of judicial officers by the Head of the Federal Military Government.

Finally, even though the issue of qualifications and experience for appointment as judicial officer, salaries and other remuneration are still intact and undisturbed under the military as they are still charged on the Consolidate revenue fund consolidated revenue fund, they are still subject to manipulations under the military rule and this could easily be effected through the use of Decrees. This goes to strengthen the various appeals for the Judiciary to have a separate vote and be self accounting.



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