AN APPRAISAL OF MILITARY RULE AND THE NIGERIAN CONSTITUTION

BY

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FEBRUARY, 1999

DECLARATION

I, BASHIR YUSUF IBRAHIM, do hereby declare that this thesis is the result of my independent research and no part of it has been published or presented for the award of a higher degree.



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9/3/07

CERTIFICATION

The Thesis entitled: *"AN APPRAISAL OF MILITARY RULE AND THE NIGERIAN CONSTITUTION"* by Bashir Yusuf Ibrahim meets the regulations governing the award of the degree of Ph.D. of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my father Justice Yusuf Ibrahim and my mother Hajiya Hassana Ibrahim.

ABSTRACT

'Constitution' may be defined as a- document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, 'and declares the principles which those' organs must operate. Moreover, it includes the whole system of government of a country, the collection of rules which establish and regulate or govern the government. Therefore, a constitution may be written or unwritten. But the practice of most modern governments, including Nigeria, is to "have a" written constitution.

Constitutional principles were gradually introduced into Nigeria,by the British colonial power from annexation of Lagos in 1862 to independence in 1'960. Thus, the issue of constitution for Nigeria has been as old as the formation of the country itself. Even after independence, the search for a durable constitution had occupied the government. The post independent constitutions for. Nigeria were usually short-lived as a result of Military' Coup D'etat. "Of the thirty nine years of the country's existence, only ten years ' were spent under constitutional governments. Dictatorships, military or otherwise are antithesis of constitutional government. The Practice of Military Governments in Nigeria has been to' suspend or abrogate some certain sections of the. constitution. A kind of combination of dictatorship and constitutionalism.

This thesis is an attempt to examine the extent to which the Military Government maintained constitutional principles. The extent of military encroachment on the .constitution will be determined. In order to achieve this objective some traditional constitutional concepts are chosen for examination. Examples of such concepts are: the rule of law, separation of powers and fundamental Rights. It is worthy of noting, that the Military participated in overthrowing the 1963 and 1979 constitutions but were responsible for making the 1979 and 1989 constitutions, and the 1995 draft constitution. The thesis extends to military and constitution making.

The thesis is divided into six chapters. The first chapter provides a brief background of the study, setting out the objective, nature, and scope of the study, followed by a brief literature review and the organisational layout.

While the second chapter begins with the evolution of the Nigerian constitution. The history and nature of every constitution that was made or operated at any given time is discussed. This includes pre, and post independent constitutions. The role of military Government in constitution making is highlighted as well.

In the third chapter, the constitutionality of Military rule is discussed. The Nature of Military 'Governments • is examined and compared with constitutional one's.

doctrine of separation of powers. Beginning with its historical background, that is, how it came into being and finally found a place in the constitutions .of many countries. It involves the legislature, executive, the judiciary, and "the principle of checks and balances in the constitution. The extent to which military rule affected the doctrine of separation of powers is also discussed.

The fifth chapter examined the Nigerian bill of rights. Fundamental Rights and freedoms were enjoyed by the- subjects or citizens in Nigeria under constitutional regimes. The enjoyments of these rights are usually curtailed under military regimes. So many Decrees were promulgated' by the Military Government, which adversely affected the citizen's fundamental rights and freedoms. All such Decrees could not be discussed, but most of them are highlighted.

Finally, chapter six contained a brief summary and conclusion of what was learned in the course of writing the thesis. The conclusion is simply that there is no substitute to constitutional government.

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CHAPTER I

1.0 GENERAL INTRODUCTION

Constitution has been defined as "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organising the government, and regulating, distributing and limiting the functions of its different departments, prescribing the extent and manner of the exercising of sovereign powers."[1]

According to K.C. Wheare the word constitution may be understood in two senses. First, it is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government and secondly, it is a selection of legal rules which govern the government of that country and which have been embodied in a document.[2]

For the purpose of this thesis, the second usage of the word constitution as defined by K.C. Wheare above will be adopted. Therefore a constitution will mean the document which embodied the legal rules intended to govern

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[1] See Black's Law Dictionary (Centennial Edition)

Nigeria, establishing its government, regulating, distribution, and limiting the functions of its different organs and prescribing the extent and mode of exercising its power. In this light, the 1960, 1963 and 1979 constitutions will fall within the meaning of constitution given above.

Constitution being, a supreme law is endowed with a higher status, in some degree than other legal rules in the system of a government. Perhaps that explains why at least it is usually laid down that the amendment of the constitution can take place through a special process different from the method by which the ordinary law is altered.[3] Moreover, the idea of a constitution stems from a belief in limited government. Limitations are placed on the executive and to some extent the legislature. For instance any law passed by the legislature which is inconsistent with the constitution will be declared void to the extent of its inconsistency.[4] The authority of the constitution binds all authority and persons, including the executive and legislature.[5]

KASU

See Section 9, 1979 constitution
See Section 1(4) Ibid.
See Section 1(1) Ibid.

Independent Nigeria had experienced constitutional governments, most especially under the 1960, 1963 and 1979 constitutions between 1960 to 1966 and 1979 to 1983. These constitutional regimes were over thrown in 1966 and 1983 respectively. Military governments were established in Nigeria between 1966 to 1979 and 1983 to 1999. The two periods put together would mean that Nigeria was under military rule for a period of 29 years.

A military government is antithesis of a constitutional government. It is a government, which acquires the power to govern as a result of a successful Military Coup D'etat. By the use of force or threat of it the military overthrows the government and the constitution. Under such a regime it does not require a constitution to grant or limits its authority, its success in acquisition of authority grants it unlimited power to legislate or exercise executive authority.

Once the military succeed in overthrowing the government and the constitution, it is then left to it to shape its own system of governance or decide on its grand norm. It may rule by a brand new constitution, or even without a constitution, or it may suspend, abrogate or

b. To examine the various Constitution (Suspension and Modification) Decrees including other Decrees with a view to determine the extent they alter, amend or suspend the constitution, including the legal status of the overthrown constitution.

c. To examine the three branches of the arms of a constitutional government, namely the executive, legislature and the judiciary, and the nature and extent of changes brought about by the military government.

d. To examine the fundamental rights provisions under constitutional government and to determine the role of the military government in preservation and enforcement or abuse of the fundamental rights.

1.2 **Methodology**

From the on set, it is imperative to make it clear that in this thesis, no claim is made to have solved completely the problems associated with military regimes and constitutionalism enumerated herein and those encountered by the earlier researchers, nor is it claimed

that this work will be better than the earlier ones on the same field of research. But as to whether what is added is very valuable or better than what was available is to be judged by others and not in this thesis.

The thesis as its title indicates, concern itself with the function of the constitution under a democratic regime and the extent of its applicability under the successive military regimes in Nigeria.

A critical exposition and analysis of the Nigerian constitution with particular reference to the 1960/63 and 1979 constitutions including all the constitution (suspension and modification) Decrees will be attempted. The thrust of this work is to determine the extent to which military regimes in Nigeria were able to maintain the traditional constitutional law principles. Example of these principles are: the rule of law, separation of powers and fundamental rights. Particular attention will be given to the role of the judiciary in the interpretation of the constitution (suspension and modification) Decrees including any other decree that may modify, alter or amend the constitution.

Doctrinal research approach otherwise described as library based research will be adopted in writing this thesis.[7] It involves analysis of case law and statutory provisions by application of the power of reasoning. This research method views law as a normative science, that is a science, which lays down norms and standards for human behaviour in a specified situation or situations enforceable through the sanction of the state. This method of research is found expedient in the present thesis for in the words of Gasiokwu, "in most developing countries, including Nigeria, doctrinal research constitutes the dominant research approach."[8] The bulk of the data to be analysed in this these will be:-

a) **Constitutions:** (I) The 1960/63 and 1979 constitutions, 1989 and 1995 draft constitutions. Report of the constitution drafting committee. Vol. I 1976 and report of the constitutional conference containing the resolutions and recommendations vol. II 1995.

(II) Constitution (suspension and modification) Decrees 1966, 1975,1984, and 1993.

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7 See Gasiokwu, M.U. (1993) Legal Research and Methodology: The A-Z of writing thesis and Dissertations in a Nutshell. Fab Arieh (Nig.) Limited pp 13-16

8 Ibid. At p 15.

b) **Case Law -** Emphasis will be given to Supreme Court cases. The high court and Court of Appeal decisions may be relied upon in the absence of the Supreme Court decisions.

Finally the British, Commonwealth Countries and U.S.A. Court's decisions may appropriately be put to use in the absence of Nigerian cases.

c) **Books, Periodicals and Journals:** The works of eminent legal scholars, philosophers and legal scientists will be made use of to buttress important legal principles and doctrines, and this will include learned journals and periodicals.

1.3 LITERATURE REVIEW

At this juncture, it is significant to state that the significance of this thesis is to contribute to the existing knowledge, that is to say there are other people who have hitherto ventured into the field of this research, yet, either by effluxion of time their work has almost become obsolete or that they did not cover some areas of importance. Therefore, attempt will be made in the following pages to review the existing literature.

Kirk Greene[9] undertook a case study of political Nigeria between 1966 and 1970, describing how Africa's exemplar democracy fell from Apogee of grace to perilously close to collapse. Or how one of Africa's bloodiest Coup D'etat resulted in constitutional chaos; and from bloodiest civil war to its crushing rebellion followed by the challenge of reconstruction. The effort of the writer was mainly concerned with how the crisis and conflict happened, why it happened, and who was to blame. The author did not examine the legality of the military take over of the Nigerian government in 1966 nor did the book discuss the system of government established by the military and its repercussion on constitutionalism.

Ruth first[10] discussed army intervention in politics, the coup and counter coup, seeking to explain why African states are so vulnerable to army intervention in politics. Essentially, it deals with the way army intervention in politics revealed the nature of political power and its failure. Three African countries namely, Nigeria, Ghana and Sudan were selected for the study with references to

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9 Greene K (1971) Crisis and Conflict in Nigeria 1996 vol. 1 Oxford University press London.

10 Ruth First: The Barrel of a gun: Allen lane the penguin press.

Algeria and Egypt. The historical account has little or no significance to either constitution making or the study of military and constitutionalism except for the fact of overthrowing the constitution.

Theophilus Olatunde Odetola[11] examined economic development and political stability brought to Nigeria by the Military led government between 1966 and 1973, the author did not advert his mind to other aspect of military rule, that is, the constitutional aspect.

Oyeleye Oyediran[12] edited Nigerian government and politics under military rule 1966-79. It consists of collection of papers with particular reference to the impact made by thirteen-year military rule on the Nigerian political system. It was an appraisal of performance of the military in power prelude to the hand over of the political power to civilian elected government in 1979. Except for the discussion of the historical search for a viable constitution for Nigeria, nothing was discussed on

11 Odetola, T.O. (1978) Military Politics in Nigeria: Transition books News Brunswick. New Jersy.
12 Oyediran, O. (1979) Nigerian Government and politics under military rule 19966-79 Macmillan press ltd.

the legal aspect of military regimes or their role in constitution making.

Odumosu[13] traces the constitutional development of Nigeria from the time of British annexation of Lagos to the date of independence i.e. 1862 to 1960. The author anchored his discussion on parliamentary institution and some characteristics of federalism in Nigeria at that period. Both on the point of history and constitution of Nigeria, it will not be out of place to state that it has become obsolete or even archaic.

Elias[14] ventured into the historical evolution of the government and constitution of Nigeria. The author featured the economic and social aspect of life in Nigeria, with particular reference to public corporations, allocation of Revenue and public finance, land law and administration, and family law. The last chapter briefly discussed the military intervention of 1966 describing the extent of modifications introduced to certain institutions and law.

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13 Odumosu O.I. (1967) Nigerian constitutional History and government. Sweet and Maxwell.
14 Elias T.O. (1967) Nigeria: The development of it laws and constitutions Stevens & sons.

The book though a comprehensive account of the areas covered by it, by effluxion of time other important developments has superseded it. The coup in 1966 was merely the beginning of military rule, coups and counter - coups, which permeated the Nigerian politics for almost three decades.

Nwbueze[15] gave an account of all the constitutions that Nigeria ever had up to September 30, 1979. The author examined the nature, sources of authority of the constitutions and forms of government established by each of them. But the factors which, brought about the change from one constitution to another or the process by which the constitutions were made are completely omitted. Moreover as the writer's discussion ended up in September 1979, it goes without saying that the 1979 constitution and other constitutional developments that followed afterwards were not discussed at all.

The presidential constitution of Nigeria[16] provides an insight into the 1979 constitutions, outlining the general principles of the presidential system of government and

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15 Nwabueze, B.O. (1982) A Constitutional History of Nigeria C. Hurst & Co. London

16 Nwabuaze (1982) The presidential constitution of Nigeria. Hurst & co. London

delved deeply into the working of the US constitution. At the time of publication of the book, very few of the constitutional provisions (1979) were tested by the Nigerian courts. Even though the U.S. constitutional principles were to a large extent enshrined in the 1979 constitution, it nevertheless was adopted with substantial modifications to suit the local circumstance of Nigeria.

In judicialism in Commonwealth Africa,[17] the author examined the role of the courts within the African countries that were colonised by Britain. A comparative approach was adopted with the judiciary in the older commonwealth and the United States. Suffice to say that a book published in 1977, cannot address a matter that was not conceived i.e. the status of judiciary under the 1979 constitution. Moreover the scope covered by the book is so wide thereby raising doubt as to thorough coverage of the Nigerian situation.

Presidentialism in Commonwealth Africa[18] was devoted to the exploration of the types of government adopted by the newly African independent states. The author focused on

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17 Nwabueze B.O (1977) Judicialism in common wealth Africa. Hurst & Co. London

18 Nwabuaze (1974) presidentialism in commonwealth Africa. Bill & Sons Ltd. London.

the adaptation of parliamentary to presidential system of government and the types of government, whether unitary or federal to one party state. Other areas discussed by the author include Human Rights, National Security and economic development. It is a comparative study of the various constitutions and their practices. The author concludes that the study revealed more diversity than uniformity, more localism than conformity to a Commonwealth pattern.

A book devoted to the study of the various constitutions of Africa with different variations and differences would undoubtedly be unable to provide adequate attention to any of the constitutions under review, more so the existing Nigerian constitution was that of parliamentary type as amended by the military government. Moreover the book being published in 1974 is far short of the important constitutional development of present day Nigeria.

Akande[19] merely set out the constitutional provisions of the 1979 constitution and made comments after each section, with particular reference to judicial decisions of

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[19] Akande, J.O. (1982) Introduction to the Constitution of the Federal Republic of Nigeria. Sweet and Maxwell.

the United States. This approach is not helpful to understanding the working of the Nigerian constitution. The role of interpretation of the constitution is vested in the courts. Academic writers need not usurp judicial powers of interpretation and moreover such interpretation can only be regarded as personal understanding or opinion of the writer and at any rate, it does not represent the law.

Achike's[20] book is divided into two parts. One part deals with the law within the Nigeria Army, its history, legal status, nature and sources of law affecting members of the armed forces. While the second part covered the military regime that came about in 1966 and the Biafran secession. Events discussed in the book are limited to the overthrow of the 1963 constitution and emergence of military rule in Nigeria. This is somewhat spent by effluxion of time and subsequent constitutional development in Nigeria.

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20 Achike, O. (1978) Ground work of military law and military rule in Nigeria. Fourth dimension Publishers.

Nwabueze[21] focussed on the problems affecting most newly African independent states. Religions, tribal, or linguistics, differences were identified as divisive factors that militated against the development of constitutionalism in the emergent states.

A large portion of the book is devoted to the studies of revolution, coup D'etat, acts of secession and other manifestations of constitutional breakdown. Suffice to say limited attention was given to the discussion on Nigerian military intervention and on point of time it was only the events that followed the 1966 coup D'etat to 1968 that featured in the book.

Ojo's Constitutional law and Military rule in Nigeria was an attempt to deal solely with the problems of constitutional law and military administration in Nigeria, a collection of articles already published in journals. The author had failed to discuss any of the Nigerian constitutions. Although he dwelled on the military regimes, very little was said of the Buhari and Babangida regimes.

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[21] Nwabuaze B.O. (1973) Constitutionalism in Emergent States H & Nwarife London & Nigeria.

Nwabueze[22] examined the impact of Military rule on civil liberties, machinery and foundations of constitutionalism. The author attempted to asses the achievement and failures of military rule regarding economic efficiency, social justice and individual liberty. The author is of the view that there were certain achievements as regards the machinery and foundations of constitutionalism but as regard civil liberties, economic efficiency, and social justice, the military had a record of failure. The learned author did not advert his mind to the structure and function of the military government nor did he examine the impact of military rule on any constitution.

In law making under military regimes,[23] Azinge attempted to provide an insight into the way and manner decrees were made. The characteristics of military legislation and judicial interpretation of decrees with particular reference to Ouster clauses. The author failed to discuss what constitute a military government and the scope and limitation of its legislative powers. It appears that Azinge's effort was based on Decrees 107 of 1993 as

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22 Nwabuaze (1992) Military rule and constitutionalism Spectrum Law Publishing.

23 Azinge, E. (1994) Law-Making Under Military Regimes: the Nigerian experience Oliz Publishers `Benin City.

the author failed to examine similar decrees of 1966, 1975, 1984 and 1985. Needless to state that there were important changes brought about by decree NO. 17 of 1985 which was completely omitted by the learned author. Other aspects omitted are how decree 107 sort to alter or modify the 1979 constitution from the perspective of law making.

From the review of the available literature it is evident that the work of social scientists and historians in the field of this thesis will serve a useful understanding of the past and planning for the future. But for certain, these books are not helpful when it comes to military rule and constitutionalism. On the books dealing with Constitutional law matters, it is observed that they were written shortly after the 1979 constitution had become law and at that time there were too few cases decide by the Nigerians courts, most especially at the level of supreme court. As for literature on military rule and constitutionalism, there are a plethora of authorities that covered issues involving military rule, following the overthrow of 1963 parliamentary constitution but little attention was given to the impact of military rule on the 1979 presidential constitution.

1.4 ORGANISATIONAL LAYOUT

It is desirable to set out the organisational structure of this thesis. Essentially, it is divided into six chapters:

The first chapter will provide the brief background of the study setting out the objective of the thesis, followed by a brief literature review showing or indicating the contribution of other writers in the field and what probably they did not include in their work or the areas they did not discuss in depth.

Chapter two will attempt to discuss the evolution of Nigerian Constitution from 1862 to February 1999. The incursion of the military into politics, the system of military administrations and their effort at constitution making will be in focus.

An insight into the military and constitutionalism will form the bedrock of the analysis in chapter three. Background to military rule in Nigeria, the legal effect of Military coup D'etat, a comparison between a military and constitutional governments are to be highlighted in the chapter. So also the hierarchy of the Nigerian norms

indicating the Grandnorm of military regime will be clearly spelt out.

In chapter four an insight into constitutional government in Nigeria will be provided. The status, powers and function of the executive, legislature and judicial arms of a constitutional government under the 1979 constitution will form the core of the chapter, followed by examination of the impact made by the military regime on the aforesaid each of the three arms of the government.

Fundamental Rights and Freedom under the 1979 constitution is the theme of chapter five. The rights to life, Dignity of the Human Person, personal liberty, fair hearing, private and family life, peaceful assembly and association and; freedom from thought, conscience and religion, expression and the press, and movement are to be analysed, so also their enforcement. The impact made by the military regimes on the aforementioned fundamental rights and freedom is the subject of analysis in this chapter.

Finally chapter six is the chapter dealing with summary and conclusion regarding what was analysed in the proceeding chapters.

It should be noted, however, that two chapters, in the 1979 constitution will not feature in this thesis, they are chapters II (on fundamental objectives and directive principles of state policy) and chapter III (on citizenship), reason being these two chapters were not affected by military rule either legislative wise or through executive action. Moreover even under constitutional regime chapter two of the 1979 constitution is not justiciable.

CHAPTER II

2.0 EVOLUTION OF THE NIGERIAN CONSTITUTION

Nigeria has experienced quite a number of constitutions from its formation or creation in 1914 to the present day. Before 1914, each of the territories acquired by the British Government, whether as a colony or protectorate, was administered by a set of rules or principles as Grundnorm. Therefore the constitutional development in Nigeria can be discussed in five phases. One is the period from 1862 to 1914. This was the period in which the colony of Lagos was established and the protectorates of Southern and Northern Nigeria formed, culminating in the unification of all these territories into one Nigeria. The second period between 1914 and 1960 was the period of gradual relaxation and withdrawal of the British Authority or control, which culminated in complete Independence in 1960. The third period is 1960 to 1963 wherein Nigeria saw the operation of the independence constitution. Nigeria remained a monarchy but a full independent country within the commonwealth. The governor-general was the Queen's representative in the Federation and the Governors stood in a similar relationship to the Queen in the regions. The period 1963 to 1979 formed the fourth, beginning With the Republican constitution, the

first, second and third military interventions to the formation of the 1979 constitution. Finally, the fifth phase 1979-1995 covers the civilian Administration in the country under the 1979 constitution to the successive military regimes and the making of the 1989 and 1995 constitutions.

2.1 NIGERIAN NATION STATE

Nigeria is the creature of the British colonial Government. Prior to this time, there existed different independent kingdoms or countries like the Sokoto Caliphate, Oyo Empire, Benin Kingdom etc. In the process of creating Nigeria the British captured the different kingdoms or independent territories gradually. Odumosu supports this fact when he stated:

> "The acquisition of the different territories of which Nigeria is now composed was piecemeal and occurred in successive stages... Modern Nigeria has come into existence through the unifying influence of the British administration which has progressively welded together different sections of the country."[1]

The British acquisition of the present Nigeria started in 1861 with the Lagos Treaty signed by King Dosumu

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[1] Odumosu O.I. (1963) Nigerian Constitution: History and Development Sweet & Maxwell p. 5.

transferring to the Queen of Great Britain the port and Island of Lagos, with absolute dominion and sovereignty. By this treaty Lagos became the colony of Great Britain. More treaties were made between the British and the various Yoruba chiefs in the hinterland transferring their land and sovereignty to the former. Most of the Western Region by 1870 had become a protectorate attached to the colony of Lagos.

To the East of Lagos, the British traders requested for protection from her majesty the Queen of England who in 1949 had established a British consulate for the Bights of Benin and Biafara, with headquarters at Fernando Po. Like in other parts of Nigeria, the British government requested the Chiefs of the Niger Delta States to cede the necessary jurisdiction, which was obtained by sufferance in 1872. The territories covered by the treaties in the Delta area were established and called the Oil Rivers Protectorate renamed the Niger coast protectorate in 1893. In 1900 the crown, by order in council, assumed jurisdiction generally for the peace, order and good government of the Niger Coast Protectorate, which it merged with the Royal Niger Company's territories under the name of the Protectorate of

Southern Nigeria, the company's interest having been bought off after its charter had been revoked in 1899.

In the former Northern Nigeria, it was first the Royal Niger Company, which entered into quite a number of treaties with the Fulani Empire. Examples of such treaties are that of 1885 and 1890 with Sokoto[2] between the National African Company (Limited) and later the Royal Niger Company (Chartered and limited) on the one part and Umoru, King of the Mussulmans of the Soudan and Sokoto on the other part. The effect of these treaties was that the Royal Niger Company was to have the sole right to trade over any foreigner to the exclusion of all others (like the French and Germans). By 1st January 1900 the charter of Royal Niger Company was revoked. The monopoly of trade and general control of the part of Northern Nigeria that was hitherto in the hands of the Royal Niger Company had been taken over directly by the British Government. Other parts of Northern Nigeria which were not under the control of the Royal Niger Company were taken by force of arms by the British.[3] Examples of such areas were Kontagora and Nupe taken over in 1901 by colonel Kemball. Yola too was not

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2 See Treaty with Sokoto, 1885 and 1890 contained in Appendices G & H, in History of Nigeria (1978) by Allan Burns. George Allen & Unwin London.

left out. In September 1901 colonel Morland with a force of twenty-two Europeans, 365 African rank and file, four guns and maxims conquered Yola. The same fate fell on the non-Fulani areas like that of the Tivs and Jukun in 1906. With the conquest and control of Northern Nigeria by the British, the region was declared the protectorate of Northern Nigeria with Sir Frederick Lugard as High Commissioner.

Between 1906 and 1914, the British Government set about unifying the colony and protectorates. Thus in 1906 the colony and protectorate of southern Nigeria was formed with Lagos as its headquarters. And the area was divided into the western, the central and the eastern provinces respectively. And these provinces were placed in the charge of provincial commissioners. These commissioners were subject to the direct control of the Governor, then Sir Walter Egerton. On the 1st of January 1914, the colony and protectorates of Nigeria were amalgamated, under Sir Frederick Lugard as governor-general, and a Lieutenant Governor each for Northern and Southern Provinces.

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[3] Allan Burns (1978) History of Nigeria George Allen & Unwin Boston; pp. 187-209

It is worthy of note that since 1862 the colony of Lagos had a small legislative control, which performed an advisory role to the Governor, until it was dissolved in 1922. At the time of its dissolution it consisted of the Governor, six officials and four nominated members, two of whom were Africans. This legislative council never passed any legislation, it only gave advice and consent to the laws promulgated by the colonial governor. The legislative council was more of an advisory council or consultative council. Even after the amalgamation of 1914 its function was limited to the colony of Lagos.

Sir Frederick Lugard on assumption of office as governor-general established a larger advisory and deliberative body for the entire country called the Nigerian council.[4] The council had thirty-six members, presided over by the governor-general, consisting members of the executive council, the Senior Residents, Seven European unofficial members representing the chambers of commerce, shipping, banking and mining. Others include six Nigerian unofficial members nominated by the Governor General to represent, as far as possible, the coastal

[4] See Nigerian Order in Council 1913

districts and the interior.[5] Two emirs from Northern Nigeria, (The Sultan of Sokoto and the Emir of Kano were appointed but they did not attend any of the council meetings) the Alafin of Oyo, one member from Lagos, one from Calabar and one from the Warri-Benin area made up of the unofficial members. Like its predecessor, this council was an advisory one.[6] Thus any resolution carried by the council had no legislative or executive authority and the Governor had unfettered discretion as to whether a matter should be discussed.

With the amalgamation of the colony of Lagos, the protectorates of North and south, and establishment of executive and legislative authority, Nigeria as a country was created or formed though under a colonial administration

2.2 THE CLIFFORD CONSTITUTION OF 1922

The educated Nigerians were dissatisfied with the colonial system of administration in the colony, which gave them little or no status in the administration of the country. This precipitated a movement for reform sponsored

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5 See S. 4 of the Order in Council of 1913.

6 S.17 Ibid.

by the West African National Congress. In October 1920, they signed a petition to the colonial secretary expressing their discontent and demanded for participation in the administration of their country.[7]

Sir Hugh Clifford, the then Governor of Nigeria introduced a constitution into the country in 1922. Both existing legislative council for the colony and the Nigerian Council were abolished. A new legislative council came into being. It was made up of the Governor as president and forty-six other members, consisting of twenty three ex-officio and four nominated officials; of the remaining nine unofficial upto fifteen could be nominated by the Governor, while four were elected on the basis of three from Lagos and one from Calabar.

The legislative council's jurisdiction was limited to the Southern provinces and the colony of Lagos, while the Governor legislated for the northern provinces. The council had power to legislate for the peace, order and good government of the colony and southern provinces.[8] Furthermore, any member of the legislative council could

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[7] See O.I. Odumosu op. cit. pp. 14-15

[8] Article VI of the Nigerian Colony letter Patent 1922 and Article VIII of Nigeria Protectorate Order

initiate any legislation provided it did not impose tax or involve the expenditure of public fund. Finance bills needed the approval of the Governor.[9] It should be noted that for the first time in the constitutional history of British dependencies throughout Africa, the elective principle was introduced into the Nigerian Legislature.

However, the four elected members were criticised for not behaving like the true representatives of their constituencies. To expect an educated elite who feels that he is only an African by the colour of his skin to truly supervise his constituency was asking too much of him.

The Nigerian political leaders were not satisfied with the Clifford constitution for the following reasons:[10]

a) The principle of official majority. There was an official majority in the legislative council and absence of responsibility for departments of Government.

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in Council 1922.

9 Ibid article 23

10 Elias T. O. (1967) Nigerian: The Development of its Laws and Constitution Stevens & Son pp. 33-f34.

b) The exclusion of Nigerians from membership of executive council.

c) The system of nominated members widened the scope of unofficial representation on the legislative council.

d) The restriction of the legislative authority of the council to the colony and southern provinces deprived Northern Nigeria of the early participation with their southern counter parts in the work of the central legislature.

e) The practice of Indirect Rule in Local Government meant another form of exclusion of the educated commoners from membership of the Native Authority Councils composed only of traditional elements in the local committees.

As regards executive council, its membership consisted entirely of British officials responsible to the Governor.[11]

2.3 THE RICHARDS CONSTITUTION OF 1946

The 1946 constitution was prepared to address some of the problems experienced with the 1922 constitution. In a despatch to the secretary of state for the colonies in December 1944, Governor Richards observed,

> "The problem of Nigeria today is how to create a political system which is itself a present advance and contains the living possibility of further orderly advance a system within which the diverse elements may progress at varying speeds, amicably and smoothly, towards a more closely integrated economic, social and political unity, without sacrificing the principles and ideals inherent in their divergent ways of life. The present system of Government in Nigeria has many inconsistencies and by its nature is unsuited for expansion on a Nigerian basis."[12]

It is against this background that the Richard's constitution was made aimed at achieving a three fold objective namely, to promote the Unity of Nigeria; to provide adequately within that unity for the diverse elements which make up the country; and to secure greater participation by Africans in the discussion of their own affairs.

These three objectives were achieved in the constitution. Firstly for the purpose of promoting unity among the people of the country, a legislative council was established for the whole of the country. The new council consisted of the Governor as president, sixteen officials,

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11 Nwabueze (1982) A Constitutional History of Nigeria Hurst and Co London p. 41

12 Land 6599, Proposals for the Revision of the Constitution of Nigeria, March 1945 as quoted by Elias op. cit.

and twenty eight unofficial of whom four were elected and the remaining twenty-four were nominated by the newly established Regional Councils, some of the members of which were nominated by the Native Authorities.[13]

Therefore under this arrangement, a link existed between the legislative council at the centre and the Native Authorities vide system of electoral colleges. The numbers of majority of officials were changed and for the first time the unofficial were in the majority in the council.

The second objective was achieved by the creation of Regional Councils consisting of a House of assembly in each of the Northern, Eastern and Western provinces and a house of chiefs in the North. The Northern Regional Councils (i.e. House of Assembly) consisted of the Senior Resident as president, eighteen officials, and between twenty and twenty four unofficial provincial members, of whom between fourteen and eighteen were selected by the Native Authorities from their own members and six were appointed by the Governor to represent interest and communities not otherwise adequately represented.[14] The House of Chiefs

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13 Ss 4, 5, 6, 7 and 8 Richardson Constitution of 1946.

14 S. 33(4) Ibid.

comprised the chief commissioner as president, all first class chiefs and not less than ten second class chiefs selected by their own order.[15]

The western House of Assembly consisted of the chief commissioner as president, thirteen officials and between fifteen and nineteen unofficial provincial members of whom the Governor nominated the Head Chiefs after consultation with the Head chiefs of the Western provinces. Between seven and eleven were selected by the Native Authorities while five were nominated by the Governor to represent interests and communities otherwise not adequately represented.[16]

Eastern House of Assembly comprised the chief commissioner as president, thirteen officials, and between fifteen and eighteen provincial members of whom between ten and thirteen were selected by the Native Authorities, while five were nominated by the Governor from interest and communities not otherwise adequately represented.[17]

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15 S. 33(2) Ibid.
16 S 34(2) Ibid.
17 S. 35(2) Ibid.

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15 S. 33(2) Ibid.
16 S 34(2) Ibid.
17 S. 35(2) Ibid.

Each of these Regional Houses had power to consider the annual as well as the supplementary estimates of expenditure placed before them, and such bills as related to the region in question. Failure by a Regional House of Assembly to consider a Bill did not affect the power of the legislative council to debate and pass in accordance with its rules of procedure.[18]

However the Houses were not competent to consider any matter which the Governor certified to be either very urgent or purely formal in nature.[19]

The third objective was achieved by the greater participation by Nigerians in the discussion of their own affairs. This was secured through the system of selecting representatives on the legislative council from the members of the Regional Houses of Assembly who had themselves been chosen from among the members of the Native Authority council.[20]

This constitution embodies the scheme of Regionalism in the country. It marked a real advance in the direction

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[18] S. 53(1) Ibid.
[19] S. 26 Ibid

of representative government by broadening the basis of selection and participation. The Native authority system of administration was directly brought into contact with the British-style legislative council system. Finally it brought the much desired contacts and dialogues between the respective peoples of North and South.

Even with this laudable development, the Colonial Government was still not seen to have gone far enough in the eyes of the Nationalist, most especially the National Council of Nigeria and the Cameroon was formed on 26th August 1944 consisting of a loose federation of diverse organisations. Examples of such organisations are trade Unions, literary societies, professional associations, social clubs and tribal unions. When the organisation decided to contest election as a political party in 1951, it then opened its membership to individuals. But before becoming or transforming itself into a political party, it was a political movement with the following objectives:

i) To extend democratic principles and to advance the interests of the people of Nigeria and the Cameroon under British mandate;

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[20] S. 8(1) Ibid.

ii) To adopt suitable means for the purpose of imparting political education to the people of Nigeria with a view to achieving self Government; etc.

It was the National Council of Nigeria and the Cameroon that strenuously opposed the constitution as inadequate because it was not subjected to public opinion nor were they consulted in its making.

2.4 THE MACHPERSON CONSTITUTION OF 1951

The constitution was made with a view to accommodate the criticisms against the Richard's constitution. It is significant at this point to mention the most important criticisms against the Richard's constitution.[21]

i) That the constitution merely provided for greater discussion by Africans in their affairs. The constitution did not give the Africans opportunity in management or control of their affairs;

ii) The provision relating to the composition of unofficial members in the Regional Houses and the Legislative council was a cause for concern for the Nationalists. This is because they could not discern a uniform formula by which the strength of the

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[21] See Odumosu O. I (1963) Nigerian Constitutional History and Government Sweet & Maxwell pp. 50-52.

unofficial members was to be determined. In other words, it was arbitrary.

iii) The Nationalists further resented the designation of chiefs and Emirs as "unofficial." It was contended that since the chiefs and emirs owed their positions to the government under the indirect rule system, they should be correctly described as "officials".

iv) Except for Lagos and Calabar where elective principles were recognised, it was believed that the system of indirect election through the Native Authorities would produce pro-government members who might prove to be anti nationalist.

In making the 1951 constitution there was consultation from the colony and the respective regions, which culminated in a general conference of January 1950 at Ibadan, Western Nigeria. The 1951 constitution was a result of the final recommendations of the 1950 conference.[22]

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22 T.O. Elias op cit p. 38

The Macpherson constitution restyled the legislative council to House of representatives consisting of 136 elected members of whom 34 each were from the East and West and 68 from the North.[23] Six officials and six others nominated by the Governor to represent interests and communities not otherwise adequately represented. The total membership of the House of representatives was 148. The 136 elected members were selected by the Regional legislative Houses, which acted as electoral colleges for this purpose. The 68 Northern members were elected from the joint council of the region consisting of the House of chiefs and House of assembly. Of the 34 members from the West, three were elected by the newly created House of Assembly from which they elected their 34 members. The president of the House of Assembly could be either the Governor himself or a person appointed by him from outside the membership of the House.

2.4.1 REGIONAL ASSEMBLIES[24]

The Macperson Constitution was designed inter-alia to build up a strong and united Nigeria and to grant increased

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23 The Machperson constitution S. 71-73

24 See Chapter II of the 1951 constitution.

autonomy to the three Regions.[25] This exercise resulted in the division of powers between the centre and the Regions. By the order in council of 1951 the Regional Government was empowered to legislate on certain enumerated subjects.[26] The three regions were divided into North, West and East.

The North had two Houses i.e. the House of Chiefs and House of Assembly. The West, too, had a House of Chiefs and House of Assembly. The East had a unicameral legislature i.e. the House of Assembly. Each of the Regional Houses of Assembly was presided over by a Lieutenant Governor.

It should be noted that the former provinces were then renamed Regions. Also for the first time executive councils were introduced into the Regions. At the Centre, too, there was the central council of ministers.

The regional legislature had power to legislate on a prescribed range of subjects,[27] for example agriculture, fisheries, forestry, and local industries. The central

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25 See the Despatch of June 1951 of the Secretary of State for the colonies.

26 For the Regional Legislative list, see third schedule to the Nigeria (constitution) order in council 1951.

27 See Third Schedule to the 1951 constitution.

legislature could legislate on all subjects including those on the regional legislative list.[28]

A public service commission was established by the constitution to advise the Governor who was vested with the responsibility for the appointment and control of all public officers.

2.5 THE FEDERAL CONSTITUTION 1954

In 1953, a crisis erupted in the legislature as a result of a motion tabled by a member for complete self-government for the country in 1956. Members of the East and West in the Legislature backed up the motion while the northern members sought for amendment to the motion to read, "as soon as practicable" instead of 1956. This amendment was accepted by the legislature.

Sequel to this development, a constitutional conference was held in London and Nigeria, which resulted in the birth of the 1954 constitution. According to Elias, this method of settling the details of a proposed constitution by discussion and agreement at a conference between Nigerian leaders and the British Government

[28] See S. 91 of the 1951 constitution.

followed the pattern set in 1951, and was in marked contrast to the previous procedure by which Governors established constitutions without prior adequate consultations with representatives of the people."[29]

By section (3) sub section (1) Nigeria became a Federation consisting of three Regions, namely North, West and East with Lagos as the capital. The Federation was styled as the Federation of Nigeria.[30]

The Federal legislature consisted of the following: a speaker, 184 members out of whom 92 represented the North, 42 each in the West and East, 2 from Lagos and six from Southern Cameroon. Included in the legislature were 2 ex-officio members consisting of the Chief Secretary, the Attorney General and the Financial Secretary. There were 6 other members appointed by the Governor who were to represent interest and communities not otherwise adequately represented thus bringing the total to 194 members.

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29 Elias, op. cit. p. 42.

30 See the Nigeria (Constitution) Order in Council 1954(a)

The regional legislature remained the same as under the 1951 constitution except that the East and West had no ex-officio members.

There were two legislative lists in the constitution. One is the Federal exclusive legislative list and, secondly concurrent legislative list for both Federal and Regional legislatures. The 1954 constitution did not provide a Residuary List. Therefore one may state that by implication all other subjects not included in either (exclusive or concurrent) list were within the exclusive legislative competence of the Regions, that is, they were residual.

2.5.1 THE EXECUTIVE COUNCIL

So much has been said of the legislative councils from 1862 to 1954 but very little was said of the executive council. It is difficult to precisely state when the executive council first came into being certainly between 1862 and 1913, there was scarcely any specific reference made in the literature on the subject as to the date of the establishment of the executive council.[31]

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[31] See Elias op. cit. p. 51.

However, a clear position was discernible with the 1922 constitution. The executive council consisted of the Governor, the Chief Secretary, the lieutenant Governor of the Southern and Northern provinces and the Administrator of the colony, the Attorney General, the Commandant of the Nigerian Regiment, the Director of Medical Services, the Treasurer, the Director of Marine, the Controller of Customs and the Secretary of Native Affairs.[32]

Furthermore, the Governor was obliged in all cases to consult with the Executive Council in the making of ordinances or in the exercise of his other powers.[33]

Between 1914 and 1942, there was no Nigerian member in the executive council. In 1942, two Nigerians were appointed to the executive council and two more additional members were added in 1946. And the number of Nigerians in the council became five since the then director of medical services was a Nigerian and an ex-officio member.

The 1951 constitution replaced the executive council with council of ministers. In the council there were four

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32 See Royal Instruction (Colony) 1922 Article 4

33 Ibid. article 12; Royal Instruction (Protectorate) 1922 Article 4.

ministers each representing the three Regions drawn from the members of the House of Representatives. Added to these, were six European officials consisting of the three Regional Lieutenant Governors, the Chief Secretary, the Attorney General and the Financial Secretary with the Governor presiding.

This reform introduced by the constitution did not go far enough with Nigerian members because they were made as representatives of their regions and had no portfolios. Decisions were still those of the 'Governor in Council and not a cabinet decision collectively taken. The ministers were required to ensure in association with the appropriate departmental heads, who were not yet made permanent secretaries of ministries that the Governor's decisions in the council of ministers were carried out.

Dissatisfied with this position, the then Nationalist vide the National Council of Nigeria and Cameroon urged the members representing Eastern Nigeria in the council of ministers to resign on the ground that the constitution had proved unworkable.

The 1954 constitution introduced some changes into the council of ministers. The Governor General became the president of the council, with ten ministers, of whom three represented each region and one represented the Southern Cameroon under British trusteeship. There were three officials, the chief secretary, the Attorney General and Financial Secretary. The Ministers were appointed by the Governor General on the recommendation of the leader of the party which secured an overall majority in the House of Representatives or, in the event that no party had an overall majority, on the recommendation of the leaders in the House of the parties which gained the majority of the seats in each region in the Federal elections.

A significant change introduced by 1954 constitution was that the Nigerian ministers were for the first time given full responsibility for specific departments. The council of ministers had become a cabinet at last.

2.5.2 REGIONAL EXECUTIVE COUNCILS

They were first introduced by the 1951 constitution, from then to 1954 the Northern, Western and Eastern regions executive councils consisted of the Lieutenant - General as

president, a maximum of Nine Nigerian Ministers and five British officials.

Under the 1954 constitution, the Western Nigeria executive Council had eleven Nigerian ministers and the Eastern one had twelve, each presided over by a British Governor as president with no British officials. In Northern Nigeria, the executive council consisted of thirteen Nigerian ministers and three officials in addition to the Governor. The officials retained were the Civil Secretary, the Attorney General and the Finance Secretary.

2.6 TOWARDS INDEPENDENCE FOR NIGERIA

The constitutional crisis which erupted in the House of representatives on March 31, 1953[34] on motion for "self Government in 1956" meaning that Nigeria should be given political independence by 1956 was sought to be amended to the effect that the phrase "in 1956 should read "as soon a practicable."[35]

It was this point of difference, that is, seeking for self Government in 1956 canvassed by the Southern

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34 The motion was introduced by a member of Action group, a political party based in Western Nigeria.

35 The amendment was requested by the Sardauna of Sokoto (Sir Ahmadu Bello) a member of Northern Peoples Congress, a political party based in Northern Nigeria.

politicians and its deferment canvassed by the Northern politicians that paralysed the Government.

The Colonial Secretary called a conference in 1954 with the leaders of the three political parties (A.G., NPC AND NCNC) in attendance to discuss Nigeria's constitutional problems. Series of conferences followed afterwards.

First the London conference discussed issues which include: the structure of the federal Legislature, Federal elections, council of Ministers, the structure of the Regional Government to mention but a few. On the issue of self Government the Secretary of State informed the conference that Her majesty's Government would not accept a fixed date for self-government. However, Her Majesty's Government was willing to permit the Regions that need it, full self-government within the competence of the Regional Government.

Sequel to the 1954 conference, there was another conference held in 1957 to review the working of the Federal constitution. The conference discussion included: Regional Government, the problem of minorities in each of the three Regions, a bicameral legislature, that is, a

House of Representatives and senate were recommended. Introduction of the office of the Prime Minister among other things was also recommended.

On the issue of independence for the federation by 1959 a resolution passed unanimously by the Nigerian House of representatives in 1957, the Secretary of State informed the conference that that issue should be left to the New Nigerian Parliament to be elected in January 1960. The Nigerian delegates were not happy about this development and were reluctant in accepting it.

Next was the 1958 constitutional conference. Issues discussed were fundamental rights, self rule for the North, and the report of the minorities' commission to mention but a few.

A final constitutional conference came up in 1960 concerned with outstanding matters in connection with Nigeria's approaching independence. Only government representatives participated in the conference. The agenda was the draft of the independence constitution for Nigeria. On 1st October 1960 Nigeria became an independent country.

Thus the 1960 Constitution came into existence by an order in Council of Her Majesty, the Queen of Great Britain on the 12th of September 1960.

2.7 THE NIGERIAN REPUBLICAN CONSTITUTION

This constitution came into being as a result of enacting the constitution of the Federation Act 1963 by the federal parliament. The Act repealed and replaced the Nigeria Independence Act 1960 and the order in Council in so far it applied to the Federation.[36] Similar powers were given to the regions.

The effect of the Republican Constitution was essentially to abolish the Monarchy. So the Queen of England ceased to be the Queen or Sovereign Head of Nigeria. Her functions devolved upon the President of the Republic and the Governors of the Regions.

Government of the Country was no longer Her Majesty's and its institution ceased to bear the label 'Royal' or 'Crown'. All properties previously held by the Crown or by some other person or authority on behalf of or in trust for the crown became as from 1st October, 1963 vested in the

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[36] See Section 154 Constitution of the Federation 1963.

president or the Governor on trust for the government of the federation or region, as the case may be.

Appeals from Nigerian courts ceased to go to her majesty's jurisdiction. No longer were cases decided in Nigeria appealed to the Privy Council. This is obvious because no sovereign country permits appeals from its own courts to another country.

Also allegiance of the Nigerian citizens was no longer to the Queen but to the Republic. Allegiance in this context connotes a personal relationship between the sovereign and his subject.

From the above one may conclude that one of the most significant changes made by the 1963 republican constitution was to sweep away the imperial basis of the 1960 independence constitution.

Both the 1960 and 1963 constitutions maintained a parliamentary system of Government. Professor Nwabueze had defined a parliamentary system of Government as "the rule

of the legislature through a committee of its own members, coupled with the responsibility (sic) of the permanent nominal head of the executive."[37]

In practice there was only one general and popular election for the members of the legislature. There was no separate election for the executive. Therefore the popular mandate given to the government was by virtue of votes that elected the members of the legislature. Furthermore members of the executive arm of the government were elected from the members of the parliament. For instance the President, the Prime Minister, Council of Ministers or Executive Council were all from the members of the legislature. This shows that the right to govern flows through the legislature to the executive.

2.7.1 COMPOSITION OF PARLIAMENT

The Federal Parliament consisted of the upper and lower houses, namely the senate and House of Representatives. The Senate consisted of twelve senators representing each region selected at a joint meeting of the legislative houses from among persons nominated by the Governor; four senators representing the Federal territory; four senators selected by the president acting in

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37 Nwabueze B.O. (1982) A Constitutional History of Nigeria Hurst and Co. London p. 96.

accordance with the advice of the prime minister. The House of representatives consisted of three hundred and twelve members.[38]

Parliament was empowered to make laws for peace, order, and good government of Nigeria over any matter covered by the legislative list.[39] Under special circumstances, the parliament could make laws for the peace, order and good government in matters not included in the legislative list.[40] Under the parliamentary system of Government the executive authority of the Federation is exercised through some members of the parliament. The executive authority of the Federation is vested in the president.[41] Both houses of parliament elect him.[42] The function of the executive extends to the execution and maintenance of the constitution and all matters with respect to which parliament has power to make laws.[43]

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38 See the 1963 Constitution of the Federal Republic of Nigeria S. 41-43

39 Ibid S. 69(1).

40 Ibid S. 69(2)

41 Ibid S. 84 and S. 34.

42 Ibid S. 35(1)

43 Ibid S. 85.

The president appointed a cabinet of ministers headed by a Prime Minister.[44] Such a Prime Minister was to be appointed from the members of the House of Representatives who appear to the president likely to command the support of the majority of the members of the House.[45] Other ministers were appointed by the president from members of the parliament on the advice of the Prime Minister.[46] The council of ministers were collectively responsible to the parliament for any advice given to the president and so were the ministers individually.[47]

The 1963 constitution established the Supreme Court[48] and empowered the president on the advice of the Prime Minister to appoint the chief justice of Nigeria, while the other justices of the court were to be appointed by the president, on the advice of the premier of the respective regions.[49] The justices of the Supreme Court could be removed from office by the president on address by both

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44 Ibid S. 89
45 Ibid S. 87(1) and (2)
46 Ibid S. 87(4)
47 Ibid S. 90 (1)
48 Ibid S. 90 (1)
49 Ibid S. 111

legislative houses for inability to discharge the function of his office.[50]

Note that the parliamentary system of government, obtained in the Federation similarly operated in the region. In the Regions the Governor was the Chief Executive who appointed the Premier from any of the members of the legislative House. He equally appointed other ministers on the advice of the premier. A bicameral legislature existed in each of the Regions, i.e. a house of chiefs and House of Assembly. For the Judiciary, there was a High Court for each of the Regions.

The 1960/1963 constitution was operated up to 1966 when it was overthrown by the military.

2.7.2 OVERTHROW OF THE 1963 CONSTITUTION

The Military mutiny organised by Major Nzeogwu, executed on 15th January 1966 (in which the prime minister, and the Federal Minister of Finance, the premiers of Western and Northern Nigeria were killed among others) resulted in the taking over the control of the Federal and Regional Governments on 16th January 1966.

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[50] Ibid. S. 112

At the time of overthrowing the Government, the president Dr. Nnamdi Azikiwe was away on a convalescent holiday in Britain. Therefore in the absence of Dr. Nnamdi Azikiwe (the president) and the whereabouts of the Prime Minister was then unknown, the Acting President Dr. Nwafor Orizu addressed the nation. He said "I have been advised tonight by the council of ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the Armed Forces of the Republic with immediate effect"[51] and then called upon the General Officer Commanding to make a policy statement. The General Officer commanding in reply said, "the government of the Federation having ceased to function, the Nigerian Armed Forces have been invited to form an interim military Government for the purposes of maintaining law and order, and of maintaining essential services." He also added, "this invitation has been accepted, and I General J.T.U. Aguiyi-Ironsi, the General Officer Commanding the Nigerian Army, have been formally invested with Authority as head of the Federal Military Government, and supreme commander of the Nigerian Armed Forces."[52]

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51 See Federal Republic of Nigeria Official Gazette No. 6 Vol. 53, Government Notice No. 147.

52 Ibid Government Legal Notice No. 148.

In the same announcement the G.O.C. suspended the part of the 1963 constitution relating to the office of the president, Prime Minister and federal parliament. In the regions the constitutional provisions relating to offices of the regional governors, premiers, executive councils and regional legislatures were suspended but the judiciary, civil service and the police were saved.

2.8 THE FEDERAL MILITARY GOVERNMENT

It is noteworthy from the onset that General Ironsi and Lt. Colonel (later General) Gowon Regimes operated under the same constitution (suspension and modification) Decree No. 1 of 1966. It was on the basis of this decree that the federal military government was formed.

Section 3(1)[53] empowered the Federal Military Government to make laws for the peace, order and good government of Nigeria or any of its part on any subject matter. This power was to be exercised by use of Decree signed by the Head of the Federal Military Government.[54]

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53 The Constitution (suspension and modification) Decree 1966. Decree No. 1

54 S. 4 Ibid.

The Executive authority of the Federal Military Government was vested in the Head of the Federal Military Government. Furthermore the executive authority of the Federal Military Government was vested with the powers of execution and maintenance of constitution of the Federation as modified and supplemented by way of other Decree.[55]

By Section 8(1)[56] two organs of the Federal Military Government were established. They were the Supreme Military Council and the Federal Executive Council.

The Supreme Military Council consisted of the following as members:[57]

a) Head of the Federal Military Government as president of the supreme Military Council.

b) Head of the Nigerian Army.

c) Head of the Nigerian Navy.

d) Head of the Nigerian Airforce.

e) Chief of Staff of the Armed Forces.

f) Chief of Staff of the Nigerian Army.

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55 S. 7(1) Ibid

56 S. 7(2) Ibid

57 Section 8 (2) Ibid

g) Military Governors of the Northern, Eastern, Western and Midwestern Nigeria.

h) Attorney General of the Federation.

While the Federal Executive Council consisted of the following as members:[58]

a) Head of the Federal Military Government as president.

b) The Head of Nigerian Army.

c) The Head of Nigerian Navy.

d) The Head of Nigerian Airforce.

e) Chief of the Armed Forces

f) Chief of the Nigerian Army.

g) The Attorney General of the Federation.

h) The inspector General and Deputy Inspector General of Police.

From the foregoing it appears that even though the Decree established two organs of the Federal Military Government namely the supreme military council and the Federal Executive Council, it merely vested the legislative and executive powers in the Federal Military Government

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[58] See section 8(3) Ibid.

without specifically providing functions of the established organs.

There were also regional Governments which were headed each by a military governor. He was empowered to make laws for the peace, order and good government of the region. He also exercised executive and legislative functions or powers.

The Ironsi and Gowon regimes lasted from 16th January 1966 to July, 29, 1975. On this latter date there was a Coup D'etat which brought the General Murtala and Obasanjo regimes. For the purpose of expediency these two regimes will be discussed together. Secondly and more importantly their regime had the same basis. The basis of the regimes was Constitutional (basic provisions) Decree 1975, Decree No. 32. Section 1(1) of the Decree vest the Federal Military Government with power to make laws for the peace, order, and good government of Nigeria or any of its component on any matter whatsoever. It exercised this power by a decree signed by the Head of the Federal Military Government.[59]

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[59] See Section 2(1) Constitution (Basic provisions) Decree 32, 1975.

The executive authority of the Federal Military Government was vested in the head of the Federal Military Government to be exercised by him in consultation with members of the Supreme Military Council.[60] However whether or not such consultation had taken place over any issue was not to be subject of inquiry.[61]

Section 6(1) established three organs of the Government. They are; The Supreme Military Council, a National Council of State and a Federal Executive Council.

The Supreme military council consisted of the following:

a) The Head of the Federal Military Government as President of the Council.

b) Chief of Staff Supreme Headquarters.

c) Chief of Army Staff.

d) Chief of Naval Staff.

e) Chief of Air Staff.

f) Inspector General of the Nigerian Police.

g) The General Officer Commanding 1st division of the Nigerian Army

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60 5(1) Ibid

61 5(2) Ibid.

h) The General Officer Commanding 2nd division of the Nigerian Army

i) The General Officer Commanding 3rd division of the Nigerian Army

j) The General Officer Commanding 4th division of the Nigerian Army

k) Twelve designated senior officers, 6 from Nigerian Army, three from Nigerian Navy, two from Nigeria Air Force, and one from the Nigeria Police Force.

l) Such other members as the Council may appoint.

m) The Attorney General of the Federation in Advisory capacity.

Section 8 provides for the function of the supreme military council. The following were its functions.

a) To determine National Policy on major issues affecting the Federal Republic of Nigeria.

b) *Constitutional matters including its amendment.*

c) National Security matters like state of emergency, war etc.

d) Executive responsibility to appoint the Head of Federal Military Government; Chief of Staff supreme *Head Quarters; Chiefs of* Air, Naval, Army Staff; Inspector General of Police, Military Governors,

members of the National Council of State and Federal Executive Council.

e) Supervisory role on National Council of State and the Federal Executive Council.

National Council of State was provided for by section 6(4) consisting of the following:

a) Head of Federal Military Government as President.

b) Chief of Staff Supreme Headquarters.

c) Chiefs of Air, Army and Naval Staff.

d) Inspector General of Police.

e) Military Governors.

f) Such other members as the Supreme Military Council may determine.

g) Attorney General of the Federation in advisory capacity.

The function of the National Council of State was covered by section 9. The National Council of State was to perform the following functions:

a) Form policy guidelines in financial and economic matters, and social affairs of the states.

b) Formulation and general implementation of National Development Plan including State programmes.

c) Constitutional matters as they affect the States.

d) Such other matters as the supreme Military Council may determine.

Section 6(6) provides for members of the Federal Executive Council. They were:

a) Head of the Federal Military Government as president.

b) Chief of Staff Supreme Headquarters.

c) Inspector General of Police.

d) Such other members (as commissioners) to be appointed by the supreme military council.

The function of the Federal Executive Council was contained in S. 10. The council is charged with the responsibility for determining and executing the general policy of the Federal Military Government with the framework to be determined by the Supreme Military Council.

At the states level, each of the states was headed by a Military Governor. He was vested with powers to make laws for the peace, order and good government, of that state. He exercised such powers by means of an Edict signed by him.

The Murtala/Obasanjo regimes lasted upto 1979. Nigeria was under Military Administration from 1966 to 1979. The first proposal to return to civil rule was by Gowon's regime which set October 1976 as the proposed date, but was later postponed on the ground that that date was unrealistic.

It is worthy of note, that lieutenant-colonel Yakubu Gowon had on assumption of office convened on Ad Hoc constitutional conference consisting of representatives from all the four regions of the federation of Nigeria, charged with the responsibility of fashioning out a suitable constitution for Nigeria.

The conference began on 12 September, 1966, but by 17 November, 1966 it could not continue following the Kano riot, and the intransigence and threat of secession by the then Military Governor of the Eastern Region, Lieutenant-Colonel Ojukwa. Both Chief Obafemi Awolowo, the leader of the western region delegates and Alhaji Lateef Jankande representing the federal territory of Lagos complicated the continuance of the conference by insisting that they will not return to it unless the Army of Northern Origin were removed from Western Region and preferably taken back to

Northern Nigeria. The Head of State Lieutenant-Colonel Yakubu Gowon, realising that it would be of no value to allow the Ad Hoc conference to continue in the absence of all the delegates representing all the Regions, and other areas of Nigeria, thereupon adjourned the conference since die.[62] Upto the overthrow of the Gowon's regime in 1975 neither the Ad Hoc constitutional conference nor any other was ever convened.

The Murtala/Obasanjo regime afterwards set October 1979 as the date for return to civil rule. In furtherance of this cause the administration appointed a constitution drafting committee to draft the 1979 constitution.

2.9 THE 1979 CONSTITUTION

The previous Nigerian Constitutions were made under the guidance of the British Government even though with involvement of some Nigerians in the process. But the 1979 constitution was a total break away from the British parliamentary style constitution to the American presidential style constitution. For the first time in the history of Nigeria, Nigerians made the 1979 constitution, from drafting to enactment.

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62 Udoma, U. History and the Law of the constitution of Nigeria Malt house pp 242-248.

This began the military involvement in constitution making in Nigeria. The supreme military council appointed a constitution drafting committee consisting of 50 members with Chief Rotimi Williams as chairman. The committee submitted its report in two volumes. (1) Report of the Constitution Drafting Committee (2) The Draft Constitution.

Thereafter a constituent assembly was formed on 1st June, 1977 consisting of both elected and nominated members from all over the country. The Draft Constitution provided the framework for the Assembly's deliberations but not all the provisions found easy acceptance and many important changes were made. Thus a copy of the Draft Constitution was certified correct by the Secretary of the assembly and counter-signed by the chairman.

An issue for consideration that was deliberated by the constituent assembly was how would the constitution derive its force of Authority. Would it be from the constituent assembly or not? In other words would the 1979 constitution be an autochthonous one or not? Undoubtedly there was an expectation that the constituent Assembly would lead to an autochthonous constitution or a constitution deriving its authority and validity from the

body of persons chosen to represent the people, and not from any external source. This expectation was derived from explanatory notes to the Constituent Assembly Decree, which stated it had "full powers to deliberate upon and enact the draft constitution drawn up by the C.D.C." At least that was the understanding of the constituent assembly. This was evident in the preamble to the Draft Constitution. It reads:

> "We the people of the Federal Republic of Nigeria ... do hereby in our constituent assembly this 5th day of June, 1978 make, enact and give to ourselves the following constitution."

However the Supreme Military Council did not share the view and understanding of the constituent assembly on how the constitution will derive its force. In its view the constitution drafted by the constituent assembly was a mere document submitted to the council for its deliberation and final approval. Ultimately, the Supreme Military Council made 22 amendments to the Assembly's constitution, which were meant, as explained by the Head of State, "to strengthen the constitution and to further ensure stability, progress and continuity." With these modifications it became necessary for the military government to enact a Decree to bring the 1979 constitution

into law. Accordingly, the constitution of the Federal Republic of Nigeria (Enactment) Decree No. 25 of 1979 was made on 21st September, 1978, and by this meant Nigeria received a new constitution. The preamble to the constitution did not make any reference to the constituent assembly. The preamble to the 1979 constitution read thus:

> "We the people of the Federal Republic of Nigeria having firmly and solemnly resolved .... Do HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following constitution.

It is quite clear that the constitution was not intended to posses a self-generating authority.

Still three days before the constitution came into effect the Supreme Military Council made an amendment to the constitution.[63]

The debate on who or what authority, was to bring the draft constitution into law was quite untenable. Certainly the constituent Assembly was not a legislative body. Its mandate was merely to deliberate on the resolutions of the constitution drafting committee and submit the result of

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[63] The Constitution (Amendment) Decree, 1979.

its deliberation to the Federal Military Government. Once that is done it had completed its assignment.

Legislative power for the purpose of enacting the Draft constitution lay with the Federal Government. The Federal Military Government was vested with powers to make laws for the federation. Therefore the constituent assembly had clearly misconceived its role of deliberating on the draft constitution with power of enacting the constitution.

2.9.1 SOME FEATURES OF THE 1979 CONSTITUTION

(a) SUPREMACY OF THE CONSTITUTION

The 1979 constitution is the Supreme Law or the Grundnorm in Nigeria binding all authorities and persons within the country.[64] Any other law operating or enacted within the country, which is inconsistent with any provisions of the constitution, shall be void to the extent of its inconsistency.[65] In effect all laws within the country must not be in contradiction with the constitution.

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64 1979 constitution S. 1(1).

65 Ibid S. 1(3)

Any law that contradicts any of the constitutional provision will be declared void. The legislature must exercise its powers within the limit set out by the constitution. The judiciary is empowered to review the laws enacted by the legislature to ensure conformity with the constitution.

(b) SEPARATION OF POWERS

The powers of the Federal Republic of Nigeria have been divided among three organs, namely the legislature, executive and the judiciary.

Legislative powers of the Federation were vested in the National Assembly, which consists of a Senate and House of Representatives.[66] The National Assembly can legislate for the peace, order and good government of the Federation or any part thereof.[67] Its powers are enumerated in the Exclusive legislative lists.[68] It can also legislate in matters set out in the concurrent legislative list.[69]

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[66] Ibid S. 4(1)

[67] Ibid S. 4(2) & (3)

[68] See part (1) of the schedule to the constitution.

[69] See part II, second schedule to the 1979 constitution.

The legislative powers of a state are vested in the House of Assembly of the state.[70] It has powers to make laws for the peace, order and good government of the state and on any matter not included in the exclusive legislative list. So also in the matters set out in the concurrent legislative list.[71]

Executive powers of the Federation are vested in the president. His powers extend to the execution and maintenance of this constitution and all laws made by the National Assembly.[72] The executive powers of a state are vested in the Governor of that state. His powers extend to the execution and maintenance of the constitution and all laws made by the House of assembly.[73]

(c) **FUNDAMENTAL HUMAN RIGHTS**

These rights are set out in chapter IV of the constitution under sections 30-40. A brief account of these rights will be given below:

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70 1979 constitution S. 4(6)
71 Ibid S. 4(7)
72 Ibid S. 5(1)
73 Ibid S. 6

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i) **Right to Life**: Every person in Nigeria has been conferred with this right and it must not be intentionally taken away, except by an order of court in case of a person found guilty of having committed a criminal offence.

ii) **Right to Personal Liberty**: The liberty of the person is guaranteed. It can only be tempered with if by an order of court a person is found guilty of having committed a criminal offence or refusal to comply with an order of court. A person unlawfully deprived of his liberty is entitled to compensation and public apology from the appropriate authority or body.

iii) **Right to Fair Hearing**: It is the right to be heard. A court or tribunal established by law must give every person brought before it an opportunity to express oneself. Such court or tribunal must be impartial.

iv) **Right to Privacy and Family Life**: The House, correspondence, telephones conversation, telegraphic communication is guaranteed.

v) **Right to freedom of Thought, Conscience and Religion**: This includes freedom to change ones religion or belief; or to manifest, and propagate his religion or belief in worship, teaching, practice and observance.

vi) **Right to Freedom of Expression and the Press**: It covers freedom to hold opinions, to receive and impart ideas and information without interference.

vii) **Right to Peaceful Assembly and Association**: Every person can associate, freely with others, may form or belong to any political party, trade union etc.

viii **Right To Freedom of Movement**: This right is guaranteed to citizens, to move freely throughout the country or reside in any part, to go out of or come into the country.

ix) **Compulsory Acquisition of Property**: This section protects the citizen from being compulsorily deprived of his property (real or personal). Therefore a person's right in movable or immovable property is protected from compulsory acquisition except of course with prompt payment of compensation.

The constitution did not only provide these rights but has made them justiciable. By section 42 of the constitution any person whose right has been, or is being or is likely to be contravened can seek redress from the High Court.

d) A RIGID CONSTITUTION

This is evident from the strict procedure for the amendment of the constitution. Section 9(1) of the 1979 constitution confers on the National Assembly powers to alter the constitution. Sub-section 2 of section 9 states that except for the creation of new states, not less than two-thirds votes are required of the National Assembly and a resolution of the Houses of Assembly of not less than two thirds of all the states.

While for the amendment of chapter IV (fundamental Rights Provisions) and creation of new states or boundary adjustment, the votes of not less than four-fifths majority of all the members of the National Assembly supported by a

resolution of the Houses of Assembly of not less than two-thirds of all the states[74] is required.

2.10 THE FEDERAL MILITARY GOVERNMENT

The Nigerian democratic experience, under the 1979 constitution lasted for only four years, between 1979 and 1983. On 31st December 1983, the Military class overthrew the 1979 constitution. Thus ushering in yet another spate of military rule in the country.

The General Buhari and General Ibrahim Babangida regimes had their basis of Governance under the constitution (suspension and modification) Decree 1984, Decree No. 1 which was later modified by constitution (suspension and modification) Amendment) Decree 1985, Decree No. 17.

Decree No. 1 of 1984 vested in the Federal Military Government the power to make laws for the peace, order and good government of Nigeria or any of its component parts on any matter whatsoever. This power is exercised by a Decree Signed by the Head of the Federal Military Government.

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[74] See Sections 9, 8 and 274(5) of the 1979 constitution.

Section 7 of the Decree established three organs of the Federal Military Government. They are the Supreme Military Council, National Council of State and Federal Executive Council. These organs were amended by Decree 17 of 1985 by section 4 with an Armed Forces Ruling Council, a National Council of State and a National Council of Ministers. Furthermore the same section provided for the members of each council. The members of each council will be outlined hereunder.

The Armed Forces Ruling Council consisted of the following:

a) The president, commander-in-chief of the Armed Forces Ruling Council.

b) The chief of General Staff, General Staff Headquarters.

c) The Minister of Defence and Chairman, Joint Chiefs of Staff

d) The Chief of Army Staff,

e) The Chief of Naval Staff,

f) The Chief of Air Staff,

g) The Inspector-General of Police,

h) The General Officer Commanding 1st Mechanised Infantry Division Nigerian Army.

i) The General Officer Commanding 2nd Mechanised Infantry Division Nigerian Army.

j) The General Officer Commanding 3rd Mechanised Infantry Division Nigerian Army.

k) The General Officer Commanding 82nd Division Nigerian Army.

l) The commander, Nigerian Army Corps of Artillery.

m) The flag officer commanding, Eastern Naval Command.

n) The flag officer commanding, Western Naval command

o) The flag officer commanding Naval Training Command.

p) The Air officer commanding training command.

q) The Air officer commanding Tactical Air Command.

r) The Air officer commanding Logistics Command.

s) Twelve designated members who shall be senior officers of the Armed Forces; and

t) Such other members as the council may from time to time appoint.

The National Council of State Consisted of the following members:

a) The President Commander-in-chief of the Armed forces who shall be the chairman of the council.

b) The Chief of General Staff, General Staff Headquarters.

c) The Minister of Defence and Chairman, Joint chiefs of staff.

d) The chief of Army staff.

e) The Chief of Naval Staff.

f) The Chief of Air Staff.

g) The Inspector-General of Police

h) The Military Governors

i) Such other members as the Armed Forces Ruling Council may from time to time appoint.

The National Council of Ministers consisted of the following as members:-

a) The president Commander-in-Chief of the Armed Forces who was the chairman

b) The Chief of General Staff, General Staff Headquarters

c) The Attorney General of the Federation and Minister of Justice.

d) Such other members to be known as Ministers as the Armed Forces Ruling Council may appoint from time to time.

Decree 1 of 1984 vide section 9 had spelt out the function of the three aforementioned organs. The function of each organ will be spelt out hereunder.

The armed forces ruling council was to perform;

a) The dissemination of National Policy on major issues affecting the Federal Republic of Nigeria.

b) Constitutional matters including amendments of the constitution of the Federal Republic of Nigeria.

c) All National Security matters, including declaration of war or state of emergency.

d) Exclusive responsibility for the appointment of the Head of Federal Military Government, the Chief of Staff General Headquarters, Chiefs of Air, Army, Naval Staff, General Officers Commanding, Inspector General of Police, Director General Nigerian Security Organisation, Military Governors, Members of the National Council of State and National Council of Ministers.

e) The ratification of the appointment of such senior public officers as the council may from time to time specify.

f) General supervision of the work of the National Council of State and National Council of Ministers.

The National Council of State performed the following functions:-

a) Policy guidelines on Financial and Economic Matters and Social Affairs in so far as they affect the states.

b) The formation and general implementation of National Development Plans including state programmes.

c) Constitutional matters in so far as they affect states.

d) Such other matters as the SMC may from time to time determine.

Finally the National Council of Ministers was charged with the responsibility of determining and executing the general policy of the Federal Military Government within such framework as may from time to time be determined by the Armed Forces Ruling Council.

The General Muhammadu Buhari and General Ibrahim Babangida regimes existed from 1984 - 1985 and 1985 - 1993 respectively. It was in an attempt to transfer power from the Military to the civilians that the 1989 constitution was drafted.

2.11 THE 1989 DRAFT CONSTITUTION

The Federal Military Government made a plan to return the country to civil rule by preparing yet another constitution. The 1989 constitution was prepared in three stages viz (a) the establishment of a "constitutional Review Committee"; (b) Establishment of Constituent Assembly; (c) The promulgation of the 1989 constitution.

On September, 1987, the Federal Military Government appointed forty-six persons to review the 1979 constitution. The committee was headed by the late Chief Judge of Adamawa State Justice Buba Ardo. The C.R.C. submitted its report in three volumes. The first volume contained the Draft Reviewed Constitution and the committee's recommendations. Volume II contained the report of the six sub committees that looked into the schedules of the 1979 constitution. The third volume contained the report of the sessions of the C.R.C.

The constituent Assembly consisted of both elected and nominated members. There were 450 elected members and 117 members nominated by the Armed Forces Ruling Council. On 11th May, 1988 the constituent assembly was inaugurated by

the president. It reviewed the Draft Constitution and submitted its report to the Federal Military Government.

It is significant to note that the armed forces ruling council added its input in the Draft Constitution by modifying or rejecting some of the recommendations of the constituent Assembly. Such rejections or modifications involve about 17 sections. For instance, in clause 1 (14), the constituent assembly report provided for penalty for coup makers. It reads:

> "Any take over or control of the Government of Nigeria by any person other than in accordance with the provisions of the present constitution, shall remain a punishable crime at all times under Nigerian law."

The Armed Forces Ruling Council rejected this provision. The President in a speech on 3rd May 1989 said,

> "We took the view that there are sufficient constitutional and other legal provisions to deal with this form of breaches of the constitution. In any case, we felt that all crimes should be and indeed are punishable offenses. Hence it appears tautological to imply that a specific offence is a punishable crime. We also viewed it as superfluous to say that a breach of Nigerian constitution could be punishable under any law other than Nigerian Law. We have therefore, expunged this clause from the Constitution."

Furthermore like the 1979 constitution, the 1989 constitution was not intended to be an autochthonous one, because it does not derive its force of authority from the constituent assembly. The authority was to be a Decree promulgated by the Federal Military Government. Section 2(1) and (2) of the constitution of the Federal Republic of Nigeria (promulgation) Decree No. 12 of 1989 states that there shall be for Nigeria a constitution as set out in the schedule to this decree and shall come into operation on the date therein provided.

It is significant to note that the Federal Military Government intended that provisions of the 1989 constitution were to come into operation piecemeal by enabling Decree. This is evident from the preamble to the constitution promulgation Decree 1989, which read in part, thus:

> "In order that the Federal Military Government may achieve its objective.... it is necessary during the transition period to enact certain Decrees by progression in order to bring into force the relevant provisions of the constitution relating to each of the three tiers of government.

Section 1 (a)(b) and (c) envisage promulgation of certain constitutional and transitional Decrees in the following sequence: local, state and federal government (basic constitutional and transitional provisions) Decree.

Thus the 1989 constitution was made, but regrettably it never came into force. The presidential election of June 12, 1993, which was to mark the completion of transition to civil rule, was annulled by the then Head of State, President Ibrahim Babangida. The 1989 constitution never saw the light of the day. It was never operated.

2.12 THE 1995 DRAFT CONSTITUTION

The annulment of the 1993 election of the president by General Babangida's Administration and subsequent dismantling of all democratic institutions hitherto by the General Abacha led administration rendered imperative the need for a new constitution. Like the 1979 and 1989 draft constitutions, the Draft 1995 constitution was prepared on the instruction of a Military Regime. In other words all these constitutions including the 1995 Draft Constitution were prepared at the instance of Military Regimes. In making the 1995 Draft Constitution, a National Constitutional Conference was inaugurated on 27 June, 1994

by the Head of State General Sani Abacha. In his speech he informed the members of the constitutional conference to deliberate on all matters as their task was for making a fresh constitution. This was because the British parliamentary models of the 1960 independence constitution, the 1979 and 1989 presidential constitutions were found to be unsatisfactory. This prompted the call for an entirely new order, which is neither the presidential nor parliamentary system in their pure forms. In the words of the Head of State, "We are aware that you are more than a constituent Assembly. You do not have before you a draft constitution.... There need therefore, not be an apprehension as to the nature of the freedom of the proceedings.[75]

Decree No. 3 of 1994 had spelt the objective of the constitutional conference to include inter-alia "propose a new constitution which shall be promulgated into law by the provisional ruling council," thereby putting to an end to the question as to who has the responsibility of bringing the constitution into law.

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[75] See Vol. II Report of the Constitutional Conference 1995 p. 4

While the conference had unlimited freedom of discussion yet the military government expressly made its position regarding its complete powers to give the constitution the force of law.

2.12.1 Composition

The conference consisted of 273 elected, and 94 nominated delegates. The Federal Military Government nominated 3 delegates for each state and 1 delegate for the Federal Capital Territory, Abuja. Also one delegate was nominated to present each of the special interest such as the Nigeria Labour Congress, Nigerian Union of Students and the Nigerian Union of teachers. There were a grand total of 380 delegates.

2.12.2 SOME SALIENT FEATURES OF THE 1995 DRAFT CONSTITUTION

There are nine chapters and seven schedules. Attempt will be made to mention some of the salient features of the 1995 Draft Constitution.

a) **Supremacy of the Constitution**:- The constitution is the supreme law of the country. Any law that is in conflict with any of its provisions will be declared void.

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It further prohibits the taking over of the Nigerian Government by any means not provided for in the constitution. Taking over of the Government by force was made punishable.

b) ***Structure of the Government***:- The Government of the Federation consists of Federal, State and Local Governments.

i) *Legislative Powers*: The legislative powers of the Federal Government are vested in the National assembly consisting of a senate and House of Representatives. The powers of the National Assembly to make laws are contained in the Exclusive and Concurrent legislative lists.

The legislative powers of a state were vested in the House of assembly of the State. Its legislative powers are set out in the state and concurrent legislative lists.

ii) *Executive Powers:* Executive powers of the Federation were vested in the president while that of the state was vested in the Governor of that state.

iii) Judicial powers have been vested in the courts established by the constitution and referred to as superior courts of record.

iv) The constitution provides for establishment of local Government whose functions are set out in part I of the fourth schedule to the constitution. Executive powers of a local Government were vested in the Chairman of that Local Government council. The legislative powers of a Local Government are vested in the Local Government Council.

c) **A Rigid Constitution**: A constitution which process of its amendment is rigorous is described as a rigid one. The 1995 Draft Constitution has made its amendment very stringent. For example, a vote of not less than two-thirds majority of the Senate and House of Representatives is required and similarly a resolution of not less than two thirds of Houses of Assembly of the States of the Federation are required.

d) **Fundamental Objectives and Directive Principles of State Policy** - All organs of government exercising legislative, executive and judicial powers are obliged to apply these provisions. Some of the objectives set out

are:- Political, Economic, Social and Family, education, foreign policy, to mention but a few.

e) **Citizenship**: This has been classified into citizenship by birth, registration and naturalisation. It prohibits dual citizenship.

f) **Fundamental Rights**: Examples of such rights are:- Right to life, Right to Personal Liberty, Right to Fair Hearing, Right to private and family life, right to freedom of expression and the press to mention but a few.

Furthermore there are some innovations in the constitutional development of Nigeria. These innovations include:

i) The principle of Federal Character hitherto non-justifiable has been made justifiable and re-enforced by the provision of a federal character commission to implement the policy or protect infraction of the principle.

ii) Members of the legislature will retain their seats in the legislature even if appointed as ministers.

Elections into all legislative Houses shall be held by November of the year of election.

iii) The President and Governors are to hold office for a period of five years only and three years for Local Government Chairmen. There is also provision for multiples vice presidency i.e. three vice presidents. Rotational presidency has been established in the Draft Constitution. Finally a political party which wins at least 10% of the total number of seats in the National Assembly or in the State Assembly can participate in the Federal and State Cabinets respectively.

iv) A constitutional court with the status of a court of Appeal is contained in the Draft Constitution. Mandatory retirement age of judges has been raised to 70 years. A new institution in the name of National Judicial Council has been created to co-ordinate the appointment, promotion, funding and maintenance of standards in the judiciary throughout the country. Post call ages for appointment of judges is now as follows: High court 12 years, court of Appeal 15 years and Supreme court 20 years.

2.13 CONCLUSION

After Nigerian Independence, the country experienced the making of two constitutions, and one draft constitution. The Military had overthrown the 1960/63 and 1979 constitutions respectively. The 1989 constitution was not brought into existence. It should be noted that the 1979, 1989 constitutions and the 1995 draft constitution were made at the instance of the successive military Governments.

Nigeria did not require the making of several constitutions as was observed by the 1995 constitutional conference. According to them there was nothing fundamentally wrong with the 1960/1963, 1979 or 1989 constitutions.

It is therefore the view of this writer that a constitution is not meant to be changed completely after six or four years of existence as was the case with the 1960/1963 and 1979 constitutions respectively. A Constitution is supposed to stand the test of time. It can be amended whenever it is necessary. Example of constitutions that were operated for quite a long time are that of the United States of America, India and Australia.

CHAPTER III

3.0 CONSTITUTIONALITY OF MILITARY RULE

Nigeria as an independent political entity attained its independence in 1960. The administration of the country since then had its basis in the 1960 constitution, which was later replaced with the 1963 constitution. Both the 1960 and 1963 constitutions were modelled on British Parliamentary democracy.

Subsequently, the 1963 constitution was replaced with that of 1979, which adopted a presidential system of government. The constitution was the source of all governmental authority. All laws derive their force of authority from the constitution.[1] In fact it was the Grundnorm of all laws. Under constitutional government, the letters of constitutional provisions, being the supreme law of the land determines all actions relating to governmental powers.[2] The three arms of government,[3] namely:- the executive, the legislature and the judiciary were provided for by the constitution. It also

1 See Section 1 (3) 1979 constitution
2 See Section 1 (1) Ibid.
3 See Section 4, 5 and 6 Ibid.

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provided the means by which officers of the government were appointed and the powers exercisable by them. Limitations to the powers were also spelt out. Moreover, the process of changing the government was clearly set out by the constitution. [4]

Therefore, to determine the constitutionality of military rule, one has to do so by examining the constitution that preceded the particular military government.

Two constitutional governments were experienced in Nigeria. One such government was between the period of 1960 and 1966, the second being from 1979 to 1983. Those constitutional governments were overthrown by the military.

This chapter, therefore, will examine the constitutionality of military rule in Nigeria that existed from 1966 to 1979 and from 1984 to date. In order to achieve this objective, an attempt will be made to discuss the background of military rule, legal effect of coup D'etat and the nature of military rule in Nigeria.

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[4] See Section 1 (2), s. 60 and 124 Ibid.

3.1 BACKGROUND TO MILITARY RULE

Military rule in Nigeria started on the 15th of January 1966, when a group of young army officers organised and attempted to overthrow the government. In Northern Nigeria, Major Nzeogwu successfully overthrew the regional government and the Premier Sir Ahmadu Bello was killed. While in the Western Region, the Premier, Sir Akintola, was killed. At Federal Level the Prime Minister Sir Abubakar Tafawa Balewa, the Minister of Finance Ekotie Eboh and other civilians were also killed. Military officers like Brigadier Maimalari were also killed. The attempt to take over the control of government in the western region and Lagos was a partial success, for Major General Aguiyi Ironsi was able to quickly rally the rest of the army against the coup organisers, posting loyal troops to guard public buildings in Lagos, Ibadan and Enugu. The political situation in the country was confused, full of uncertainty. As a result of the action of some members of the armed forces, the surviving council of ministers and members of the parliament could not continue to operate the government successfully. Faced with the threat of civil war from the dissident soldiers from the North, and in an attempt of the surviving members of the Federal Council of Ministers to preserve their own lives and that of the nation they decided to abdicate their position in government and

transferred the government of the federation to the Nigerian Armed Forces under the leadership of General J.T.U. Aguiyi Ironsi, the General Officer commanding the Nigerian Army. Thus he become the Head of the Federal Military Government and Supreme Commander of the Nigerian Armed Forces. Suffice to say that the General J.T.U. Ironsi government was short lived. By yet another coup D'etat by the Military on 29th July 1966, Lt Col (Later Major General) Yakubu Gowon became the Head of State.

The Military on assumption of power suspended the provisions of the 1963 constitution relating to the executive, namely the Office of the President and Prime Minister, and the establishment of parliament that is the legislature.[5] Thus extinguishing the existence of the Executive and the Legislature hitherto provided by the 1963 constitution.

Under the Military Administration, the legislative power of the Government was vested in the Federal Military Government,[6] to be exercised by means of Decrees signed by the Head of the Federal Military Government[7] while the executive

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5 See Government Notice No. 148, Vol. 53 of 26th January 1966

6 See Decree No. Of 1966 section 3

7 See Decree No 1 of 1966 section 4

authority was vested in the Head of the Federal Military Government to be exercised by him or through persons subordinate to him.[8] Note should however be taken that Decree No. 1 of 1966 provided for the establishment of the supreme military council and Federal Executive Council but did not specify the function of the respective bodies.[9]

It is significant to say that judicial authority was exercisable by the courts, since the Military Government did not suspend it nor did it transfer its function to anybody.

In 1975, the General Gowon led Military Government was overthrown by Brigadier General (Later Major General) Murtala Ramat Muhammad in a coup Detat. Like the Ironsi Government, Mohammed Government did not last long because the latter fell victim to the assassin's bullet and died.[10] He was then succeeded by General Obasanjo.

The Murtala/Obasanjo regime operated their government on the basis of constitution (Basic Provisions) Decree 1975, Decree No. 32 which modified Decree No. 1 of 1966. The

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8 See Decree No 1 of 1966 section 7

9 See Decree No 1 of 1966 sections 8

10 He died on 13 February, 1976

Government still remained with the Federal Military Government. Legislative and Executive powers remained the same as under the preceding Military Government. Unlike under Gowon's regime, the Head of State in the Murtala/Obasanjo regime was obliged to make consultation with the supreme military council in the exercise of his executive power.[11] Although whether such consultation was made or not was non justiciable.[12]

Both Supreme Military Council and Federal Executive Council were maintained but a National council of state was introduced.[13] Decree No 32 of 1975 not only created or established the three councils above but also had provided for the function of each one of them. The Supreme Military Council was vested with the power to determine major national policy, constitutional matters, national security matters, appointment of Head of State and Service Chiefs, ratification of appointments of Senior Public Officers and supervisory role to National Council of State, and Federal Executive Council.[14] National Council of State was to formulate guidelines on financial and economic matters, social affairs, constitutional

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11 See S.5(1) Decree 32 of 1975.
12 S.5(2) Ibid
13 S.6(1) Ibid
14 S. 8 Ibid

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matters as they relate to states and such other matters to be determined by the Supreme Military Council.[15] While the Federal Executive Council was to determine and execute the general policy of the Federal Military Government as may be determined by the Supreme Military Council.[16] The status of the judiciary still remained as under Decree 1 of 1966.

So far the above discussion has covered a period of thirteen years of Military rule from 1966 to 1979. Needless to mention that after four years of break of military rule between 1979 and 1983, the Military Staged come back and to the next period of military rule we shall now turn.

For the second time, on 31st December, 1983, the civilian Government established under the 1979 constitution was overthrown by the Military. In a broadcast to the nation, the military spokesman had this to say,

> "... You are living witness to the grave economic predicament and uncertainty which an inept and corrupt leadership has imposed on our beloved nation for the past four years.... After due consultation over these deplorable conditions, I and my colleagues in the Armed Forces have, in the discharge of our national role as the promoters and protectors of our National interest decided to effect a change in the

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15 S.9 Ibid

16 S.10 Ibid.

> leadership of the government of the federal Republic of Nigeria to form a Federal Military Government. This task has just been completed...."[17]

Thus the civilian government was overthrown and the Federal Military Government came into being. Once, again, another series of military regimes were to follow in succession. The Military government of Major General Muhammadu Buhari enacted the Constitution (Suspension and Modification) Decree 1984, No. 1 which in all material fact was in paramateria with Decree 32, Constitution (basic provisions) Decree, 1975. It established a Federal Military Government, National Council of states and a Federal Executive Council.

On the 27 of August 1985, there was a coup D'etat against the Buhari led Military government, which brought Major General Ibrahim B. Babangida to power. Decree No. 1 of 1984 remained the main source of the Babangida Government, except that Decree No. 17 made some amendments to the principal Decree. The name of the Head of the Federal Military Government was re-styled the President and Commander-in-Chief of the Armed Forces. The Supreme Military Council was also

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[17] See A Special Federal Government announcement by Brigadier Sani Abacha (as he then was) Nigeria Tribune, Monday January 2, 1984.

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re-styled the Armed Forces Ruling Council, National Council of State remained the same, while the Federal Executive Council was re-styled the National Council of Ministers.[18] It should be noted that each of these councils maintained its function as before.

Decree 107, constitution (suspension and Modification) Decree 1993 heralded the coming of General Sani Abacha into power on 17th November, 1993, after the resignation of the Head of the National Interim Government, Chief Ernest Shonekan. Decree 107 was an incarnation of Decree 32 of 1975, Decree 1 of 1984 and Decree 17 of 1985 except that the title of Head of State and the Federal Executive Council was re-introduced. The Armed Forces Ruling Council was re-styled the Provisional Ruling Council.[19]

In all the preceding Military Regimes the Judicial authority of the Federation remained with the Courts, the only significant change was that the appointment of judicial officers became the sole responsibility of the supreme military council or by whatever name it may be called.[20]

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18 See Section 4 Constitution (Suspension & Modification) Amendment Decree 1985.

19 See S.8 Constitution (Suspension & Modification) Decree 1993.

20 See S.14 and S.15 Constitution (Suspension & Medication) Decree 1984 and 1993 respectively.

3.2 LEGAL EFFECT OF COUP D'ETAT

From the on set, it is significant to understand the meaning of coup D'etat and possibly to distinguish it from similar yet different conception. It is not uncommon to find the term Coup D'etat used interchangeably or as a synonym to a Revolution. According to Chief Williams, a Military Government comes about as a result of "a successful revolution or Coup D'etat. The expression is accordingly synonymous with revolutionary government."[21] To Nwabueze, "A coup D'etat, if successful, is a revolution."[22] In the various Federal Government (Supremacy and Enforcement of Powers) Decrees,[23] the military has been consistent in asserting that its action of overthrowing government was revolutionary. After the 1966 Coup D'etat, it declared that "whereas the Military revolution which took place on January 15, 1966 and which was followed by another on July 29, 1966...". The Coup D'etat of 1983 was similarly declared as "the military revolution which took place on 31st December 1983". Thus Coup D'etat has been used as synonym to a revolution. Therefore, the question for

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21 Williams F.R.A.: The Nigerian Judiciary and Military Government 1995 JNL Vol. 2 No. 2 P.1

22 Nwabueze B.O (1973) Constitutionalism in the Emergent States. Hurst & Nwamnife London & Nigeria p.228.

23 See the 1970, 1984 and 1993 Decrees, respectively.

consideration, is a Coup D'etat synonymous with a revolution? In answering this question, each of the terms will first be defined, beginning with Coup D'etat

A Coup D'etat is defined by Black's law dictionary as a political move to overthrow existing government by force. According to Chambers Dictionary, it is a violent or subversive stroke of state policy. From these definitions, it is apparent that a coup D'etat is carried by the use of force or threat of it and the objective is to take over the political administration of the particular country concerned. Usually, it is associated with the Military. The military by the use of force or threat of it forcibly intervenes into the political affairs of a country thereby overthrowing the constitution and the government.[24]

Revolution has been defined by Black's law dictionary as "a complete overthrow of the established government in any country or state by those who were previously subject to it." The shorter Oxford Dictionary defined it as "an overthrow of an established government by those who were previously subject

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[24] For example in 1966, the Nigerian Military staged a bloody coup D'etat but in 1983, it was a bloodless coup.

to it. "While chambers Dictionary defined it as "a great upheaval: a complete change... a radical change in government." A revolution, therefore, comes about by the actions of the people who were previously the subjects of a particular government. In other words, a popular movement supported by the masses of a given country brings about a revolution. It is achieved by a complete overthrow of the government. The whole system or form of the government and the rulers are changed by another system and set of rulers. Examples abound in history of: Russian Revolution of 1917 where the Czarist regime was replaced by a socialist - communist regime; The American Revolution of 1776 brought about the change from the condition of British colonies to national independence effected by the thirteen states of the American Union; the French revolution of 1789 brought about the overthrow of the French monarchy; the expulsion of James II from the British throne (1688-89) brought about the establishment of a really constitutional government under William III; to mention but a few. In fact a revolution is brought about by certain members of opposition to the government together with the general members of the public. Leaders of opposition to the government of the day, with the

support of the members of the general public will organise themselves by first revolting against the government and subsequently overthrowing it and the rulers thereby creating a new government, entirely different from the overthrown one.[25]

Having thus defined both a revolution and a coup D'etat, can it be said that the two are the same? Certainly not, there are some major differences between them. An important major difference between a Revolution and Coup D'etat is the method by which each one of them may be attained and also the parties involved. Members of the political opposition to the government bring about a revolution. It is supported both by the leaders of the Revolution and their followers from the general public. This sort of popular uprising is associated with a new change in government not contemplated by the old order. Whereas in the case of Coup D'etat it is only a certain section of the military who seize power by seeking to subvert the established order. Nwabueze ably described the difference in the following words:

> "A revolution may also be brought about by virtue of the people's constituent power. Changes in the condition of society or in its fundamental conceptions may give rise to a popular demand for a change, which

[25] See Calvert A. 1970 Revolution: Pall Mall Press Ltd. London p.132.

> may be shared by the rulers and governed alike... A change brought about in this manner amounts to a revolution because it is not effected in accordance with the constitution but it is not a coup d'etat since the hypothesis is that it is concurred in by both the rulers and the governed. It does not seek to subvert the established order, but rather to create a new order better suited to the present needs and circumstances of the society.[26]

From a juristic point of view a revolution is the total destruction of the constitution of a given country and replacing it with a new one. For example if the legitimate government of a country is a monarchy, then some group of individuals forcibly, seizes power and replaces it with a republican form of government, the success of this change means that the validity of the new government is determined by the new legal order and not by the old order. Whereas in the case of coup D'etat the military overthrows the government and constitution of the country and gives the coup makers absolute powers. In otherwords the new government brought about by the Military is not a constitutional one. Military rule is established by Decrees promulgated as the necessity of the situation warrants. There is no restraint on a military regime in the exercise of its legislative and executive

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26 Nwabueze, B.U. Op Cit p.232.

powers. This important difference was clearly pointed out by Nwabueze. He said,

> "The destruction of the constitution, the instrument of the restraint upon government, by a revolution would not undermine constitutionalism if the object was to create a new constitution better adopted to the current needs of the community. It is in this respect that the main difference lies between a coup, especially military coup, and a revolution brought about by means of the peoples constituent power. In the former the abolition of the constitution is usually not followed by the restoration of the limitations, which it imposes upon government. Usually the motivation for the coup is the assumption of absolute power by the coup makers and this is so whether the coup D'etat is staged within or without the Government. [27]

Differences between a revolution and coup D'etat is thus outlined, yet there are some similarities, that is, in the success or failure of both. On the one hand if a revolution or coup D'etat succeeds, then it becomes a law creating fact, that is the old order or constitution is overthrown, but on the other hand, if it fails, the action to overthrow the existing legal order will be considered as illegal. They will be adjudged guilty by the constitution they attempted to overthrow. The persons responsible for attempting to

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27 Ibid p.244.

overthrow the existing legal order will be guilty of the crime of treason.[28]

Clearly from what has been discussed so far, the conclusion will be that even though a revolution and a coup D'etat share some similarities yet they have important differences. Therefore, they should not be used interchangeably or one as synonym for the other. The term coup D'etat will be most appropriate for accurate description of change of government by extra- constitutional means in Nigeria.

Next, the issue of the legality of coup D'etat will be in focus. In this segment, attempt will be made to examine the constitutionality of Coup D'etat from the perspective of the constitution it sought to over-throw and then proceed to determine the legal status of the government established, following the coup. It should not be forgotten that in the history of Nigeria two constitutions i.e. the 1963 and 1979 were overthrown following Military Coup D'etat in 1966 and 1983 respectively.

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[28] Kelson H. 1934-35 LQR Vols 50 & 51 pp.118-119 as quoted in Introduction to Jurisprudence, by Lord Lloyd (1972) Stevens & Sons p.303.

First, the Military Coup D'etat of 1966. Prior to the constitutional crisis of 1966, the Nigerian government was formed on the basis of the 1963 Republican Constitution. The system of government was modelled along Westminster Parliamentary democracy. The constitution provided for the president of the Republic, a bicameral legislature, an executive otherwise known as Council of Ministers and a judiciary vested with judicial powers.[29] On the life span of the government and the procedure for changing it, the constitution provided that the life span of the parliament was five years, unless it was dissolved earlier by the president upon the advice of the prime minister or where the House of representatives passes a resolution that it has no confidence in the government of the federation or if the office of the Prime Minister is vacant and the President reasonably believes he can not appoint a person who can command the support of the house of representatives.[30] At the expiration of five years or even before that time if the President so wish could use the above reason to dissolve the parliament. After the dissolution of the parliament a new election would be held and the leader of the party that emerged victorious with the

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29 See Sections 34, 41, 84 and 87 of the 1963 constitution.

30 See section 68(2), 68(4), 68(a) and (b) of the 1963 constitution

majority of elected members would be invited to form a new government. Thus, it is through this method that power could be transferred from one set of rulers to another set of rulers in accordance with the constitution. It should be noted that any transfer of power, which is not made by the process stated above, would be unconstitutional.

In a dramatic event of 15 January, 1966, resulting from a rebellion started by some members of the Military in a certain section of the country, the acting prime minister, fearing the rebellion may continue and probably spread or engulf the country with serious consequences as to cost of lives and property,[31] purportedly transferred the power to administer the country to the Head of the Military who had to quell the rebellion. There is no doubt, from the foregoing, the 1963 constitution did not expressly provide for a change of government from the civilian to the military. Clearly the purported transfer was unconstitutional, because it can not be supported by any section of the 1963 constitution.

However, it is an established principle of law that a constitution cannot anticipate all kinds of challenges that

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[31] The rebellion had cost the lives of two regional Premiers, and the whereabouts of the Federal Prime Minister was unknown.

could befall a nation. Emergency situations abound in which the need to protect public security lives and property of the citizens will become of paramount importance. In that situation the safety of the state should be supreme. In other words, in the event of serious threat or danger to the existence of the state, the safety of the state will become of vital importance to the existence of the constitution. In fact the safety of the state is necessary to the existence of the constitution, and must therefore override some of its prohibitions and limitations in a situation of grave danger. Thus, the doctrine of necessity comes to be recognised as an established principle of law.[32]

In the celebrated case of Lakanmi V. A.G. (West),[33] Ademola CJN expressed the opinion that the events of January 1966 was unprecedented in history. In the words of the Chief Justice;

> "Never before as far as we are aware, has a civilian government invited an army take-over, or the armed forces to form an interim government."

And he added,

> "We venture to put the attitude of the Acting President and the Council of

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32 See Nwabueze B.O. 1982 A Constitutional History of Nigeria C Hurst & Co London pp 166-174

33 1971 UILR Vol.I p.201 at 215

> Ministers to the head of the army thus your men have started a rebellion, which we feel may spread; you have the means to deal with them. We leave it to you to deal with them and after this, return the administrative power to us".

Recognising the necessity of the situation and the circumstances that led to the transfer of the power from the civilians to the military, the Supreme Court adopted the doctrine of necessity to justify the event of January 1966. The court arrived at the following conclusion thus:

> "We think it is wrong to expect that constitutions must make provisions for all emergencies. No constitution can anticipate all the different forms of phenomena, which may be set a nation. Further, the executive authority of the federation is vested in the president by section 84 of the constitution and we think in a case of emergency he has power to exercise it in the best interest of the country, acting under the doctrine of necessity."[34]

The import of the Supreme Court decision in the Lakanmi's case was to rubber stamp the constitutionality of Military rule thereby subordinating the military Government to the provisions of the 1963 constitution. But the Military Government was not prepared to rule or be subordinated to the supremacy of the constitution. Sequel to the Supreme Court

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[34] 1971 UILR Vol.I 201 at 215 See also Achike O. Groundwork of Military Law and Military Rule in Nigeria. Fourth Dimension Publishers pp. 114-119.

decision in the Lakanmi's case, the Military Government promulgated, Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970 in the preamble to the Decree which was made part of the Decree. It declared that the events of 5th January and July 1966 effectively abrogated the whole pre-existing legal order in Nigeria except what was preserved under Decree No. 1 of 1966. It categorically made it clear that its actions were not contemplated expressly or impliedly by the 1963 constitution.

A proper construction of Decree No. 28 of 1970 would mean that the Federal Military Government was not a constitutional one, therefore it was not limited in its executive or legislative actions to the constitution. Whatever constitutional provision was left in existence was by the permission of the Military Government as expressed by Decree No. 1 of 1966. The validity of the military Government was not to be adjudged by the provisions of the 1963 constitution, since it came to power by force or its threat. It is still regrettable that the Supreme Court analysis and decision in Lakanmi's case was limited to the event of January 1966. An important opportunity was lost of considering the event of July 1966, because the Supreme Court did not make any reference to it in the judgement.

Now to the Military coup of 1983 which saw the demise of the 1979 presidential constitution. That event was not similar to that of 1966. There was no issue of transfer of power nor was there the question of doctrine of necessity as it applies to any constitution. Probably the nine year military rule, that is, between 1966 and 1979 and of course the Military coup of 1966 was ingrained in the mind of the makers of the 1979 constitution as it is always said, experience is a better teacher. A provision was inserted into the 1979 constitution to prevent any sort of transfer of power to the Military or for the Military to forcefully take over the administration of the country. Section 1(2) of the constitution states that:

> "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this constitution."

This section prohibits any attempt by any person or groups of persons whether military or civilian from taking over the Government of the Federation or any of its constituent part except by the means provided for in the 1979 constitution.

What then is the manner for taking over the administration of the Federal Government or its constituent part from the perspective of the 1979 constitution? The constitution provides for election at regular interval as the only legitimate means of changing the administration of the country. It provides that the president and members of the National Assembly are to be elected into their respective offices.[35] Therefore where the people elect a government be it a good or bad one, such a government can only be changed after four years.

From the foregoing the Military Coup D'etat of 1983 cannot be supported by any of the provisions of the 1979 constitution. Therefore, the action of the military in taking over the administration of the Federal Government of Nigeria in a coup D'etat is prohibited by section 1(2) of the 1979 constitution and if such action is to be adjudged by the constitution it is to be declared unconstitutional.

The Military Coup of 1983 was not contemplated by the 1979 constitution. Thus, the Military Government left no one

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[35] See Sections 123-126 and 71, 1979 constitution.

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in doubt, by promulgating the Military Government (Supremacy and Enforcement of Powers) Decree 1984, wherein they declared that the Coup D'etat of 31st December 1983 effectively abrogated the whole pre-existing legal order in Nigeria and that was an abrupt political change which was not within the contemplation of the constitution of the Federal Republic of Nigeria 1979.

On the whole, what would be the status of coup D'etat in law? If the Military stage a successful coup d'etat, it means that, it overthrows both the constitution and the government. The validity of the power of the Military government is to be determined by their success and not the overthrown constitution. Support for this view can be found from the Kelsen theory of effectiveness. He said,

> "If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal."[36]

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[36] Kelsen H. (1934-35) Pure theory of law Vol. 50 & 51 LQR as quoted by Loyd (1972). Introduction to Jurisprudence p.303 at 304.

In the Pakistan case of State V. Dosso, the Chief Justice of Pakistan (Sir Muhammad Munir CJ) said, "Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change."[37]

3.3 THE NATURE OF MILITARY GOVERNMENT

After a successful military coup D'etat, the immediate thing that follows is the establishment of a Military Government. The term Military Government has been defined as government which acquires the power to govern as a result of successful military coup D'etat.[38] By the use of force or threat of it, the military overthrows the Government and the constitution. A Military Regime does not require the consent of the people to govern nor does it require any formal constitution to grant or limits its authority. Its success in acquisition of authority grants it unlimited power to legislate or exercise executive authority. Nwabueze summed up the nature of Military government thus:

> "The basis of the Military Government's absolute power is of course force. A military government is a regime of force. It rules by the barrel of the gun not by the people's consent. What is of far greater significance is that, the

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37 (1958) 2 PSCR 180 at 185

38 Williams FRA "The Nigerian Judiciary and Military Government" Vol. 2 No.2 1995 JNL p.1

> authority exercised by the Military Government does not derive from the people. It robs the people of the fundamental attribute of their sovereignty, the right, by means of a constitution, to institute a form of government for themselves and to define the extent of the power being delegated. A successful military coup d'etat is not only a coup against the government and the constitution, it is a coup against the people. It is comparable to colonial subjugation of people: both rob the people of their constituent power."[39]

Once the military succeed in overthrowing the government and the constitution, it is then left to it to shape its own system of governance or decide on its grundnorm. It may rule by brand new constitution or adopt the overthrown constitution or it may suspend, abrogate or modify some part of the overthrown constitution. In otherwords, the military government has no obligation to define their governmental powers or to place any limitation on those powers. They may wish to concentrate unto themselves all executive, legislative and judicial powers of the state. The military government may as well spell out the organs of government and adopt a judicial system whereby judicial powers are vested in the judiciary and the remaining governmental powers are vested in

[39] Nwabueze, B.O. (1992) Military Rule and Constitutionalism in Nigeria. Spectrum Law Publishing p.5

other organs set up by the military.[40] Certainly, there is no doubt that the military government has absolute powers to choose how it intends to rule the country.

The practice of successive Nigerian Military governments have been to suspend or modify some certain sections of the over thrown constitution, while permitting the unsuspended provisions of the said constitution to continue in force subject to, and, therefore liable to be overridden by the Decrees of the Federal Military Government. Subsections (1) and (2) of section 1 states that the provisions of the constitution mentioned in schedule 1 to this Decree are hereby suspended and subject to this and any other Decree, the provisions of the said constitution which are not suspended by subsection (1) above shall have effect subject to the modifications specified in schedule 2 to this Decree.[41] This simply means that the continued existence of any provision of the constitution under military rule is subject to, and may be overridden by ANY and EVERY Decree of the Military Government.

Furthermore, the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984 reinforces the

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40 Williams FRA op cit pp 11-13.

41 See Decree No.1 of 1966 and 1984

subjection of the unsuspended provisions of the constitution to all Decrees of the Military Government. In other words if any provision of the suspended constitution is in conflict with a Decree of the Federal Military Government, the latter shall prevail and the preamble to the Supremacy and Enforcement of Powers Decree, which is declared as forming a substantive part of the Decree says it all in clear, explicit and unequivocal terms:

> "WHEREAS the military revolution ... effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the constitution (suspension and modification Decree .....
>
> "AND WHEREAS in the exercise of its absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever, the Federal Military Government permitted certain provisions of the said constitution to remain in operation.
>
> "AND WHEREAS ... the provision of a Decree shall prevail over those of the unsuspended provisions of the said constitution."

From the preceding discussion, the position becomes clear that the Military on coming to power by coup D'etat establishes a government of absolute legislative and unlimited

power. It has a supreme authority. Even where a formal constitution is not abrogated, then such a constitution is under the supreme authority of the Military Government. Nwabueze put the situation thus:

> "The Military government established following a military coup is an absolute one, with unlimited power. Its authority is supreme. Where a formal constitution is established, it is subject to the absolute and supreme power of the Military Government. The Military Government is the source from which such a constitution derives its authority, and at whose sufferance it must therefore operate."[42]

As to the validity of the existing ordinary laws of the land that pre-date the coup D'etat, the position is that such laws will continue to be in operation and except if those laws are altered by the Military government.[43]

At this juncture, for the purpose of clarity, it is imperative to make a comparison between a military Government and a constitutional one. By so doing the correct picture of the nature of military government will clearly emerge. In otherwords, to what extent does the military government accommodate the elements of constitutionalism?

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42 Nwabueze B.O. A Government Mustn't be a Lawless leviathan. New Nigerian, Monday, October 1, 1984.

43 See S.13 of Decree No. 1 of 1966 and S.15 of Decree No. 1 of 1984.

A constitutional government is one that is established by the constitution.[44] The legitimacy of the Government is derived from the constitution. All organs of the government, their functions, powers and limitations are contained in the constitution. In fact the method of acquisition of the power is by elections provided for in the constitution. There exists absolute supremacy of the constitution over the government and the people. All powers flow from the constitution.[45] Whereas a military government does not have a constitution that limits its power. Even where a constitution exists in a military regime, it is not regarded as supreme.[46] In fact the military government enjoys absolute supremacy over the constitution.

On the area of making legislation, under a constitutional government, there is a legally prescribed procedure.[47] This involves the machinery of committees, in the legislative houses, with series of hearings and debates. In case of matters involving some kind of specialisation, consultations with various interested groups like trade unions and other

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44 Example are the Nigerian Governments under the 1960 and 1979 constitution
45 S (1) (2) 1979 Constitution
46 See the FMG (Supremacy and enforcement of powers)
47 See S. 54 and 55 1979 constitution

interested sections of the community become inevitable. A bill introduced into the legislative houses has to be fully debated before it may be passed as an Act or law. This process minimises the incidence of arbitrary and ill thought out legislation. But in the case of a military regime, a legally prescribed procedure for law making as discussed above is completely absent. The constitution (suspension and modification) Decree No. 1 of 1984 for example merely empowers the Government to make laws for the peace, order and good government of Nigeria. The power is to be exercised by the Head of the Federal military Government. The courts are precluded from entertaining any question as to the validity of any Decree, which in essence means that the cornerstone of constitutionalism, the judicial review of the constitutionality of legislation is thus absent in a Military Government.

Fundamental Rights of citizens are properly and adequately protected under a constitutional government. Chapter IV of the 1979 constitution deals with the issues of fundamental rights. Any person whose right is violated or threatened can commence an action against the law violator in

any of the High Court's of the Federation.[48] But under Military regime, the practice has been to suspend the bill of rights expressly or the purpose of specific enactment. Moreover, the civil proceedings against executive actions of the military government for the purpose of the certain enactment are prohibited from being instituted or entertained by any court of law.[49] In essence the Military government may enact any legislation which infringes the fundamental rights of the citizen. If there is any violation of the citizens right pursuant to that enactment the court will surely not enforce it since they are precluded from doing so. However, in fairness to the Military regimes in Nigeria, they have tried to maintain the conditions of free society and the rule of law; there are no police methods; and no regimentation of the individual's life, such as characterises the society of the totalitarian state.

Unlike in a constitutional government, a military regime does not permit the existence of political parties nor does it admit of any form of political opposition. There is no organised opposition to the Military government. The most disturbing aspect of military rule in this regard is its

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48 See S.42 of the 1979 constitution.

49 See S.1(2)(b)(i) FMG (Supremacy and Enforcement of Powers) Decree 1984.

intolerance even to simple Newspaper criticism. Detention of journalists or indefinite closure of Newspaper houses is prevalent in Military regimes.[50]

In this regard, a more repressive and reprehensible legislation is the public officers (Protection against false accusation) Decree 1984 which provides for two years *imprisonment without option of fine for a statement, true or* false, which is calculated to bring the government or public officer to ridicule.

The 1979 constitution embodied the Doctrine of Separation of powers. Each of the three organs of the government namely, the legislature, executive and the judiciary were separated. Their powers and functions were vested in a different body or person. Whereas, the military by nature has a unified and hierarchical structure, which tends to influence the Military Government in its approach to governmental powers. Even though the Military governments tend to preserve in form the tripartite structure of the legislature, executive and judiciary *in practice it is not so.* Legislative and executive powers are to a large extent vested in the Federal Military

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[50] See the Guardian Newspapers and African Guardian weekly magazine (Proscription and prohibition from circulation) Decree No. 8 of 1994. The National Concord, the Reporter etc were at one time or the other proscribed by the Military.

Government under the Head of State, who invariably is the head of the supreme military council an the Federal Executive Council. Undoubtedly judicial powers have been separately maintained, but going by the decision in Lakanmi's case and its aftermath (Federal Military Government (Supremacy and Enforcement of powers) Decree No. 28 of 1970, one is not left in doubt as to the fact that the judiciary was not an independent body, it being submerged in the absolute legislative sovereignty of the Federal Military Government.

Both the 1963 and 1979 constitutions provided for a federal structure or arrangement for Nigeria with some strict form of divisions of power between the Federal government on the one hand, and the state governments on the other. But in the case of a military regime, the federal arrangement is only maintained in form. This is evident from the fact that the Federal Military Government reserved for itself unlimited power of law making in all matters whatsoever. However, a military Governor of a state may legislate on the matters previously within the exclusive competence of the state but with the consent of the Federal Military Government on concurrent matters. On the sphere of executive powers, the Governor merely exercises delegated executive powers, with the entire executive authority of the county lodged at the Centre

i.e. the Federal Military Government. Moreover, the Military Governors of the states are appointed by the Head of the Federal Military Government, and in true military tradition of a hierarchy of command, responsible to him.

3.4 THE GRUNDNORM OF THE MILITARY GOVERNMENT

In most societies, it is not uncommon to find that their legal order consists of graduation or hierarchy of norms. These norms are in the form of legislation categorised in order of superiority. The highest of the norms is what is called the Grundnorm. All other norms are subject to it. Nwabueze, opined that:

> "The conception of a grundnorm is that it is the fountain-head, the highest and the most superior norms of a legal order. It is the norm to which all other norms in a legal order are subject, and by reference to which the legal validity of all such other norms is determined. It is axiomatic that the grundnorm has superior legislative force over ordinary enactment. It follows that a norm which, by its own explicit stipulation, is subject to other norms, and therefore liable to be overridden by them, is not, and cannot be the grundnorm of a legal order".[51]

What is the Grundnorm of the militia? Under constitutional government, in the hierarchy of norms, the most

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51 (1996) JNL Vol. 3 No. 1 p.109.

superior of all norms is the constitution. All other norms exist subject to the constitution. For instance, the 1979 constitution has established its supremacy by virtue of section 1. It therefore becomes the fountainhead, the highest and the most superior norms of the legal order. Whereas under a military regime, the principle of the supremacy of the Military Government in its law making capacity was established in the constitution (Suspension and Modification) Decrees No 1 of 1966, No. 1 of 1984, No. 107 of 1993, and in the preamble to each of the supremacy Decrees of 1970, 1984 and 1993. Nwabueze, ably categorised the Nigerian legal order under Military rule in a gradation from the lowest level to the highest level in the following words:-

> "The lowest level, the base, comprises customary law and the received English law (Common Law and Statutes of general application); these have force subject to laws in the next, higher level which comprises statutes enacted by civilian legislatures (state and federal) and by the state military governments, conflicts between them being resolved in favour of civilian federal statutes if validly enacted. The next higher level, to which all laws at the lowest level are subject, comprises the unsuspended provisions of the pre-existing constitution i.e. the 1979 constitution. Decrees of the Federal Military form the highest level, the apex in the hierarchy; all other laws including the unsuspended provisions of the 1979 constitution, are subject to them (Decrees of the Federal Military Government). The

overarching norm of the entire legal order under the military regime is the principle of the overriding supremacy of the Decrees of the Federal Military Government, and it is that norm (a legal norm specifically enacted by Decree) that constitute the grundnorm."[52]

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52 Nwabueze B.O. Lawyers Bi-Annual October 1995 Vol. 2 No. 2 PP. 166-167.

CHAPTER IV

4.0 SEPARATION OF POWERS

Separation of powers is a constitutional law doctrine. It provides that the three main organs of government, namely: Executive, legislative and judicial should be separated. Each to be independent of the other in order to provide checks and balances. The idea of separating the three organs of the government has been evolutionary. It did not spring up overnight. It has taken many years to evolve, dating back to around 345 B.C. The doctrine reached its peak in 1786 when it found a lasting place in the American constitution. The American Constitution serves as a model presidential system of government. The Nigerian Presidential Constitution of 1979 adopted the doctrine of separation of powers.

This chapter examines the evolution of the doctrine of separation of powers and the extent of its applicability under the 1979 constitution and thereafter under Military rule.

4.1 THE EVOLUTION OF THE DOCTRINE

The origin of the doctrine of separation of powers can be traced to the period of ancient Greek philosophers. Plato, the great leading philosopher of his time has made allusion to

the doctrine in his works.[1] While writing on the "ideal city", he divided the population into three classes. First were the perfect Guardians, who undergo a long and rigorous training in philosophy. This class should be invested with the absolute and untrammelled power over the rest of the State. Thus, they were to have legislative powers to make laws, rules and regulations.

Secondly, there were the auxiliary Guardians who are largely involved with the administration and keeping order. Their education is more limited than that of the perfect Guardians. They are only to have a partial understanding of the laws they administer, and do not appreciate their metaphysical basis.

Thirdly, for lack of a better term, is a class consisting of the general members of the state like farmers, traders, artisans, etc. Their education is confined to the instructions they need in order to perform their own individual task sufficiently.

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[1] See Plato Great Dialogues Plato. Translated by W.H.D. Ronse (1956) MENTO pp. 211-125 or Plato – The Republic Book III (412-415) and also Plato The laws Translated by Trevor J. Saunders (1970) Penguin Classics, pp. 221-244.

It appears from the writing of plato that there were two organs of government namely the legislature whom he described as the perfect guardians, and the Executive otherwise called the auxiliary guardians. That being so, Plato's idea was short of one organ of the government, as we know today, that is, the judiciary. Evidently, the third arm of Government, that is the judiciary was completely not mentioned. Therefore the position of judiciary in plato's theory is certainly a matter of conjecture. If one were to think or assume that the perfect Guardians, or auxiliary Guardians were responsible for the Administration of justice, then there would have been a fusion of powers in one of the two identified arm of government in Plato's theory.

Can we then conclude by saying that Plato's theory was not satisfactory or inadequate in the light of what we now know of the doctrine of separation of powers? Certainly not. If one recalls the period in which Plato advanced his theory, the period of ancient Greek city-states where everybody knew everybody else and the system of administration at that time was monarchy closer examination of the work of plato in the Republic or the laws will reveal that the dialogues as recorded sometimes expose difficulty without giving a solution. The objective was to bring other men's thoughts to

birth, or to stimulate them to think, or to encourage them to go on searching for solutions for themselves.

More importantly, it lies in the fact that Plato's work in this regard was Utopia. He was laying foundation for what he conceived as an "Ideal city". In other words, he imagined that if a city will be built upon or on the basis of his imaginary ideas that will enhance the development of the people in that state.

Plato was not alone when it came to writing on Utopia. There were other writers or philosophers of his time and later generation who based their writings on utopia. A classical work of this nature was Thomas More's and Johann Andrae's Chritianopolis. They conceived of a classless society in which the community as a whole and from which all traces of a state have disappeared, owns all the means of production and distribution. This idea was called communism.[2] A different perspective of communism came to light in 1848 with the publication of the communist manifesto by Karl Marx and Friedreich Engels. Their ideology stemmed from the fact that the proletariat (working class) will rise against the

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[2] The New Encyclopaedia Britannica 15th Edition 3:496.

Bourgeoisie (capitalist) class. As a result of that the working class would be able to appropriate the means of production, distribution, and exchange.[3]

The Central theme of communist Utopia was the creation of a society whose members are equal and existing without a state.[4] A creation of a stateless state, which implies there can be no executive, legislature or judicial arms of the state. At this juncture, one will hasten to say that since the exposition of the communist utopia, it is still far from being achieved or realised.

Therefore, it is to the credit of Plato that what was once thought of as utopia has found itself translated into reality, if one concedes that his idea of the executive and legislature had provoked more thought on the subject culminating in the addition of the third arm of government i.e. the judiciary.

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3 Ibid - 16:740:1a

4 David, R ET EL (1978) Major Legal Systems in the World Today. Stevens and Sons P.160. See also Engel, A. et el (1971) Ideologies and Modern Politics Fletcher & Sons Ltd., Norwich p.102. See also Zarodov K. (1981) Leninism and Today's Problems of the Transition to Socialism Progress Publishers Moscow pp.6-15.

Aristotle,[5] a student of Plato had further advanced Plato's theory. In his work the Politics, he combined both theory and practice. He was of the view that all type of constitutions must contain three elements. These are: Deliberative, Officials and the judicial elements. Therefore to him a constitution must contain the tripartite doctrine of separation of powers. To put it in his words,

> "There are three elements in each constitution in respect of which every serious law giver must look for what is advantageous to it ... The three elements are first, the deliberative, which discusses everything of common importance; second officials; and third, the judicial element".[6]

What are the functions or powers of each of the three elements? First the deliberative element. Its powers cover decisions as to war and peace, the making and dissolving of alliances, legislation, the penalties of death, exile and confiscation of goods, the choosing of officials and the scrutiny of their conduct on expiry of tenure. Membership into the deliberative element according to Aristotle should be determined either by election or lot.

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5 He was a student in the famous Academy of Plato.

6 Aristotle - The Politics Translated by Trevor J. Saunders Penguin Classics p. 276-291

organ while the officials can be equated with the executive, and the judicial element with the judiciary. This proposition as expounded by Aristotle is no doubt an improvement on Plato's theory, because he added the third arm of the government - the judiciary in explicit terms.

It will certainly be a matter of interest to enquire as to the reason for the improvement of Plato's theory. First unlike Plato and Marx, Aristotle adopted a descriptive rather than prescriptive method when it comes to writing about the science of politics. The latter method seeks to make a pattern of an ideal state and, in varying degrees according to the taste of the author, to lay plans for the realisation of that pattern. While the former examines the data of politics, looks at constitutions as they exist now or have exited in the past, and seeks to draw conclusions about the way they are likely to develop. It does not aim at describing an ideal state or at determining what kind of constitution is best.

Secondly, Aristotle had studied and compared various types of constitutions. He was known to have written probably historical and descriptive accounts of 158 constitutions. Thus he uses both actual and imagined states for comparative purposes and draws a distinction between the ideally best and

the best in the circumstances or the best for a particular people. In his study, he laid emphasis on the organs of government within the different kinds of constitutions.

Therefore there is little wonder for his contribution by way of bringing to the fore the third arm of government the judiciary.

However, Saunders, a commentator on "The Politics had cautioned us that we should not think that the idea of separation of powers conceived by Aristotle corresponds exactly with the existing prevailing notion of the doctrine. "We should beware" says Saunders "of supposing that Aristotle's three fold division of powers corresponds more than very roughly to the fairly sharp modern separation of powers as between legislature, executive and judiciary."[7]

It is the view of this writer that the caution is unnecessary. How can one ever imagine that a civilisation to which is not directly connected with another would have exactly similar institutions. There was no evidence to link the ancient Greek City states influence on the other states because both were generations or centuries apart. The fact

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[7] Ibid pp. 276-277

can never be denied of the considerable influence of the philosophy of Plato and Aristotle to the development of modern

constitution, most especially as it relates to separation of power. Needless to point out that these great philosophers had considerably influenced some of the philosophers that came after them. Examples were; Thomas Aquinas, Machiavelli, Jean Bodin and Kickword Hooker to mention but a few.

With this, it will not amount to an exaggeration for one to say that the doctrine of separation of powers did not evolve overnight, it had gone through some stages culminating in the modern doctrine.

Separation of powers as we know it today stemmed from the work of John Locke. To him, it was wrong, taking the frailty of human beings into consideration, to invest one person or body with law making and enforcement or execution of the same. To do so may result on those persons exempting themselves from the same laws. Or they may make the laws or execute them in a manner to suit their individual interest. The solution therefore, would be for a separate legislature, who may make laws for the common public good and subject themselves to it, like all other persons in the society. He maintained that

along sides the legislature, there should be a body invested with the responsibility of enforcing the laws. Thus the legislative and executive power came to be separated.[8]

An eminent French jurist, Montesquieu observed Locke's theory along with an imperfect understanding of the seventeenth century English Constitution to further provide illuminating doctrine of separation of powers based on the executive, legislature and the judiciary. Montesqiueu's theory was propounded on the basis of political liberty. According to him without division of powers, the tendency would be that the powers are likely to be abused. His ideas can be summed up thus:

"Political liberty is to be found only when there is no abuse of power. But constant experience shows 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 checked by another when the legislative and executive powers are United in the same person or body ... there can be no liberty ... Again, there is no liberty if the judicial power

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8 John Locke (1969) Two Treatises of Government. Edited by Thomas Cook Hafner Publishing company Inc New York pp 194-195.

is not separated from the legislative and executive... There would be an end of everything if the same person or body whether of the nobles or of the people were to exercise all three powers."[9]

Individual liberty is of paramount importance, for a society to function efficiently. Added to this is the need to separate the three political powers with defined roles and functions. Thus the doctrine of separation of powers into legislative, executive and judicial. Each divided and invested in a different body but within a system of checks and balances. All the three organs of the government are separated but co-ordinate or at least they interrelate with each other at some point. Without providing the co-ordinate functions of the three organs within the system of checks and balances, the tendency of struggle for supremacy between them will be enhanced. Consequently, the state may disintegrate in the process.

The doctrine of separation of powers has found acceptance and application in the constitution of the United States of

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9 L'Esprit des Lois Chapter XI as quoted by Aiche Et El (1979) Cases and Materials on Constitutional Law in Nigeria. Oxford University Press p.20.

America. In fact it is the oldest written constitution that first incorporated the doctrine.

Legislative, executive and judicial powers were invested in different bodies or organs under the 1787 constitution of the United States. Legislative powers were vested in congress consisting of a senate and House of representatives.[10] While the Executive powers were vested in the president.[11] Judicial powers were vested in the Supreme Court and such other inferior courts as the congress may from time to time establish.[12]

Under the Nigerian Constitution of 1979, the doctrine of separation of powers has found its way, just as it did under that of the United States of America. The next study will focus on separation of powers in the Nigerian Constitution.

4.2.0 SEPARATION OF POWERS IN THE NIGERIAN CONSTITUTION

The doctrine of separation of powers is one of the cardinal features of the 1979 constitution. Executive, legislative and judicial powers of the Republic were vested in

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10 See the Constitution of USA 1787 S.I. Article I

11 Ibid S.I. Article II

12 Ibid S.I. Article III

each of the three organs of the Government. Executive powers were vested in the president; legislative powers were vested in the National Assembly, judicial powers were vested in the courts.[13] The constitution had clearly demarcated and committed the powers of each arm of the government in the respective organ. So also the inter-relationships between each of the organs were clearly spelt out in a system of checks and balances. Next, attention will turn to each of the three organs of the government for discussion.

4.2.1 THE LEGISLATURE

The legislature is the organ of government charged with the responsibility of making laws in the society. All activities in human society are supposed to be guided by some kind of customs, rules and regulations. It is the sine quanon of all civilised societies, that provides the standard norm of peaceful living and coexistence among the members of the society. Legislative power simply means the power to enact a rule of conduct or behaviour in a given society by a body duly authorised to do so by law. Therefore the legislature makes law for the good and well being of the society.

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[13] See Senator Adesaya Vs President of Nigeria (1981) 2 NCLR 359 at 387 per Idigbe J.S.C. "Under our constitution, government is divided into three separate and independent section. Viz: The Executive, the legislature, and the judiciary, and it is I apprehend, the duty of each section to avoid encroachment by one on the sphere of the others"

Section 4 of the 1979 constitution places the legislative powers of the republic in the National Assembly. It provides for a Bi-cameral legislature. Its powers extend to making laws for the peace, order, and government in the whole of the federation. These powers are two fold: one, those specified matters enumerated partly by specific provisions in the body of the constitution and partly under two lists scheduled to the constitution.[14] These two lists are called `exclusive' and `concurrent' legislative lists respectively. The former exclusive to the National Assembly or Federal Government and the latter concurrent to the national and state governments. The exclusive legislative list contains 67 items. It is so called because it was only the National Assembly that can make laws in respect of those items, to the exclusion of the State government or legislature. Secondly there is the concurrent legislative list, which itemised twelve matters. In that list, it defines the respective extent of federal and state power in respect of those matters. It is interesting to note that concurrent legislative matters do not necessarily imply that both federal and state Legislature can legislate on the same subjects. The fact of the matter is that in respect of some matters, it is not uncommon to find that either the federal or state has some exclusive powers. For example, the

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[14] See the 2nd schedule to the 1979 constitution.

federal government merely regulates and co-ordinates scientific and technological research but does not have to establish or run such institutes. In the field of University, technology and professional education, including establishment of institutions, that is wholly covered by the Federal government but the states power is only confined to establishment of the institutions only. The same applies to electric power. The general power is vested in the federal government but the state government is restricted to the generation, transmission and distribution of electricity to areas within the states like local government or rural areas not covered by a national grid system.

However, there are matters, which are strictly speaking concurrent as the word is ordinarily understood, which means both the federal and state governments can act over the entire fields. Examples of such areas are: trigometrical, cadastral and topographical surveys and archives. In this regard, in case of conflict of legislation over the same subject matter, the federal legislation is to prevail.

It should be noted that there are some matters, which are not included in the exclusive or concurrent legislative lists and are not mentioned in the body of the constitution. Such

The legislature has no unrestricted power to legislate on every conceivable thing. The legislature is to legislate on matters assigned to it by the constitution. It cannot legislate on matters that it does not have power so to do. Any legislation that is inconsistent with the provision of the constitution will be declared void.[16]

On the issue of Fundamental Rights and Freedoms, eleven of them were guaranteed by the constitution.[17] The legislature were empowered to make laws in respect of private and family life, the right to freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, freedom of movement, that are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality, or public health.[18] The contention here is that the legislature cannot make any legislation to abridge the individuals right to life, dignity of the human person, personal liberty, fair hearing and freedom from discrimination. While they can legislate on the other fundamental rights and freedoms but that also is subject to that being justifiable in a democratic

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16 Section 1 (3) 1979 Constitution, See also A.G. Bendel State V. Attorney General of the Federation & ors. (182) 3 NCLR 3.

17 See SS 30-40 1979 Constitution.

18 See S.41 Ibid.

established by law. The courts, have by this section been vested with power of judicial review of legislation that may be made by the legislature. The subsection further prohibited the legislature from passing any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

In summary, the constitution vested in the legislature the power to make laws for the peace, order and good government within the sphere set out by the constitution. And legislative powers are to be exercised subject to the Constitution. The judiciary is empowered to ensure that the legislature makes laws within its legislative competence.

This discussion will be incomplete without looking at legislative procedure in law making. The intention here is to briefly highlight the general mode of exercising legislative power. This has been provided for in section 54 of the Constitution.

Legislation is commenced by means of a proposed law from the time of introduction into the legislative body through all the various stages in both houses. Black's law dictionary defined a bill as "the form of a proposed law before it is

enacted into law by vote of legislative body. And "Act" is the appropriate term for it after it has been enacted by and passed by the legislature. Under the 1979 constitution a bill may originate from one house and consented by the other. For example a draft legislation called a bill may originate in the senate. If it succeeds in that house then it will be sent to the House of representatives. The latter is usually expected to approve or assent to the same. Who is responsible for initiating the legislation? The constitution seems to be silent on this point. However, by vesting in the president in council with his vice president and ministers responsibility for policy in respect of all matters within the legislative competence of the national assembly, the constitution manifests a clear intention that the executive is to be responsible for the initiation of legislation.[19]

Where a bill has undergone the necessary process in one legislative house and the same is passed, then such a bill will be taken to the other legislative house for deliberation and assent. If the bill receives the assent of that legislative house, it will then be taken to the president. He has thirty days to signify his assent or his refusal. If the

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[19] See section (5(i) and (136) 979 constitution.

president assents to the bill, it then becomes a law or it can be called an Act.

But where the President withholds his assent, the bill should be re-presented to both legislative houses. Each of the houses is expected to re-pass the bill with at least two-thirds majority. With that the bill becomes law and the assent of the president will no longer be required.

It should be noted that the proceedings of each house are regulated by the rules made by it subject to the provisions of the Constitution.[20] Until each house does so, the standing orders of the former senate are made applicable to the proceedings of the Senate and those of the former House of Representatives to the proceedings of the House of Representatives.[21]

4.2.2 THE EXECUTIVE

One of the most outstanding features of the presidential system of government in Nigeria is the unity of the Executive. Unity in this context means the vesting in a single person the exercise of the executive powers of the government. It is

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[20] S. 56 Ibid

[21] S. 270 Ibid

this "singleness" says Nwabueze, "of authority that marks the characteristics attribute of the executive presidency...".[22]

The 1979 constitution provides that there shall be for the federation a president who shall serve as the Head of State, the Chief Executive and Commander of the Armed forces.[23] As a head of state he is not only the head of government alone, but also the entire state which includes the whole territory and people inhabiting, and for the purpose of international relations, his acts are considered to be that of his state. As the chief executive of the Federation, he is personally invested with power to be exercised by him, in his discretion as a personal ruler. Therefore he is personally responsible for decisions and actions of government.

However, this is not to say that the executive discharges the role of that office alone. In other words, the fact that there is a single executive does not mean that he is the only person constitutionally expected to perform that function alone and unaided. He is by the express terms of the constitution permitted to act either directly or through the

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22 Nwabueze B.O. (1982) The Presidential Constitution of Nigeria. C. Hurst and Company London pp. 84-85.

23 See Section 122 (1) and (2) 1979 constitution.

vice-president and ministers or officers in the public service of the federation.[24] It should be noted that where the Vice President or ministers exercise executive authority, they do so on delegated capacity and that is absolutely left to the discretionary powers of the President.[25]

At the level of state government, the Governor of each state serves as the chief executive. Like the President he has the discretion to act through the Deputy Governor or any commissioner.[26]

The functions of the executive are to be found in section 5 of the 1979 constitution. It states that subjects to the provisions of this constitution the executive powers of federation:

a) Shall be vested in the president...

b) Shall extend to the execution and maintenance of this constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being power to make laws.

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24 See section 5(1)(a), 1979 constitution.

25 See section 136(1) 1979 constitution

26 See sections 162(2) and 174 (1), 1979 constitution.

A proper interpretation of section 5 of the 1979 constitution would indicate that executive powers, subject to the constitution are vested in the chief executive. There, therefore, seems little doubt that, that is a wholesome or comprehensive grant of power. This of course serves as the general grant, if it is viewed against the background that nowhere has the term 'executive power' being defined and the term does not lend itself to any precise meaning.[27] As to the general grant of power that has been couched in the terms of the execution and maintenance of (1) the constitution, (2) the laws made by the National Assembly and (3) all matters with respect to which the National Assembly has for the time being power to make laws.

How is the president expected to maintain the constitution? Under the specific powers granted to him by the constitution, he is expected to for instance establish ministries, departments and offices, to appoint and remove ministers and top civil servants; and to assign functions to them, to formulate policies; maintenance of law and order by the use of armed forces to suppress insurrection as the occasion may dictate, to initiate and execute social welfare

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[27] Prof. Nwabueze said that "No other term in the science of government is so much taken for granted and yet so difficult of precise delineation "see Nwabueze B.O. (1974) Presidentialism in Commonwealth Africa. Billing and Sons Ltd, London p.1

and economic development projects, to manage the finances of the country, and to conduct relations with other countries,[28] etc. All these powers enumerated above were provided by the specific constitutional provisions.

To the second limb of section 5(1)(b), that is execution and maintenance of all laws made by the National Assembly, that is the predominant source of presidential power, since there is hardly any law that does not require some sort of action. The legislature may make laws, which require the execution of the president, a case in point, for instance education law. Here it becomes the responsibility of the executive to give life to this law, by building schools, enforcing standards, appointing teachers, paying the teachers' salaries, making provisions for the necessary equipment etc.

It should be noted that the mere passing of a legislation by the legislature without specifically empowering the executive or president to act, is sufficient for him to executive it. In other words no specific grant of authorisation is necessary. For instance, when the legislature enacts a law for the provision of say medical and health facilities, then whether the law specifically vests the

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[28] See SS 138-9, S.136, S.197, S.140, SS74-7 and SS 122(1) and 136(2) 1979 constitution.

president with the power to do so or not the president can proceed with building hospitals, equipping them with beds, medicine, surgical instruments etc provided of course an appropriation has been made by the legislature.

It still stands to be asked whether the president can perform any function that has not been specifically granted him by the constitution or the legislature? In other words, is the president empowered without specific grant of authority by legislation to do all things, perform all functions that are necessary for administering the state, so long as such things or functions are not positively prohibited by law. This brings us to the third limb of section 5(1) (b) to the effect that the president can exercise powers on all matters within legislative competence, whether or not it made law on that subject matter. This by implication means that even without legislative authorisation, the president can act on those matters but only to the extent that they admit of executive action in advance of legislation.

4.2.3 THE JUDICIARY

The judiciary is the third arm of government provided by the constitution. But before going into what constitutes judicial power under the constitution, first the nature of the

power will be examined. Judicial power is vested in the courts for the determination or examining questions presented to it involving rights and liabilities of one or more parties with a view to making decisions on it. The court determines cases or controversies between citizen and citizen or citizen and the state or state and the state. The concept of judicial power is however difficult to define. WINDEYER J in REG V TRADE PRACTICES TRIBUNAL, observed that "judicial power is really amorphous". The concept seems to defy some form of definition. However jurists and judges alike have made attempts to paint a picture of it.[29]

Nwabueze sees it as the "Power which the state exerts in the administration of justice in contradistinction from the power it possesses to make laws an the power of enacting it."[30] By this definition judicial power simply means the power given to a state department for the purpose of administration of justice.

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29 (1970) 123 CLR 394 at 396.

30 Nwabueze B.O. (1977) Judicialism in Common Wealth Africa. Hurst & Company London p.1

In Senator Adesanya V. The president and Another,[31] the definition of Griffith C.J. in Huddert, Parker Ltd V More Head[32] was adopted. It was defined as:

> ".... The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which had power to give a binding and authoritative decision ... is called upon to take action."

Taking this definition into consideration, judicial power can best be understood in the context of a body or tribunal established as governmental department charged with the responsibility of determining issues involving individuals (among themselves) or individual and government or government and government.

A respected scholar[33] has identified seven attributes of judicial power from a range of judicial decisions.[34] These attributes can be summarised as follows:

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31 (1981) 2 NCLR 358 at 392.

32 (1909) 8 CLR 330 at 357.

33 op cit p. 1-2 (Prof Nwabueze)

34 Huddart Parker & Co Ltd V. Moorehead (supra) Rola Co (Australia) Ltd V The Common wealth, the State V. Akainyah Crim App No. 39 of July 1968 (Ghana) Prentis V. Atanti Costine to 213 US 210 at 226

i) The existence of a dispute between two or more parties about some existing legal right; an act, e.g. a contract or industrial award, that only creates new rights by which future conduct is to be regulated cannot therefore be judicial;

ii) A compulsory jurisdiction at the instance of a party to inquire into dispute,

iii) A power to determine authoritatively the facts of the dispute;

iv) A power to determine authoritatively the law relevant to the dispute;

v) A decision arrived at by the application of the relevant law to the facts, and which, by declaring the rights in question, finally dispose of the whole dispute;

vi) This final decision binds the parties in the dispute.

vii) A power to enforce compliance with or obedience to the decision.

Next, focus shall turn to judicial power as it is contained in the 1979 constitution. Judicial power of the federation is vested in the federal courts namely the judicial powers of the states in the courts.[35] These courts namely the Supreme Court, the Court of Appeal, the Federal High Court,

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[35] See S 6(1) & (2) 1979 Constitution.

High Court of a State, Shariah Court of Appeal of a State, and Customary Court of Appeal of a state are regarded as superior courts of record[36] In Abraham Adesanya V. the President (supra) Idigbe J.S.C. said, "Judicial power... is invested in the court for the purpose of determining cases and controversies before it."

What then constitutes judicial powers as provided by the constitution? Section 6(6)(a) of the constitution provides that judicial power "shall extend, notwithstanding anything to the contrary in this constitution to all inherent powers and sanctions of a court of law." These are permanent attributes or qualities of a court of law in contradistinction to those conferred on it by the constitution or statute establishing the court. In other words the powers of the court extend to anything necessary which the court may resort to doing in order to achieve its objective in dispensing justice. For example, the court has an inherent power to punish for contempt of authority. "The power to punish for contempt," says justice field, "is inherent in all courts, its existence is essential to the preservation of order in judicial proceedings and to the enforcement of judgements, orders, and

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[36] See S 6 (3) & (5) c-f 1979 constitution.

writs of the court, and consequently to the due administration of justice."[37]

The scope of judicial power has been determined by the provision of 6(6)(b) of the 1979 constitution. First, the powers extend to all matters between persons, or between government or authority and any person in Nigeria. This means that the judiciary can exercise its power over all persons (Natural or juristic) and government in Nigeria irrespective of any matter whatsoever. Second, the power extends to all proceedings or actions for the determination of any question as to the civil rights and obligations of that person.

Therefore it is only when the civil rights and obligation of the person who invokes the jurisdiction of the court are in issue for determination and when such rights can be presented under some judicial form of proceedings that judicial powers are exercised. Bello J.S.C. (as he then was) had this to say on the construction of section 6(6)(b).

> "It seems to me that upon the construction of the subsection, it is only when the civil rights and obligation of the person, who invokes the jurisdiction of the court, are

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[37] Exparte Robinson (1874) 19 Wall 86 US 505 at 505

> in issue for determination that the judicial power of the courts may be invoked."[38]

4.3.1 CHECKS AND BALANCES

Checks and balances are concepts in the presidential system of government, which provide that there should be a check of one organ by the other i.e. between the executive and legislature with the purpose of balancing their powers respectively. The system of checks and balances is still within the doctrine of separation of powers. In fact, it serves as process of interrelationship between the various organs of the government. Largely it makes every organ of the government to be involved in the process of administering the country and ensuring that none of the organs exceeds or abuses its powers.

However, this does not mean a certain governmental department will usurp the function of another department. The essence of this concept was carefully observed by the court in US Vs Nixon in the following words: "the power properly belonging to the departments, ought not to be directly and completely administered by either of the other department.

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[38] See Abraham Adesanya V President (supra) at 385.

None of them ought to posses, directly or indirectly an overriding influence over the others in the administration of their respective powers."[39]

Moreover, the encroaching nature of power has always been a well-recognised phenomenon in the fashion that the powers are to be exercised. It becomes necessary to find what would be a catalyst and also serve as a restraining force to keep the organs within their own spheres. Undoubtedly this forms the essence of checks and balances that are found in the Nigerian constitution.

Under these checks and balances, one will find that there are certain instances where one department in conjunction with another performs the functions assigned to a particular department. For instance the primary function of the legislature is to make law. But a bill passed by the legislature will not become law except if it is assented to by the executive. The executive assent in this case is seen as performing the role of the legislature.

In appropriate circumstances, the executive may veto a bill passed by the legislature. Even though the word "VETO"

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[39] 418 US 683 (1974)

has not been used in the constitution, nevertheless it has referred to constitutional powers granted to the chief executive to withhold his assent on a bill passed by the legislature. The executive power of veto was based on the need to balance up the powers of the executive against that of the legislature. Where the executive veto's a bill passed by the legislature, it is then returned to the latter. In this circumstance the legislature is expected to re-examine the bill for the purpose of most likely detecting an error. It should be noted that the president's veto may be overridden by a two-thirds majority vote by the national assembly, thereby bringing the bill into law.[40]

On the other hand, the executive is vested with the constitutional powers of appointment of various categories of public officers, but such appointments are subject to confirmation by the legislature. For example, where the president appoints ministers into the Government of the federation such appointment can only take effect, if it is confirmed by the senate. The same thing applies to the following offices:- Members of Civil Service Commission, Electoral Commission, Judicial Service Commissions. Others include: the Auditor General, the Chief Justice of Federation,

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[40] See S.54(5) 1979 constitution.

Justice of The Supreme Court, and president of the court of Appeal[41]. Needless to point out that if the president wishes to remove any of such officers, he may have to seek the approval of the senate, too.

Another area of importance regarding checks and balances has to do with the nation's budget. The constitution provides that the president is to prepare a budget at the beginning of each financial year and submit the same to each of the houses of the National Assembly.[42] The budget is supposed to be passed into appropriation bill by the National assembly as the case may be. If the bill is passed by both houses of the National Assembly, it will be presented to the president to signify his assent or withhold it. To this extent, the executive and legislature are involved in the preparation and making of the nation's budget. Once the appropriation bill or supplementary appropriation bill becomes law or act, the responsibility of implementing the budget lies with the executive. A check has therefore been placed on him by the constitution. The legislature through its public account committee is vested with the power to ensure that monies so

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[41] See section 14(1), 80(1), 2111), 211(2), & 218(1) 1979 constitution.

[42] See section 75(1) 1979 constitution.

appropriated are spent accordingly. All the departments that were involved in expenditure are to have their accounts audited by the Auditor-General. The Account plus the Auditor-General's report have to be examined and reported upon by the Public Accounts committee.[43]

The judiciary by the use of the doctrine of judicial review (which will be discussed later) does check the function of the legislature and the executive. It is the function of the judiciary to interpret laws made by the legislature including the constitution. Any legislation passed by the National Assembly may be subjected to judicial review in order to ensure that it is not contrary to the letters and spirit of the constitution. Likewise the judiciary has the power to review executive actions in order to ensure that it conforms with the constitution.

It must of course be admitted that, in the light of the practice and exigencies of modern government, governmental agencies are multi-functional.[44] Efforts to apply to real life such an intellectually inchoate notion as separation of powers

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[43] See S. 79(3) 1979 constitution.

[44] Nwabueze B.O. Constitutionalism in the Emergent State.

may indeed result in restrictions of governmental authority and function. It was observed by Holmes J. in SPINGER V. GOVT OF PHILLIPHINES ISLAND[45] that, "It does not seem to need argument to show that however we may disguise it by veiling words, we do not and cannot carryout the distinction between legislative and executive actions with mathematical precision and divide the branches into water tight compartments..."

At this juncture, we shall pause to illustrate with the aid of decided cases how the judiciary serves as a check on the legislature given that judicial power should only be exercised by the judiciary separately and independent of legislative power. The question is what legislative acts would amount to usurpation of judicial power. It is trite law that the power of legislature to make law for the peace, order and good government does not entitle it to pass a legislation which usurps the judicial power of the courts, and any such legislative usurpation is ultra-vires the constitution and therefore void.[46]

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45 (1928) 27 US 189 at 200.

46 B.O. Nwabueze (1977) Judiciallime in Commonwealth Africa Hurst * Company London p.193.

In Lakanmi V. A.G (West),[47] the Federal Military Government enacted decree No 45 of 1968. Part A of the schedule to the Decree set out inter alia, the names of particular offices whose forfeiture orders were made. The names of the appellants were included. It was therefore clear what the decree (No 45 of 1968) set out to do and that the object of the legislature was directed to the appellants and their pending appeal. The question has arisen whether this Decree was valid or not. The Supreme Court of Nigeria held that Decree No. 45 of 1968 was ultra-vires and nothing short of legislative judgement, an exercise of judicial power and an usurpation because a separate judicial power vested in the judicature was a cardinal feature of the 1963 constitution. The feature remained even after the military take over of January 1966.

What then constitutes legislative usurpation of judicial powers? For a legislative act to amount to an exercise of judicial power usurpation says Nwabueze, two elements are necessary:

i) It must make a declaration of guilt against a named person in respect of an offence alleged to have been committed by him; and

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47 1971 UILR Vol.1 p.201.

ii) It must impose punishment upon him. By such an act the legislature pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.[48] Examples of legislative judgement is a bill of attainder or a bill of pains and penalties.

Therefore it appears that in the absence of these two elements, a legislative act will not become an exercise of judicial power notwithstanding that it may be directed against a named person.

In KARIAPPER V. WIJESINHA,[49] a Ceylonese legislature enacted a law, which imposed certain disabilities on a named person who had been found guilty of bribery by a commission of inquiry. It vacated the seat in parliament or the local authority of a person so named and disqualified him from being a voter or a candidate for parliament or local authority for

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48 Op cit. p.147 (B.O. Nwabueze)

49 (1967) 2 AER 485

seven years. The judicial committee held that the Act, not an exercise of judicial power because the two elements were absent from the Act and that it contained no declaration of guilt of bribery or any other offence. Parliament did not by the Act make any finding of guilt against the person named therein, that the finding had been made by a commission of inquiry independent of the Act. "The question of guilt or innocence of the person named in the schedule does not arise for the purpose of the Act, and the Act has no bearing on the determination of such a question should it ever arise in any circumstances, secondly the disabilities imposed by the Act are not in all circumstances punishment."[50] They are intended, not really to punish but discipline and "keep pubic life clean for public good."[51]

On the other hand, a different decision was arrived at in the Nigerian case Lakanmi V A.G. (West) (supra) where the deprivation was the confiscation by statute of property of named individuals found guilty of corruption by a tribunal of inquiry. Although confiscation of property savours of punishment, the Act, which imposed it, did not itself pronounce the named individuals of corruption. The Supreme

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50 Ibid p. 491

51 Ibid p. 491

Court nevertheless held the Act invalid and nothing short of legislative judgement, an exercise of powers and therefore usurpation.

It is noteworthy that neither of the two elements necessary to constitute legislative usurpation of judicial power was contained in Lakanmi's case. Perhaps the judiciary was wary of legislative encroaching on its powers.

4.3.2 THE DOCTRINE OF JUDICIAL REVIEW

Keeping the three arms of the government into the sphere ascribed to each by the constitution cannot be maintained without the doctrine of judiciary review. In fact the doctrine is of utmost importance in the operation of the doctrine of separation of powers. It is the safeguard to rule of law or constitutionalism. Each of the organs of the government or individual or organisation must conform to the provision of the constitution. Since the constitution is a supreme legislation, it overrides every action of the legislature or executive that does not conform to it. This viewpoint was expressed in clear and unambiguous words from the wordings of the 1979 constitution. It states, "the constitution is supreme and its provisions shall have binding

force on all authorities and persons, throughout the federal republic of Nigeria."[52] This section is the bedrock of rule of law in Nigeria by providing that the constitution is the supreme law and its provisions bind all authorities and persons.

In order to ensure that supremacy of the constitution is maintained, section 1, subsection 3 of the constitution says that, "if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.

The import of section 1 of the constitution is to subordinate every one, including the three organs of the government to the constitution. To be specific in this regard, the legislature must not make any law that is inconsistent with the provisions of the constitution. If the legislature makes any law that is inconsistent with any of the provisions of the constitution, such law will be void. The efficacy of this provision is maintained through the powers vested in the courts. And that is what is meant by judicially review - the power of the courts to review any law made by the

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52 See section 1 of the 1979 constitution.

legislature and to ensure that it conforms with the letters and spirit of the constitution.

The main concern here is specifically with exercise of legislative power by the legislature, their limitations and the power vested in the judiciary to review it. The judicial power to review legislation passed by the legislature can be seen in section 4(8) of the constitution. It provides that the exercise of legislative power ... shall be subject to the jurisdiction of courts of law and judicial tribunals established by law; and the National Assembly or House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law." The doctrine of judicial review can be traced to this section.

The courts have been empowered to declare any governmental action as unconstitutional and void on any of the following grounds:

i) Where the constitution prescribes a form or manner of enacting a legislation, the courts would strike down any Act not enacted in accordance with the laid down constitutional requirements.

In Williams V. Majekodunmi, it was observed that; "It is trite law that ... if the legislature overstep the bound of its authority or if it did not fulfil certain conditions which are indispensable to give effect to its own legislation then[53] ... its own legislation was ineffective."

In A.G. Bendel State V. A.G. Federation and Ors,[54] where a revenue allocation bill passed separately by the senate and House of Representatives was at variance. In conformity with section 55(2) of the constitution the senate President convened a joint finance committee of the National Assembly to examine the bill and resolve the difference. The committee met and adopted the senate set of amendments. The bill was then passed to the President for assent without referring it to the joint sitting of the National Assembly as required by the constitution, which was assented to. Dissatisfied with the mode and manner, by which the National Assembly had exercised its legislative power, the government of Bendel State challenged the constitutionality of the Act. It was held that by virtue of section 4 (8) of the constitution, the courts have the power and duty to see that there is no

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53 (1962) ALL NLR 41 at 422.

54 (1982) 3 NCLR 3

infraction of the exercise of legislative power, whether procedural or substantive as laid down in the relevant provisions of the constitutions and if there is any infraction, the court will declare any legislation passed in pursuance to it unconstitutional and void. "In my view" said Fatai Williams CJN, "A legislature which operates a federal constitution in which the exercise of legislative power and its limits are clearly set out has no power to ignore the condition of law making that are imposed by the condition which regulate its power to make laws."[55]

ii) Where the court finds that the legislature has for whatever reason exercised its power in excess of its authority or otherwise ultra-vires, it will not hesitate to invalidate it.

In A.G. Bendel State V. A.G. Federation, the notion that the National Assembly once established, has inherent power, derived from the mere fact of its establishment, to delegate or transfer to its joint finance committee established or appointed only for the purpose of resolving differences which have arisen between the two houses of the National Assembly

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[55] Ibid at p.40

during the passage of money bills, its exclusive constitutional power to make law was rejected by the supreme court. Fatai Williams CJN said, "since the legislative process has not been followed in the passing of the Allocation of revenue (Federal Account) Act 1981, the Act to my mind is not a valid law.[56]

iii) The court would declare as null and void any statute, which contravenes any provision of Fundamental Rights in Chapter IV of the constitution. Special powers were conferred on the High court regarding these matters.[57]

In Lakanmi's case (supra), the court observed,

> "We are not in doubt that the federal military Government when it engaged in this exercise, is to clean up a section of the society which has engaged itself in corrupt practices ... But, if in this pursuit, the Government, however well meaning, fell into the error of passing legislation which specifically, in effect, passed judgement and inflicted punishment or in other words eroded the jurisdiction of the court, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts must intervene."[58].

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56 Ibid p. 40

57 See Section 42 1979 constitution.

58 Supra at p.222 See also Shugaba Darman V. Minister of Internal Affairs (1981) 2 NCLR 459

iv) Where the exercise of powers of one organ usurps or violates constitutional powers of the other organ, otherwise contrary to the provisions of the constitution, the court will no doubt invalidate such an action.

In A.G. Ogun State V. A.G. of Federation[59] the Supreme Court held that neither the National Assembly nor the president has the constitutional power to regulate or interfere with the exercise by a state Governor of his executive function. It would also not be competent for a state Assembly or a Governor to regulate or interfere with the power of the president in the exercise of his executive functions. Consequently, the president in the exercise of his power to adopt the public order Act would be acting unconstitutionally if he imposed in the adoption order duties, and obligations on the Governor of a state or other state public officers.

v) Any legislation which purports to limit or oust the jurisdiction of the courts will be declared unconstitutional.

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[59] (1982) 3 NCLR 166. See also Senator Allan & Anor V. A.G. Cross Rivers state* Ors (1982) 3 nclr 18.

In Adamu & Ors V. A.G. Bendel state and Ors,[60] it was held that chieftaincy matters are cognisable in a court of law by virtue of section 4(8) of the constitution, and any other law which purports to oust the jurisdiction of the court in chieftaincy matters is inconsistence with section 4(8) and to that extent void.

4.3.3 SEPARATION OF POWERS UNDER MILITARY RULE

Military rule refers to a system of government established by the members of the armed forces of a country. A regime established by force of arms is considered to be an aberration. Presently, this type of government can be found in developing countries of Africa. Examples of such countries are Nigeria, Uganda, Congo, etc. With the end of the Cold war and demise of Soviet Union, it is hoped that military governments will give way to democratic ones.

In this segment attention will focus on the fate of separation of powers under military rule. Successive Nigerian Military governments have preserved, in form at least, the tripartite structure of the legislature, executive and the judiciary. A supreme military council, made up of only military officers like the Head of State Commander-in-Chief of

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[60] (1982) 3 NCLR 676. See Abubakar Ibrahim V. Thomas Yepui (1980) 1 PLR 491.

the Armed Forces, Chief of General Staff and other Service Chiefs form the legislature. The executive authority lies in the Federal Executive consisting of Military Officers, and civilians as ministers of the federation. The separateness of judiciary is, though as the case of Lakanmi V. A.G West and the Federal Military Government (Supremacy and Enforcement of Powers) decree 1970 show, the judicial power has ceased to be independent and has been submerged in the absolute legislative sovereignty of the Federal Military Government. Kayode Eso JSC succinctly and perfectly described the nature of military rule and separation of power in the following words:

> "There is no doubt that the legislature cum the executive (now merged into one under the military) could enact laws which could deprive the courts of jurisdictions... it did happen after the case of Lakanmi V. A.G. West ... That was the exercise of one jurisdiction (of making laws) in collision with the another jurisdiction of adjucating on laws thus made, however, Unpalatable to jurisprudence. *In other words, there we had a clash of two giants, the Executive cum legislature on the one hand and the judiciary on the other...."*[61] (Emphasis supplied).

How were the legislature and executive merged into one? By the constitution (suspension and modification) decree,[62] the Head of State and Commander in Chief of the Armed Forces was

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61 Military governor of Ondo state V. Adewunmi (1988) 1 NSCC 1136 at 1148

62 Decrees 1961, 1984, 1985 & 1993.

made the head of the Federal Military Government and President (Chairman) of both the Supreme Military Council and the Federal Executive Council. Even though it was earlier stated that the supreme military council was the legislative organ of he Federal Military Government that was not expressly provided for. The constitution (suspension and modification) Decree[63] says that the Federal Military Government shall have power to make laws, and laws are made with the enacting words, the Federal Military Government hereby decrees.' It is however not defined who is or what constitutes the Federal Military government for this purpose. But, whatever it means, it does not mean or include the Federal Executive council.

With regard to executive organ of the Federal Military Government. The powers are exercised by the Federal Executive Council, even though it is formally in the Head of the Federal Military Government.

In actual fact the Federal Executive Council is subject to the control of the head, by virtue of his presidency of it and his authority as the commander-in-chief. Moreover, the executive council is merely an organ (Subordinate) of the

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63 Ibid. Decree No. 1

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Federal Military Government, for members of the Council are appointed by it through the head of state.

In the next segment attention will be focused on the legislative, executive and judicial powers under military rule.

4.3.4 LEGISLATIVE POWER UNDER MILITARY RULE

Legislative power of the Federal Authority was vested in the Federal Military Government. Section 2(1) of the Constitution (suspension and modification) Decree 1984 states that,

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

The import of this provision is that the Federal Military Government was vested with the legislative powers of the Federation on any matter. The words "any matter whatsoever" provide the military government with unlimited legislative power as far as subject matter is concerned. To this extent, one may safely conclude that absolute and unlimited legislative power has been conferred on the Federal Military Government. No doubt, this is in clear derogation from

section 4 of the 1979 constitution, which limited federal legislative power to exclusive and concurrent legislative lists.

Furthermore, the Decree merely vests legislative power on the "Federal military Government." Nowhere in the Decree does it define what that means, at least for the purpose of exercising legislative power. The same wordings were repeated in section 2 of Decree No 1 of 1966, section 2 of Decree No 32 of 1975, and section 2 of Decree 107 of 1993. It is, however, submitted that by necessary implication, it was the supreme military council, or with whatever name it may be called, that exercises that function on behalf of the Federal military Government. Since the function of that body, inter alia includes amendment of the constitution. Justice Niki Tobi echoed this view, too. He said, "Since the Federal Military Government qua government lacks the physical capacity to make laws, the legal entity of the government can do so, through any of its agents. And so that is how the supreme military council came into the law-making scene. And that also explains the law making power of its successor - the AFRC."[64]

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[64] See 1990 Jus Vol. 1 and 4.

Therefore in practice, it is the supreme Military Council, or Armed Forces Ruling or Provisional Ruling Council that exercises the law making power of the Federal Military Government.

Legislative powers of the Federal and State Government are exercised by means of Decrees and Edicts respectively. A Decree comes into being if it is signed by the Head of Federal Military Government, while that of an edict if it is signed by the Governor of a State.[65]

Supposing the Head of the Federal Military Government promulgates a Decree without tabling the issue before the supreme Military Council, what becomes of it? In other words, what is the validity of a Decree signed by the Head of State without the members of the Supreme Military Council ever knowing of it?

The answer would seem that the Decree will be considered as duly promulgated, for neither the members of the supreme military council nor any member of the general public can question the validity of any Decree signed by the Head of the Federal Military Government. Moreover the proceedings of the Military government are usually held in secret. In most

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[65] See S. 3(1) Constitution (Suspension and Modification) Decree 1984.

cases, except where the supreme military Council discloses what it deliberated on, the discussions in such council is a matter held secret. Needless to state that at state level, there is nothing like or equivalent to the supreme military council. The Governor of a state is the sole legislature. Similarly, the Head of Sate may be likened to the State Governor at least in this regard.

In addition, there is no court vested with the power to entertain any question as to the validity of any Decree or Edict. The court's jurisdiction in respect of entertaining any question as to the validity of any Decree or Edict has been expressly ousted. Section 5 of Constitution (Suspension and modification) Decree 1984 states that:

> "No question as to the validity of this or any other Decree or edict shall be entertained by any court of law in Nigeria".

Ouster of the Courts jurisdiction as provided above remains to be a vexed issued before the Nigerian courts. It is not uncommon for actions to be brought before the courts, directly or indirectly challenging the validity of Decrees or Edicts or the Competency of the Government to promulgate such Decrees.

In A.G. Mid-West V. ESSI,[66] the plaintiff/respondent was the proprietor of Essi College, Warri, which the Government of Midwestern State purported to transfer and vest in the state by virtue of the Education Edict 1972, section 39. The plaintiff claimed before the Warri High Court an order that the purported transfer and vesting of Essi Collage, Warri to the Government of Midwestern State was invalid.

The issue for determination in this case among other things, was whether a court in Nigeria has the jurisdiction or power to declare a Decree invalid, or question the competence of any of the Government of the Federation to promulgate it.

It was held inter alia that:

(1) No court in the federation has any jurisdiction or power to declare a Decree invalid (ii) No court in the federation has any jurisdiction or power to question, or pronounce upon, the competence of any of the Governments of the Federation to promulgate a Decree or an Edict.

The Federal Military Government has jealously guarded its absolute powers to make laws for the country and to preserve its unquestionable authority. This was accomplished under

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66 (1997) NSCC 178

Decree No. 13 of 1984 otherwise called the Federal military Government (Supremacy and Enforcement of Powers) Decree 1984. The preamble to the Decree reads:-

> "AND WHEREAS by section 5 of the said constitution (suspension an modification) Decree 1984, no question as to the validity of any Decree or Edict ... shall be entertained by any Court of law in Nigeria."

By section 1(1) of Decree 13 of 1984 the preamble was made part of the Decree. Still, as if this was not enough the Military Government further renders null and void any suit pending before any court of law challenging the competence of the Federal or State Military Government to make any Decree or Edict.[67]

In Ekpo V. Calabar Local Government,[68] the Court of Appeal said that, by virtue of the constitution (suspension and modification (Amendment) Decree No. 1 of 1984 and the Federal military Government (supremacy and Enforcement of powers decree No. 13 of 1984, no person can challenge the validity of a Decree.

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[67] See S1(1)(b)(1) Federal Military Government (Supremacy and Enforcement) Powers Decree 1984.

[68] (1996) 10NWLR PT478 at 322

An important question for consideration is what happens where an edict is consistent with the provision of a Decree? The Decree is a superior legislation over an edict, therefore where an edict is inconsistent with a provision of a Decree, such an edict will become null and void to the extent of its inconsistency. Regrettably, section 5 of the constitution (Suspension and Modification) Decree did not make provision for the resolution of such conflict. Moreover, the enabling Decrees are not also helpful in this regard. The attitude of the courts in this matter is to assume jurisdiction, and inquire into whether or not an edict is in conflict with a Decree.

In NZERIBE V. A.G. IMO STATE,[69] the court of appeal per ONALAJA JCA said,

> "Where the Federal Government and the State Government have powers or concurrent powers to legislate on the same subject matter, the Federal Act or Decree supersedes the laws or Edict of the State. Where there is a conflict between the Act or Decree on the same subject matter and the law or edict will become void to the extent of the inconsistency."

In Adeyemi & Ors. V. A.G. Oyo state and Ors.[70] the Supreme Court had to determine whether there was a distinction between

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69 (1996) 10 NWLR PT 488 P 322 at 334

70 (1984) NSCE Vol. 15 p. 397 at 405. See PEENOK INVESTMENT LTD (1982) 12 SCI, See Uwaifo's Case (1982) 7 SC 12 124 at 281.

the power to challenge the legal capacity or power of the authorities to make an Edict or Decree and the power to inquire into the validity of such Edict or Decree.

The court held per Nnamani J.S.C. that, ".... While the Supreme Court would not challenge the legal capacity or power of the authorities to make an edict or Decree it had always declared its undoubted power to inquire into whether an edict is inconsistent with the provisions of the constitution of the Federation."

An Edict, which is inconsistent with a provision of the unsuspended provision of the 1979 constitution, will equally be declared void.

In Labiyi V. Anretiola,[71] the Supreme Court was called upon to decide whether the High court can exercise jurisdiction to rule upon the effect of the provision of an edict which is inconsistent with a provision of the *constitution of the Federal Republic. It held that it is* clear on reading of section 2(1) - (4) of Decree No. 1 of 1984, particularly subsection (3) that the legislative powers

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[71] (1992) 23 NSCC (PT3) 120.

of the Military Governor of a State is subject to prior consent of the Federal Military Government with respect to any matter in the concurrent legislative powers set out in the second column of part 1 of the second schedule of the constitution; and to the constitution of the Federal Republic of Nigeria. That any law validly made by the Military Governor of a state is subject to provision of the 1979 constitution. Therefore the Edict made by the State Governor in contravention of the provision of 1979 constitution was accordingly declared void.

Thus, such has been the extent of legislative power exercised by the Federal Military Government through the Supreme Military Council or by whatever name it may be called.

The next important power for consideration is the Executive of the Federal Military Government.

4.3.5 EXECUTIVE POWER UNDER MILITARY RULE

Executive Authority of the Federal Republic has been vested in the Head of the Federal military Government.[72] while that of a state was vested in the Military Governor of that

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[72] See S.6(1) Decree No 1 1984 and Decree 107, 1993

state. Such authority may be exercised by himself or through persons or authorities subordinate to him.[73] In other words there is provision for delegation of power or authority in this regard. The Head of the Federal military Government is to exercise his executive authority in consultation with the Supreme military Council. But the issue as to whether or not such consultation takes place is not to be inquired into in any court of law. It therefore means that the Head of State has discretionary powers as to whether or not to consult the supreme military council when exercising his executive powers.

The executive authority of the Federal military Government extends to the execution and maintenance of the constitution of the Federal Republic of Nigeria as modified and supplemented by Decree No. 1 of 1984 or any other Decree, and to all other matters whatsoever throughout Nigeria.[74] One may, however ask whether there is any constitution under military rule? Constitution as supreme law of a country or its highest Grundnorm does not exist under military government, because under military rule, the Federal military Government has absolute powers to do as it likes. Its powers

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73 See S.6(3) Decree No 1 1984 and Decree 107, 1993

74 See S.6(5) Decree No 1, 1984 and Decree 107 1993

are unlimited, not subject to the letters of any constitution or any other law for that matter. Any provision of the constitution in existence under military rule is at the sufferance of the Military government and may be suspended at will. To this extent, the use of the word constitution under military rule is a misnomer, but its continued usage is perhaps for lack of a better term.

There is also the Federal Executive Council charged with the responsibility for determining the general policy of the Federal military Government within the framework to be determined by the Supreme Military Council.[75] The Head of the Federal Military Government is empowered to delegate any function assigned to him to the Federal Executive Council or to any other authority in Nigeria, but the delegatory powers does not extend to signing Decrees.[76] Delegatory powers have also been vested on the Federal Executive Council.[77] It may delegate any function conferred on it by any law to any of its members or to any officer in the public service of the Federation.

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75 See S(11) Decree N 1, 1984 and S.12 Decree 107, 1993

76 See S.12(1) Decree N 1, 1984 and S.13 (1) Decree 107, 1993

77 See S.12 (4) Decree N 1, 1984 and S.13 (4) Decree 107, 1993

A lot of wisdom exists in the delegation of powers conferred to the Executive branch. Various ministries and parastatals exist under the control of the Executive department. Examples of such ministries are; Information, Police, Internal Affairs, External Affairs, Mines and Power to mention but a few. To limit the exercise of this power to the Head of Military Government and his executive council without provision for delegation of authority will no doubt cripple it, not to make it impossible to reasonably exercise its due function. Delegation of powers today forms part of the exigencies of modern government.

4.3.6 JUDICIAL POWER UNDER MILITARY RULE

Curiously enough, the Military Government did not see it necessary to temper with judicial power under the constitution, as it had done with regard to the legislative and executive powers. Judicial power was not contained in the constitution (suspension and modification) Decree or any other Decree of the Federal Military Government. In fact the existence of the Judiciary cum judicial power has been left untouched in sections of the unsuspended provisions of the 1979 constitution. The judicial powers of the Federation are

vested in the courts.[78] Chapter VII of the 1979 Constitution contains the judicature. Under this chapter the court system was outlined.

However, the only significant alteration introduced by the Federal Military Government on the judicature is the establishment of the Advisory Judicial Committee.[79] This body replaced the Federal and State Judicial Service Commissions. Distinction between appointments of State and Federal Judges were abolished by the new system. The Supreme Military Council should make appointments of judges to the Federal and State Judiciary on the Advise of the Advisory Judicial Committee.

The Advisory judicial committee advises the supreme military council on the following matters:[80]

a) The appointment of the Justices of the Court of Appeal

b) The appointment of the Chief Judge and Judges of the Federal High Court, the Chief Judges and Judges of the High Courts of the State, and of the Federal Capital

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78 See Section 6, 1979 constitution.

79 S.14(1) Decree No. 1984, & S.15(1) Decree 107, 1993.

80 S.14(3) Decree No. 1 1984, & S.15(3) Decree 107, 1993

Territory, the Grand Khadi and other Khadis of the Shariah Courts of Appeal of the States and the President and other judges of Customary Courts of Appeal of the states; and

c) Any matter pertaining to the judiciary that may referred to the committee by the Supreme Military Council.

At first glance, it appears that there is a lacuna in both Decrees No. 1 of 1984 and Decree 107 of 1993 in that neither of them provides, the means of appointment of Supreme Court justices and the chief justice of the Federation. It is the view of this writer that it is a very important omission, because the Supreme Court is the highest court of the country and its justices are the highest judicial officers. Therefore, it is submitted that Decree 107 of 1993 should be amended to include the procedure for appointment of the justices of the Supreme Court including the chief justice of the Federation. Even though one is not oblivious of the fact that in practice such appointments are done by the Head of the Federal Military Government in consultation with the members of the Supreme Military Council.

What would be the effect of the decision of the Advisory Judicial committee to the supreme military council? Well, as

the name of the committee implies, its functions are simply advisory. They are only to advise or, better put, make recommendation to the Supreme Military Council, first for the appointment of certain judicial officers and secondly to advise the council on judicial matters to which the council may seek their advice. That being so the Supreme Military council is not duty bound to accept any recommendation or advice given to it by the judicial advisory committee. The supreme military council as the highest ruling body in the country may on its own motion or discretion appoint any judicial officer or take any measure on judicial matters without consulting the Advisory judicial committee. Invariably, they may accept or reject any advice or recommendation given to it by the Advisory judicial committee.

What has so far been the relationship between the judiciary and the Federal Military Government?

In the history of Military rule in Nigeria, the first encounter between the judiciary and the Military Government was in the case of Lakanmi Vs. A.G. West (supra). The then Military Government was dissatisfied with the decision of the Supreme Court. It reacted by promulgating the Federal

Military Government (supremacy and Enforcement of (Powers) Decree 1970, which in effect nullified the Supreme Court's decision in that case. The Decree further established the supremacy of the Federal Military Government, conferring it with absolute and superior powers over all persons or authorities including the judiciary in Nigeria. Subsequent Military regimes have also taken solace in similar Decree.[81] Thus relegating the judiciary to a lower status than it had under the constitution.

Having subordinated the judiciary to the Supreme power of the Military Government at first instance, it went further to promulgate some Decrees and in accordance with their whims inserted exclusion clauses. This tends to preclude the courts from ever entertaining the subject matter covered by that Decree. That serves as a kind of gag order on the courts. Court's jurisdictions are usually ousted by such clauses. The courts have in a number of cases religiously followed or observed those exclusion clauses.

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81 See the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984 and 1993 respectively.

In the case of A.G. Lagos state V. Hon Justice Dosunmu,[82] the respondent challenged edict No. 3 of 1976 and the validity of Decree No. 17 of 1977 which further affirmed the provisions of the Edict. The Decree precluded any court of law from inquiring into the validity of the 1976 Edict and into any act done under the Edict or order such as the forfeiture of plot No. 272 registered as L07307 in dispute.

The court held that the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the superior court by that which specifically appears to be so. It is true that the powers of the courts are great, they are limited by any ouster clause. "In these days" says Oputa JSC, "that a Decree has supremacy even over the constitution... any clear and specific ouster in a Decree as in section 2 (1)(a) of Decree No. 17 of 1977 has to be seriously considered and religiously obeyed." He then advised that "the best advice is that given by Rigby L.J. in Re-Watkins[83] that we ought not overstep our jurisdiction because we think that it might be advantageous so to do."[84]

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82 (1989) 20 NSCC (PT 2) P. 545

83 (1869) LRCD P. 339

84 (1989) 20 NSCC (PT2) P.545 at 560. See also Osadebey V. A.G. Bendel State (1991) 22 NSCC (PTI) P.138

A significant impact occasioned by use of some ouster clauses has the overall affect of doing away with the doctrine of judicial review, since the Military Government has from the on set made Decrees declaring that it has absolute powers and its powers (legislative and Executive) are not subject to the jurisdiction of any court of law in Nigeria.

Another disturbing aspect in the relationship between the military government and the judiciary is the refusal of the former to obey legitimate court orders. Refusal of the Military Government to obey court orders tantamount to erosion of judicial authority. This further confirms that under Military rule the judiciary is not recognised as an arm of the Government. Professor Chukkol has rightly observed that it is more disturbing to realise that, "even within the context of crass legalism of a military administration, the judiciary and the administration of justice is seriously handicapped."[85] This lamentation was made against the background that judgements of courts could not be enforced, especially where

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[85] See K.S. Chukkol on Enforcement of Judgement Against Public Officers and Institutions and the Rule of Law in (Ed) LAW, JUSTICE AND THE NIGERIAN SOCIETY Nigerian Institute of Advanced Legal Studies, Lagos p.60 at 63

parties against whom the judgements given were government institutions or highly placed public figures in the society.

A locus classics on this point is Governor of Lagos State V. Ojukwu,[86] while the substantive issue was pending in the High Court of Lagos State, the respondent/Applicant sought for and obtained a ruling against the Lagos State Government from the court of Appeal to the effect that he should be restored to his residence a No. 29 Queens Drive, Ekoyi Lagos and had the Lagos State Government or its agents restrained from evicting him from the said property. The Lagos state government without an order of court forcibly ejected Chief Ojukwu. While in defiance of carrying the order of court of Appeal, the Lagos State Government Sought for an order of the Supreme Court staying the execution of the order of court of Appeal pending the determination of the Appeal in the Supreme Court.

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In dismissing the Appeal the Supreme Court said that it is a very serious matter for anyone to flout a positive order of court and proceed to taunt the court further by seeking a

[86] (1986) 1 NWLR (pt 18) 621

remedy in a Higher Court while still in contempt of the lower court. Uwais J.S.C. (as he then was) said,

> "I think I should still stress that it is a matter of grave concern that the Military Government of Lagos State should be seen to disregard a lawful order issued by a court of law. If Governments treat court order with levity and contempt the confidence of the citizens in the court will be seriously eroded and the effects of that will be the beginning of anarchy in place of rule of law. If anyone should be wary of orders of court it is the authorities, for they, more than any one else, need the application of the rule of law to govern properly and effectively."[87]

Finally, successive military governments are known to have established tribunals (special or military) to take over the administration of justice in certain circumstances. Examples of such tribunals are: Recovery of Property (Special Military Tribunals) Decree 1984, Karibi-Whyte Civil Disturbances Tribunal of 1987 and Justice I.N Auta Civil Disturbances Tribunal 1995 to mention but a few.

Establishments of tribunals per se are not the problem, but it is the way and manner the Military Government has gone about it. For example under special tribunal (miscellaneous offenses) Decree 1984, it empowered the Head of the Federal

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87 Ibid at p.639

Military Government to establish the tribunal and determine its composition, to consist of a serving judicial officer, (as chairman) and three members of the armed forces and a police officer. The decision of the tribunal is not subject of Appeal to the regular courts, but goes to the supreme military council for confirmation, variation or disallowance.[88] The point here is that, it seems that the Federal Military Government has lost confidence in the judicial system to create a system of tribunal whereby the Military is in full control. This is evident from the proliferation of these tribunals and using serving or retired Military Officers as members. Apparently they have taken away the traditional role of the courts.

On the other hand, the Military governments are not entirely to be blamed for that, taking into consideration the protracted delay in the judicial system whereby the adage of justice delayed is justice denied has fallen squarely on our courts. Cases usually take along time to be disposed of in our regular courts. Some cases take up to five years or more to be disposed of.

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[88] Sections 1(1) & (2), 2(2) (a) &(b) special Tribunal (Miscellaneous Offence) Decree No. 20 of 1984

It is the view of this writer that the transfer of judicial function to the special and military tribunals cannot serve as a solution to the problems facing the courts. Rather than take an escapist solution in the tribunals, increasing the number of courts and equipping them, improving the condition of service of the judicial officers and reviewing the system of administration of justice will go along way in minimising the problems.

4.3.6 **CONCLUSION**

From the foregoing discussion, the doctrine of separation of powers has been thoroughly discussed. It has been firmly established both in principle and practice under the 1979 constitution.

But with the coming of military rule in Nigeria, the doctrine of separation of powers has been thrown overboard. The above analysis has proven that the doctrine is only operative in a democratic government. The overthrow of the constitution by the Military saw the demise of the doctrine. First, by the constitution (Suspension and Modification) Decree, the Executive and Legislative powers were fused in one body. Second, the judicial power though left intact as a constitutional provision, but in actual fact and practice, the

Military Government had by use of Decrees eroded its powers almost to extinction. Beginning with ouster clauses, establishment of special and military tribunals to, in some cases, legislative judgement. Worse still, its refusal in some cases to obey court orders.

Therefore, it is submitted that the doctrine of separation of powers suffered a deathblow in the hands of the Military Government.

CHAPTER V

5.0 HUMAN RIGHTS UNDER MILITARY RULE

The collective term Human Rights is very difficult to define. However, if one must define it, then it will be better to begin with the definition of Right. Right has been generally defined "as power of free action." That means the power, which an individual has to freely exercise his volition. As a juristic term it connotes "a capacity residing in one man of controlling, with the assent and assistance of the state the actions of others." These Rights are of course exercised by Human beings. That perhaps explains why it is defined as "the primal Rights pertaining to men are enjoyed by Human beings purely as such, being grounded in personality, and existing antecedently to their recognition by positive law."[1]

Since this right is enjoyed by Human beings alone excluding any other creatures, it can rightly be called Human Rights. The Rights are essentially that of Human beings and no one else. They are the inherent or inalienable Rights of men which they cannot be deprived or divested of. Therefore, they are inviolable. Inviolable in the sense that no law or

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[1] See Black's law Dictionary. Six Edition Centennial edition (1891 - 1991).

administrative order or action can abridge or take them away. Human Rights are recognised accepted and bind the state, most especially the legislature and the executive. The legislature in exercise of their legislative powers can not pass legislation to abrogate the rights. For example, the legislature cannot pass legislation to take away the life of any Human being. So also the Executive cannot in exercise of its executive power direct that anybody's life be taken away, except of course through the due process of law. Moreover in cases of breach of any of the fundamental rights, remedies are already provided for.

In modern times, the state is very powerful. It controls all coercive powers. These state powers are vested in individuals. There is the need to control the powers of the state lest they may be abused. Therefore, Human Rights are essentially limitations on the state actions. They are used to measure state conduct. In other words, men are born with certain inalienable Rights and so have to be protected against the might of the state. According to Laski,

> "... If in any state there is a body of men who posses unlimited political power, those over whom they rule can never be free. For the one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who posses it. They

> are always tempted to impose their canon of good upon others, and, in the end, they assume that the good of the community depends upon the continuance of their power. Liberty always demands a limitation of political authority, and it is never attained unless the rulers of state can, where necessary, be called to account. That is why Pericles insisted that the secret of liberty is courage."[2]

Human Rights otherwise sometimes called Natural Rights are accorded superior status in modern times. It has been elevated to the status of Groundnorm of the society. In fact, these Rights are fundamental by virtue of the fact that they are incorporated into the Constitution of a given country. Fundamental Rights, says Perrott are "such Rights when they are expressed in, or guaranteed by laws which are basic or pre-eminent laws of the legal system in question," and he added "for example Rights which are specified in a written Constitution, or in judgement of a superior court interpreting the Constitution, or in enactment of a legislature designed to render the Constitution more specific in a certain area."[3]

Thus it is obvious that Human Rights are very important rights, and for that reason they are regarded as forming part of the Groundnorm of a country. By incorporating them into

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2 Harold Laski, (1961) Liberty in the Modern State pp.42-43

3 J.W. Bridge (1973) Fundamental Rights Sweet and Maxwell London p.8.

Constitutional provisions, it becomes difficult if not impossible for the legislature to abridge it by legislation or for the executive to impinge it.

The oldest Constitutional document, which incorporated the Fundamental Rights, was the Magna Carter of Britain. Lord Denning did not mince words in describing it as "the most important Constitutional document we have ever had"[4] Thus it was the fount of English liberty. The Magna Carter as is known today took its final form in 1225.[5]

Another of the older Constitution, which contained the bill of Rights, is that of the United States of America. Even though it was not in the original Constitution of 1787, it was incorporated by amendment.[6] It should be noted that there are other European countries whose Constitutions contained the bill of Rights.

At the international level, that is beyond the incorporation of bill of Rights into the Constitutions of some countries, Human Rights has been accorded recognition and acceptance. In fact it was affirmed in the charter of the

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4 See Denning (1981) The Family Story. Butterworth p.228

5 See the Statute Rolls of England.

6 See the Constitution of the United States 1791.

United Nations, which imposes the obligation on all member states to promote its development. This was achieved with the United Nation Universal Declaration of Human Rights in 1948, otherwise called the United Nations Charter on Human Rights. Its preamble states inter-alia "to affirm faith in fundamental Human Rights, in the dignity and worth of the Human person, in the equal Rights of men and women." In order to ensure that the member states conform to this lofty ideals, the United Nations has set up a commission on Human Rights charged with the responsibility of monitoring its implementation by member states.

Complementary to the role of the United Nations on Human Rights, there are other regional and sub-regional organisations involved in promoting the same ideals. For example, there is the European convention on Human Rights supported along with European commission on Human Rights. Similarly there is the African charter on Human and peoples Rights.

It is important to state that at the time the members of the international community were gearing up towards promoting Human Rights, most of the African countries were under colonial subjugation. But as time went on, as soon as they

were granted independence, they were also incorporating bill of Rights into their Constitutions.

Nigeria had at the time of her independence incorporated Human Rights into the 1960 Constitution. Thus the inclusion of fundamental Rights into Nigerian Constitutions (1960 and 1963) was said to have originated from the minorities commission headed by Sir Henry Willinsk appointed by the British Government in 1957 to look into the fears of the minorities. It was the view of the committee that one of the methods of allaying the fears of the minorities was the Constitutional guarantee of fundamental rights. The committee observed as follows:

> "Provisions of this kind (i.e. Human Rights) in the Constitution are difficult to interpret, nevertheless, we think they should be inserted. Their presence defines beliefs wide-spreading among democratic countries and provided a standard to which appeal may be made by those whose Rights are infringed. A government determine to abandon democratic course will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of government on individual rights."[7]

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[7] Minorities Commission Report CMND 505 (1958) p.97

For certain no one doubts that the minorities commission muted the idea of incorporating a bill of Right into the Nigerian independence Constitution. But it will be wrong to assume that it was so incorporated to ally the fears of some certain minorities within the Nigerian federation. One may ask: Is Human Right in the Nigerian Constitution intended only for the protection of the fears (real or imaginary) of the so-called minorities? Or does it mean that some groups of persons are entitled to Human Rights than others? Human Rights as was stated earlier belongs to all members of the community of Human Race, irrespective of their beliefs, colour, geographical location or ethnic group.

Furthermore the issue of Human Rights violation has nothing to do with minority or majority in government. For example is the government of the former minority white apartheid of South Africa where they oppressed the black majority. Currently the Human Rights violations of Hutu majority by Tutsi minority in Rwanda in East Africa, which has culminated into a bloody civil war causing the death of over 500,000 lives, is also a case in point.

Finally on this point the ruling class in Nigeria may not necessarily come from the so-called majority, and violation of

a person's Right is not dependent on whether or not a person belongs to a majority or minority group. The conclusion therefore is that it was a milestone in the Constitutional development of Nigeria to have incorporated a bill of Right into the independence Constitution. All the previous Constitutions never had a bill of right. Moreover the inclusion of the bill of Rights into the Constitution will provide the minority groups with some protection or that they have basis to complain if members of the majority group in power violates their fundamental Rights. And the bill of right was meant for the protection of persons citizens and aliens alike.

The subsequent Constitution, which followed the 1960/63 Constitutions incorporated Human Rights in chapter four, that is, the 1979 Constitution. In this chapter an examination of the Nigerian bill of Rights as contained in chapter four of the Constitution will be attempted, and to further examine the extent to which these Rights are preserved and protected.

5.1 FUNDAMENTAL RIGHTS IN THE 1979 CONSTITUTION

In September 1975 the Constitution drafting committee was set up under the chairmanship of Chief F.R.A. Williams and assigned with the responsibility for producing a Draft

Constitution for Nigeria for submission to the Supreme Military Council. The C.D.C had to deliberate among other things, on Fundamental rights. In their deliberation they had to determine what Rights they will recommend as fundamental Rights in the Constitution. They were of the view that fundamental Rights are natural rights, vested in every individual and to which he is entitled without any obligation or duty on the part of the government to provide facilities for their enjoyment. Moreover such Rights imposes limitations on executive, legislative or judicial power of the government and are accordingly easily justiciable. Fundamental Rights perceived from this view point, the committee recommended the following rights: (1) Right to life; (2) Right to dignity of Human person; (3) Right to personal liberty; (4) Right to fair hearing; (5) Right to private and family life; (6) Right to freedom of thought, conscience and Religion; (7) Right to freedom of expression and the press; (8) Right to peaceful assembly and association; (9) Right to freedom of movement; (10) Right to freedom from discrimination; (11) Right to property.[8]

All these rights were upheld as forming the chapter IV on Fundamental Rights in the 1979 Constitution. Except that the

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[8] See Report of the Constitution Drafting Committee Containing the Draft Constitution. Vol. I SS 26-36.

Right to property as recommended by the C.D.C. was modified. Section 40 of the 1979 Constitution merely prohibits compulsory acquisition of individual property except in a manner set out in that section. Fundamental Right provisions under the 1979 Constitution will be discussed later.

It is interesting to know that some members of the C.D.C. were of the opinion that the aforementioned rights were not complete without inclusion of certain other Rights such as (a) freedom of the press; (b) the Right to equal pay for equal work (c) the Right to education, (d) the Right to free health and medical services (e) the Right to permanent employment in any of the public services of the Federation; (f) the Right to full employment and security of employment; (g) the Right to suitable and adequate shelter; (h) the Right to suitable and adequate food; (i) the Right to a minimum living wage (j) the Right to adequate and self-fulfilling leisure and (k) the Right to unemployment benefit.

All these Rights for want of a better term the committee described them as economic and social Right. The committee (C.D.C) rightly observed that the enjoyment of these Rights depends upon the availability of resources and in the final analysis it relates to the obligation or duty of the

government to provide the facilities. From this observation the committee attempted to distinguish fundamental Rights from these economic and social Right. They rightly observed thus:

"Most of the fundamental Rights are in a sense natural Rights vested in every individual and to which he is entitled without any obligation or duty on the part of the government to provide facilities for the enjoyment. Thus, the Right to freedom of expression or to liberty of a person are Right which do not depend upon the provision of any facilities by the government... by contrast economic and social "rights" are different... to insist that the Right to freedom of expression is the same kind of "right" as the "right" to free medical facilities and can be treated alike in a Constitutional document is, the majority of us feel, basically unsound."[9]

Thus the CDC recommended that those economic and social Right should not be justiciable but are to be regarded as fundamental objectives and Directive principles of State policy. This recommendation was upheld and form part of chapter II of the 1979 Constitution. Thus fundamental Rights provisions came to form Chapter IV of the 1979 Constitution.

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[9] See Report of the Constitution Drafting Committee containing the Draft constitution (1976) Vol. 1 p. xvi.

At this juncture, attention will now focus on the fundamental Right provisions.

5.1.1 RIGHT TO LIFE

The most precious, if not the most important of all the fundamental Right, is undoubtedly the Right to life. It is the Right of a Human being to existence. The Right to live. In fact it is the foundation for the realisation of a person's objective in life and enjoyment of other rights. Therefore every Human being must have the Right to life. S 30(1) of the 1979 Constitution guarantees every person the Right to life However, a person could be deprived of his life in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. The question is can a person be deprived of his life if the was found guilty of a criminal offence by a foreign court? For example X a Nigerian was tried for a criminal offence in Ghana and was found guilty. A Ghanaian court sentenced X to death. Can the order or sentence of the Ghanaian court be carried out in Nigeria?

It is view of this writer that right to life is a universally accepted right for every Human being. There are also circumstances under which a person may lose such Right.

Unfortunately, section 30(1) did not spelt out the circumstances under which a court may pass a death sentence. We think that if the circumstances are spelt out by the Nigerian Constitution, a Nigerian tried and convicted for a criminal offence in any foreign country in which death is the penalty, nothing will prevent the carrying out of such a sentence in Nigeria.

But if by way of an example drug trafficking in United States carries the death penalty and in Nigeria it carries life imprisonment. Certainly one does not see how the death sentence passed on a Nigerian by the United State court can be carried out in Nigeria since if the case were to be tried in Nigeria such a person was likely to serve a life sentence in jail. On the other hand if the penalty in both countries carries the death penalty, one does not see any reason why such a sentence passed by a foreign court should not be enforced in Nigeria.

Furthermore, subsection 2 of section 30 enumerates other circumstances by which a person may lose his life without containing section 30(1). The circumstances are:-

a) For the defence of any person from unlawful violence or for the defence of property;

b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

c) For the purpose of suppressing a riot or mutiny.

Any person whose Right to life is threaten could apply to the court of law to enforce his Right to life guaranteed him under the Constitution. The procedure and circumstance for enforcing this Right has been outlined by the court.

In Chief Isagba V. Ashiedu,[10] Unurhoro J examined the scope of section 30 and said; "it is my view that application to enforce fundamental Rights under the Constitution and particularly under section 30(1) of the Constitution, which seeks to protect Human life, needs to be viewed with great concern. Indeed, the allegation made in support of such applications must always be grave and therefore, it call for substantial facts to ground the order sought. To take the life of any person in circumstances not permitted by law, is a criminal act and indeed, any conspiracy or act directed towards the fulfilment of the said objective for the purpose of taking the life of anyone, is also a criminal act."

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10 (1982)3 NCLR 784 at 801

He went to state the procedure for applying to the court for the purpose of enforcing the provision of section 30.

> "I make bold to state that for the enforcement of fundamental Right under section 30(1), must be accompanied by an affidavit showing real threat and danger to life and the facts disclosed must be something more than words and it must be something near physical attack or violence and in the case of mere words, a strong and substantial affidavit evidence would be needed. The affidavit must disclose facts amounting to real danger to life and this must be to the satisfaction of the court."[11]

5.1.2 RIGHT TO DIGNITY OF HUMAN PERSON

Section 31(1) of the Constitution provide for Right to dignity of Human person. It says "Every individual is entitled to respect for the dignity of his person. It prohibits torture, inhuman or degrading treatment, slavery or servitude and compulsory labour.

In Wabili V. C.O.P[12] the court held that detention under deplorable prison condition constitute an infringement of the fundamental Right of every man to respect for the dignity of his person.

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11 Ibid at 803.

12 (1985) 6 NLLR 424

However, the prohibition against forced labour or compulsory labour is not absolute, because there are certain exceptions provided by the section. Examples of such are:- any labour required in consequence of the sentence or order of a court or such labour required of the armed forces or police force, or any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community and so on.

Aguda is of the opinion that any form of corporal punishment is contrary to section 31 of the Constitution. He said "I make bold to suggest that any form of corporal punishment inflicted on an adult should be held contrary to the provision of the 1979 Constitution under consideration. I take the infliction of corporal punishment on any adult is degrading and can only be tolerated in a barbaric society."[13]

Going by the provision of section 31 particularly subsection (1)(a) prohibiting torture or inhuman or degrading treatment of any person, one may safely assert that any form of torture as a method of interrogation by members of the police force is unconstitutional.[14] But the problem here is

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13 Aguda (1983) The Judiciary in the Government of Nigeria. New Horn press Ibadan p. 46-47.

14 The police use some sophisticated means of torture against suspects like beating with quash, putting severe cold water on ones knees, legs, piecing one's ankle with a nail to mention but a few.

that such activities are done in secret police interrogation centres with no witness at all. That makes it difficult for the victims to assert their Right guaranteed them under this provision.

5.1.3 RIGHT TO PERSONAL LIBERTY

Justice Oputa described personal liberty as "freedom from external coercion in the use of one's faculties." According to him, "it is the status of not being the property or chattel of another."[15]

The Right to personal liberty is very important to all members of the society. An individual should have the freedom to move his body freely without physical restraint. It is a freedom against arbitrary arrest and detention of an individual without recourse to due process of law. However, this freedom is not absolute. It is controlled or subject to the interest of public peace, law and order. The state, in order to protect other important interests, had to arrest some people, thus relegating the Right to liberty. Therefore, this Right becomes delicate The state had to balance the Right of an individual to personal liberty on the one hand while on the

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15 Oputa (1989) Human Rights in the Political and legal culture of Nigeria Nigerian Law publishers p. 95.

other hand to deprive a person's Right for the protection of the general interest of members of the community. Hari Chand observed thus:

> "The law is intricate as regards restrictions on liberty.... The ideal state is one, which can give maximum liberty to its individuals without endangering collective security and pubic peace. Therefore, there is constant movement in each country for wider field of liberty and thus the shackles of restrictions are being removed bit by bit. In a highly civilised society, probably there would be no or very little restriction on one's liberty as the people themselves would be so educated and aware as to raise the limits of liberty themselves."[16]

Section 32(1) of the Constitution state that, "every person shall be entitled to his personal liberty and no person shall be deprived of such liberty." This section guaranteed a person's right to personal liberty. However, it provides the circumstances under which such right could be curtailed.

The issue for consideration is under what circumstance would a person loose his Right to personal liberty. The Constitution has made elaborate provisions, which will serve as guide on how the liberty of the individual is to be curtailed.

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16 Chand H. (1982) Nigerian Constitutional Law Santoshi publishing House India p. 41.

Section 32(1) of the Constitution has set out six circumstances where a person may be deprived of his personal liberty. The first tree circumstances are provided for in paragraph A - C of the section. It involves acts done in or for the judicial process or as a result of a judicial process. They include:

a) in the execution of the sentence or order of a court.[17]

b) failure to comply with the order of a court of law.

c) for the purpose of bringing an alleged offender before the court.

The last three instances dealt with interfering with the personal liberty of minors in their own interest such as for the purpose of education.[18] Or confining people suffering from infections or contagious diseases or alcoholics and drug addicts in the public interest[19] and finally cases dealing with persons who entered Nigeria unlawfully - their expulsion or extradition.[20]

In whatever circumstances, if an individual is arrested or detained, he has the Right to remain silent, until he

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17 Odusote V. Senior Magistrate Ayenibiowo (1985)6 NCLR 778

18 S.32(1)(d) 1979 constitution

19 S. 32(1)(e) 1979 constitution

20 S.32(1)(f) 1979 constitution.

consults a lawyer or anybody of his own choice.[21] And such an arrested or detained person must be informed in writing within 24 hours and in the language he understands of the facts and ground for his arrest and detention.[22]

Subsection 4 of section 32, provides that any person who is detained or arrested for the purpose of bringing him before a court in execution of the order of court or upon reasonable suspicion of his having committed an offence or for reasonably preventing him from committing criminal offence, must be brought before a court of law within a reasonable time.

If that is not done, within 2 months of his detention in respect of a parson in custody or who is not entitled to bail, or within 3 months from the date of arrest or detention in the case of a person released on bail, then such person may be released either conditionally or unconditionally.

Subsection 5 of section 32 defined "a reasonable time" used in section 32(4) to mean that a detained or arrested person in any place within a radius of 40 km of a court of competent jurisdiction, must be charged to court within 1 day

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21 S. 32(2) 1979 constitution.

22 S. 32(3) 1979 constitution.

or 2 days in other circumstances. In a case stated,[23] the court of Appeal enunciated the following principles.

i) That when a person is arrested or detained by the police in connection with an allegation on reasonable suspicion of committing a crime and they are actively pursuing investigation of the matter, the duty of the police is in appropriate case to offer bail to the suspect and for bringing him to court of law within 1 or 2 days as the case may be no matter under whatever sections of the C.P.A. or police Act 1967 the police may purport to be acting.

ii) That whether the police grant a person under arrest or detention bail or not, in appropriate case, it is their duty to bring any such person in their custody before a court within 1 day or 2 days as the case may be in compliance with relevant Constitutional provision.

However, the bringing of a suspect to court within 1 or 2 days may not extend to persons suspected of committing capital offence. In the case of Oladipo V. C.O.P.[24] the court observed,

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23 Eda V. Cop (1982) 2 NCLR 219.

24 (1983)4 NCLR 407

> "So it is only in relation to capital offence that the police will be justified in detaining a person without bringing him to Constitutional court within a reasonable time i.e. within a day or two of his arrest or detention. In other words, a person who is detained or arrested for a bailable offence i.e. an offence which is not a capital offence must be brought to court within a day or two days of his arrest or detention by the police."

With the greatest respect to the court of Appeal one may not agree with its observation in this case. There is nothing in the wording of section 32 to suggest that the police must not bring a person before a court of law within one or two days of the arrest of a person suspected of having committed a capital offence. The section did not distinguish a capital offence from non capital offence for the purpose of bringing an accused person before a court of law within one or two days. It is the view of this writer, that any person arrested or detained or suspected of committing an offence, capital or otherwise must be brought before a court of law within one or two days as the case may be. If one is to go by the dictum of the court of Appeal, the danger will be that the police may abuse its powers of arrest and detention of persons on the flimsy excuse that the accused is charged with a capital offence. Moreover the court of Appeal did not state the

maximum period that the police must take such an arrested or detained person before a court of law.

The courts are obliged to adopt a liberal interpretation of the Constitutional provision regarding the fundamental right generally, most especially section 32.

Subsection 7 of section 32 seems to water down the effect of subsection (4) in the case of a person arrested or detained upon a reasonable suspicion of having committed a capital offence. But that notwithstanding, the court had to interpret that provision strictly, to conform with the general spirit of the section as a whole and to safeguard as much as possible the liberty of the accused person.

In Akokhia V. C.O.P.[25] the court said; "the provision of subsection 7(a) of section 32 could therefore not and should not be used to keep a person arrested or detained upon a reasonable suspicion of having committed a capital offence indefinitely or allow his trial to drag on at the convenience of the court of trial, rather, the interpretation that should be given to paragraph (a) under this subsection should be that

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[25] (1984) 5 NCLR at 845.

the bringing to court and the trial of such a person mentioned therein should be carried out more expeditiously than the period stipulated under subsection 4 of the section 32 of the Constitution."

If a person is unlawfully arrested or detained, there is a provision for compensation and public apology by the appropriate authority or person.[26]

Finally, a law which imposes a detention for a period not exceeding three months on a member of the Nigeria Police Force or a member of the armed forces in the execution of a sentence in respect of an offence punishable by such detention of which he has been found guilty is protected by subsection 7(b) of the section.

5.1.4 RIGHT TO FAIR HEARING

The Right to fair hearing has been guaranteed by section 33 of the Constitution. Subsection 1 of that section states:

> "In the determination of his civil Right and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law

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[26] See S.32(b) 1979 Constitution.

> and constituted in such a manner as to secure its independence and impartiality."

This section is the basis or bedrock of fair hearing. It specifically confers on any person the Right to fair hearing by a court or other tribunal, which is independent or impartial. This principle is akin to doctrine of natural justice, because it is an inherent Right of man to have fair and just treatment in the hands of the rulers or their agents. According to Aihe natural justice incorporate the notion of fair hearing. He said,

> "As a negative concept, it acts as a modern 'natural law' limitations on the power of the state. Hence decisions affecting the Right of the citizens must not be made without first giving those affected a fair hearing (Audi alteram partem), and the decision makers must not be a party to the dispute or interested in the subject matter of the decision or otherwise biased (Nemo Judex in Causa sua)"[27]

What then are the ingredients of fair hearing contemplated by section 33 of the Constitution?

The first is that the hearing must be "within a reasonable time." Therefore, determination of a case within a

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[27] AIHE ET EL (979) Cases and Material on constitutional law. p.94

reasonable time is a component or necessary requirement of a fair hearing. The issue is what is reasonable time? Reasonable time in this context is very difficult to define. This is because, one may find that some cases are easy to dispose of while others are not easy to dispose of considering the nature of evidence, circumstances of the case, simplicity or complexity of it, too. Fair hearing within a reasonable time entirely depends on the nature and circumstance of each case.

All the same the Supreme Court attempted a judicial definition of a "reasonable time." In Ariori and others V. Elemo and others,[28] Obaseki J.S.C. said, "reasonable time must mean the period of time which, in the search for justice, does not wear out the parties and their witness and which is required to ensure that Justice is not only done but appears to reasonable persons to be done."

The learned Justice further formulated the test of what may be considered as judgement which does not contravened the fair trail provision, when he said:[29]

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[28] (1983) 1SC 13 at 24.

[29] Ibid at.

> "The reasonable time for the consideration and delivery by the court depends only on the time an active, healthy and mentally alert judge takes to read and consider evidence and write his judgement with full and consciousness of all the impressions of the witnesses, at the trial. A period of time which dims or loses the memory of impressions of the witnesses, is certainly too long and is unreasonable. When a period of time dims or losses, the memory or impressions of witnesses, it occasions a miscarriage of justice, contravenes the fair trial provisions and violates the whole proceedings".

It can safely be assumed that delay in court proceedings will defeat the concept of fair hearing as envisaged by section 33(1). As the adage Justice delayed is Justice denied. However delay per se will not contravene section 33(1) of the Constitution, unless it occasioned a failure of justice.

The second ingredient of section 33(1) is that a court or tribunal must be "constituted in such a manner as to secure its independence and impartiality." That is to say the members of the court or tribunal responsible for the decision making must not be interested in the case or matter. In other words, there is no likelihood of being biased in its judgement or decision.

In the case of L.P.D.C. V. Fawehinmi[30] the applicant a legal practitioner was charged with professional misconduct by the legal practitioner's Disciplinary Committee. The committee was headed by the Attorney General of the Federation as chairman, who preferred the charges against the applicant. That means the Attorney General was serving as a prosecutor and judge. The applicant sought to enforce his fundamental Right under section 33(1) of the Constitution. The applicant was of the view that the Attorney General being a prosecutor and a judge suggest that there was a likelihood of bias against him. The court of first instance held inter alia

i) That the position of the Attorney-General as the chairman of the legal practitioners' Disciplinary committee and the complainant and the prosecutor offends against the principle of natural Justice and raised a substantial issue of real likelihood of bias in the said disciplinary committee.

ii) The Disciplinary committee set up to adjudicate on the charges against the applicant is a breach of the provision of section 33(1) of the Constitution as being constituted in such manner as to be unlikely to secure its independence and impartiality.

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30 (1985) 2 NWLR 300

On Appeal to the court of Appeal by the legal practitioners Disciplinary Committee, it unanimously dismissed the Appeal. A further appeal was made to Supreme Court. The court held inter alia:

In the exercise of its disciplinary authority over legal practitioners, the L.P.D.C. must observe the rules of Natural Justice. Not only must it not be biased against a legal practitioner whose conduct is being questioned but also it must not place itself in a position, which it may appear that there is likelihood of bias.

The Supreme Court highlighted the meaning of real likelihood of being biased when it said:

> "The term real likelihood may not be capable of exact definition since circumstances giving rise to it may vary from case to case but it means at least a substantial possibility of bias. This may arise because of personal attributes and relationships such as personal hostility, personal friendship, employer and employee relationship, partisanship in relation to the issue at stake and a whole host of other circumstance, from which the inference of a real likelihood of bias may be drawn."[31]

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[31] Ibid at 333.

Section 33(2) provides that a law may be promulgated given a government or authority power to determine the civil *rights and obligations of any citizen. Therefore, in addition* to the courts or any other tribunal, an administrative authority may be conferred with the power to determine the civil rights and obligation, of any person, provided such person will be heard by the determining authority and its decision is not final and conclusive.

The issue is what is the difference between a court or other tribunal and a statutory body? This has been a controversial and indeed difficult problem that faced our judiciary in quite a number of cases. One such leading cases is that of *L.P.D.C.V. Fawehinmi.*[32]

In that case Karibi Whyte J.S.C. formulated this test.

1) Whether it has before it alis inter partes
2) Whether the decision of the statutory body is binding.
3) Whether the decision is conclusive and final.

Sometimes it may be difficult to distinguish a statutory body from a court or tribunal. From the test formulated by Karibi-Whyte J.S.C. One thing becomes pertinent. That is,

[32] (1985) NWLR p.300.

the name of the administering authority is not of any importance at all. The most important thing is the function such administering authority is not of any importance at all. The most important thing is the function such administering authority embarks on. Therefore whatever name it may be called, if there are parties who are involved in a dispute and whatever decision arrived at binds and parties thereto and such decision being final and conclusive, the same of the determining authority notwithstanding, it will surely be seen and considered as a court of law. However, if it does not satisfy the foregoing test, then it might be an administrative body simpliciter.

Whatever may be the case, the application of section 33(2) is without prejudice to subsection 1 of that section.

Subsections 4 to 12 of section 33 adequately treated or provided on elaborate procedure for fair hearing in respect of criminal trial in any court or tribunal.

Subsection 4 clearly stated that any person who is charged with a criminal offence is entitled to fair hearing. This subsection is akin to subsection (1) of section 33. Subsection (1) has been discussed thoroughly earlier, it is

for this reason that subsection (4) will not be discussed in detail.

S.33(5) states that every person is presumed to be innocent. It is the duty of the prosecution to prove its case beyond reasonable doubt. It is not for the accused person to establish his innocence. In the case of Okoro V. State,[33] Karibi-Whyte J.S.C. reiterated the position of the Law in the following words. He said:

> "It is both the constitutional duty imposed on the court, and the right conferred on the accused by the constitution to ensure the purity of our criminal justice administration that the presumption of innocence of the accused is maintained in violate. Accordingly even where the point was not taken by the accused or his counsel, being fundamental to the jurisdiction of the court it should be taken by the court."

He further stated

> "It must be pointed out in this case that every proceeding subsequent to the violation of the provision of S.33(5) is void having been conducted without competence" He thus concluded, "under our law, it is not for the accused to prove his innocence. The burden is on the prosecution to establish the case against the accused beyond reasonable doubt. These preposition establish that where no case has been made out against the accused

[33] (1985)5 NWLR 255 at 272.

> at the end of the case of the prosecution, asking him to answer the charge against him is a reversal of the constitutional provision by asking him to establish is innocence."

However, the position of the law as stated above, is still subject to any law that might require any person to provide a particular fact. This is so because the same Subsection State that no law is to be invalidated for the reason that it confers any person the duty of proving a particular fact. It should be noted that once the prosecution has adduced the relevant evidence against the accused person, it is for the latter to prove his innocence.

Section 33(6)(a) and (b) provide that an accused person should be informed promptly in the language that he understands and in detail of the nature of the offence including adequate time and facilities for the preparation of his defence.

The right of an accused person to be told the detailed nature of the offence alleged against him is two folds. Firstly, a charge is to be prepared in detail, normally a written statement of the offence by name and section, which the accused is alleged to have committed. The object of the charge is to enable to accuse person to know the case he will

have to meet and to be ready to defend himself. Secondly, where an accused person appears before the court, the charge or nature and particulars of the offence should be explained to him.

In the case of Lafia V.C.O.P,[34] the appellant was convicted under the Indian Hem Decree 1966, section 5(1)(b) which carries a penalty of not less than ten years imprisonment. The Magistrate read the First Information Report to the appellant at the trial, which the appellant said, was true. The report was not explained to him. The Magistrate found the appellant guilty. On appeal, the High Court ordered retrial.

Furthermore an accused person must be given adequate time and facilities for his defence. For example, he should have easy access to his counsel and be free to have contact with the persons whom he intends to serve as his witnesses.

Sections 33(6)(c) and (5) gives an accused person the right to defend himself in person or be represented by a legal practitioner of his own choice. And to examine any witness

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[34] (Unreported) MD/17CA/71.

brought by the prosecution. So also to bring any witness before the court to testify on his behalf.

One important thing to note is that an accused person ha the right to defend himself in person or be represented by a counsel of his own choice. Therefore, an option is given to the accused person either to defend himself or be defended by a legal practitioner. In ordinary criminal cases which are not capital offence, and accused person may elect to conduct his case by himself, but in capital offence, to allow the accused person to conduct his defence by himself may not meet the end of justice. In order to make sure that the accused has been given fair hearing in cases involving capital offence for example murder cases the court has interpreted section 33(6)(c) as a mandatory provision. In he case of Josiah V. State,[35] Oputa J.S.C. has asked,

> "What is a hearing worth to an accused person who does not understand the language of the court, who does not know the rule s of procedure, and who cannot properly present his case?" He then further explained, "the right to counsel is thus at the root of and is necessary foundation for a fair hearing. The ordinary layman, even the intelligent and educated laymen is not skilled in science of law ad he thereof needs the aid and advice of counsel. It is because of this

[35] (1985)1 NWLR p.125.

> need that in capital offence, attracting the death penalty, the accused is not left undefended. If he cannot afford the services of counsel, the state assigns one to him."

In the case of Udo V. State,[36] the accused person who stood for murder trial was refused adjournment by the trial court to enable him be represented by counsel. The court heard two important prosecution witnesses in the absence of the accused counsel. The accused was however allowed to examine the prosecution witnesses. The court of appeal upheld the decision of the trial judge. The crux of the matter before the Supreme Court was whether the provision of equal opportunities for both the prosecution and the defence. The court held as follows:

i) That the right of an accused person to counsel is fundamental and essential to fair trial in Nigeria. It is not only a statutory right but also a constitutional one.

ii) That is implicit in the concept in the concept of fair hearing as an aspect of natural justice in the broad sense that the court should in criminal trial give equal

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[36] (1988)3 NWLR 316

opportunities to both the prosecution and the defence. A murder trial cannot be fair when an accused standing trial for his life, has to conduct the case himself as against a legal practitioner, for the prosecution.

iii) That it is contrary to the spirit and letters of section 33(6)(c) and (d) of the 1979 constitution if the accused not being a legally qualified person, is made to slug out his defence in a charge of capital offence against the prosecutor who is a legal practitioner. The provision of the law can only be satisfied when the legal practitioner is present and renders all necessary professional service to him all through the trial. The import and connotation of the section 33(6)(c) and (d) of the constitution 1979 is the fundamental principles of fair trial.

Nothing can be further from the truth. One may say that the cases of Udo V. State, Josiah V. State (Supra) and other establishing the same principles are no doubt a landmark for the Nigerian judiciary particularly the supreme court. The assigning of a counsel to an accused Person in respect of capital offence is surely to be encouraged and supported. But the seriousness with which counsels assigned to defend the accused person is sometimes in doubt. Sometimes, such

counsels for fear of not being paid at all or earning a meagre amount makes them to mishandle the case assigned to them. The case of one counsel is fresh in mind who was assigned a case but mishandled it on the ground that he was not sure who would pay his fees, whether the state or legal aid.[37] Sometime sin 1986, this writer visited the legal aid council in Kano State only to find that there was only one legal officer and one member of the National Youth Service Corps. With this calibre of officers one will doubt how these two officers could succeed in handling cases that require the aid of the council of legal aid.

To this end, one may say that a great challenge is thrown to the honourable members of the legal profession at the bar, to maintain the honour of the legal profession by bringing justice nearer to the poor people of the society who could not afford the exorbitant charges as legal fees. This discussion may be conclude with the observation of Oputa J.S.C.[38] He said,

> "Sometimes one wonders what is happening o the legal profession. In the tradition of the profession, one of the reasons for its being termed honourable is that counsel never complain of his fees. He tradition of having a small pocket in the Barrister's gown is that litigants used to put money there when arguments proceeded

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37 See Udo V. State, Supra.

38 See Udo V. State (Supra) at p.343.

> in court --- for council to be briefed by the state or the court is usually and should always be regarded as an honour itself. It is deemed to be recognition of the ability and the honourable bearing of counsel. That honour must be brought back to the profession, and in my view, no counsel who does not regard state or court brief as an honour should ever be so honoured with such briefs."

Section 33(6)(e) says: every person who is charged with a criminal offence should be entitled to have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence. In the case of Buraimo Ajayi and Another V. Zaria N.A.[39] the supreme court while considering the right of an accused person enshrined in section 21(5)(e) of the constitution of the Federation (1963) which is now section 33(6)(e) of 1979 constitution declared that: "there shall be adequate interpretation to the accused person of anything said in a language which he does not understand and equally that there shall be adequate interpretation to the court of anything said by the accused person in a language which the court does not understand.

In the case of Ahmadu Msughand V. The State[40], the applicant was charged with the murder of one Sule with a gun.

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39 (1984) NNLR 61 at p.63.

40 (1964) NNLR 61 at p.63.

He was convicted and sentenced by the High Court. He appealed against his conviction and sentence, on the ground that the learned trial judge had erred in law in convicting him. The evidence of the prosecution witnesses was given in Hausa. The appellant understands Tiv language and not Hausa. The interpreter employed by the court could translate from English into Tiv, and vice-versa but not from Hausa to Tiv. It is against this background that he appealed to the Federal Court of Appeal on the ground that the evidence was not properly interpreted and there has been a violation of section 33(6)(e). The court held that there was no fair trial. It further said that even if the judge and counsel on both sides understand Hausa language, the same could not be said of the appellant and others.

It is the duty of the accused person or his counsel to bring to the notice of the court the fact that he does not understand the language in which the trial is being conducted otherwise he cannot complain of a violation of his right to an interpreter.[41]

Subsection 8 of section 33 states that n person is to be tried for an offence which at the time of commission of that

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[41] The State V. Salihu Muhammed Gwonto (1983) 1 SCNLR 142

act was not an offence nor a penalty be imposed on an accused person heavier than the penalty in existence at the time of the offence was committed.

In the case of Ikpara V. Bendel[42] State, the Supreme Court in examination this provision had this to say:

> "The reason for the entrenchment of such provisions in the constitution as a fundamental right would appear to have been two fold: in the first place, the provisions were intended to prevent retrospective legislation the field of criminal law whereby an innocent act or omission or a non criminal act when it took place might not overnight be punishable under he law ---- In the second, the provisions were intended to prevent the imposition of a heavier punishment for an offence which at the time of its commission could only attract a light punishment; for instance converting by legislation a simple offence like misdemeanour into a felony which would attract a heavier punishment on conviction."

In order for the constitution to a safeguard the right of the individual where it becomes necessary to be tried once in respect of an offence committed by him, it then incorporated the rule against double jeopardy. That is to be found in section 33 subsection (9). Except upon the order of a superior court any person who has been tried by a court of

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42 (1982)3 NCLR 152 at 156.

competent jurisdiction which results in acquittal or conviction must not be tried again for the second time in respect of the same case.

Perhaps the proper construction of this provision is that where a person has been tried before a court of law and such trial resulted in acquittal or conviction, it will be contrary to the constitution to have such person tried again on the same facts before the same or another court, except of course by order of a superior court.

In the case of Nafiu Rabiu V. State[43] the Supreme Court had to determine whether the plea of double jeopardy under section 33(9) of the constitution was available to a person acquitted by a court of first instance went there is an appeal to a higher court. On this issue the curt came to the conclusion that section 33(9) clearly anticipates that in the course of a trails of an accused person from a court to court for one and the same criminal offence, a court higher than the last of the intermediate courts; may order a retrial notwithstanding that in the process of trial from one court to the other one of the intermediate courts may have made an order of acquittal in respect of the accused person in those

[43] (1981)2 NCLR 293.

circumstances there is still but one and the same trial and not another or second trial.

The rule against double jeopardy has been extended to persons who have been pardoned.[44]

In fairness to the accused person, and in order for the court to arrive at a fair and just decision, the accused person must not be compelled to give evidence at his trial.[45]

Any conviction for a criminal offence must be an offence defined and its penalty prescribed by law.[46] This subsection defined a written law as an Act of the National Assembly or a Law of State, any subsidiary legislation or instrument under the provision of Law.

It is trite law that justice must not only be done but must manifestly be seen to have been done. Perhaps it is in compliance with this maxim that the constitution made it clear that all record of criminal proceedings must be kept and the party to litigation or his representative must be given a copy

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44 S. 33(10)

45 See S.33(11)1a 79 Const, Nafiu Rabiu V. State Supra.

46 S.33(12) 1979 Constitution

of the proceedings within seven days of the conclusion of case.[47]

5.1.5 RIGHT TO PRIVATE AND FAMILY LIFE

The Right of privacy is the Right to be left alone. It protects the homes, families, thoughts, emotions, expressions, and personalities of the citizens. It guaranteed the Right of each individual to associate with the people of his choice. It prevents the government and business associates from collecting and stockpiling unnecessary information about persons, generally. Most important of all is the individual Right to control information, which are personal to him. Section 34 of the Constitution state:

> "The privacy of citizens, their homes, correspondence, telephone, conversation and telegraphic communication is hereby guaranteed and protected."

In the Duchess of Argyll V. Duke of Argyll,[48] both parties were married in 1951 but were divorced in 1963. While they were married, they discussed as all married couples do - their personal affairs fully between them.

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47 S. 33(7) Ibid.

48 (1962) 1 CH 302

They discussed "our attitudes, our feelings, our hopes, aspirations and foibles, our past lives and previous marriage." The duke made some arrangements with some certain publishers to publish articles based on information regarding the secrets relating to Duchess private life.

The Duchess moved for an injunction to restrain the Duke and the publishers from publishing her secrets regarding her private life. The court granted the order for injunction.

According to Lord Denning M.R. "Any unreasonable intrusion upon the plaintiffs seclusion or solitude or into his private affairs is an infringement of his Right of privacy."[49]

5.1.6 RIGHT TO FREEDOM OF THOUGHTS, CONSCIENCE AND RELIGION

The Constitution has guaranteed every citizen freedom of thought, conscience and religion.[50] This being so, every person could choose the religion he wants to follow. He could equally choose to change his religion or even choose to stay without practising any religion at all. Whenever this right

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49 Denning (1982) What next in the Law Butherworth p. 224.

50 S. 35(1) of the 1979 constitution.

has been exercised, a person could publicly practice, teach, observe and propagate his religious belief, alone or in conjunction with other people who share the same belief or religion.

Therefore, the Constitution being explicit in guaranteeing everyone the Right to choose his belief or religion, it will be contrary to the letter and spirit of the Constitution, to compel any person to do otherwise.

In Jebeba Ojonye V. Adegbda,[51] the respondent was sued by the Appellant before Grade II Area court claiming the sum of 40.00 as a refund of expenses he incurred to buy a goat for the burial sacrifice of the Appellant's deceased husband, when she refused to buy the goat as required by Adoka native law and custom on the ground that it was against her Christian faith (religion). The trial court found her liable. On Appeal, the court held inter-alia. That the Constitution guarantees in clear term freedom of religion and the Adoka custom, which compels the Appellant to do what is not the practice of her religion violates section 35(1) of the Constitution, therefore, it is void. The court observed.

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[51] (1983) 4 NCLR 492 at 494

> "The Constitution guarantees freedom of religion to every citizen and the courts must guard jealously any attempt directly or indirectly to erode this freedom which is essential to maintain peace and stability in a multi-religious society like Nigeria."

Furthermore, for the children who attend schools, the Constitution has made it categorically clear that they must not be involved in any religious activity which is not their own or that of their parents.[52] Also each religious community could as of Right provide religious instruction in any place of education for their pupil.[53]

While the Constitution has guaranteed freedom of religious belief and activities, it expressly outlaw the formation and involvement in the activities of any secret society.[54]

5.1.7 RIGHT TO FREEDOM OF EXPRESSION AND THE PRESS

Section 36(1) of the Constitution state that, "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."

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52 S.35(2) Ibid
53 S.35(3) Ibid.
54 S.354) Ibid.

By this section every member of the society can express his opinion or ideas, whether alone or in-group to the general public. This will inevitably lead to cross-fertilisation of ideas, progress and development of the society. This freedom extends or covers all type of expressions which in part or convey opinion, ideas, or information, irrespective of content or mode of communication. So also every member of the society is free to receive if he so wish any opinion, ideas or information. In other words the freedom to receive includes the freedom to express opinions, ideas, or information.

The preamble to section 36 state that, the "right to freedom of expression and the press" but nowhere in the section did it mention the "press." However it will not be out of context if the word "person" used in the section is interpreted to include the press.

In Adikwu V. Federal House of Representatives.[55] The court held that the Right of freedom of expression and the Right of press freedom guaranteed under section 36 of the Constitution is meant to guarantee to every person and the press, freedom to express and communicate without interference.

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[55] (1982) 2 NCLR 394

In determining the scope of section 36 of the Constitution, the court said,

> "The Right of freedom of expression and the Right of press freedom guaranteed under section 36 of the Federal Republic of Nigeria 1979 is meant to guarantee to every person and the press, freedom to express and communicate, ideas (to impart ideas and information) without interference. Whilst under the Constitution there is no difference whatsoever between the Right of those who seek to receive or disseminate ideas and information by way of a newspaper and those who give lectures and speeches and seeks to enlarge the audience by publication and wide dissemination. The purpose of that section is to guarantee to each of them and every person the fundamental Right to do so without interference. This is however subject to the built in limitation and exceptions to that section which restricts fundamental Right of freedom of speech, ideas and expression. The fundamental Rights apply with equal force to the political essayist and the newspaper syndicate. It is a Constitutional guarantee of freedom of flow of information without interference with the freedom."[56]

5.1.8 RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION

This right is very important in any democratic society, because people could come together in an association to foster their common goal, objective and interest, be it educational or political or trade union.

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[56] Ibid at 417.

Section 37 of the Constitutions says that every person shall be entitled to assemble freely and associate with other persons, and in particular may form or belong to any political party, trade union or any other association for the protection of his interest.

In Alhaji Balarabe Musa V. P.R.P.,[57] the court said,

> "The Right of every person to assemble freely with others is guaranteed by the Constitution by virtue of section 37, ... Nothing stop the applicant from going where he likes, when he likes, how he likes, within the law. If he decides to attend meetings with anyone whatsoever no one has the Right to stop him physically..."

It is to be noted that as everyone has the Right to choose his associates, in like manner he could also leave the association whenever he likes.

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In Alhaji Abubakar Rimi V. P.R.P.,[58] the court observed, "The provision (S.37) applies to individuals, corporate and unincorporated bodies. It enables individuals to come together under a political banner voluntarily or to leave the association as they please."

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57 (1981) 2 NCLR 763 at 868

58 (1981) 2 NCLR 734 at 743

5.1.9 RIGHT TO FREEDOM OF MOVEMENT

Section 38 of the Constitution guaranteed the freedom of movement to every citizen of Nigeria. A Nigerian could move throughout the length and breadth of the federation and could reside in any part thereof. A citizen could not be refused entry into or out of the country. However, this freedom is not absolute, for legislation reasonably justifiable in a democratic society could be enacted to restrict the movement of an individual. This include persons reasonably suspected of committing criminal offence or extraditing a person to another country to be tried outside the country or serve a criminal sentence passed on him by a foreign court which there is a reciprocal agreement between Nigeria and such country.

The issue of freedom of movement was considered in Shugaba V. the Federal Minister of Internal Affairs and Ors.[59] In that case Shugaba was deported to Chad by the Federal Government on the ground that, he was not a Nigeria citizen. The court held that Shugaba was a Nigerian and that the deportation order had constituted inter alia a violation of his fundamental Right to move freely.

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[59] (1981) 1 NCLR 25

5.1.9.1 Right to Freedom from Discrimination

Section 39 of the Constitution prohibits discriminatory legislation.

This is two-fold. One, there must not be a legislation or executive order which discriminate against any citizen on the ground that he belongs to a particular community, ethnic group, place of origin, sex or political opinion. And that no person must be subjected to any disability on the ground of the aforementioned. Secondly, a citizen of Nigeria must not be discriminated against by reason of the circumstances of his birth.

5.1.9.2 Enforcement of the Fundamental Rights

In order to make the fundamental Rights provisions meaningful, the Constitution provides for their enforcement. It is to be found in section 42 of the 1979 Constitution. In fact the section confers a special jurisdiction on the High court of each state of the federation to enforce the fundamental Right of any person. It says;

> "Any person who alleges that any of the provision of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a high court in that state for redress."

By this section a person will not wait until his right is violated before commencing an action, a likelihood of its violation could attract legal action.[60] Each of the High courts in any state of the Federation has been conferred with the special jurisdiction to hear and determine any issue pertaining to violation of the fundamental Right of the person.[61]

Finally, the above-mentioned fundamental Rights and freedom exists in the 1979 Constitution. The courts were empowered by the Constitution to enforce them. From the above discussion, the courts did enforce them accordingly. It is the view of this writer that the enjoyment of the Rights and Freedom by the members of the society will no doubt create a healthy atmosphere for the development and well being of the society.

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5.2.0 IMPACT OF MILITARY RULE ON FUNDAMENTAL RIGHTS

Military rule by its nature is the opposite of Constitutionalism. It is a government established by the members of the armed forces. A government of force. Historically, their claim to be in government is to clean the

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60 Okoji V. A.G. Lagos state

61 Section 42(2) 1979 constitution. See Afebai V. A.G. Bendel State (1984) 5NCLR 503, Tony Momoh V. Senate (1981) 1 NCLR 105

political slate of corruption, mismanagement and misrule.[62] In order to accomplish this task, some kind of emergency measures had to be introduced. For example, those allegedly responsible for misrule has to be arrested and detained under the emergency powers. Two reasons can be advanced for this. One, those who are responsible of looting the government treasury or who contribute to the economic adversity to the nation must be held accountable for their misdeeds. Secondly, there is the tendency of those who mismanage the government and contribute to the economic adversity to the nation to run away or hide themselves and re-group to sabotage the revolutionary government. These factors, perhaps informed the decision of the military government to suspend the fundamental Rights provisions along with other Constitutional provisions.

The discussion in this respect will focus on some of the Decrees that in one way or the other affects the Fundamental Rights of the citizens under Military rule. Without attempting to list all the Decrees in this regard, here are some of them.

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62 See a special Federal Government Announcement by Brigadier Sani Abacha (as he then was) Nigeria Tribune Monday January 2 1984. See also text of the speech by Head of State Major General Muhammdu Buhari (as he then was) Monday January 2 1984. P3

First, the State Security (Detention of persons) Decree No. 2 of 1984 expressly suspends chapter IV of the 1970 Constitution dealing with Human Rights.

Secondly, Decree No. 4 Public Officers (Protection Against False Accusation) of 1984; provides for a term of imprisonment without option of a fine for anyone found guilty of publishing in any form "any message, rumour, report or statement..." whether true or false which had the effect of bringing the government or any of its officials into ridicule or disrepute. If it is a media house it is to pay a fine of ten thousand naira and could have all its equipment confiscated by the Federal Military government.

Thirdly, Decree No. 9 - political parties (Dissolution Decree 1984). This Decree banned all political parties and associations. Note that at some stage trade unions like Academic staff union of Nigerian Universities and Students Union were banned by Decrees.

Fourthly Decree No. 19 Public Officers (Special Provisions) Decree 1984 prohibited any court action for redress, for wrongful dismissal or termination of an employment by any public officer dismissed, terminated, laid

off, retrenched, purged or removed for whatever cause since December 31st 1983.

Fifthly Decree 13 of 1984 - the Federal Military Government (Supremacy and Enforcement of powers) Decree 1984. The Decree first of all oust the courts jurisdiction on any civil proceedings brought against it or its servants in respect of anything done pursuant to any Decree. Secondly, it suspended the enforcement of fundamental right in respect of anything done pursuant to any Decree or Edict. Clearly this decree legalises any action by the government whether lawful or unlawful. Thus it confers uncontrolled power of the government to whimsically do anything and to expand the horizon of their power to the detriment of the Human Rights of the people.

As we have already said that it is not practicable to mention and discuss all the Decrees that are in conflict with the Fundamental Rights provisions of the 1979 Constitution. But an attempt will be made to highlight the basic features of those decrees, which have serious impact on the fundamental rights.

5.2.1 EXCLUSION OF FUNDAMENTAL RIGHTS

Interestingly, the Grundnorm of the Federal Military Government, that is, Decree No. 1 of 1984 and Decree 107 of 1993 did not abrogate the fundamental right provisions of the 1979 constitution. In fact it only abolished the old legal order and brought a new one in its place that is the supremacy of the Federal Military Government.

The first Decree with serious impact on the fundamental Rights is Decree No 2 of 1984. Section 4(2) states that "Chapter IV of the Constitution of the Federal Republic of Nigeria 1979 is hereby suspended for the purpose of this Decree."

This provision has in explicit terms suspended the operation of the fundamental Rights provisions contained in the 1979 Constitution for the purpose of the Decree. The purpose of the Decree is essentially for the detention of certain category of persons. It therefore stand to reason by observing that the wording and scope of the suspension of chapter IV of the 1979 Constitution is too wide and quite unnecessary. For instance, the freedom against the arrest and detention of person is only contained in S.32 of the 1979 Constitution. Other sections of the chapter may not in any

way relate to the idea of arrest and detention of any person under this decree. One may ask in what connection does this Decree relate to a person's right to life? Moreover, it is only a living person that can be arrested and detained. Supposing that a person who has been detained under this Decree happens to be unlawfully killed by the detaining authority. Does that mean that there is no remedy to the family of the deceased person and that the detaining authority will not be prosecuted for violating the Right to life of the detained person?

From the wording of this provision, it appears that such a person who has been deprived of his Right to life will not have any remedy and that the detaining authority will not be prosecuted for unlawful killing. Therefore, it is the opinion of this writer that provisions of section 4(2) of Decree 2 of 1984 has been unnecessarily couched in too-wide a scope. The section was found baffling by professor Ojo. He said,

> "It is baffling that the draftsman find it necessary to suspend the application of the entire chapter IV (dealing with all rights) in all cases relating to every such decree."[63]

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[63] Ojo (1987) Constitutional and Military Rule in Nigeria Evans Bors Ltd. p.264.

It is my considered opinion that only provisions of fundamental Rights as they relate to the arrest and detention of persons ought to be suspended and not the entire chapter on Fundamental Rights.

What then is the meaning of "for the purpose of this decree"? The purpose of the Decree has been outlined in section (1) of Decree 2 of 1984. It grants the chief of staff supreme Headquarters the powers to order the detention of any person that is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts.

In Lamina Lawal Arowoye & Ors. V. I.G. P.[64] the applicant and others were detained by order of the chief of staff supreme Headquarters, purportedly under Decree 2 of 1984, for having been recently concerned in acts prejudicial to public order. It was argued in favour of the Applicant that the Chief of Staff has no right in law to detain anybody who has been concerned with acts prejudicial to public order and his was limited to detention for state security. Public order, it

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[64] Unreported suit No. ID/14M/84 date 6 April, 1984.

was argued is of a minor degree within the competence of the police.

Counsel for the respondent submitted that state security includes public order and the chief of staff was till acting within the Decree.

The court nullified the order and directed the release of the detainee on the ground that state security is within the province of the Nigerian Security Organisation and the Armed forces whilst public order is that of the police.

In effect, the state security and detention of persons decree abrogates only S.32 of the 1979 Constitution.

Furthermore, the Decree states that the Chief of Staff can detain a person for a period of three months, renewable for yet another three months. It is in fact detention without trial. Once the chief of staff satisfy himself that a person is engaged in activities that are prejudicial to state security, he can order the detention of such person.[65] Regrettably the Decree did not define act prejudicial to state

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[65] See Igbongidi V. Director of prisons (1986) NLHC P. 119

security nor did it provide any guide as to how the Chief of General Staff will arrive at such decision. There is no yardstick provided to check the Chief of General Staff. It therefore, permits one to conclude that the whims and caprice of Chief of General Staff can be synonymous with act prejudicial to state security.

5.2.2 OUSTER CLAUSES

Under Military Rule, in order to ensure the efficacy of the suspension of the fundamental Right provisions, the courts jurisdiction are usually ousted form entertaining application for the enforcement of the fundamental rights. In addition to the ouster clause, the officer engaged in breaching the Fundamental Rights were immune from any civil liability.

Section 4(2) of Decree 2 of 1984 state that "...and any question whether any provision thereof has been or is being or would be contravened by anything done or purported to be done in pursuance of this decree shall not be inquired into in any court of law."

The above provision was specifically made to oust the courts jurisdiction in any action that is taken to court pursuant to Decree No. 2 of 1984.

The Military government in its bid to establish and ensure its supremacy has by use of section 1(2)(b) (ii) of Decree 13 of 1984 oust the jurisdiction of the courts in respect of breach of fundamental Rights that involve or resulting from any action pursuant to any Decree or edict of the military government. It states:

> "The question whether any provision of chapter IV of the Constitution has been, is being or would be contravene by anything done or proposed to be done in pursuance of any Decree or an edict shall not be inquired into any court of law and accordingly, no provision of the Constitution shall apply in respect of any such question."

Needles to state that this section has totally broken the camel's back. It gives the military government unfettered power to breach a person's fundamental right. The military may by legislation direct that any person or group of persons should loose their Right to life including any of the other fundamental rights. If such a legislation is made and enforced, the aggrieved party or parties can not challenge such legislation or action in any court of law. In fact such aggrieved parties have no remedies known to law at all.

Therefore the combine effect of section 4(2) of Decree No. 2 and section 1(2)(b)(ii) of Decree No.13- of 1984 is to

completely abrogate the Fundamental Rights provisions in chapter IV of the Constitution, thereby conferring on the military government absolute powers to do whatever it likes to the citizen, no matter how barbaric. It further abrogate the High court's special jurisdiction granted to it by section 42 of the 1979 Constitution.

In Ching-Yao V. Chief of Staff[66] Ademola JCA Interpreted section 4(1) &(2) of Decree No. 2 of 1984 in the following words.

> "My view is that while the language of the Decree does not use express words ousting the jurisdiction of the court, it cannot be said that the words used in S.4(1) of the Decree is not a bar to bringing legal proceedings against any person for any thing done or intended to be done in pursuance of the Decree. Section 4(2) of the Decree suspended the whole of chapter 4 dealing with usual Rights to personal liberty, fair hearing, freedom of expression, freedom of movement, freedom of association and such like rights. It has also removed the special jurisdiction of the state High court to adjudicate such matters."

He then finally concluded that:-

> "My view is that the combined effect of the provisions of Decree No. 2 and Decree No. 13 of 1984 is that on the question of

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66 (1986) NCHC P. 437 at 446

> civil liberties, the law courts of Nigeria must as of now blow muted trumpets."[67]

This decision of the court of Appeal did not go down with professor Ojo for he find the decision objectionable. He said:

> "The trumpet need not be muted if they were audible before nor need they be audible if they were muted before ... There was no reason for the court to throw up its hand in apparent frustration and helplessness... It is in period like this when the administration is undemocratic and in a hurry to govern that the courts are required to apply the finest judicial ingenuity against seemingly draconian laws, to protect personal liberty."[68]

In the light of the learned professor's objection what should the courts do? He is of the opinion that the courts should simply assume jurisdiction on the face of the ouster-clause to ensure that the Decrees are complied with to the latter. In other words no one should be allowed to hide under the ouster clauses to advance his personal whims or abuse the powers granted him. He puts it thus:-

> "However terrible the language of a statute on ouster of the courts jurisdiction is, the court still owe a duty to assume jurisdiction to determine whether or not they have jurisdiction. The courts can only said to be barred when person exercising power under the Decree

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67 Ibid at 447.

68 Ojo Op cit pp.229

> or edict acts pursuant to any Decree or Edict and this can only be done by examining the power exercised or purportedly exercised under the Decree or Edict."[69]

The advise given by Professor Ojo is quite preferable to the decision of the count of Appeal. The court should not refuse to assume jurisdiction on the face of the ouster clause. The best it can do in the circumstance is to ensure that the person exercising powers under the Decree does so in accordance with its provision no matter how draconian such provisions may be.

5.2.3. ESTABLISHMENT OF TRIBUNALS

The preceding discussion illustrated how the judiciary was crippled by the Military government. Still, it appears that military regimes in Nigeria wants to rule exclusively by itself. In this regard they favour establishment of all kind of tribunals to try cases of both existing offences and those created by the various enabling Decrees. Tribunals per se are not undemocratic or unconstitutional. But those created by the military government does not conform to the Constitutional requirement. Section 33(1) recognises tribunals in so far as they conform to the standard of impartiality and the rule of

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[69] Ojo Op cit p. 228.

Nemodex and audi alteram partem. We intend to examine the extent to which the tribunals established by the military are contrary to section 33 of the Constitution, which is one of the key provisions on fundamental right.

If one is to begin from the appointment and composition of the tribunal from the enabling decrees, it will be discovered that the Head of State appoints the members. All the tribunals have members of the Armed forces in the majority but the chairman was to be a serving or retired judge of the High court or any court of like jurisdiction.[70] Except for the recovery of public property (special military tribunal)[71] where the Chairman was an officer in the armed forces not below the rank of colonel or its equivalent, but assisted by a High Court judge serving or retired on points of law.

One wonders how a tribunal composed of three military personnel appointed by the Head of the Military Government will discharge their function impartially. The practice of the government appointing military personnel and involved in prosecution of alleged offenders is quiet deplorable. Professor Nwabueze sums up the situation thus:-

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[70] See section(2) Decree 20 of 1984

[71] See section 5(2)(a) Decree No.3 of 1984

> "The executive is the accuser in a criminal trial, and it simply affronts Justice that it should also, through its functionaries or other persons appointed by it, be the judge of the quilt or otherwise of an accused person. Justice can only be seen to be done if the trial is conducted by persons who are in no way connected with the executive, either as its appointee to the membership of the tribunal or as its paid functionary."[72]

Another serious fundamental flow in this kind of dispensation of Justice is the Supreme Military Council in which the Head of the Military Government is the chairman is the confirming authority. That being so, the view has been held that the role of the Supreme Military Council as confirmation authority reduces the function of these tribunals as merely investigatory and that their decisions are non binding, because the decision of the tribunals can only take effect only after such confirmation. Moreover, the supreme military council can alter, modify or amend those decisions.

Certainly in a situation where the Federal military government promulgate Decrees creating the offence, establish tribunals either headed by a military officer or composed of military personnel, and the decision of such tribunals are

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72 Nwabueze (1992) Military Rule and Constitutionalism. Spectrum Law series p.64. See also Jamo N. M. On Comparative Analysis of the Proceedings and Procedures of the Special and Military Tribunals and those of Regular Courts. (Ed) Special & Military Tribunals and the Administration of Justice in Nigeria. Human Rights Monitor Kaduna. p.209

subject to confirmation by the supreme military council, cast serious doubt on the impartiality of the tribunal. One can not but see it clearly as a clear breach or derogation from the principle of fair hearing contrary to section 33 of the 1979 Constitution.

Finally one might mention in passing that the decisions in these kinds of tribunals are not subject to Appeal to any court of law. The system of Appeal would have ensured thoroughness and fairness from the tribunal since they serve as a court of first instance. It further gives the accused persons assistance and satisfaction that they will have a second or third chance of another independent judicial body to review their cases. It is no doubt one of the methods by which the tribunal or even the judiciary maintains its respect in the community.

Lack of provision for the Appeal becomes worst if the decision of the tribunal involves life and death. Professor Nwabueze finds it highly intolerable. He said,

> "Intolerable as it is that special tribunals should be authorised to convict and punish for criminal offence, it is outrageous that their decisions, especially a sentence of death, should be unappealable to the ordinary courts of law. That a tribunal, even an ordinary

> court, should be authorised to impose the death penalty without an appeal to a higher court is, to say the lest, careless of Human life. It makes light of what is really almost sacred thing."[73]

5.2.4 THE NATIONAL HUMAN RIGHTS COMMISSION[74]

Discussion, of Human Rights under military rule would have been incomplete without including the National Human Rights Commission. This is so because it was established by the Federal military Government in 1995. It is quiet inconceivable for a Military Government World-wide known for violation of Human Rights to establish a commission for the promotion of the same. However, we shall take an excursion into the Human Right Commission.

The starting point should be the function which the commission is established to perform. Section 5 of Decree No. 22 states; the commission shall -

a) deal with all matters relating to the protection of Human Rights as guaranteed by the Constitution of the Federal Republic of Nigeria 1979, as amended, the African charter on Human and People's rights, the united Nations charter

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73 Ibid p.54 op cit.

74 Established by Decree No. 22 of 1995.

ad the Universal Declaration on Human Rights to which Nigeria is a signatory;

b) Monitor and investigate all alleged cases of Human Rights violation in Nigeria and make appropriate recommendations to the Federal Military Government for the prosecution and such other actions as it may deem expedient in each circumstance;

c) Assist victims of Human Rights violation and seek appropriate redress and remedies on their behalf;

d) Undertakes studies on all matters pertain to the Human Rights and assist the Federal Government in the formulation of appropriate polices on the guarantee of Human rights;

e) Publish, from time to time, reports on the state of Human Rights protection in Nigeria.

f) Organise local and international seminars, workshops and conferences on Human Rights issues for public enlightenment.

g) Liaise and corporate with local and international organisations Human Rights with the purpose of Human rights,

h) Participate in all international activities relating to the promotion and protection of Human rights.

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i) Maintain a library collect data and disseminate information and materials on Human Rights generally;

j) And carry out all such other function as are necessary or expedient for performance of its function under this decree.

These are the functions and power of the commission. The summary of it all is that it has been vested with the responsibility of enlightening the general public on Human Rights issues. And to promote the protection of Human Rights both within and outside Nigeria. It should, however, be noted that from the content of paragraph (b) above where the commission investigates and finds Human Rights violations, it can only make appropriate recommendation to the government. One really wonders what happens where the commission finds the government violating Human Rights and assuming it courageously make a recommendation of for example telling the government release the detainees. Will the government oblige the recommendation of the commission? Where the government refuses to oblige the recommendation, what then happens?

Human Rights and Military Government are strange bedfellows. They are quiet incompatible. For the government,

Military or otherwise, is the great human right violator. According to P.K. Nwokedi, the Chairman of Human Right Commission there are three categories of violators of human rights; the government itself, government functionaries and private functionaries, but its more on the part of government functionaries especially on the government law enforcement agents.[75] (Emphasis supplied)

Regrettably, the establishment of this commission cannot be to the credit of the human right record of the Federal Military Government. This is so, because the commission has to perform its function in line with the Military Government decree that have encroach so much on the fundamental rights enshrined in the 1979 constitution. This is evident from the preamble and section 5(a) of Decree 22 of 1995. The section state in part that the commission shall deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria 1979, as amended..." (Emphasis supplied).

This means that the commission cannot perform its function on the Human Rights provision of the 1979

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[75] Newsletter (NHRC) December 1997 First Edition p.15

constitution but only as modified or amended by Decrees Nos 2 and 13 of 1984 or any other decree for that matter. One can therefore safely conclude that the functions of the commission does not affect the way and manner the military government may violate the fundamental right provision.

5.2.5 CONCLUSION

Human rights as guaranteed under the 1979 constitution, and as amended by the Federal Military Government has been examined the conclusion in this regard is that the enjoyment of fundamental rights and freedoms can only be realised under a constitutional government. Whereas under Military rule, first the fundamental rights are modified to exclude its application against any action of the Military government or its agents, secondly by use of ouster clauses the judiciary was barred from entertaining such matters. This leads us to the inevitable conclusion that there are no fundamental rights or that they can be violated with impunity by the Military government.

In practice, however, the military government could be guilty of breaching or encroaching on six out of the ten fundamental rights and freedoms discussed under the 1979 constitution. The abridged rights are as follows;

1) Right to life (S.30)

2) Right to personal liberty (S.32)

3. Right to fair hearing; (S.33)

4) Right to freedom of expression and the press (S.36)

5) Right to peaceful assembly and association (S.37)

6) Right to freedom of movement (s.38)

It should be admitted that it is not known to this writer whether the military government had at any time made law or by its executive power or actions did breach the other four sections (right to private and family life S.34; right to freedom of thought, conscience and religion S.35; Right to freedom from discrimination S.39; compulsory acquisition of property S.40) of the fundamental rights and freedoms.[76] One thing is for certain, that is, nothing in law prohibits the military government from violating those rights. As they did alter and breach the six mentioned rights above, they can definitely do so in respect of the other rights if they so wish.

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[76] Right to private and family life (34); Right to freedom of thought, conscience and religion (35); Right to freedom from discrimination (36), compulsory acquisition of property (40)

CHAPTER VI

6.0 SUMMARY AND CONCLUSION

In the preceding chapters, attempt was first made to discuss the evolutionary process of Nigerian constitution. The discussion on the evolution of Nigerian Constitution was followed by the analysis of the impact of military rule on the Nigerian constitution. This was achieved by discussing the traditional constitutional concepts and structures as they exist in the Constitution most especially the 1979 Constitution and how military rule came to modify, alter, amend or even abrogate them. In this chapter attention will be focused on what was learned in the preceding discussions and analysis of the impact made by military rule on the Nigerian constitution.

To begin with, the idea of a Constitution as it is known today was introduced into Nigeria by the British colonial power. From conquest of several independent territories and their amalgamation of what is presently called Nigeria, starting from 1862 to 1960, constitution-making in Nigeria was in the hands of the colonial officials, thereby determining the constitutional development of the country. Constitution making was entirely controlled by the British imperial government not only was the constitution determined by the

British colonial power but even the operators of the Constitution were mainly persons appointed by the colonial government, like the governor-general, High Commissioners and even lesser colonial field administrators. [1]

The colonial policy was gradually relaxed with the introduction of the Richardson Constitution in 1946. It was under this Constitution that Nigerians were for the first time allowed to participate in the administration of their affairs. For example, out of the 72 members of the central legislative council, 28 were Africans or Nigerians. Also for the first time Regional Houses of Assembly were introduced to enable Nigerians to participate in the discussion of their own affairs. They paved the way for Nigerians, to not only be involved in discussing their affairs, but also to participate in making the subsequent constitutions, even though under the supervision or guidance of British colonial power.[2] The number of Nigerians in both the legislative and executive council witnessed a steady increase under the 1951 and 1954 Constitutions. With political independence to Nigerian in 1960, the country saw what one may call a government for Nigerians and by the Nigerians. Thus, it would be correct to

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1 See Nigeria order in council 1913, and the Clifford Constitution 1922.

2 The Macperson constitution 1951 provides for 136 Nigerian elected members out of a total of 148 seats.

conclude that, "In Nigeria, within the one century of colonial rule, (1862-1960) the country had seen almost half a dozen constitutions with numerous complementary legislation amending them"[3]

It is a pity that the presidential Constitution of Nigeria (1979) had to be suspended after four years of existence. It is no exaggeration to say that both politicians and lawyers alike have not found anything wrong with that constitution. Justice Idoko, Chief Judge of Benue State had warned those who find some excitement in the making of new constitutions at the slightest opportunity. He said;

> "The hurray with which we greet new Constitution after another is reminiscent of people who believe that a good Constitution will work itself to life. Nothing is wrong with the 1979 Constitution and yet everything was wrong with those who were to make the Constitution alive - the executive, the legislature, and unfortunately the judiciary."[4]

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This view finds fault with the operators of the Constitution but the learned judge had conceded to the fact

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3 Tahir M. (1995) Slow March to Democracy: Understanding the Growth and Characteristics of Constitution order in Nigeria. In: Ayua (Ed) Law; Justice and the Nigerian Society. Nigeria Institute of Advanced Legal Studies, Lagos. P.106.

4 Idoko A (1995) In the Search of Durable Democracy in Contemporary Nigeria. Ibid p.147.

that the Constitution was not at fault at all. The inability of the operators to succeed in giving life to the Constitution is as a result of prolonged military rule resulting or creating an inexperienced political class. Four years of operating a Constitution is certainly not enough to pass death sentence on the political class and penalise them by overthrowing the Constitution.

On the other hand, a Constitution may be changed only if it has proven that it is not capable of serving the purpose for which it was made. For instance the 1963 Constitution had invested the regional governments with more powers than the federal government and that was threatening the continuation or existence of the Nigerian federation.[5] Therefore a Constitution with a strong federal central government was necessary for the continuity and survival of the Federal Republic of Nigeria, thus a settlement on the 1979 presidential constitution.[6]

Finally, modern constitutions have been known to contain a provision for its amendment. Once a section or part of the Constitution becomes no longer useful or that the Constitution

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5 B.O. Nwabueze (1982) A Constitutional History of Nigeria C. Hurst & Co. London pp 148-149.

6 See the Reports of the Constitution Drafting Committee Vol. II 1979.

ought to have included something or there is necessity to incorporate new ideas such can be accommodated by simply amending the Constitution rather than engage in changing the Constitution as a whole.

Under normal circumstances, changes in government are supposed to take place by a procedure laid down by the constitution. At least so said the 1979 constitution. Section 1 subsection (2) states:

> "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this constitution."

Therefore if any person or group of persons would take control of the government of Nigeria without resort to the provisions of the constitution, such take over can be described as unconstitutional. A take over of government by extra-constitutional means. In Nigeria, this is widely known as Military coup D'etat - a forceful overthrowing of the Government and the constitution. Once that is successfully done, the Constitution ceases to be the Grundnorm. The Grundnorm is replaced with that of the Federal Military Government. The Grundnorm of the Military Government is embedded in the principle of its supremacy in law-making

capacity. The Supreme Court of Nigerian, in the case of Labiyi V, Anretiola,[7] had spelt out the Grundnorm of the Federal Military Government and further provides the hierarchy of norms in order of superiority. The norms, beginnings with the Grundnorm are set out hereunder: -

i) Constitution (suspension and modification) Decree 1984.

ii) Decree of the FMG (Federal Military Government)

iii) Unsuspended provisions of the Constitution 1979.

iv) Laws made by the National Assembly before 31/12/1983 or having effect as so made

v) Edict of Governor of a state.

vi) Laws enacted before 31/12/1983 by the House of Assembly of a state, or having effect as so made.

A respected constitutional law scholar of thought has correctly identified the Grundnorm of the legal order in the Nigerian successive military Regimes. He said,

> "The grundnorm of the legal order in Nigeria's military regime is the principle of the supremacy of the Military Government in its law making capacity, as enacted in S1(2) of each of the constitution (suspension and modification) Decrees No 1 of 1966, No. 1 of 1984, and in S.1(3) of No. 107 of 1993, and in the preamble to each of the supremacy Decree of 1970, 1984, and 1993, just as in

[7] (1992) 23NSCC PT3 P.120 at pp. 132-133 per Karibi-Whyte J.S.C. see also Military Governor of Ondo State V. Adewunmi (1988) N.S.C.S. 1136,

> England the Grundnorm of the legal order is the principle of the legislative supremacy of parliament under the country's unwritten constitution."[8]

From the foregoing, it is crystal clear that the Grundnorm of the Military Government lies in the Constitution (suspension and modification) Decree, which in turn granted it absolute supremacy in law making over any existing legislation. On the other hand the Grundnorm of a democratic government is the constitution. For example section 1(i) of the 1979 Constitution states that, "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." It further declares void any legislation that is inconsistent with it.

On the issue of separation of powers under military regime, it has been established that it does not exist. The doctrine of separation of powers is a constitutional law doctrine. It can only exist under a constitutional arrangement like the 1979 constitution. It is now trite law that the executive and legislative powers in a military regime are combined in the Federal Military Government, that is a settled issue. However, since both military and constitutional

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[8] Nwabueze B.O. (1995) On Nature of a Revolutionary Military Government. The Journal of Nigerian Law (3(7):168.

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governments maintained the existence of the executive and legislative power, it becomes imperative to clarify each one of them.

Under constitutional government legislative powers are vested in the National Assembly with their powers enumerated in the exclusive and concurrent legislative lists.[9] The legislature has no unrestricted power to legislate on every conceivable thing, since it cannot legislate on matters not assigned to it by the constitution. In other words, it cannot legislate on any matter that it does not have power so to do. For instance the legislature is prohibited from making any law in relation to any criminal offence with retrospective effect.[10] Moreover, the exercise of legislative power is subject to the court's power of judicial review and the legislature cannot oust the jurisdiction of the court.[11] In summary legislative powers are to be exercised subject to the provisions of the constitution, and the judiciary is empowered to ensure that the legislature make laws within its legislative competence.

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9 1st and 2nd schedule to the 1979 constitution.

10 See section 33 (8) 1979 constitution.

11 See 4 (8) 1979 constitution.

On the other hand section 2 (1) of the constitution (suspension and modification) decree 1984 vest the federal military government with power to legislate on "any matter whatsoever," thus conferring it with unlimited legislative power. Its legislative power is not subject to judicial review. Perhaps that explains the legislative capacity of the military government to oust the jurisdiction of the courts, as it deems fit.[12]

Executive power under the constitution is vested in the president. In the presidential system of government there is the unity of the executive. His powers extend to the execution and maintenance of the constitution; and all laws validly made by the National Assembly and to all matters with respect to which the National Assembly has power to make laws.[13] Whereas under Military rule, executive authority is vested in the Head of the Federal Military government and his authority extend to the execution and maintenance of the Constitution of the Federal Republic of Nigeria as modified and supplemented by decree No. 1 of 1984 or any other decree, and to all other matters whatsoever throughout Nigeria. [14]

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12 See for example S. 4 (2) of Decree 2 of 1984.

13 See section 5, 1979 constitution.

14 See also S. 6 (1) and (5) Decree 107 of 1993

It appears that both under constitutional and military regimes executive powers are the same but the difference seems to be that the latter had power on "all other matters whatsoever throughout Nigeria." In other words, the executive under military regime has unlimited executive power, which means his powers are not limited as that of an executive under the constitution.

The contentious issue remains the status of the judiciary under a military regime. The military regime did not invest itself with judicial powers, but it permits the judiciary to continue to exercise those powers.[15]

However that does not mean that separation of power is maintained as far as judicial power is concerned, a view asserted by Ayoola J.C.A. in the case of Guardian Newspapers Ltd. V. A.G. Federation.[16] First, the doctrine of separation of powers is explicit on having the executive, judicial and legislative powers being separated and invested in different bodies. Secondly, the judicial power under the military regime has not been co-opted into its Grundnorm. Its legal

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15 Judicial authority/power is maintained under section 6 of the unsuspended provision of the 1979 constitution..

16 (1995) NWLR 703 at 745.

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basis is to be found in the unsuspended provisions of the 1979 constitution, which has bee established as the third norm in the hierarchy of norms in Nigeria. Therefore, it cannot be a partner in governance, at the same pedestal with the executive and legislative arm of the Federal Military Government.

The resulting effect of this is that there can be no liberty for the citizens. It is undoubtedly a feature of military regimes. This fact is supported by the effect of the State Security, (detention of persons) decree No. 2 of 1984, Decree No. 4 public officers (Protection Against False Accusation) of 1984 to mention but a few.

It is against this background that one finds that the judiciary has been gravely emasculated by Decrees, which oust their jurisdiction. By this act, the Federal Military Government has proven that the judiciary is not and cannot be a partner to it in governance. The first serious and significant attempt by the judiciary to let itself off the hook was in the Lakanmi's case, which was met with stiff resistance by the Federal Military Government.[17]

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[17] See Federal Military Government (Supremacy and Enforcement of Powers) Decrees 1970, 1984 and 1993.

The judiciary does not have the power to match that of the Federal Military Government. Perhaps that explains why they adopted a pragmatic approach, a realist and positivist position, most especially regarding the ouster clauses. The attitude has been summarized by Bello C.J.N in Attorney-General (Anambra State) V. Attorney General (Federation) and Ors,[18] when he said,

> "Under our present condition, Decrees are the supreme laws in Nigeria and all other laws including the current Constitution are inferior to the Decree."

Also in Attorney-General (Federation) V. Sode,[19] the court observed that although a court is competent to determine whether it has jurisdiction in a particular case, where the provision ousting the jurisdiction of the court is clear, and unambiguous, the court must apply the provision as it is. Furthermore on the legislative excess of the Federal Military Government, the court laments its helplessness in the face of the ouster clauses. Belgore J.S.C. said,

> "Decrees of the Federal Military Government clearly oust the courts jurisdiction. There is no dancing around the issue to find jurisdiction that has been taken away .... It must be remembered that the Armed forces Ruling Council is not a parliament, neither does it pretend to be one ... legal practice will attract

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18 (1993) 6NWLR (PT302) 692 at 714.

19 (1990) INWLR (PT 128) 500

> more confidence if administrative avenues are pursued rather than journey of discovery inherent in court actions in such matters."[20]

Such has been the attitude of the judiciary to the military regimes. They have accepted their status that is as subordinate to the Federal Military Government. Were the Courts to attempt to ignore the Military Government in this regard, that will certainly amount to judicial defiance.[21]

A confrontation between the Military Government and the Judiciary will not serve any useful purpose. Reason being that if a country of about a hundred million in population will accept military rule without defiance, how can one reasonably expect about 15 supreme court judges, and about 37 justices of the Court of Appeal to successfully defy the Military Government? Even if one add them with the High court Judges.

Judiciary under Military rule should deserve sympathy rather than be rebuked, particularly if one re-counts the judges who were summarily dismissed or retired on charges that

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20 See Nwosu V. Imo State Environmental Sanitation Authority & Ors (1990) 2 NWLR (pt/35) 688 at 737.

21 See Lekwot V. Judicial Tribunal (1997) 5 LRN P.1825 at 1838 per belgore J.S.C.

were not verified against them nor principles of fair hearing followed by the General Buhari and Idiagbon regime. "The dependence of judicial tenure on the pleasure of the government," says professor Nwabueze, "is clearly manifested in the summary manner in which over sixty high court judges in various states of the Federation were removed early in 1985, as part of the nation wide purge in the public service."[22] *However, that does not mean that one condones corruption in* any form by any member of the judiciary. The judiciary can be sanitised and the bad eggs should be flushed out after proper investigation and the principle of fair hearing extended to the accused judicial officers. Certainly, it is wrong to condemn them without at least being heard.

So much has been said about the law making powers of the federal military government. The discussion will be incomplete without looking into the role of Attorney -General in this regard. Essentially, the office of the Attorney General is a creature of the constitution.[23] It provides that there shall be an Attorney - General of the Federation who shall be a minister of the government of the Federation. The

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22 Nwabueze B.O. (1992) Military Rule and Constitutionalims Spectrum law publishing Ibadan p. 24

23 See Section 138 (1) 1979 constitution.

constitutional powers of the Attorney General are provided as follows:-[24]

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial in respect of any offence created by or under any Act of the National Assembly.[25]

(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person and

(c) To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

In the exercise of these powers, the constitution stipulates that the Attorney - General should have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.[26] Added to these functions and powers of the Attorney - General, he performs a miscellany of statutory functions.[27]

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24 See section 160 (1) Ibid.

25 In the second schedule of Decree 107 of 1993, the words "National Assembly" shall be substituted with the words "Federal Military Government."

26 See section 160 (3) 1979 constitution.

27 See the legal practitioners Act – Leader of the Bar. Member council of legal education. See also the company and Allied Matters Decree 1990. Generally, he is responsible for all matters connected with administration of justice

Like all cabinet Ministers, the Federal Attorney- General is also a member of the Cabinet, thus automatically pitched with the executive arm of the government.

Thus, the Federal Attorney General under a civilian administration has nothing whatsoever to do with law making, because that is an exclusive preserve of parliament or the legislative arm of the government.[28]

On the other hand the Attorney General under a military government, enjoys greater powers than his counter in civilian administration, being a member of the Federal Executive Council, and member of the nations highest ruling body makes him participate in policy formulation and law making, while his constitutional and statutory duties link him closely with the judiciary.

Thus the Attorney - General being the chief law officer of the Federal Military Government,[29] his opinion is sought on almost every subject and his advise is treated with great respect. He performs the important role of drafting Decrees for the military regimes most especially in an attempt to

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28 See section 4 (1) –(4) 1979 constitution.

29 Along side the Attorney – General, General Sani Abacha President and commander in chief of the Federal Republic of Nigeria created and appointed the office of a legal adviser (1993- 1998)

provide legitimacy to an otherwise illegal regime. Azinge[30] aptly described the role of Attorney - General in law making thus:

> "As the main actor in the theatre of Decree drafting, his interpretation of provisions of the law are deemed flawless since he is presumed to know the intention of the law makers of which he is a principal character. He is treated as the beautiful bride in Military Administration because of the endless search for legitimacy by an otherwise illegal regime. The Attorney - General provides the answer through the law making process by subordinating the constitution to Decree and dismantling all democratic structures. He creates an enabling environment for consolidation of military rule by ensuring that a *recalcitrant judiciary does not declare the* regime illegal. Thus he does by stuffing the statutes with ouster clauses excluding the jurisdiction of the court."[31]

Suffice it to state that all the Federal Attorneys - General appointed by the federal military government have been civilians and distinguished legal scholars and luminaries[32] who by their training are supposed to be the apostle of the rule of law. Yet they became tools in the hands of the military regimes by drafting obnoxious decrees.[33]

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30 Epiphany Azinge served as special assistant to two Attorneys – General of the Federation: MR Clement Akpamgbo, (SAN) and Dr. Olu Onagorawa respectively.

31 Azinge, E. (1994) law –making under military regimes. The Nigerian experience Oliz publishers p 112.

32 Like Elias, Nnamami, Offodile, Ajobola and Akpamgbo etc.

33 "No amount of textbook theory on rule of law and preservation of fundamental human right can change the dictatorial tendencies of a military regime" see Azinge, E. Op cit p. 118.

Finally, going by what the constitutional powers of the Attorney General outlined above, it appears that the Attorneys - General under military regimes have exceeded their constitutional powers or authority, for in the words of Azinge,

> "No Decree specifically confers on the Federal Attorney - General the power to make law for the Federal Military government. Neither is there any Decree specifically conferring him with the power to draft the Decree."[34]

Chapter IV of the 1979 constitution contained the bill of rights; they include the following: (1) Right to life, (2) Right to dignity of Human person, (3) Right to personal liberty, (4) Right to fair hearing, (5) Right to private and family life, (6) Right to freedom of thought, conscience and religion, (7) Right to freedom of expression and the press, (8) Right to peaceful assembly and association, (9) Right to freedom of movement, and (10) Right to freedom from discrimination.

All these rights were enforceable by the courts as fundamental and inalienable right of man. The judiciary had

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[34] Ibid. P. 113.

in a number of cases upheld the provisions of the fundamental rights provisions, as was discussed in chapter five of this thesis. Section 41 (1) and (2) of the 1979 Constitution empowered the legislature to abridge the citizen's fundamental right only in relation to sections 34,35,36,37 and 38 of the constitution. This can only be done if the abridgement is justifiable in a democratic society.

On the issues of the Fundamental Rights under Military regimes, their record is not a good one.[35] Of course while one concedes to the fact that in certain circumstances, the liberty of the citizen may be interfered with, the way by which the Military Government treat this matter is alarming. One, it ousts the court's jurisdiction from enforcing the Fundamental Rights provisions, for the purpose of some decrees. Examples of the ouster clauses may be found in the following decrees; they are Section 13, recovery of public property (special Military tribunals) decree 1984, section 12 (1) and (2) Exchange control (anti sabotage) decree 1984, section 8 (1) and (2) special tribunal (miscellaneous offences) decree 1984, and section 4 (1) and (2) state

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[35] For example so many people (mostly public office holders) were detained without trial under the Buhari/Idiagon regime between 1984 and 1985.

security (detention of persons) decree 1984, to mention but a few.

The main reason for the (fundamental rights provisions) entrenchment in the Constitution is to secure the liberty and freedom of the citizen against the arbitrary power of the state.[36] Therefore if a person's Fundamental Right cannot be secured against the almighty powerful state, then it is the view of this writer, that it becomes meaningless.

Secondly, the power to deprive a citizen's Fundamental Right is vested in the chief of Army Staff under very vague and undefinable circumstances.[37] He has an unfettered power to detain any person whose acts are in the view of the Chief of Army staff prejudicial to state security or has contributed to the economic adversity of the Nation, or in the preparation or institution of such acts. It is a matter of regret that "acts prejudicial to state security or contributing to the economic adversity to the nation" are not defined. So many persons were detained under this Decree. Furthermore the Chief of Army Staff can detain a person for a period of three or six

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36 See Senate Vs. Momoh (1983) NCLR 268

37 See section 1, State Security (Detention of persons) Decrees 1984.

months and in succession without charging the detained person to court. It is submitted even if this kind of a decree is necessary then it must spelt out in clear terms the circumstance under which a person's Fundamental Right can be infringed. A duration of time, like one months should be the maximum period for such detention. If such period expires and the detainee is not charged before a court of law, then he must be released.

The practice of Military Regime of ousting the court's jurisdiction as regard chapter IV of the Constitution for the whole duration of its existence is a matter of serious concern. Once the necessity of such legislation no longer exist, then it must be abrogated or repealed.

Finally, it is contrary to common sense and logic to oust the jurisdiction of the court on the whole of chapter IV dealing with Fundamental Rights and freedom against the background that it is not all the rights that are capable of threatening the security of the state. For example in what way would a person's right to life threaten the security of the state?

The Military Regimes in Nigeria have been saluted for ruling the country by Laws.[38] Laws are always made to deal with certain circumstances. The Military Government does not just carry out its activities without recourse to law. Except that sometimes, it engages itself in adhominem legislation (i.e. a legislation directed to or against a named person)[39] and retrospective legislation.[40] Still that does not make a military regime to be a government under the rule of law. The rule of law does not apply to the legislative acts of a Military Government because, in its law making capacity, a Military Government is subject to no law higher than, or superior to, itself.[41] Yet the Military Government has not gone far enough. The fact that they have absolute legislative power that does not permit them to promulgate Decrees that are absolutely oppressive to the people they seek to govern. The military regime should always be cautioned of absolutely corrupting itself with power. Professor Nwabueze cautioned them thus:

> "Absolute power corrupts absolutely, Military Legislation thus challenges the ability of the Military Government to resist the corruptive, temptations of its

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38 See FR Williams: The Nigeria Judiciary and Military Government. 1995 JNL Vol. 2 No. 2 p3

39 See for instance the Daily Times of Nigeria ltd. (transfer of certain shares) Act No. 101 1979 (which was backduted to 1st Sept. 1975.

40 See for example Special Tribunals (miscellaneous offences) Decree No. 20 1984.

41 Nwabueze B.O: Nature of a revolutionary military government (1996) vol. 3 No. 1 p. 103.

> absolute power. It is a great challenge indeed to set limit for oneself, self limitation and self restraint is an exercise in rare courage, calling for a deep sense of maturity and responsibility and an appreciation of the nature of political power as a delegated power and a public trust."[42]

The learned professor further warned the Military Government that:

> "In exercising its absolute and unlimited powers, therefore, the Military Government must not behave as if the community whose affairs it is administering is a colonial one which has lost its right of self government in the military coup that brought it to power. It would be a tragedy if an event, heralded as a salvation for the people, turned out to be their own subjugation."[43]

The Military Government must not be a lawless leviathan. Whenever it becomes necessary for them to assume the leadership of the country, having invested themselves with all the governmental powers, they must exercise self-restraint. So that they do not end up oppressing the people whom they initially assume power to save.

This leads to the issue of the Military Government and respect for the rule of law. So many cases were cited earlier

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42 Nwabueze B.O. Government Mustn't be a law less leviathan New Nigerian Newspapers, Monday October 1, 1984 p. III

43 Ibid p. IIV

on showing how the Military Government exercised power without regard to the rule of law.[44] On this point, one must state that the government should rule by example. It is only when the government respects the law, that the citizens will feel that they are equally bound to follow the law. For to do otherwise will certainly, lead the society into a chaotic situation.

Military governments have been known to discard the regular conventional courts for Special and Military Tribunals. The tribunals established by the military government must observe the simple principle of fair hearing (audi-alteram partem) and the concept of natural justice. In order to achieve this objective, the members of the tribunal must be impartial. They must be persons with adequate legal training. This will go a long way in reducing the incidence of false conviction. Professor Nwabueze has this to say;

> "Evidently, the kind of process best calculated to reduce to the barest minimum the chances of a false conviction and punishment is that in which the trial is conducted by independent, trained and experienced judges who are learned in the law and versed in the difficult part of sifting evidence and judging the demeanour

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[44] See Gov. of Lagos State V. Ojukwu (986) 1 NWLR (18) P.621; See also Obeya Memorial Specialist Hospital V. Attorney General (1987)3 NWLR (Part 60) 325.

> of witnesses, and who have been reared in the common law tradition of individual liberty, which insists, rightly, that it is better for nine guilty persons to go free then for one innocent man to be incarcerated."[45]

In addition, the use of military personnel serving or retired in the tribunals to try ordinary criminal cases is quite untenable. Military personnel have no business being in the tribunal trying cases where the parties are civilians. Their presence always cast doubt as to the impartiality of these tribunals.

Furthermore, the decisions of these tribunals are not subject to the appeal process of the judicature. Where a tribunal composed of military and laymen adjudicate in a given case it is then certain that their decisions may be prejudicial of the rights of individuals, its decisions on points of law should not be final but should be subject to appeal to the ordinary courts.[46]

Another issue of concern related to the point raised above has been the use of ouster clauses to divest the courts from performing their traditional role of adjudication - a

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45 Nwabueze B.O. (1992) Military Rule and Constitutionalism. Spectrum Law series p.62.

46 Ibid p.61.

constitutional function. By the use of this clause, the judiciary has been divested from its natural power to adjudicate on the said subject matter. Ouster clauses in decrees must be abolished. It does not serve any useful purpose except strengthening the powers of the Military Government in its lawless activities against the citizen. Incapacitation of the judiciary by the use of ouster clauses does not add to the stability and security of a military regime.[47] Instead of emasculating the judiciary, the Military Government should improve the living and working condition of the members of the judiciary. Add more courts and personnel to meet up with the increasing number of the population of the country. This may help in reducing the incidence of delay in the courts and eventually improve on the speed of adjudication.

On a final note, it is submitted that Nigeria must reject military rule and adopt a constitutional government.[48] It is only under a constitutional government, that the powers of the government are spelt out and vested in a certain and specified body or organ. The organs of the government are: the

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47 Aduba N. Development and the rule of law under Babangida Regime (1985-1992) Justice Journal 3 (3 & 4): 38.

48 See Aminu A. the observance of the rule of law and fundamental Human Rights. (1990) Law Development and Administration of Justice in Nigeria. Federal Ministry of Justice series. P 390.

Executive, Legislature and the Judiciary. Each of these organs are invested with certain well defined powers and functions, within a system of checks and balances. The doctrine of judicial review serves a very useful purpose in ensuring that each of the organs is kept in proper check. Thus the issue of arbitrariness, despotism and dictatorship in governance will be reduced to the barest minimum if not stamped out completely, since the respective organs of the government are under the rule of law.

Modern constitutional governments do incorporate the bill of rights, like chapter IV of the 1979 constitution. This provides the citizens with the opportunity of knowing what their rights are and it further limits the government from encroaching on those rights. The constitutions further provide the necessary mechanism for the enforcement of the Fundamental Rights, whenever they are breached or even threatened.

The best advice for Nigeria in the circumstance is that given by Justice Idoko, when he said:

> "Our desire for liberty has to grow stronger in this country. For it is then that democracy gets a good soil to grow. Liberty which rumbles when it is put to the test of action must be a weak and brittle thing.

> Yet a free people must place self-discipline upon itself in a time of crisis. It is this liberty found on law, that will make us a self-reliant people that face the future with confidence and trust. Our surest defence against tyranny and absolutism depends on the enforcement of the rule of law and the fundamental liberties written in our constitution. That is why the court must in all sincerity and seriousness be made the effective watch-tower."[49] (Emphasis supplied).

PARADOX OF MILITARY RULE[50]

It is a paradox of military rule in Nigeria whereby a regime which overthrow the constitution to rule by Decrees would set up a process of constitution making leading to obviously establishment of a constitutionally democratic government. No sooner the military government is settled, a process for constitution- making and for return to democratic government is usually set in motion. This is otherwise - called transition programme. It seems that the military regimes in Nigeria were not unaware of the fact that military rule is an aberration and that democratic rule is a better option. According to General Buhari, "It is clear that a global consensus has emerged that democracy, however adapted, is the choice and any country or institution within a country that rejects this does so at a great risk of international

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49 Idoko A. Op cit p.140 at 154.

50 See Olagunju Et-El (1993) Transition to Democracy in Nigeria (1985) –1993) Safari Books Ltd. Ibadan pp 24 – 58.

isolation and abuse. Democracy does not take root easily, and is full of shortcomings. But it remain still the least evil of any form of government in our time."[51]

Conscious of this fact, that democracy is a global consensus, Nigerian military regimes have strenuously made efforts to return the country to civil rule. This effort is anchored on constitution making, for it remains the cornerstone of any democratic government. Constitutional review committees and conferences established by successive military regimes usually mark the beginning of the process of return to civil rule. Gowon's regime constitutional conference started on 12th September 1966; Murtala - Obsanjo's on 19th October 1975, Babangida's on 11th May 1988; and Abacha's on 27th June 1994. In 1998, General Abdulsalam set up a constitution review committee.

All these efforts of military regimes at constitution making has been geared towards creating a formidable and enduring institutional arrangement that can ensure steady consolidation and growth of Nigerian democratic nation state.[52]

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51 See major General Buhari on leadership and accountability in a period of moral crisis forth annual Sir Ahmadu Bello Memorial lecture delivered under the auspices of Arewa House Kaduna on May 15, 1998.

52 See General Sani Abacha's speech of Monday 27th June 1994 at inauguration of the National Constitutional Conference.

President Ibrahim Babangida (as he than was) who had taken part in so many coup de'tat,[53] captured the essence of constitution making by the military in the following words:-

> "I believe I reflect the growing conviction and awareness among Nigerians that the persistent, destabilising interruption and disruption of our orderly political evolution by bad politics, bad governments, and reactive military interventions is a form of national self defeat. There is certainly little doubt that few contemporary nations have seen as many changes of government as we in Nigeria have done since independence. If at the end of your work we successfully build a foundation for good, peaceful, purposeful and stable order which allows us to concentrate on the achievement of individual, community, national self-fulfilment and greatness, than, all of you here, our administration and the nation shall have course for pride and satisfaction in your inauguration. We all realise that your role is probably one of the most significant in our continuing effort to give our nation a place in history. It is certainly crucial to the process of the gradual return to democratic government and the eventual withdrawal of the military from the management of the state by 1992."[54]

Thus the greatest legacy of military regimes to democratic governments in Nigeria has been the constitution. The military overthrow the constitution on their assumption of power yet at

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53 See Daily Times October 7, 1990

54 See Ibrahim Babangida – Address to members of the constituent assembly at Abuja on 11th May 1998 or Portrait of a New Nigeria – Selected speeches of IBB p 45.

the point of their exit it is another constitution that they will put in place, that is, the paradox of military rule in Nigeria. What then has been the feature of the constitution bequeathed to the civilians. All the constitutions prepared under the military, that is the 1979, 1989, 1995 and 1999 were modelled on the presidential system of government as opposed to parliamentary model that was inherited from the former British colonial authority at independence in 1960. However it must not be forgotten that even though the military prepared constitutions were modelled on the presidential system of government, differences exist in these constitutions in matter of detail which have been geared towards strengthening or avoiding the pitfall of the preceding constitution.

SOME SALIENT FEATURES OF THE NIGERIAN CONSTITUTION

In this segment attempt will be made to highlight some of the salient features of the Nigeria constitution. The objective here is to bring the effort so far made by the military in fashioning out a constitution for the country as well as the improvement made in respect of each of the constitution that was made at one time or the other.

(a) **SUPREMACY OF THE CONSTITUTION**

All the four Nigerian constitutions (1979, 1989, 1995 and 1999) were based on the principle of supremacy of the constitution. They declared that, "this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the federal republic of Nigeria" and that, "if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

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(b) **CONCEPT OF PROPORTIONATE REPRESENTATION:**

The constitutions provide for a bicameral legislature that is the senate and house of representative. Except for the 1979 constitution, which provided for five senators from each state, the 1989, 1995 and 1999 constitutions provided for three senators from each state. Both the 1995 and 1999 constitutions provided for three hundred and sixty members representing constituencies of nearly equal population as far as possible while that of 1979 and 1989 constitutions provided for four hundred and fifty, and four hundred and fifty three members in the house of representatives respectively. In a country like Nigeria being a plural society, the principle of proportionate

representation will go along away in diffusing tension among its people.

(c) **PRINCIPLE OF FEDERAL CHARACTER**

Akin to the provision for proportionate representation is the principle of federal character. In a plural society like Nigeria, the need to ensure that all part or segment of the society is not marginalised or ignored in matters of administration of the country, the provision of the federal character was provided for, in the constitutions.

It states that:

> "The composition of the government of the federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups, in that government or in any of its agencies."

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Furthermore the constitution enjoins all the organs of the government, authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provision of fundamental objectives and directive principle of state policy.

It should be noted that all the constitutions have enshrined this principle in chapter II. However, the provisions in chapter II of the constitution are non-justifiable, which includes the provision for the principle of federal character. Subsection 6 (c) of section 6[55] provides that:

> "The judicial power vested in accordance with the foregoing provisions of this section... shall not, except as otherwise provided by this section, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution." (Emphasis supplied).

An examination of the issue of non justiciability of the provisions of the fundamental objective and directive principle of state policy will reveal that it is not absolute, for any of its provision may be enforced if there is any provision of the constitution that provide for its enforceability. The operative words of section 6 (6) (d) which says "except as otherwise provided by this constitution" seems to suggest so.

The 1995 and 1999 constitutions made provision for the federal character commission. The commission is empowered to

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[55] See 1979, 1989, 1995 and 1999 constitutions

give effect to the federal character provisions, thus invested with power to:

a) work out an equitable formular subject to the approval of the National Assembly for the distribution of all cadres of post in the public service of the federation and of the states, the armed forces of the federation, the Nigeria police force and other government security agencies, government owned companies and parastatals of the states.
b) Promote, monitor, and enforce compliance with the principles of proportional sharing of all political posts at all level of government.
c) To take such legal measures, including the prosecution of the head or staff of any ministry or government body or agency which fails to comply with any federal character principle or formular prescribed or adopted by the commission, and
d) carryout such other functions as may be conferred upon it by an Act of the National Assembly.

The post of cadres mentioned above include the following: permanent secretaries, directors general in extra ministerial departments and parastatals, directors in ministries and extra

ministerial departments, senior military officers, senior diplomatic post and managerial cadres in the federal and state parastatals, bodies, agencies and institutions. Equally it extends to every public company or corporation in the appointments of its directors and senior management staff.[56]

d) THE NATIONAL JUDICIAL COUNCIL

All the Nigerian constitutions have embedded the doctrine of separation of powers. Legislative powers are vested in the National Assembly, executive powers are vested in the executive and judicial powers are vested in the courts. These three arms of the government are supposed to be independent of control from the other within a system of checks and balances. The 1995 constitutional conference observed that,

> "The universal principles of separation of powers between the three arms of government - executive, legislative and judiciary - appears not to be in operation in Nigeria at federal and state levels particularly with reference to the judiciary. The judiciary in Nigeria is tied to the apron strings of the executive both at the federal and state levels and this erodes the independence of the judiciary. In other words the judiciary in Nigeria is so dependent on the executive that it is

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[56] See section 19 (1) (2) (3) & (4) of part I of third schedule and section 8 (1) (2) (3) & 94) of part 1 to third schedule of 1995 and 1999 constitutions respectively.

> regarded as an extension of the executive."[57]

It therefore recommended the establishment of National Judicial Council in order to ensure the independence, integrity, impartiality and credibility of the judiciary. In the words of the constitutional conference;

> "The National Judicial Council will enhance the independence and impartiality of the judiciary especially during civilian regimes, while justice and fairness will be assured to the citizens. It will maintain uniform standard and quality among judicial officers in the country through appropriate vetting and assessment of judicial appointees."[58]

The function of the National Judicial Council may be summarised as follows:-[59]

(i) to recommend to the president or government, as the case may be, suitable persons to be appointed to the offices of Chief Justice of Nigeria, Chief Judge of a state and other Judicial officers of all superior courts of record at federal and state levels.

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57 See Report of the constitutional conference containing the resolutions and recommendations vol II 1995 p. 96.

58 See Ibid. pp 94 – 100 especially at 95,

59 See section 16 part I of third schedule and section 21 part 1 of third schedule to 1995 and 1999 constitutions.

(ii) To recommend to the president or the governor, as the case may be, the removal or dismissal from offices of judicial officers of superior courts of record at federal and state levels.

(iii) To appoint, dismiss and exercise disciplinary control over members of its staff.

(iv) To control and disburse moneys meant for the judicial services of the federation.

It is hoped that the National Judicial Council will enhance the independence of the judiciary and improve the administration of justice in Nigeria.

e) **REVENUE ALLOCATION**

Few issues in Nigerian fiscal finance have received more attention or generated more public interest than revenue allocation. The interest in this area came about as a result of demand by Nigerians for an equitable revenue allocation formular and of course that manifest the complexity of the issues involved.

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Revenue allocation may be defined as "the mechanism for sharing the country's financial resources among the different ties of government in the federation, with overall objectives

of enhancing economic growth and development, minimising inter government tensions and promoting national unity" and in the Nigeria context, it "involves the sharing of national revenue and other resources first vertically among the federal, state and local governments, and second, horizontally among the states, and among the local government."[60] Thus, revenue allocation belongs to the watershed between politics and economic and falls squarely within the area of political economy. In this sense, the issues of revenue allocation are partly economic, but are largely a matter of political compromise.

The 1979 and 1989 constitutions merely vest the National Assembly with powers to make law with respect to revenue allocation formular to be distributed among the federal, state and local governments whereas the 1995 and 1999 constitution has made a radical departure from the former in this regard. This significant innovation is to be found Section 162 (2) of the 1999 constitution[61] states: -

> "The president, upon receipt of advise from the revenue mobilisation allocation and fiscal commission, shall table before the National Assembly proposals for revenue

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60 See T.Y. Danjuma, Revenue Sharing and the political economy of Nigerian federalism in the Nigerian journal of federalism vol. 1 No. 1 June 1994 p 45

61 See section 163 (2), 1995 constitution.

> allocation from the federation account and in determining the formular, the National Assembly shall take into account, the allocation, principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density. Provided that the principle of derivation shall be constantly reflected in any approved formular as being not less than thirteen percent of the revenue accruing to the federation account directly from any natural resources."

Two important innovations are the features of this section, one is involvement of the revenue mobilisation allocation and fiscal commission and the guidelines for the National Assembly while determining the nation's revenue allocation formular.

The National Revenue Mobilisation, Allocation and Fiscal Commission was first established by the regime of General Babangida by Decree No. 49 of 1989 charged with the following duties and responsibilities, among other things:-

a) systematic design and effective mobilisation of all resources of public sector revenues;

b) periodic review of the revenue allocation principles and formulae such would minimise short-term political pressure; and

c) prescription and application of revenue allocation formulae after due approval by the federal government

for the purpose of sharing the federation account between the federal, state and local governments:

This commission found a lasting place in the Nigerian constitution and have the following powers, inter alia:-[62]

(a) Monitor the accruals to and disbursement of revenue from the federation account

(b) Review, from time to time, the revenue allocation formulae and principles, in operation to ensure conformity with changing realities provided that any revenue allocation formular which has been accepted by an act of the National Assembly shall remain in force for a period of not less than five years from the date of commencement of the Act.

It is hoped that with the constitutional role of the National Revenue mobilisation, allocation and fiscal commission, the constitutional guidelines given to the National Assembly and appropriation of thirteen per cent of the revenue on the principle derivation from any natural resources to the people concern will ease tension on the political pressure

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62 See section 31 part I the third schedule and section S 35 part 1 to the third schedule to the 1999 and 1995 constitutions respectively.

involving revenue allocation formular and disbursement thereby promoting the desired national development.

f) **FUNDAMENTAL RIGHTS**

All the four constitutions have maintained fundamental rights provisions in chapter four. They are: (I) right to life, (2) right to dignity of Human person, (3) right to personal liberty; (4) right to fair hearing (5) right to private and family life; (6) right to freedom of thought, conscience, and religion; (7) right to freedom of expression and the press; (8) right to peaceful assembly and association; (9) right to freedom of movement; (10) right to freedom from discrimination; and (11) right to fair compensation on compulsory acquisition of property.

It is a matter of regret that the National Human Rights Commission[63] created by the Abacha led military regime did not find a place in either the 1995 or 1999 constitutions. Perhaps the commission does not have any relevance under civil democratic government where citizens enjoy their unfettered rights and freedoms guaranteed them by the constitution.

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[63] Established by Decree 22 of 1995

REFERENCES

A. BOOKS

1. Odumoso O.I. (1963) Nigerian Constitution: History and Development Sweet & Maxwell.

2. Allan Burns (1978) History of Nigeria George Allen & Unwin Boston and London.

3. Elias T.O. (196) The Developments of its Law and Constitution Stevens & Sons

4. Nwabueze (1982) A Constitutional History of Nigeria Hurst and Co London.

5. Vol. II Report of the Constitutional Conference (1995) printed by National Assembly Press Abuja.

6. Nwabueze B.O. (1973) Constitutionalism in the Emergent States Hurst & Nwamnife London & Nigeria.
7. Calvert A. (1970) Revolution Pall Mall Press Ltd London.

8. Lloyd D. (1972) Introduction to Jurisprudence Stevens& Sons.

9. Achike O. Groundwork of Military Law and Military Rule in Nigeria Fourth Dimension Law Publishers.

10. Plato Great Dialogues Translated by W.H.D. Rouse (1956) Mento.

11. Plato The Laws Translated by Trevor J. Saunders (1970) Penguin Classics.

12. David R. & J.E.C. Briely (1978) Major Legal Systems in the World Today Stevens & Sons.

13. Angel A. et el (1971) Ideologies and Modern Politics Fletcher & Sons Ltd. Norwic.

14. Zarodov K. (1981) Leninism and Today's Problems of the Transition to Socialism Progress Publishers Moscow.

15. The New Encyclopaedia Britannica (15 Edition)

16. Aristotle The Politics Translated by Trevor J. Saunders Penguin Classics.

17. John Locke (1963) Two Treatises of Government. Edited by Thomas Cook. Hafner Publishing Company Inc. New York.

18. Aihe et el (1979) Cases and Materials on Constitutional Law in Nigeria Oxford University Press

19. Nwabueze B.O. (1982) The Presidential Constitution of Nigeria. Hurst & Company London.

20. Nwabueze B.O. (1974) Presidentialism in Commonwealth Africa. Billing & Sons Ltd London.

21. Nwabueze B.O. (1977) Judiacialism in Commonwealth Africa. Hurst & Company London.

22. Laski H. (1961) Liberty in the Modern State.

23. Bridge J.W. (1973) Fundamental Rights. Sweet & Maxwell, London.

24. Denning (1981) The Family Story. Butterworth London.

25. Report of the Constitution Drafting Committee Containing the Draft Constitution Vol. 1 (1976) Federal Ministry of Information printing division Lagos.

26. Aguda A. (1983) The Judiciary in the Government of Nigeria. New Horn Press, Ibadan.

27. Oputa (1989) Human Rights in the Political and Legal Culture of Nigeria. Nigerian Law Publishers.

28. Chand H. (1982) Nigerian Constitutional Law. Santoshi Publishing House India.

29. Denning (1982) What Next in the Law Butterworth London.

30. Ojo A. (1987) Constitutional Law and Military - Rule in Nigeria Evans Bros Ltd.

31. Ayua I. (Ed) Law; Justice and the Nigerian Society. Nigeria Institute of Advanced Legal Studies, Lagos.

32. Okoye F. Ed 91997) Special and Military Tribunals and the Administration of Justice in Nigeria. Human Rights Monitor, Kaduna.

B. JOURNAL

1. Williams F.R.A. `The Nigerian Judiciary and Military Government' (1995) The Journal of Nigerian Law (1996) Vol. 3 No.1

2. Kelsen H. 1955 `The Pure Theory of Law'. Law Quarterly Review Vol. 50 & 51.

3. Nwabueze B.O. `Nature of Revolutionary Military Government in Nigeria'. The Journal of Nigerian Law 1996 Vol.3 No.1 OK Lawyers Bi-Annual Oct. 1995 Vol.2 No.2

4. Aduba N; `Development and the Rule of Law Under Babangida Regime (1985 - 1992) Justice Journal Vols. 3 & 4.

5. Elegido J.M: `Judges and Coup D'etat' Oct 1994 Lawyers Bi-Annual Vol.II No.2

6. Tobi N: `Legislative Competence of the Armed Forces Ruling Council' 1990 Justice Journal Vol.4