FEDERALISM AND MILITARY RULE

IN

NIGERIA

by

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DEDICATION

This thesis is dedicated to my deceased mother MRS. AMINA OTINI AGBONIKA who could not live to reap the fruit of her labour.

Epitaph

"Death is a black camel which kneels at every man's gate. Death rides on every passing breeze. He lurks in every flower.
Mors Omnibus Communis."

Heber

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Finally, I declare that I am fully responsible for any short-coming in this work.

J.A.M. AGBONIKA
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ABSTRACT

FEDERALISM AND MILITARY RULE IN NIGERIA

This thesis examines the practice of federalism under military rule in Nigeria. The primary objective is to determine to what extent federalism is practicable under military governance.

The argument is that military rule and federalism are two fundamentally different concepts of political organisations, and that it is a misnomer to call a military government federal because of the inherent contradictions between the two.

The thesis is divided into twelve chapters. Chapter 1 deals with the introduction. Chapter 2 provides the theoretical framework. It examines the concept of federalism. Chapters 3, 4, 5 and 6 provide the empirical background to the study. They trace the development, basis, as well as the status of Nigerian federalism under civil rule. They also examine the contradictions between federalism and military rule. Chapter 7 discusses the advent and legality of military government in Nigeria. Chapters 8, 9 and 10 look at the machinery of the military administration, while Chapter 11 analyses the federal-state fiscal and financial relations. The concluding Chapter 12 summarises the broad issues of the preceding chapters and highlights the effects of military rule on the Nigerian Federation in particular and on the study of federalism in general.

The conclusion that emerges from this study is that federalism and military rule are incompatible. Nigeria's

military government has in practice subverted the federal principle. It has been operating a quasi-federal rather than a truly federal system of government. It is argued that a return to a civilian federal system, adjusted to meet the country's needs is essential if Nigeria is to have an accountable, stable democratic government and respect for human rights.

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CHAPTER ONE

INTRODUCTION

The establishment of a federal system of government in 1954 for Nigeria was a conscious and rational attempt to solve her problem of pluralism. Whilst the country was in the throes of the decolonisation process in the early 1950's, the British Colonial Administration and the indigenous political elite considered the introduction of classical federalism[1] to be an effective means of reconciling the divergent forces that exist within the Nigerian society. Consequently, in 1954, federalism was formally adopted. In 1960, Nigeria obtained her independence from Britain and became an independent sovereign state and a member of the Commonwealth. She attained a republican status in 1963.

Federalism is a dynamic process, and since 1954, Nigeria has had her own peculiar experiences in the federal experiment. One of them is the emergence of military rule which has been in force since 1966. This phenomenon has become pervasive in most countries of the Third World especially in Latin America, the Middle East, Asia and Africa. Over half of the continent of Africa is now governed by military or civil-military regimes, and in most cases, the period of military rule has lasted much longer than that of the supplanted civilian administrations, thus leading one to question the validity of the proposition

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[1] For the definition of "classical federalism", see Chapter Two (infra, 2:2).

that military rule is nothing but "a political aberration".[2]

In Nigeria, the frequency of military intervention in government[3] and its aftermath effects, has been the over-concentration of authority and powers in the Central Government at the expense of the States. This has brought about what one might call a 'master-servant' relationship in terms of federal-state relations with gradual erosion of the powers of the subnational units.

A careful study of federal and military characteristics[4] reveals that military rule is antithetical to the federal nature of the political and social structures which Nigeria has contrived. The military features impede coordination of authority and distort the equilibrium in federal-state power-sharing which, of course, are the sine qua non for the practice of federalism. Hence, arising out of this study are the questions: why is it impracticable for Federalism to thrive under military rule; and which aspects of the military political process militate against the achievement of functional federalism in Nigeria?

In attempting to answer these questions, four main aspects of military administration in relation to federal-state partnership are considered in this study. They

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[2] Adebayo, Augustus, Principles and Practice of Administration in Nigeria (Ibadan: Spectrum Books Ltd., 1981), pp.85-86. See also Samuel Decalo, "Military Coups and Military Regimes in Africa", Journal of Modern African Studies, 11 (March 1973), pp.105-127.

[3] Military coups have become cyclical in Nigeria. Since 1966, 5 coups (excluding 3 attempted) have taken place.

[4] See Chapter 5 (infra).

include the constitutional, political, administrative and fiscal relations. The list is by no means exhaustive, but they are considered as the most important, and a reasonably intensive study of them gives a reliable indication of the nature and scale of the violation of the federal principle by the Nigerian military government.

The main criterion used in determining whether or not the Nigerian military adheres to the concept of Federalism, is the extent of "federal predominance" in the constitutional structures, administration and policy implementation of the government. In doing so, two tests are applied.[5]

First, "Is the federal principle predominant in the military Constitution?" If so the Constitution may be called federal. If on the other hand, there are many modifications or deviations in the constitution that the federal principle ceases to be of any significance, then, the constitution cannot be termed federal.

It is not sufficient for the military (or any other government) to have a federal constitution. That is something, but there is no guarantee that a federal system will operate. What determines the issue is the working of the system. The second test therefore is, "Does the system of military government embody predominantly a division of powers between the general and regional authorities, each of which, in its own sphere, is coordinate with and independent of the other?" If so, that government is

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[5] These tests are derived substantially from Professor Wheare's famous theory of the federal principle; see Wheare, Kenneth C., Federal Government, 4th edn. (London: OUP, 1963), pp.15 & 33.

federal, and vice versa.[6]

It is argued in this study that because of the inherent contradictions between military rule and federalism, the former would not augur well for a heterogeneous society like Nigeria where regional autonomy in certain matters is fundamental for the corporate existence of the federated units. Besides, as the most populous sovereign state in Africa and one of the architects of Pan-Africanism, Nigeria is expected to be a model of constitutional government. Hence, to assert its leadership role,[7] federalism which she claims to have been practising must be functional, viable and authentic.

It is against this background that we set out to examine the practice of federalism under military rule.

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[6] Note that in Nigeria, the Military Constitution is an amalgam of the unsuspended parts of the civilian constitution, Decrees, Edicts and other subsidiary legislations promulgated from time to time by the Supreme Military Council or the Military Governor of a State. In this study, unless otherwise expressly stated, the words "federal", "general", and "central", are used interchangeably and they refer to the national government while "region", "canton", "province", "subnational" are synonymously used in relation to state governments. The phrase, "Federal Military Government" is used notionally because the argument of the thesis is that military government is not federal.

[7] See Wayas, Joseph, Nigeria's Leadership Role in Africa (London: Macmillan, 1979).

CHAPTER TWO

THE CONCEPT OF FEDERALISM

Before examining the impact of military rule on federalism in Nigeria, a preliminary discussion on the concept of federalism is needed both for the sake of clarity and to set out the framework for the analysis. Such a preliminary clarification is necessary for two reasons: firstly, at least from the legal point of view, the term "federalism" has often been used loosely and imprecisely by many scholars, especially social scientists;[1] secondly, it will enable us to compare and contrast the type of government which the Nigerian military purports to run and that which it actually operates. Thus, this Chapter is essentially a synthesis and a critique of some of the existing theories on federalism.

2:1 Evolution of the Federal System

Though the origin of federalism cannot be ascertained with any degree of precision, its concept is not entirely new. The first appearance of what can be called federal government occurred in ancient Greece after the Peloponnesian war during the thirteenth century. The circumstances that inspired the 'invention' were mainly military - the fear of the city states to defend themselves against the war threats from Sparta, Macedon and Rome. The city states delegated to military rulers only defence powers while retaining for themselves decisions on diplomatic matters and other non-military issues. In addition to military alliances, there were found in Greece

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[1] See the various definitions of federalism below.

the Amphiktyonies, the Acheans and the Aetolian Leagues which were communities of city states of a rather religious character but wielded great political influence. Also, in the Italian city states of the Middle Ages, in the American and Swiss Confederations before 1787 and 1848 respectively, there existed some loose federal unions through which the states were linked together.

The unique feature of each of these groups was the provision of a formal structure to look after the common affairs of the group while leaving the individual member or unit to take care of such matters that were not of general concern.[2] This fact of union of group selves, united by one or more common objectives but retaining their distinctive group being for other purposes is the inner essence of federalism.

Between the evolution of the city states of ancient times and the development of the modern states, particularly since the formal adoption of a federal Constitution by the United States in 1787, federalism has assumed a new dimension. The end of World War II in 1945 marked the beginning of an extraordinary popularity of the idea of Federalism as a panacea for a great variety of socio-political and econo-cultural problems at all levels of governmental organisation in many parts of Europe, America, Asia, Australia, and Africa. This contemporary interest in federalism arose from post-war developments and the proliferation of political systems which manifest

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[2] For elaborate discussions on the history of the ideas of federalism, see among others, Mogi, Sobei, The Problem of Federalism: A Study in the History of Political Theory (London: Allen & Unwin, 1931); and Riker, William H., Federalism: Origin, Operation, Significance (Boston: Little Brown & Co., 1964).

division of authority and powers among different levels of government. Indeed it has now become fashionable among the Commonwealth countries to use federalism as a means of softening political tensions. Thus, newly independent nations wishing for the realities of economic and political sovereignty, and not merely its ceremonial trappings, turn frequently to some kind of a federal system. Apart from the post-war developments, the historic success of federalism in the United States, Canada, Australia and Switzerland, to some extent, gave impetus to developing nations and also lent credence to federalism as a solution to the common contemporary problem of units, which standing alone, are frail, uncompetitive and economically non-viable. By the 1960's, half of the land mass of the world was ruled by governments that described themselves as federalist.[3] One can, therefore, agree with Professor Riker's view that the 20th century is the Age of Federalism.[4] Riker's view is supported by Elazar who maintains that the federal revolution is as much a product of the modern era as contemporary urbanism, and that it has become significant in shaping modern political life.[5]

The increasing tendency by governments in modern times to apply democratic principles particularly in the decision-making process and policy implementation has

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[3] Examples include Argentina, Austria, Australia, Brazil, Canada, Congo, Ethiopia, West Germany, India, Malaysia, Mexico, Nigeria, Pakistan, the Soviet Union, Switzerland, the United States, Venezuela and Yugoslavia.

[4] See Riker, William H., Federalism: Origin, Operation, Significance (Boston: Little, Brown, 1964), p.2.

[5] Professor Daniel J. Elazar, "Urbanism and Federalism", Publius, 5 (1975).

rendered the introduction of federalism attractive. Federalism seeks to resolve the theoretical antimony of the unity of the whole and freedom of its constituent parts. But what exactly is the meaning of "federalism"?

2:2 Definition

A proper examination of the working of a federal system of government should of necessity begin with a definition of federalism.

The word "federalism" is derived from the Latin term foedus which means treaty or alliance. This implies that at the root of every federation lies an agreement among the federating units.

It should however be noted from the onset that no one single definition of federalism has been universally accepted because of the difficulties of relating theoretical formulations to the evidence gathered from observing the actual operation of federal systems. What exists is the multitude of definitions - a score or more of descriptive frameworks, and a plethora of different "types" of federalism, all of which involve the use of a preceding adjective, for example, "cooperative federalism", "coordinate federalism", "quasi-federalism", "dual federalism", "organic federalism", "modern federalism", "new deal", "military federalism", and the latest, "intergovernmental relations" to designate various shades of federalism.[6]

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[6] See among others, Wiltshire, Kenneth, Planning and Federalism: Australian and Canadian Experience (St. Lucia: University of Queensland Press, 1986); Sawer, Geoffrey, Modern Federalism (Carlton, Victoria: Pitman, 1976); and Jaensch, Dean (ed.), The Politics of New Federalism (Adelaide: Australasian Political Studies Association, 1977).

According to Professor K.C. Wheare, the exponent of modern contemporary federalism, a federal government is a constitutional arrangement which divides law-making powers, executive and judicial functions between two levels of government within the same polity.[7] To him, this constitutional form is brought about by circumstances where people are prepared to give up only certain limited powers but wish to retain others, both sets of powers being exercised by coordinate authorities.[8] Apparently, this is based on the short definition of Sir Robert Garran who describes federal government as one in which sovereignty or political power is divided between the central and subnational units such that each of them, within its own competence is independent.[9]

A federal government is governed by the federal principle which in Wheare's words "is the method of dividing powers so that the general and regional governments are each, within a sphere coordinate and independent".[10] The important criterion therefore is the division of powers between two levels of government.[11]

However, Wheare's definition has been variously

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[7] See Ransome, Patrick (ed.), Studies in Federal Planning (London: Macmillan, 1943), p.43.

[8] Wheare, Kenneth C., Federal Government, op.cit., p.3.

[9] See the Report of the Royal Commission on the Australian Constitution, 1929, p.230.

[10] Wheare, Kenneth C., op.cit., p.10.

[11] This definition tallies with the American system of government which Wheare considers as an epitome of federalism.

criticised as being too legalistic and inflexible[12] and that it neglects sociological and political factors which are crucial to an understanding of the dynamics of federalism.[13] According to Dicey, Wheare's theory tends to produce conservatism, legalism and predominance of the judiciary.[14] The fact that no real federal system has achieved absolute "independence", which Wheare seems to propose, has led Watts also to suggest "interdependent federalism" from a recognition of the extent of social, political and economic interactions and interdependence of governments within a federation.[15] Professor Vile also argues that the interdependence, constitutional and political, of two levels of government is as important as their independence, and that more important than the coordinate status of the two levels is the requirement that neither should be subordinated to the other.[16]

Livingston and Jinadu bring to bear more fundamental criticism of the Whearean definition. Professor Livingston insists that federal institutions are significant only if they reflect a diversified society with a marked degree of differences. According to him, federalism is not an absolute but a relative term, and that there is no specific

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[12] See A.H. Birch, "Approaches to the Study of Federalism", Political Studies, 14, 1 (1966), p.15; and Riker, William H., Federalism; Origin, Operation, Significance, op.cit., pp.98-99.

[13] William S. Livingston, "A Note on the Nature of Federalism", Political Studies Quarterly, 62 (1952).

[14] Dicey, A.V., The Law of the Constitution, 10th edn., pp.171-180.

[15] Ronald L. Watts, Administration in Federal Systems (London: Hutchinson, 1970), p.7.

[16] Vile, M.J.C., The Structure of American Federalism (London: OUP, 1961), pp.198-9.

point at which a society ceases to be unified and becomes diversified.[17] Livingston, a sociologist, also deploys the dominance of the legal view of federalism. He sees federalism as the product of the interaction of socio-cultural and political factors noting that documentary constitution may be a poor guide to whether a political system is federal or otherwise. According to him, the essential nature of federalism is to be sought for, not in the shading of legal and constitutional terminology but in the economic, social and cultural forces that have made the outward forms of federalism necessary.[18]

Livingston has introduced a sociological element into the federalism concept - the interaction between constitutional framework and socio-cultural substructure, by demonstrating that the form of the constitution is not independent of the centripetal and centrifugal forces operating within the society. The defect of this definition, however, is that while he enumerates the factors which affect the operation of a federal system, it is full of vagueness. It fails to identify which of these factors are requisite or fundamental to the formation of a federation. Secondly, his definition of a federal system is rather sweeping - so broad that all societies with division of powers can find a niche in the classification. This approach does not help us in sorting out the boundaries between federal states like the United States of

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[17] Livingston, William S., "A Note on the Nature of Federalism" (supra), p.25.

[18] Livingston, William S., Federalism and Constitutional Change (London: OUP, 1956), pp.1-2. See also Carl J. Friedrich, "Federalism and Opposition", Quarterly Journal of Comparative Politics, 1 (1966), p.286.

America and highly centralised unitary systems such as Britain.

Jinadu, on the other hand, thinks that the basic defect of Wheare's position is his failure to distinguish between an idea and its institutional manifestations. According to him, Wheare fails to take into account two crucial elements: firstly, that a system of federal government even if it works according to Wheare's model, may apply only to a particular society and does not provide a sufficient basis for the assumption that the federal principle which he propounds will be respected universally; and secondly, that the paraphernalia of government and the constitution of a country may contain no formal recognition of federalism (there might even be no constitution at all), and yet that society might still be living by the principles of federalism as was the case of Greece.[19] Jinadu seems to be justified in his statement, for although it is sensible to use the United States as the parameter on historical grounds, there is no justification for insisting as Wheare does that any federal system which was not a prototype of the U.S.A. would thereby be condemned as unreal. In this respect, Wheare seems to have fallen prey to a kind of historicism.

There is also a great deal of truth in the criticism of his dual theory of federalism. Apart from being too formalistic and legalistic, its rigidity on strict compartmentalisation between national and regional governments makes it impracticable and inadequate for

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[19] See L. Adele Jinadu, "A Note on the Theory of Federalism", in Akinyemi, Bolaji A. et al (eds.), Readings on Federalism (Lagos: NIIA, 1979), pp.13-25.

modern societies. Wheare deliberately puts forward a rigid definition maintaining that:

> "I have put forward uncompromisingly a criterion of federal government... ; to the extent to which any system of government does not conform to this criterion, it has no claim to call itself federal."[20]

Therein lies again his shortcoming. The truth is that the federal principle has acquired a functional and dynamic character emphasising cooperation (though not subordination) between the general and regional governments rather than dualism. The necessity in modern times for social, economic and political inter-governmental cooperation for optimal utilisation of the available resources makes interdependence a more viable political reality. Furthermore, Professor Wheare's insistence on the presence of certain (fixed) institutional criteria[21] for the establishment of a federal system is no longer tenable because each federation is a product of its own environment. Wheare should however be given the credit for laying the foundation for the development of modern theories of federalism.

Davis, a political scientist, maintains that the exclusive hallmark of every constitutional system which is federal is the presence of an explicit division of legislative power in the constitution. He dismisses as unattainable Wheare's requirement of financial autarchy and instead proposes a system of equalisation grant controllable by the national government. This, he claims, would lead to the maintenance of some uniform standard

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[20] See Ransome, Patrick (supra), p.34.

[21] See the discussion on the determinants of federalism in Chapter Two (infra, 2:3).

among the component units of the federation.[22]

Though Professor Davis' view is laudable, it requires some qualifications: first, "an explicit division of legislative power in the constitution" per se might not provide enough safeguard for the proper functioning of a federal system. A lot depends on the social, economic and political forces operating within a particular federation. For example, in recent years, in America and Australia, the need to create a welfare state with a view to providing basic social services to all citizens has inevitably led to federal dominance in areas that constitutionally belong to the states.[23] Secondly, although autonomy of each tier of government in its own sphere is undoubtedly an essential principle of federalism, a state government cannot claim, to exclusion of the national government, ownership or dominion over the territory and people within the state.[24] What is required is that each government should have a reasonable degree of autonomy within its prescribed competence. Such area of competence must be substantial without the possibility of de facto coercion and/or inducement of one government by the other.

As regards Davis's principle of "equalisation grant" vis-a-vis maintenance of uniformity of standard among the component units of the federation, it must be clearly

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[22] Davis, Rufus S., The Federal Principle (Berkeley: University of California Press, 1978), pp.142-43.

[23] For a lucid discussion on the modern trends, see Schwartz, Bernard, American Constitutional Law, 2nd edn (New York: Greenwood, 1969); and Sawer, Geoffrey, Australian Federalism in the Courts (Melbourne: Melbourne University Press, 1967).

[24] See the views of the U.S. Supreme Court in White v. Hart, 13 Wall 646 [1872] at p.650.

understood that the problem of revenue allocation in any federal system does not lend itself to one simple solution as he seems to contend. It is dependent on a number of variables such as population, need, development, the relative poverty or affluence of the constituent states, and some other political considerations. Besides, while it is the business of the federal government to ensure in its fiscal scheme that every unit reaches an equal standard of financial self-sufficiency, preferably by its own efforts, differences in the availability of human and material resources among the units will seem to make such a goal unattainable in practice. Furthermore any fiscal scheme adopted must be adjustable from time to time to take into account the social and economic changes within the country. The important thing is that each unit should be financially sufficient to enable it to carry out its constitutional responsibilities without necessarily "equalising" with others.

Professor Sawer, a legal scholar, on his own part, defines federalism as "any system of government in which there is a considerable devolution of power on geographical basis, and the terms of the devolution are respected, or at least, not frequently and in any important degree disregarded, over appreciable periods of time".[25] Professor Sawyer's approach seems reasonable; he has shifted from the rigid position adopted by Wheare and does not believe in strict compartmentalisation between two levels of government. He regards federalism as a process

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[25] Sawer, Geoffrey, "New Federalism", in Jaensch, Dean (ed.), The Politics of New Federalism, op.cit., p.15.

or a "spectrum" rather than a static phenomenon. Once a basically federal structure is established and stabilised and becomes part of the political habit of the people concerned, he says, the strains which may push it in the centralising or in the disintegrating direction are apt to set up counter-pressures, and the system as a whole will then move ponderously one way or the other in the federal spectrum.[26] In fact, instead of committing himself to any one single definition of federalism, Sawer prefers to speak of "a federal situation", that is, a situation where geographical distribution of power to govern is desired or has been achieved in a way that gives the several government units of the system some degree of security.[27]

The controversy generated by the foregoing theories demonstrates the pervasiveness of the concept of federalism. It confirms our earlier assertion that there is no consensus among all scholars on the general theory of federalism. Each definition has arisen within the confines of a particular discipline, and the approach of each author seems to reflect his own immediate environment. As can be seen from the preceding analysis, it has been predominantly social scientists who have spearheaded the criticism of a strict legal perception of federalism. They borrow models derived from other aspects of their discipline and attempt to bring them to bear on federalism.[28]

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[26] Sawer, Geoffrey, Modern Federalism (supra), p.2.

[27] Ibid., p.2.

[28] For a detailed account of these models, see among others: Sharma, B.M., Federalism in Theory and Practice (Chandausi: Bhargova, 1951); Dikshit, Rameah R., The Political Geography of Federalism (London: Macmillan, 1975); Duchacek, Ivor D., Comparative Federalism: The Territorial Dimension of Politics

However, as a working definition for this study, we conceive federalism as a constitutional arrangement whereby the powers of a state are shared between two levels of government - national and regional - such that each is supreme in a definite sphere of its own. It should however be added that the independence which each level of government enjoys in federal relationship in no way implies that there is a water-tight compartment between the national and subnational governments. Federalism is more fully understood if it is viewed as a process, as an evolving changing relation rather than a static design regulated by firm and unalterable rules. It is an amalgam of legal, sociological and political facts. As Franck rightly observes, "what we mean by federalism is not a fixed point on a map, it is a tendency which is neither unitary nor separatist".[29] Federalism is therefore a compromise solution between unitarism and confederalism.[30] The essential nature of federalism could be summarised as follows:

(a) the federal relationship is between two levels of government, the national and the state, each operating

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(New York: Holt, Rinehart & Winston, 1970); MacMahon, Arthur W. (ed.), Federalism: Mature and Emergent (New York: Doubleday, 1955); and Erhlich, Stanley, "Reflections on Federations and Federalism", International Political Science Review, 5, 4 (1984), p.360.

[29] Franck, Thomas M. (ed.), Why Federations Fail: An Inquiry into the Requisites for Successful Federalism (New York: New York University Press, 1968), p.x.

[30] For a detailed analysis on the distinction between federalism, unitarism, and confederalism, see Elias, Taslim O., Federation vs. Confederation (Trinidad: Whitehall, 1960); Watts, Ronald L., Administration in Federal Systems (London: Hutchinson, 1970); and Deutsch, Karl W., Politics and Government (Cambridge, Mass: Houghton, 1980).

directly on the people;

(b) each level enjoys separate and independent existence, and none is subject to the control of the other;

(c) there are constitutionally defined areas of competence over which each government could exercise legislative, executive and judicial powers;

(d) each tier of government is financially sufficient to discharge its constitutional responsibilities;

(e) the component units of the federation should be relatively equal in size and population;

(f) all the component state governments have equal juridical status in relation to the national (federal) government;

(g) there is a written constitution which is supreme;

(h) each government may have its own constitution; and

(i) there exists an independent judiciary which interprets the constitution and acts as its guardian.

By the combination of these characteristics the classical model[31] of federalism ensures that each level of government within the federal polity is not just a 'house-keeper' but a 'house-holder'.

With the foregoing attempt at the definition of federalism, it seems relevant to consider briefly the preconditions for the establishment of a federation.

2:3 Determinants of Federalism

What motivates people, tribes, colonies, provinces, cantons, regions, states or nations to form a federation?

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[31] By "classical model" we refer to American federalism, for according to Wheare, "The modern idea of what federal government is has to be determined by the United States of America" - K.C. Wheare (supra), p.1.

What are the peculiar circumstances that could render the introduction of federalism as a model of government imperative in any political community? To answer these questions, it is necessary to highlight some of the factors that have been responsible for the formation of federal systems.

Given the contention that "the study of federalism is still in a state of partial theories",[32] it is not yet possible, except by using Wheare's criteria (albeit with some modifications) to determine the prerequisites of federalism.

According to Professor Wheare, the pioneer of modern federalism, federal government is rare because its prerequisites are many. It requires the co-existence of several national characteristics which are not found together anywhere in the world.[33] But notwithstanding the fact that it is not feasible to formulate universal criteria, the following are a number of socio-economic and geo-political conditions that have exerted some influence in determining the choice of federalism in many countries of the world. They include common desire, common culture, common defence, ethnic forces, heterogeneity, geographical contiguity, economic and administrative advantages, historical association, similarity of political and social institutions, pre-existence of independent states;[34] a community of outlook based on race, religion and language;

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[32] Dare, Leo O., "Perspectives on Federalism", in Akinyemi, Bolaji A. et al (eds.), Readings on Federalism, op.cit., p.34.

[33] K.C. Wheare, op.cit., p.35.

[34] Ibid., pp.35-52. See also Awa, Eme O., Issues in Federalism (Benin City: Ethiope, 1976).

the existence of successful older federal models, and the character of political leadership.[35]

It needs however to be added that some of these factors which traditionally have been identified by Wheare and other scholars as "essential prerequisites" may be useful or even necessary, but they are not enough to ensure the success of federalism. The failure of some federations, such as the East African Federation, the Federation of Rhodesia and Nyasaland, the West Indian Federation, and the Federation of Malaysia, suggests that within a hierarchy of necessary elements for federation, these factors, though frequently cited as sine qua non, are actually secondary factors of secondary importance. Their value lies in the fact that they may engender a common commitment to primary factors and goals of federalism.[36] In effect, they serve as catalysts, promoting the primary-goal factors (such as charismatic and ideologically committed leadership) which give rise to a federal condition that elevates the federal value above all other political considerations and in which the ideal of the federal nation represents the most important political fact in the lives of the people and leaders of each unit of the federation (see Chart A below).

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[35] For a comprehensive account of the contributions of these factors to the development of federalism, see for example, Wheare, Kenneth C., op.cit., pp.1-52; and Watts, Ronald L., New Federations: Experiment in the Commonwealth (Oxford: Clarendon Press, 1966), pp.42-66. For the application of some of these factors to the Nigerian situation, see Chapter 4 (infra).

[36] See Franck, Thomas M., Why Federations Fail (supra); Sawer, Geoffrey, "Failed and Incipient Federalism", in Modern Federalism, op.cit., pp.35-50; and K.C. Wheare, op.cit., pp.35-52.

CHART A

THE FACTOR-GOAL COMPONENTS IN FEDERATION MOTIVATION

Goal-Factor Type	Factors	Goals	Contribution to Success of Federation
Primary	Ideological federalism Popular or elite charisma Supremacy of the political federal value	Federation for its own sake Manifest destiny National greatness	The prerequisite needed to ensure against eventual failure.
Secondary	Common language Similar values, culture Complementary economies Common colonial heritage Common enemies Common challenge	Federation for the sake of mutual economic advantage Security against attack "Opening up of the frontier" More important role in international affairs Common services	These factors may bring federation into being and thereafter engender the primary factors. The factors of common challenge and common enemies appear to stand the best chance of effecting the transition to primary factors. If so, the federation is likely to suceed; but it is by no means certain that this sequence will occur. If it does not, the federation is susceptible to failure despite the favourable motivation based on secondary factors and goals.
Tertiary	Ethnic balance Hope of earlier independence Colonial power's need to rid itself of uneconomic colonial territory	Prevention of racial/tribal friction Independence Solvency	The motivation based on these factors and goals may bring about a federation but, unless rapidly replaced by secondary and primary goal-factor motivation, these tertiary goals can be said to contain the seeds of their own defeat. In themselves, these factors rarely engender the development of secondary and primary factors.

Source: Franck, Thomas M., Why Federations Fail. op.cit., p.172.

At this juncture, it seems appropriate to look at the genesis of Nigerian federalism.

CHAPTER THREE

THE EVOLUTION OF NIGERIAN FEDERALISM

The Chapter discusses the origin and development of federalism in Nigeria as well as the constitutional framework existing in the country when the military first seized political power on the 15 January 1966. It also looks at the physical and cultural backgrounds of Nigeria. Such a geo-historical approach would give us a better understanding of how the Federation of Nigeria came into being. It would also provide a fuller picture of the growth of federalism in Nigeria. In effect, in order to assess the impact of military rule, we must understand the present, and to understand the present, we need to know the past.

3:1 Description

The Federal Republic of Nigeria consists of twenty one states and the Capital Territory of Abuja.[1] Her population is now estimated to be over 100 million, greater than those of Australia, Canada and New Zealand combined, and much greater than that of any other single country in the continent of Africa.[2] Nigeria has the

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[1]. See Map I and Chart B below.

[2]. See The Guardian (London), 2 July 1987, p.10; and African Concord (Lagos), 9 July 1987, p.39.

MAP I

THE FEDERAL REPUBLIC OF NIGERIA

Source: Newswatch (Lagos) October 5, 1987, p.51

CHART B

THE 21 STATES OF THE FEDERATION

State	Capital City	Area (Sq. km)	Population (1963 census)	(1982 projection)
Anambra	Enugu	17,675	3,596,618	5,735,400
Bauchi	Bauchi	64,605	2,431,296	3,877,100
Bendel	Benin	35,000	2,460,962	3,924,400
Benue	Makurdi	45,174	2,427,017	3,870,300
Borno	Maiduguri	116,400	2,997,498	4,780,000
Cross River/ Akwa-Ibom	Calabar/Uyo	27,237	3,478,131	5,546,400
Gongola	Yola	91,390	2,605,263	4,154,500
Imo	Owerri	11,850	3,672,654	5,856,600
Kaduna/ Katsina	Kaduna/ Katsina	70,245	4,098,306	6,535,400
Kano	Kano	43,285	5,774,840	9,208,900
Kwara	Ilorin	66,869	1,714,485	2,734,000
Lagos	Ikeja	3,345	1,443,568	2,644,800
Niger	Minna	65,037	1,191,508	1,904,800
Ogun	Abeokuta	16,762	1,550,966	2,473,300
Ondo	Akure	20,959	2,729,690	4,352,900
Oyo	Ibadan	37,705	5,208,884	8,306,400
Plateau	Jos	58,030	2,026,657	3,231,800
Rivers	Port Harcourt	21,850	1,719,925	2,742,700
Sokoto	Sokoto	102,535	4,538,787	7,237,800
Federal Capital Territory	Abuja	7,315		
TOTAL		923,768	55,670,055	89,117,500

Source: Nigeria Year Book (Lagos: Patike Ltd., 1986), p.1

largest black population in the world, and with an average Gross National Product (GNP) of about £16 million, she is considered to be the richest in tropical Africa.[3] The country is blessed with a variety of resources both human and material.[4]

The country is situated on the west coast of Africa- on the shores of the Gulf of Guinea. It lies between parallels of 4° and 14° north, entirely within the tropics. It is bounded on the south by the Atlantic Ocean, on the west and north by the Republics of Benin and Niger respectively, and on the east by the Republic of Cameroon.[5]

The approximate size of Nigeria is 923,768 square kilometres, four times greater than Britain and more than twice Belgium and France put together. The greatest length from east to west is over 1,200 kilometres; with its width, from north to south, over 1,000 kilometres.[6]

3:2 The Birth of Nigerian Federalism

The roots of federalism in NIgeria must be sought in the process by which the country came into being, the administrative structure of colonialism that was set up, and in the varying responses of Nigerians to both the

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3. See Crowder, Michael and Abdullahi, Guda Nigeria: An Introduction to its History (London: Longman, 1979).

4. For details, see Chapters 4 and 11 (infra).

5. See Map I, above.

6. See Sir Alan Burns History of Nigeria (London: Allen & Unwin, 1963), pp.1-45.

process and structure of colonial rule. Without colonialism it is doubtful if the Nigerian Federation would have emerged.[7] Therefore, in order to understand the origin and growth of Nigerian federalism, it is necessary to examine how Nigeria was governed into federation by the British imperial power.

3:2:1 British Colonialism

The earliest social interactions between Britain and Nigeria was mainly through trade both in goods and human beings (slavery). By the eighteenth century, British adventurers like Mungo Park, John Lander and Richard Lander had gone to the territory now called Nigeria on expedition sponsored by some mercantile organisations in the United Kingdom. The initial aim of the expedition was to discover the source of the Niger (the river from which Nigeria later derived its name) with a view to establishing commercial intercourse.

The success of the Lander brothers, among others, in 1830 served as a stimulus to a Liverpool merchant, McGregor Laird to come to Nigeria in 1832 on trading mission. Thereafter, other British merchants and adventurers came one after the other many of whom died as a result of malaria fever. Trading posts were set up along the coast of the Bights of Benin and Biafra, especially at the posts of Calabar, Warri, Lagos, Benin River, Brass and Bonny. But the absence of a constituted

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7. See Eleazu, Uma O. Federalism and National Building: The Nigerian Experience (supra), pp.15-18.

authority exclusively charged with the responsibility of maintaining law and order made the trading activities in these areas increasingly somewhat chaotic and rather unsafe. To secure protection for themselves against threat to and physical assaults on, their lives and property, the merchants made representations to the British Government. In response, a man, named John Beecroft was appointed as a Consul for the Bights of Benin and Biafra in 1849. Beecroft had his headquarters at the Island of Fernando Po.

On arrival in Nigeria, he and his team did not confine their activities to protecting the interests of the British merchants alone; instead, they went further on humanitarian ground to sign treaties with the native rulers for the abolition of slave trade and protection of the ministers of the Gospel (the missionaries). Such treaties were signed (sometimes through coercion) with King Akitoye of Lagos and the Alake of Egbaland in 1852.

In 1855, King Akitoye died and was succeeded by his son, Dosumu. As a ruler, Dosumu was very incompetent to manage the affairs of Lagos. And in the absence of any strong ruler possessed of sufficient ability to control the unruly and undesirable elements within the society of Lagos at the time, a state of anarchy was imminent. There was neither effective protection for property, nor effective machinery for enforcing the payments owed by the natives to the foreign merchants. Traders were maltreated and plundered and since the local courts were ridden with

corruption, no proper redress of grievances could be obtained. Furthermore, human sacrifices and clandestine traffic in slaves continued unabated, albeit, latently. In short, there was no capable and dynamic native ruler to assist Consul Beecroft.

Consequently, the British Government came to an inevitable conclusion that a permanent occupation of Lagos was indispensable to the complete suppression of slave-trade, corruption and other vices.[8] The conquest of the area it was hoped would give great support to the development of lawful commerce and check the aggressive spirit of the King of Dahomey, near Lagos, whose barbarous wars and encouragement to slave trading was the main cause of disorder in that part of Africa.[9] Accordingly in 1861, Lagos was annexed to Britain and had its status changed from consular to that of a colony. And by 1862, H.S. Freeman was appointed as the first British Governor for the Colony of Lagos.[10]

By 1870, the French and German merchants had shown commercial interest in Nigeria and started trading side by side with the British along the River Niger. To avoid internal competitions, all the British firms in Nigeria

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[8]. For full details, see Ejimofor, Cornelius O. British Colonial Objectives and Policies in Nigeria (Onitsha: Africana Ltd., 1987).

[9]. The Foreign Secretary, Lord J. Russell in a letter dispatched to the British Consul at Lagos on June 22, 1861; see "The Conquest and Annexation of Lagos as a Measure to Stop the Slave Trade", in Ejimofor, Cornelius O. (supra), pp.15-23.

[10]. For an elaborate account of the annexation of Lagos, see Cook, Arthur N. British Enterprise in Nigeria (Philadelphia: University of Pennsylvania Press, 1943).

got themselves amalgamated in 1879 under the name of United African Company, presenting a common front against their French and German rivals. The name of the amalgamated company was changed first in 1881 to National African Company Limited and later in 1886 to Royal Niger Company Limited. It was in the latter name that the amalgamated British firms obtained a Royal Charter on July 10, 1886. It must be emphasised that until 1880s Britain was interested in maintaing trade relationship with but not in political acquisition of Nigeria. Contacts between the two countries were channelled mainly through private enterprises. Britain's political interest became manifest only in the period of Western imperialism particularly during the scramble for and partition of Africa.

In 1885, rival European powers assembled at the Berlin Conference under the chairmanship of Chancellor Otto Von Bismarck of Germany to reach a settlement on the final demarcation of their respective spheres of influence in Africa. Thereafter, British control over Nigeria was given international recognition. The basic principles of colonial administration which were laid down at Berlin were later ratified at the Brussels Conference in Belgium in 1892. One of the resolutions adopted was that each European power should set up economic structures that would facilitate the integration of African societies into the expanding system of world capital accumulation. It was also agreed that each imperial power in governing her territories should endeavour to foster the spread of

Western culture.[11]

Besides commerce and the spread of Western culture, the imperial powers also had religious motive. They went to Africa with Bible to preach the words of Christ to the native 'infidels' - what has been referred to as 'a civilising mission'.[12] Thus, the period of the scramble for Africa formally marked the beginning of Western imperialism in the Continent.

Britain, one of the leading participants of and a signatory to, both the Berlin and Brussels Conferences was legally and morally bound to implement their resolutions to the letter. The British Government which hitherto had maintained that suppression of slavery and trade were the only reason for the occupation of Lagos[13] decided to join other European competitors in economic exploitations of Africa,[14] and Nigeria in particular.[15]

In an effort to outrival the French and German

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11. Ibid., p.50.

12. See Hodges, Charles The Back of International Relations (New York: Wiley, 1932), pp.421-22.

13. See Ejimofor, Cornelius O. British Colonial Objective and Policies in Nigeria (Onitsha: Africana Ltd., 1987).

14. For a detailed account of economic exploitation, political subjugation and cultural transformation in Africa by the European powers, see Rodney, Walter A. How Europe Underdeveloped Africa (Tanzania: Tanzania Publishing House, 1972); and Nzula, Albert A. Forced Labour in Colonial Africa (London: Zed Press, 1979).

15. For a lucid analysis on the capitalist exploitation of Nigeria by the British imperial government, see Falola, Toyin (ed.) Britain and Nigeria: Exploitation or Development (London: Zed Press, 1987).

competitors, Britain in 1893 entrusted the whole of the territory that constitutes the present-day Nigeria to a private company, the Royal Niger Company (that was already trading in the country) to administer on behalf of Her Majesty's Government. The aim was to protect British economic interest. Under its charter, the Company was given exclusive responsibility for the peace and orderly government of the entire Niger Basin together with what is now known as Northern Nigeria.[16] The unfettered administrative power conferred on the Company enabled it to make laws, collect taxes and customs duties, have courts, judges and police which are, of course, powers that a private company do not normally possess. The company also set up its own constabulary, which "though proved an effective force was not employed on orthodox policy duties but rather on punitive expeditions against any African who defied the company's commercial monopoly."[17] The Royal Niger Company (RNC) had an undisputable authority over trade on the River Niger and used it to stifle foreign competition. It was primarily the manner in which the RNC exercised its exclusive right to supervision of trade in the Niger Basin that the international boundaries of Nigeria were later determined. But why did the British Government decide initially to

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[16]. For the territorial jurisdiction of the Royal Niger Company, see Map II below.

[17]. Professor Henry S. Wilson The Imperial Experience in Sub-Saharan Africa since 1850 (Minnesota: University of Minnesota Press, 1977), p.81.

rule Nigeria through a company instead of direct administration? As earlier pointed out, Britain was at the beginning of the "Scramble for Africa" ambivalent about her role in Nigeria. Her emphasis was on economic

MAP II

NIGERIA UNDER THE ROYAL NIGER COMPANY, 1893-99

Source: Sir Rex C. Niven, How Nigeria is Governed (London: Longman, 1950), p.13.

relationship rather than political intercourse. Furthermore, she was not prepared to spend the British tax-payers' money on impoverished colony like Nigeria. The idea of ruling through the medium of a private company was "an ingenious method whereby Britain could claim rights over territories covered by the Royal Niger Company and yet at the same time take no responsibility for anything that went wrong with them; and above all, the British Government did

not have to pay anything to have these areas governed."[18]

The RNC ruled till the beginning of the twentieth century when the British Government took direct political and administrative control of Nigeria. But before discussing in detail the type of government instituted by Britain in her effort to transform the country into a federation, it seems appropriate to examine cursorily the early form of government in Nigeria before the emergence of colonial rule. This would enable us to appreciate the contributions of the colonial government towards the development of the Nigerian Federation.

3:2:2 The Early Form of Government in Nigeria

When the British Colonial power came to Nigeria, it met a variety of societies, ranging from the type we may refer to as classless structure to the advanced tributory states.

The indigenous forms of government were mainly emirates, dynasties, empires, kingdoms and chiefdoms with little or not formal organisational structure comparable to those of modern states. With the exception of the Hausa-Fulani oligarchy and the Kanuri dynasty under the leadership of Emirs in the North, and the ethnic hegemony of the various Yoruba and Bini Kingdoms in the South under the suzerainty of Obas, which by African standards operated a well organised functional administration with good fiscal system and trained judiciary, there was no one single organised government controlling the whole country. In fact, some of these empires and kingdoms were not even

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18. Sir Rex C. Niven op. cit., p.11.

founded until the sixteenth century.[19]

In terms of administration, the northern-most part of the country, predominantly occupied by muslims, was exclusively governed by feudal rulers called Emirs. The governmental organisation of the area across the Rivers Niger and Benue (the Middle Belt) inhabited by some autonomous minorities was built around chiefdoms and small emirates.

The situation in the South (which was later divided into Eastern, Western and Midwestern Regions) was slightly different. The Youbas of the West were (and are still) a culturally homogeneous society. They constitute the major ethnic group in the defunct West, cohabiting with minorities like the Edos and Urhobos. They were ruled by Obas who operated a traditional system of government. The eastern territory of the south was a non-feudal society. The Ibos who form the majority cohabited with some minority groups like the Itsekiri, Ijo, Ibibio and Ekoi. Apart from the Rivers Area, no formal recognised traditional ruler or any constituted authority existed in the East before the arrival of the British. The unit of government was either family, clan or village. The Ibo society was rather loosely administered by village heads without a formal government or a feudal class like the British monarchy. In modern times

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[19]. For a detailed account of the pre-colonial system of administration in Nigeria, see Ikime, Obaro (ed.) Groundwork of Nigerian History (Ibadan: Heinemann, 1980).

it could be described politically as an acephalous society.[20]

In sum, the country had a variety of rudimentary governmental systems before the advent of colonialism.

3:2:3 British Administration in Nigeria

The performance of the Royal Niger Company (RNC) up to 1899 satisfied the limited British colonial objectives in Nigeria - the acquisition of the territory for commerce and protection of British economic interest. However, by the end of the nineteenth century, it became clear to the British Government that the RNC was unequal to the mounting demands of the imperial rivalry in which the British, the French and the German had locked horns. The Company was unable to bring the bulk of Nigeria under the effective control of British influence. It was also incapable of integrating with the native communities under its jurisdiction.[21]

Besides lack of integration, the Company used its position as the imperial agent to establish trading monopoly along the River Niger in breach of its charter whereupon its British trading competitors petitioned the home government in the United Kingdom. In addition, the RNC suffered from conflict of interests. The dual responsibility of business-cum-administration assigned to it became unbearable as it

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[20]. For more elaborate discussions, see Tamuno, Tekena N. The Evolution of the Nigerian State: The Southern Phase, 1893-1914 (London: Longman, 1972).

[21]. F.D. Lugard Colonial Annual Report of Northern Nigeria, 1900-1901 (no.346) (Kaduna: Government Printer, 1901), p.22.

could not serve two masters(the British Government and the shareholders) at the same time. Its 'motto' became business first, administration second. It could not expand beyond the banks of Rivers Niger and Benue and in spite of the huge profits the Company was making at the time, it resisted the pressure of the British Government to provide effective administration and security for the occupied territories which were necessary for forestalling foreign invasion or restraining fully the slave-raiding propensities of the local chiefs. The Company claimed that as a trading concern with limited resources, and whose primary object was profit maximisation, it was ill-quipped to provide the necessary financial, administrative, diplomatic and military wherewithal which the German and Anglo-French imperialist competition warranted. Thus, administratively, the Royal Niger Company failed to achieve the desired success.

The incompetence of the Company in its dual role was not unexpected because even the very idea of imbuing commercial companies with administrative power had earlier been criticised in the Parliament at the Westminster by the Right Honourable Earl of Cromer who argued that:

> Administration and commercial exploitation should not be entrusted to the same hands.[22]

The RNC tended to "glory in the name of English people and concealed its desire to make money with the desire to govern

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[22]. Cited by Sir Charles Orr, "Ancient and Modern Imperialism", in Wilson, Henry S. op. cit., p.81.

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Nigeria".[23] Such action was totally unacceptable to the critics of the "dual mandate" who advocated that "a chartered company's dual functions of administration and finance should in fact be kept wholly distinct."[24]

With the unsatisfactory performance of the Royal Niger Company,the only option left for Britain was to take over the direct political control of Nigeria. Consequently, the Company's charter was revoked in 1899.

It should not, however, be supposed that the record of the Royal Niger Company was wholly a dismal failure. In spite of its short-comings, no one doubts the fact that the Company played an important role in the suppression of slave trade as well as in the development of commerce especially in mercantile goods. The political power which the Company wielded in its occupied territory provided the conducive and controllable atmosphere necessary for profitable trade and spread of Western civilisation. There is no gain-saying that the company laid the foundation for the occupation of Nigeria by the British Government. In fact, the process of British colonisation of Nigeria is an example par excellence of Furnival's theory that "in history, the flag follows trade and not vice versa."[25]

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[23]. A.P. Thorton The Imperial Idea and Its Enemies: A Study in British Colonial Power (New York: St. Martins Press, 1959), p.158.

[24]. Sir Frederick D. Lugard The Dual Mandate in British Tropical Africa 2nd ed. (Edinburgh : Blackwood, 1922), p.25.

[25]. J.S. Furnival Colonial Policy and Practice (London: Cambridge University Press, 1948), p.19.

3:2:4 Direct Political Control

As soon as the Royal Niger Company was relieved of its administrative and political control of Nigeria, the British Government changed its laissez-faire attitude towards the country and enthusiastically assumed full political leadership. On January 1, 1900 the country was divided into two administrative units - the Northern and Southern Protectorates. Each of these Protectorates was to be administered by a High Commissioner appointed from the Imperial Capital, London; and in all matters they were required to exercise separate and distinct political control. One of the first two British High Commissioners sent to Nigeria was Sir (later Lord) F.D. Lugard who was initially kept in charge of Northern Nigeria but later became the Governor-General of the entire country. Of all the British administrators he was the most outstanding.[26]

On assuming office as the first British High Commissioner in Northern Nigeria, Colonel Lugard, a one-time commander of the Royal Niger Company's army (the Royal Niger Constabulary) decided to retain the Fulani system of Native Administration that he met after subduing the Fulani potentates to submission through military invasion. He introduced "Indirect Rule" - a system of governing the native through the instrumentality of their traditional rulers. He divided the Northern Protectorate into provinces, each being headed by a British administrator,

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[26]. See DiKe, Kenneth O. One Hundred Years of British Rule in Nigeria, 1851-1951 (Lagos: Federal Information Service, 1958).

called Resident. The provinces were in turn subdivided into administrative Divisions, manned by District Officers. Whilst the District Officers were answerable to the Residents, the latter were directly responsible to the High Commissioner (Lugard). The actual day-to-day running of the local administrations was entrusted to the Emirs who were assisted by native chiefs and councillors. These Emirs combined legislative, executive as well as judicial functions subject, of course, to the overall supervision of the Residents and District Officers. Native laws and customs were allowed to be applied provided they were not repugnant to natural justice equity and good conscience, nor incompatible either directly or indirectly with any written law; nor contrary to public policy.[27]

A number of factors dictated Lugard's indirect rule policy. The size of Northern Nigeria, coupled with the difficulty of communications and means of transportation, presented formidable administrative problems. Direct administration would have involved the British Government in extremely heavy expenditure, especially if qualified personnel were to be recruited from Britain. It was even not possible to attract British staff of the right calibre to the Nigerian service because the country was then regarded as the 'white man's grave' due to the prevalence of malaria disease which killed many Europeans. Furthermore, any move to enforce direct British Rule would have

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[27]. This provision was incorporated into the Northern Nigeria High Court Laws 1955, s.34.

implacably antagonised and embittered the pre-existing Fulani administration which had already established foothold in the North before the coming of the British. To avoid such a conflict particularly in the face of competition from other European powers Sir Frederick Lugard permitted the existing Hausa-Fulani ruling class to continue with the status quo, using the medium of the Indirect Rule.[28]

It is to be noted that while Lugard was busy subduing and pacifying the North with astonishing efficiency, other servants of the British Crown were equally strengthening British sovereignty over the Southern Protectorate. Among Lugard's contemporaries were Sirs W. McGregor, R.D.R. Moor and W. Egerton. These men were responsible for the creation of Southern Protectorate as a single unit in 1906 by incorporating the Colony of Lagos.

In 1906, Lugard was transferred from Northern Nigeria to take up the post of governorship of Hong Kong. He came back in 1912 and became the country's Governor-General. In 1914, he amalgamated Northern and Southern Nigeria. His main aim was the unification of the country. The merger was the first major attempt to integrate the Nigerian communities nation-wide. The preceding years (1900-1914) witnessed a period of separate development between the Northern and Southern Protectorates; each came under British sphere of influence at different times, ruled by

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[28]. See Awolowo, Obafemi The People's Republic (Ibadan: OUP, 1968), p.19.

different High Commissioners.[29] But what were the nature, structure and effect of Lugard's amalgamation?

3:2:5 Lugard's Amalgamation Scheme

The idea of amalgamation was conceived as early as June 1910 when the Secretary of State for the Colonies, Sir Lewis Harcourt, made a proposal to the House of Commons at Westminster in London for the merger of the northern and southern provinces of Nigeria. By this time it was argued that the division of the country into two could lead to duality in administration, accompanied by inevitable but unprofitable political rivalries. An arbitrary partition of a country like Nigeria was considered rather incongrous and absurd as that could retard the development of a general principle of government for the entire country. It was also discovered that administering North and South as separate and distinct units would aggravate the relative poverty of the former since all the custom duties imposed on trade accrued to the latter which alone owned all the sea-ports. This in turn would have made the impoverished North to be dependent on the British treasury for financial support. Such financial burden was considered an economic liability to the British Government. Furthermore, the railway systems in the North and South differed in gauge and this could introduce unhealthy competition. A merger of the two Protectorates, it was argued, would bring about the advantages of (i) better financial management and optimal

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[29]. See Nwabueze, B.O. A Constitutional History of Nigeria (London:Longman, 1982), p.36.

utilisation of the available resources; (ii) better administration especially at the higher level of civil service; (iii) more sensible and rational division of the country into provinces on geographical and ethnic basis; and (iv) a comprehensive work programme.[30]

Lewis Harcourt's proposal was accepted by the House of Commons whereupon Lugard was mandated to implement the scheme. Lugard submitted a Report in favour of amalgamation to Colonial Office, London in March 1913. The Report was later approved and on January 1, 1914 Lugard amalgamated the Northern and Southern Protectorates into one country, called Nigeria, with himself as the first Governor-General.[31]

Lugard pursued his assignment with vigour and determination using traditional rulers to run his administration. The amalgamated Northern and Southern Protectorates were redesignated as Northern and Southern Groups of Provinces. He allowed them to retain their individual identities. In the North where he had experimented his "Indirect Rule" system with astonishing success as High Commissioner between 1900 and 1906, he retained and strengthened the existing governmental organisations that had been built up by the Fulani feudal autocratic class (the Emirs) who wielded enormous political authority and power. The British officials were purely policy makers with supervisory role whilst the Emirs and

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30. See Morel, E.D. Nigeria: Its Peoples and its Problems (London: Murray, 1912), pp.190-207.

31. See Map III, below.

their subordinate chiefs were the policy executors.[32]

MAP III

THE AMALGAMATED NORTHERN AND SOUTHERN PROTECTORATES OF NIGERIA, 1914-46

Source: Adapted from Crowder, Michael and Abdullahi, Guda, Nigeria: An Introduction to Its History (London: Longman, 1979), p.153.

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32. See Perham, Margery Lugard: The Years of Authority (London: Longman, 1960).

Lugard conceived his task as one primarily of unifying the laws and administrative practices of Northern and Southern Nigeria. He swept away the Southern governmental structure - courts legislative council, including a variety of native administrative systems, and in their place erected a scaffolding of institutions and legislation based on those he had developed in the North. The native administrations were centralised and supervised by "Residents" who were accountable to Lieutenant Governors and the latter to Lugard, the Governor-General. Lugard rejected the proposals for subdivision of Northern and Southern Nigeria into smaller units of greater ethnic and economic coherence because that would have broken the continuity of the existing institutions upon which his one-man control depended. He did not want his authority to be undermined by fragmenting the country which could lengthen the chain of his command.[33]

He set up some national institutions like transport and communication departments, the armed forces, treasury, Supreme Court; and a Nigerian Council, which met three days annually. Other departments such as Agriculture, Medical, Public Works, Education, et cetera which had been functioning in the South before amalgamation were established in the North to maintain parity of status. Over

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[33]. See J.A. Ballard, "Adminstrative Origins of Nigerian Federalism", (supra).

these Departments was the superstructure of "One Nigeria".[34]

Lugard's experience of Indirect Rule in the North dictated the content of his administration in the South. He considered ruling through the native institutions as the most effective means of catering for the peculiarities of the various component ethnic groups as well as keeping to a minimum administrative costs. It must however be pointed out the system of indirect rule extended to Southern Nigeria was given cold reception. There were resistance, open opposition and sheer apathy. In the eastern province of Southern Nigeria where paramount chiefs were appointed through "warrants" by the Colonial Government (in the absence of any established feudal system), the institution generated hostility and civil strife among the rulers and the ruled.[35]

Lord Lugard's administrative structure was hierarchical.[36] As the Governor-General, he was at the apex, followed by his Chief Secretary and Directors in-charge of the Central Departments. Their functions covered the entire country. The Governor-General who was the main co-ordinator ran the national secretariat at Lagos. He was assisted in the Northern and Southern Groups of Provinces by

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[34]. See Ejimofor, Cornelius O. British Colonial Objectives and Policies in Nigeria (Onitsha: Africana Ltd; 1987).

[35]. A striking example was the Aba Riot of 1929 which claimed many lives.

[36]. See Chart C below.

CHART C

ADMINISTRATIVE STRUCTURE OF NIGERIA AFTER AMALGAMATION

Source: Eleazu, Uma O., Federalism and Nation Building: The Nigerian Experience (supra), p.78.

two Lieutenant Governors with headquarters at Kaduna and Enugu respectively. The departmental officers were required to remain distinct and separate from the traditional rulers (the political officers) who ran the Native Administrations.

The contributions of Lugard and his successors to the growth of Nigerian federalism would be better understood from an examination of the country's constitutional development.

3:2:6 Lugard's Constitution, 1914

Under Lugard's Constitution, the Governor-General had unfettered power, combining the functions of a ceremonial head of state with those of a prime minister. He provided a central forum for exchange of ideas between the Northerners and Southerners on matters in general administration and policy of his government by setting up a deliberative advisory body known as the Nigerian Council. The majority of the members were his European nominees. The function of the Council was to assist the Governor-General in monitoring local opinion, especially those of public officers and businessmen. The Governor had overriding discretion to disallow any proposal made by a member of the Council if he considered it as being detrimental to national interest. No resolution passed by the Council could have the force of law without the Governor giving effect thereto.[37]

In the case of the judiciary he set up a hierarchy of courts ranging from Native Courts, Magistrates Courts,

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[37]. Nwabueze, B.O. op. cit., p.38.

Provincial Courts, High Courts and Supreme Court from where appeals lay to the Privy Council in London.

On the whole, Lugard's Constitution which lasted from 1914-19 was to all intents and purposes unitary. By usurping the functions of the legislature, the executive and the judiciary, Lugard, to say the least, was autocratic and dictatorial. His Constitution did not make enough provision for complete fusion of Northern and Souther Nigeria; each section of the country continued to regard itself as a nascent sovereign principality, maintaining an attitude of arrogance and self-sufficiency. Indeed, Lugard's manifest intention was not so much unity as uniformity in administrative practice (the Indirect Rule system) between the North and South. No conscious efforts were made to co-ordinate the political activities of the merged territories. His centralised and hierarchical system of administration did not give the Lieutenant-Governors enough power to deal with regional issues.[38] The complete subordination of the traditional rulers and their subjects under the guise of Indirect Rule constituted a breach of Lugard's avowed principle of preserving indigenous social institution and self-government.[39] His amalgamation achieved only a limited success; it was merely a way of relieving the British Government of having to finance the administration of

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[38]. For a fuller account, see Kirk-Greene, A.M.H. Lugard and the Amalgamation of Nigeria (London: Frank Cass, 1968).

[39]. See Lugard, F.D. The Dual Mandate in British Tropical Africa, op. cit., p.101.

Northern Nigeria at a time when the south was showing annual budget surplus sufficient to cover the North's deficit.[40]

However, to the extent that Lugard was able to bring the Northern and Southern Nigeria under one administrative umbrella, he could be said to have made some positive contributions. The merger of the two administrations was a useful attempt at removing unhealthy political rivalry and duplication of administrative functions/functionaries. And more fundamentally, without Lugard's administrative ingenuity, the name of the geopolitical entity called Nigeria today would have gone into oblivion. He founded the country and his wife Flora gave it a name "NIGERIA" in 1914. His departure from Nigeria in 1919 brought his Constitution to an end. Although the Constitution was unitary, it marked the beginning of the country's quest for federalism and national unity.

3:2:7 Clifford's Constitution 1922

Sir Hugh Clifford stepped into Lugard's shoes in 1919 armed with a very different set of preconceptions aimed at initiating policies towards a gradual development of a federation for Nigeria.

Cifford who came to power at the end of World War I was an outstanding individual, a man of wide experience, strong personality, great energy and determination. He had long experience in colonial administration in Gold Coast (now Ghana) before coming to Nigeria and within a few months of

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[40]. For details, see Sir F.D. Lugard Nigeria: Report on the Amalgamation of Northern and Southern Nigeria and Administration, 1912-1919 (Cmnd. 468) (London: HMSO, 1920).

his arrival, he had toured the whole country and put forward proposals for recasting Lugard's amalgamation scheme in an entirely different fashion. He abolished the Nigerian Council which Lugard created in 1914, describing it as "an authorised debating society meant to rubber stamp Lugard's wishes".[41] Clifford's proposed reforms included establishment of centralised government, abolition of the post of regional Lieutenant Governor for the South, and a reduction of the powers of the LieutenantGovernor of the North. Most of his suggestions were too radical and constituted a dangerous assault on Lugard's Indirect Rule policy which favoured separate and independent administration for Northern and Southern Nigeria. His proposals also had in-built unitary tendencies, not conducive to the development of a federal system. They were accordingly rejected in London by Lord Milner, the Secretary of State for Colonies.[42]

After his unsuccessful attempt to effect major administrative reforms, Sir Hugh Clifford turned his attention to constitutional development. Thus, in 1922 he introduced a new constitution (called Clifford's Constitution) which for the first time in the country's constitutional history established a formal legislature - the Nigerian Legislative Council. The Council was empowered to make laws for the Colony of Lagos and the Southern

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[41]. See Okonjo,, Isaac M. British Administration in Nigeria (New York: HoK, 1974), p.81.

[42]. See J.A. Ballard (supra), pp.333-48.

provinces while the Governor-General alone legislated for the North by Proclamation. He feared that the Norther Emirs who had separatist intentions might reject any law enacted by the Council whose headquarters was based at Lagos in the South. The membership of the Legislative Council (and the Executive Council which was later set up) was dominated by his white nominees and only few Nigerians were elected from the coastal areas of Lagos, Calabar, Warri, Rivers, Oyo, Egba and Ibo Divisions of Southern Nigeria. The qualifications for this limited franchise were property and income. The Governor was not bound by the decision and advice of the Councils.[43]

On the whole, Clifford suffered from the same criticisms that he levelled against Lugard. His Constitution was more unitary than that of his predecessor. His major achievement was the enlargement of the Legislative Council and the introduction of elective principle which are essential ingredients of federalism. Although Clifford left Nigeria in 1925, his successors, namely, Graeme Thomson, Donald Cameron, and Bernard Bourdillon administered the country within the framework of his Constitution until 1946 when it was replaced with the Richards Constitution.[44]

3:2:8 Richards Constitution, 1946

None of the governors who ruled Nigeria from 1914-46

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[43]. For more details, see Awolowo, Obafemi Thoughts on Nigerian Constitution (Ibadan:OUP, 1966).

[44]. See Cookey, S.J.S. "Sir Hugh Clifford As Governor of Nigeria: An Evaluation", African Affairs, (July 1980), p.545.

actually succeeded in 'sewing' the country into a coherent whole, nor was any specific form of government in the modern sense introduced for Nigerians. However, Sir Arthur Richards (later Lord Milverton) who assumed the governorship of Nigeria at the end of World War II set in motion a process of federalisation via regionalism. His main pre-occupation was how to bring the North and the South together through constitutional arrangement. He attempted to achieve such political union by setting up Regional Councils which were comprised in the North of the leading Emirs, and in the East and West, of representatives of Native Authorities. Such an arrangement provided a link between the native administrations and the government bureaucracy. While the Regional Councils were required to advise the Lieutenant Governors in their respective provinces, the Nigerian Legislative Council was to advise the Governor at the centre.[45]

Richards introduced a new Constitution in 1946 under which he created the Northern, Eastern and Western Regions[46] with a view to associating Nigeria's various peoples more closely with the working of their own government. The establishment of these three regions which incidentally coincided with the boundaries of the three dominant Nigerian ethnic groups, the Hausa-Fulani (North), the Ibo (East), and the Yoruba (West), according to Sir

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45. See Ezera, Kalu Constitutional Developments in Nigeria (Cambridge: Cambridge University Press, 1961).

46. See Map IV below.

Arthur Richards, "represented not the division of the country into three, but the beginning of the fusion of innumerable small units into three and from these three into one".[47]

MAP IV

THE THREE ORIGINAL REGIONS OF NIGERIA, 1946-63

Source: Adapted from Panter-Brick, Keith S. (ed.), Nigerian Politics and Military Rule (London: Athlone Press, 1970), p.x

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47. Sir A.F.Richards, "Nigeria's New Constitution", United Empire, 37 (1946), p.78.

The tripartite division of the country into the three semi-autonomous units by the Governor was based on his erroneous assumption that:

> Nigeria falls naturally into three regions, the North, the West and the East, and the people of those regions differ widely in race, in customs, in outlook and in their traditional systems of government.[48]

Richard 's Constitution was meant to achieve three main broad objectives which included, inter alia, "to promote the unity of Nigeria; to provide adequately within that unity for the diverse elements that make up the country; and to secure greater participation by Africans in the discussion of their own affairs."[49] It was in furtherance of sustaining this "unity in diversity" that he established n 1946 a constitutional framework based on regionalism (an embodiment of the federal principle) for the entire country.

The 1946 Constitution provided for a central legislature and three regional legislatures. The central legislature had few elected members, the majority were nominated by the Governor. Among the Regional legislatures, that of the North was bicameral, consisting of House of Chiefs and House of Assembly, whereas the East and West, each had a unicameral legislature, the House of Assembly. Both the legislative and executive arms of the regional governments were subordinate to and controlled by

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[48]. Sir Arthur Richards Proposals for the Revision of the Constitution of Nigeria (Cmd 6599) (London: HMSO, 1945), p.5. Emphasis is mine.

[49]. Ibid., p.6.

the central government.

Sir Arthur Richard's Constitution was an imposition because he introduced it without consulting people and country's political elite.[50] His principle of nomination instead of election and the refusal to confer independent legislative powers on the Regional Assemblies were both undemocratic.[51]

But in spite of these criticisms, the Richards Constitution remains a landmark in the constitutional development of Nigeria. Its greatest achievement lay in the integration of the Northern and Southern Nigeria in a common national Legislative Council to enact laws, as well as participating in the discussion of their own affairs for the first time in the country's political history. The introduction of regionalism enabled each region to develop at a pace best suited to it.[52]

In sum, Richards Constitution which lasted till 1951 had a positive effect on the nation in several ways: (i) it recognised that constitutional evolution must be conceived in the context of Nigeria's large size, ethnic diversity and uneven development; (ii) it helped to resolve the dilemma of imperial policy as to whether government in Nigeria should

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[50]. See Coleman, James S. Nigeria: Background to Nationalism (Berkerly: University of California Press, 1958), pp. 271-84.

[51]. See Martin Wright The Development of Legislative Council 1606-1945: Studies in Colonial Legislature (Volume 1) (London: Longman, 1946).

[52]. See Dudley, Billy J. An Introduction to Nigerian Government and Politics (Bloomington: Indiana University Press, 1982), pp.44-45.

be structured ultimately on federal lines; (iii) it helped to initiate the debate among nationalist groups as to whether the goal of a unitary or federal state should be sought; (iv) it sought to rationalize the existing governmental institutions in the country; (v) it pointed to federalism as the basis for future constitutional and political advance in Nigeria; and (vi) it unified the existing dual system of government into one stream by incorporating the native administration into constitional law.

The Constitution had attempted to create Nigeria-wide political relations on the basis of federalism such that by 1954 this process reached the point at which it was accurate to say that a full-fledged federal system was in operation. Thus, although the Richards Constitution was far from being federal, it was an adumbration of a federal constitution.[53]

3:2:9 Macpherson's Constitution, 1951

Sir John Macpherson who took over from Arthur Richards as Governor of Nigeria in 1949 retained the country's tripartite regional pattern that he met and agreed to rule the country on the broad premise of his predecessor. But in introducing his own Constitution, he scrupulously avoided the error of Richards who was accused of lack of

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[53]. For an articulate and a very lucid discussion on the constitutional and political significance of Richard's Constitution, see Williams, Babatunde A. "Constitutions and National Unity in Nigeria: A Historical and Analytical Survey". Nigerian Journal of Business and Social Studies 1,1(1968), p.57.

consultation, by making elaborate contacts through organised meetings, seminars and conferences, involving a wide spectrum of the Nigerian society.

It should be remembered that the period 1914-50 was dominated by tribalism and regionalisation of politics. All the political parties in the country emerged out of ethno-cultural organisations and more often than not emphasised differences rather than similarities of the Nigerian peoples. There were hostilities and threats of secession.[54] Such separatist agitations are perhaps inevitable in a quest for a federal union in a multi-cultural society like Nigeria for according to Wheare, "it is usually a matter of surprise that union is possible at all among communities which differ in language, race, religion or nationality".[55]

In the midst of these threats and counter-threats Macpherson devised a Constitution in 1951 with the aim of finding a solution. His Constitution provided for some measure of elective and responsible government with official majority. It introduced the first election in Nigeria that was fought on partisan lines. It provided for central and regional legislatures, and maintained the principle of proportional representation among the three Regions. At the level of executive, it endowed each Region with a Premier and a Cabinet while the Centre had a Prime Minister and

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[54]. See Tekena N. Tamuno, "Separatist Agitations in Nigeria Since 1914", Journal of Modern African Studies, 8,4 (1970), p.566.

[55]. K.C. Wheare op.cit. p.35.

Ministers.[56]

In sum, although the area of regional competency was generally restricted as a result of control by the centre, the 1951 Constitution represented a major advance from the pre-existing constitutional arrangement towards federalism. The main defect was that Sir John Macpherson's tenure was characterized by incessant interplay of centrifugal and centripetal forces in the country's polity - a situation which demanded a more federal structure established by a more federal constitution. Such a federal solution was found with the emergence of the 1954 Constitution after the repeal of Macpherson's in 1953.

3:2:10 The Lyttleton Constitution, 1954

The 1954 Constitution was named after Sir Oliver Lyttleton who succeeded Macpherson in 1953. The Constitution which was based on the Australian model provided an interesting departure from its predecessors in terms of intergovernmental relations. It introduced a full-fledged federal form of government and gave fuller recognition to regional autonomy. The Lyttleton Constitution of 1954 was a milestone in the development of Nigerian federalism.

Its highlights are as follows:[57]

(i) Nigeria was to be a federation made up of a federal government and three regional governments, each with

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[56]. See the Nigeria (Constitution) Order-in-Council 1951.

[57]. See the Nigeria (Constitution) Order-in-Council, 1954. See also Dudley B.J. op. cit., pp.52-54.

specified powers such that no one government could legislate on matters not allocated to it;

(ii) Matters not allocated either to the federal or a regional government were to be contained in a "concurrent list" over which any government could legislate, but where a regional legislation on a current matter was inconsistent with a federal Act, then the regional legislation was to the extent of such inconsistency null and void;

(iii) The federal legislature, to be composed of an equal number of members from each of the three regions, was to be directly elected, and whichever party won a majority of the seats in the federal legislature would form the federal government;

(iv) There would be Federal Supreme Court whose functions would be interpretation of the constitution and hearing appeals from the regional High Courts. Appeals from judgments of the Supreme Court would lie to the Privy Council;

(v) Regional Assemblies were to have full legislative sovereignty over matters arrogated to them by the constitution;

(vi) The regional High Courts were to interpret all laws passed by the regional legislatures;

(vii) In the North, there was to be additional court (the Sharia Court of Appeal) to hear appellate cases involving moslem personal law. In the event of conflict between decisions by the Sharia Court of Appeal and the Regional High Court, such a conflict was to be adjudicated

by a Court of Resolution;

(viii) Each Region was to have its own civil service which would be headed by a regional executive to which the bureaucracy would be responsible;

(ix) Each regional government would be responsible for the purchasing and marketing of all export commodities produced within the region;

(x) In each region, the titular head of government was to be known as the Governor; in the case of the federal government, the Governor-General; and

(xi) Each region was to have the power to determine when it would become internally self-governing.

From the foregoing, it can be seen that the establishment of a federal system of government in 1954 by the Lyttleton Constitution occasioned far-reaching changes both in the structure and texture of the Nigerian Federation.

But in spite of these laudable accomplished objectives of federalism, at least one criticism could be levelled against it. The Constitution left the territorial and regional boundaries of the country unaltered thereby making the Northern Region still twice as large as the other two regions combined. Of the danger of such regional imbalance, Sir Kenneth Wheare says:

> The capacity of states to work a federal union is also greatly influenced by their size. It is undesirable that one or two units should be so powerful that they can override the others and bend the will of the federal government to

themselves.....[58]

The Independence and Republican Constitutions of 1960 and 1963 respectively were modelled along the 1954 federal constitution. The 1963 Constitution was in force when the military struck in 1966. The Nigerian Federation developed from 3 Regions in 1954 (see Map IV, ante); 4 Regions (1963), 12 States (1967), 19 in 1976 (see Maps V-VII below) to 21 States in 1987(see Map I, ante).

The creation of these states has altered the structural configuration of Nigeria for a more diffuse correlation between units of government and ethnic or cultural solidarities. The particular pattern of ethnic hegemony which expressed itself politically through the regional governments in the pre-military era has been scattered.

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[58]. K.C. Wheare (supra.) pp 50-51. See Map IV (ante).

MAP V

NIGERIA AS A FEDERATION OF 4 REGIONS
(August 1963 - May 1967)

Source: Adapted from Panter-Brick, Keith S., op.cit., p.x.

MAP VI

NIGERIA AS A FEDERATION OF 12 STATES
(May 1967-February 1976)

Source: Panter-Brick, Keith S. (supra), p.xi.

MAP VII

NIGERIA AS A FEDERATION OF 19 STATES
(February 1976-September 1987)

Source: Crowder, Michael and Abdullahi, Guda, op.cit., p.2

3:2:11 Summary

This chapter has examined the genesis and development of Nigerian federalism from the colonial period through Independence to the advent of military rule. It has also explored the precolonial environment in which the British imperial power fashioned the modern governmental structure which independent Nigeria inherited. Three principal phases have been identified in the development of federalism in Nigeria.

The first phase (1914-50) shows that as a result of Lord Lugard's amalgamation scheme, Nigeria was administered within a unitary framework. The extension of Indirect Rule system from the North to the South was a manifestation of his firm belief in unitarism. His successors, namely Sirs Hugh Clifford and Arthur Richards, in the main, followed his administrative formula. To all intent and purposes the country's governmental system up to 1950 was basically unitary.

The second phase (1951-53) which we shall now refer to as the era of quasi-federalism reveals that there was a considerable devolution of authority and powers to the subnational units but the political relations among them were rather inauspicious due to divisive political rivalry which gave a sharper edge to the divergencies that were originally cultural and ethnic. The emergent regionalism that arose underscored the presence of dual nationalism and ethnic parochialism. In the circumstances, there was

required an urgent solution to contain these conflicting claims by providing an appropriate governmental system which could guarantee compromise.

The search for such compromise under the third phase (1953-54) led to the adoption of federalism whose political institutions have progressively developed.

CHAPTER FOUR

THE BASIS OF NIGERIAN FEDERATION

In Chapter Two[1] we discussed the general prerequisites for federal union. This chapter seeks to investigate specifically the circumstances or factors that influenced Nigeria's choice of federalism as a form of government. The objective is to show how social segmentation and cleavages which gave impetus to the adoption of federalism in Nigeria in the first instance make it undesirable to introduce military rule in the country.

There are three well-known broad criteria for the formation of a federation: firstly, the federating units should desire unity with each other; secondly, they should equally desire to retain some measure of regional independence; and thirdly, they should possess the capacity to operate a federal system.[2] In the context of Nigerian experience, a combination of these factors dictated the federal option.

4:1 Factors Influencing the Desire for Unity in Nigeria

The existence of some unifying forces in the country facilitated the introduction of a federal system of government.

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[1] See Chapter Two (ante, 2.3).

[2] See Wheare, Kenneth C., op.cit., pp.35-52; and Awa, Eme O. (supra), pp.15-37.

4:1:1 British Colonial Rule

British colonialism more than anything else propelled the choice of federalism by Nigeria. Federalism is as much a British creation as Nigeria herself.[3]

Ever since the formation of the Canadian Federation, Britain has consistently resorted to the federal formula as a means of decolonising the multi-ethnic or multi-racial entities that made up her former colonial empire. Out of that empire have emerged federal states like Australia, India, Pakistan, Malaya (now Malaysia), Uganda, and the ill-fated Federation of Rhodesia (now Zambia and Zimbabwe) and Nyasaland (now Malawi), and the abortive Federation of West Indian Islands.[4] The imposed amalgamation of the Northern and Southern Nigeria in 1914[5] has been partly responsible for the desire of the various ethnic groups in the country to preserve that union thereafter in the face of all odds.

Prior to the establishment of British Colonial Administration, there was practically no organised form of government in the modern sense, nor was there any state whose size and boundaries had approximated to the present territory of Nigeria. What existed was a coterie of tribes whose territorial boundaries were in a constant state of flux as a

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[3] See generally the discussion on the evolution of Nigerian federalism in Chapter 3.

[4] For details, see Franck, Thomas M., Why Federations Fail (supra), pp.167-99. Ghana seems to be an exception probably because of the smallness of its territory and population.

[5] See Lord Lugard's amalgamation scheme in Chapter Three (ante, 3.2.5).

result of incessant internal wars and migrations. But with British occupation and subsequent colonisation the country became unified and the present boundaries were delineated.[6] The unification of the country which came through the effort of the British Government has had a tremendous influence on the people's desire to enter into a federal pact. When all the three Regions (North, East, and West) became virtually autonomous under the Richards Constitution of 1946, they saw in federation the earliest opportunity and the surest means of persuading Britain to grant them Independence. It was argued that under a federal umbrella, they could speak with one voice (a measure of unity) and achieve their ambition of becoming an independent sovereign state. Based on the foundation laid by the colonial government, all the leaders of opinion in the country were determined to unite for the common objective of securing independence from Britain. As Chief Obafemi Awolowo, a one-time Premier of Western Region confessed some years later after the consummation of the federal union:

> "The unity of the country is assured, assured in the sense that it is a heritage which is being handed over to us by the British Government..."[7]

It should be noted, however, that the favourable light in which Britain regarded federalism and its recommendation to her colonies, particularly Nigeria, was in the main due to economic considerations. In the first place, the economic

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[6] For a fuller account, see Chapter 3. See also Ezera, Kalu, Constitutional Developments in Nigeria (supra).

[7] House of Representatives Debates (Daily Parts), April 1, 1960, p.460. Awolowo was then the Leader of Opposition in the Federal Parliament.

complementarity of a federated Nigeria would save the British Government the financial burden of looking after the impoverished sections of the country. Secondly, a united Nigeria would afford Britain wider market for her surplus manufactured goods as well as source of raw materials. In effect, it is the economic investment which Britain had in Nigeria that underpinned her interest in evolving a federal system for the country. It was not out of altruistic motives. As Professor Osuntokun rightly observes,

> "British investment in Nigeria was already substantial, it was not in the interest of British capitalists to see the edifice which owed its existence partly to the enterprise of Liverpool merchants to collapse like a house of cards."[8]

Thus, the antecedent of Nigerian federalism is traceable to the structures and ideological patterns of British colonialism which carried with it a federalist fait accompli.[9]

4.1.2 Imitation

Another apparent reason for choosing federalism could be said to be imitative in nature. Deriving inspiration from the Commonwealth countries of Australia, Canada, India and their counterparts in Europe, the departing British officials and Nigerian political elite reasoned that federalism would compensate for the nation's inability to meet modern

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[8] Jide Osuntokun, "The Historical Background of Nigerian Federalism" in Akinyemi, Bolaji A. et al. (eds.), Readings on Federalism, op.cit., pp.98-99.

[9] That Nigerian federalism is rooted in the social structure of British colonial domination, see Oyovbaire, Sam Egite, Federalism in Nigeria: A Study in the Development of the Nigerian State (New York: St. Martin's Press, 1985), pp.28-58; and Odumosu, Oluwole I., The Nigerian Constitution: History and Development (London: Sweet & Maxwell, 1963), p.231 et seq.

political, economic and strategic demands without at the same time threatening the special interests of the constituent parts. Federalism, it was thought, would avoid the extreme of over-centralisation implicit in the hitherto unitary system and to prevent the risk of disintegration. A federal government, it was argued, had worked for political craftsmen of Europe in earlier times; now it was to be experimented on 'African soil'. The force of imitation seemed to have worked well in Nigeria because it provided from outside a plan which fitted the prevailing circumstances within the country. That the adoption of federalism in Nigeria is partly imitative, receives the affirmation of Professor Dudley who maintains that "among the factors responsible for the decentralisation of constitutional responsibilities in the country included a positive attraction on the part of Nigerian leaders to the Wheare model".[10]

4:1:3 Positive Nationalism and Statesmanship

Positive nationalism also influenced the federal decision - positive in the sense that the nationalist leaders became unanimous in demand for a federal system of government at the terminal period of colonial rule as opposed to their hitherto separatist demands of "North for Northerners", "East for Easterners" and "West for Westerners".[11] They realised that

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[10] Billy J. Dudley, "Federalism and Balance of Political Powers in Nigeria", Journal of Commonwealth studies, 4, 1 (1966), pp.16-17. Emphasis is mine. Note also that Canada, Australia and Switzerland were influenced by the American federal system.

[11] See Tekena N. Tamuno, "Separatist Agitations in Nigeria Since 1914" (supra).

a federal system is the only sure basis on which Nigeria can remain united. A new political order and deep sense of patriotism had developed following a wave of political current which was sweeping across the entire country at the end of World War II.

The question that agitated the minds of Nigerian nationalists was how the country ought to be governed to contain the centrifugal tendencies. Among the foremost articulate and vocal nationalists at the time were Dr. Nnamdi Azikiwe from the Eastern Region who advocated strongly through political campaigns that Nigeria should be divided into a federation of eight 'nationalities' to be called the "Nigerian Commonwealth",[12] Chief Obafemi Awolowo of the Western Region who favoured 'linguistic federalism'[13] and the Northern Regional spokesman, Alhaji Abubaker Tafawa Balewa, who believed that "Nigeria's political future only lies in federalism".[14] Their contribution towards the growth of emergent nationalism confirms one of Wheare's prerequisites for federal union that:

> "A great deal will depend on leadership or statesmanship at the right time. A federation is in the nature of an association created by act of

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[12] Nnamdi Azikiwe, Political Blue Print for Nigeria (Lagos: Zik Press, 1945).

[13] Obafemi Awolowo, Path to Nigerian Freedom (London: Faber, 1947).

[14] Quoted by Professor J. Isawa Elaigwu, "Subnational States and the Future of Federalism in Nigeria", Nigerian Journal of Political Economy, 1, 2 (1983), pp.3-4.

will on the part of a group of leaders."[15]

Thus, in the formation and sustenance of a federation, leadership behaviour and its effect on followership plays an important role. The Nigerian civil war (1967-70) which threatened the survival of the Nigerian Federation would have been averted if the country at that time had astute leaders.

4.1.4 Economic Complementarity

Economic considerations also influenced the federal option. Nigeria's enormous size, and resources (both human and material) have provided her with a variety of environments, giving rise to the production of a wide variety of food and export crops. She has a considerable amount of natural resources such as navigable waters, petroleum and petroleum products, coal supplies, tin ores, bauxite, columbite, hides and skin and a sizeable productive labour force. With these abundant resources, it was thought that a Nigerian Federation would have sufficient economic strength to sustain the constituent units and that economic interdependence among them would bring a considerable advantage to the whole country. Map VIII below shows the main features of regional economies and the distribution of the main components of Nigeria's export production.

In terms of exports, Map VIII reveals a marked degree of regional specialisation - while Northern Nigeria produces cereal crops, namely, groundnuts and cotton and wheat, the

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[15] K.C. Wheare, Federal Government, op.cit., p.39. See also Riker, William H., Federalism: Origin, Operation, Significance (supra), pp.5-7.

MAP VIII

THE MAIN FEATURES OF THE REGIONAL ECONOMIES

Key to shading: 1 - Regional Boundaries; 2 - Northern limit of the Tsetse fly; 3 - Northern limit of the Southern Root economy; 4 - Southern limit of the Northern Grain economy; 5 - Groundnuts; 6 - Cotton; 7 - Tin 8 - Benniseed; 9 - Cocoa; 10 - Rubber; 11 - Principal oil palm areas; 12-Subsidiary oil palm areas.

Source: J.R.V. Prescott, "The Geographical Basis of Nigerian Federation", Nigerian Geographical Journal, 2, 1 (1958), p.2.

South grows root crops with palm produce from the East, cocoa and rubber from the West and Mid-West respectively. In the case of mineral resources, petroleum is obtained from the Eastern and Mid-Western Nigeria while the North produces iron

ores (Kwara) and columbite (Jos). Iron ores are also produced in Aladja in the defunct Mid-Western Region. The complementary nature of regional production which enables the country to withstand the vicissitudes of world trade and market prices more easily than a collection of individual regions is a powerful factor in favour of federation.

Furthermore, most of the Northern export products for overseas have to pass through Lagos and Port Harcourt (the country's main international seaports) located in the South. Therefore, it is in the best interest of the North to remain closely integrated with her Southern neighbours. Besides, before the discovery of oil in the eastern part of Southern Nigeria in the 1970s, the area specialised only in coal and palm produce. This dependence on few products was considered as a potential economic weakness and therefore it was in Eastern Nigeria's favour to be associated federally with other Regions not dependent on the same commodity. The location of the Western states on the landward side of Lagos gives them an advantage in federal union, particularly in terms of income derived from transport and distributional services to the hinterland. Lagos in particular has a dual advantage from federation: firstly, as a vital seaport linking the coastal areas to the hinterland, it enjoys the privilege of being the national commercial nerve centre; and secondly, its position as the federal capital, gives it much economic and political benefit.[16]

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[16] For more discussion on the economic complementarity between the Northern and Southern States of Nigeria, see J.R.V. Prescott (supra).

The economic advantages of the federal system in respect of external trade are also reflected in the production for internal market. Shifting cultivation is the common feature of agriculture in Nigeria. There is, however, a fundamental difference between the Southern root economy and the Northern grain economy. Whereas the South, characterised by forest zones, practise a system of bush fallow with yams, cassava, maize and beans as the main crops, the major products of the North are cereals, especially guinea corn, millets and groundnuts.[17] These two agricultural systems have the mutual advantage of being bound together by a considerable volume of trade. The northward movement of cassava, yam, fresh fruits and palm products from the Southern states and the southward flow of groundnuts, onions, beans and cattle under a federal system gives the North and South mutual advantage in securing a variety of resources for internal markets.

In sum, the association of Northern and Southern Nigeria in a federation is largely for reasons of economic complementarity of the two - while the landlocked North requires the coastal port facilities of the South, the latter needs the infrastructures of commerce, industry and employment of the whole country, including the North for the benefit of "their highly mobilised, urbanised, migratory and trading peoples".[18]

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[17] See Buchanan, K.M. and Pugh, J.C., Land and People in Nigeria (London: Macmillan, 1955), pp.105-9.

[18] Professor S.E. Oyovbaire, "The Historical and Environmental Setting of Nigerian Federalism", in Federalism in Nigeria, op.cit., pp.28-58.

4:2 Factors Supporting a Measure of Regional Independence in Nigeria

If the factors highlighted above have produced in Nigerian communities the desire to be united for some purposes, which are those that have induced in them the desire to remain separate for other matters?

As in all federations, in Nigeria, the fundamental reasons for the demand of regional separateness which gave impetus to the choice of federalism is diversity, arising from socio-cultural and geopolitical differences.

4:2:1 Geographical Differences

Federalism evolves with a tacit recognition of regional personalities and spatial political interactions.

As shown in Chapter 3 (Map I), Nigeria stretches from the Atlantic Ocean in the South to the semi-arid desert in the North, about 923,768 square kilometres. The country is bigger than France, United Kingdom and Belgium combined. Geographically this massive country exhibits great variations both in climatic conditions and natural resources.[19] These in turn have led to the emergence of differences in occupation and way of life. Such differences underlie the need for regional independence in some matters. Federalism presupposes "unity in diversity". In effect, one of the factors responsible for the introduction of federalism in Nigeria is the existence geographical differences - a consideration which has been of decisive influence in the United States, Canada

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[19] For example, see Maps IX, X and XI below. See also Dikshit, Rameah R., The Political Geography of Federalism, op.cit., p.10.

MAP IX
NIGERIA'S RAINFALL

Source: Crowder, Michael and Abdullahi, Gude, Nigeria: An Introduction to Its History, op.cit., p.4.

MAP X
NIGERIA'S VEGETATION

Source: Adapted from Crowder, Michael and Abdullahi, Guda, op.cit., p.4.

MAP XI
RELIEF AND DRAINAGE IN NIGERIA

Note: *Nigeria is well served by rivers, the greatest of which are the Niger, and the Benue which flows into it at Lokoja. Both the Niger and Benue flow all the year round and were therefore major highways of communication before the construction of railways and the introduction of the motor-car. This is a drawing of the confluence in the nineteenth century.*

Source: Crowder, Michael and Abdullahi, Guda (supra), p.5.

and Australia.

4:2:2 Ethnic Pluralism

The inhabitants of Nigeria are mainly of negro origin and the chief characteristic of the country's population is heterogeneity. The country is multi-ethnic and multi-lingual with a variety of cultures. Although English is the official language, the over 300 ethnic groups in Nigeria prefer to use their dialects in inter-personal communications. The country's diversity in religion, language, culture, and traditional political institutions could not be obliterated by the British colonial rule. In fact, the painstaking efforts of Lord Lugard to forge Nigerian unity through the amalgamation of the Northern and Southern Provinces were thwarted by centrifugal forces - each ethnic group or geopolitical unit was determined to remain separate and autonomous with a view to preserving its own language, culture and identity.[20]

Nigeria's desire for unity was haunted by the 'ghost' of secession and separatism such that by the time appreciable progress was made, ethnicism had already gained a foothold.[21] There was lack of unity among the political leaders too. According to the Premier of Northern Region, Sir Alhaji Ahmadu Bello:

> "Lugard and his amalgamation were far from being popular with us...; we should cease to have anything more with the Southern people, we should

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[20] See Chapter 3 (ante, 3:2:5) and Map XII below.

[21] See Professor T.N. Tamuno, "Separatist Agitations in Nigeria Since 1914", op.cit., 565.

MAP XII
THE MAJOR ETHNIC GROUPS IN NIGERIA

Source: Crowder, Michael and Abdullahi, Guda, op.cit., p.7.

take our own way."[22]

And in the words of Chief Obafemi Awolowo, the Premier of Western Region:

> "Nigeria is not a nation; it is a mere geographical expression. There are no Nigerians as there are 'English' or 'Welsh' or 'French'.[23]

The President and Prime Minister of Nigeria, Dr. Nnamdi Azikiwe[24] and Alhaji Abubakar Tafawa Balewa[25] made similar negative and divisive remarks.

These statements of eminent Nigerian leaders have been cited to show the magnitude of the problem of disunity arising from socio-cultural differences. Although some of the statements were exaggerated, it is a notorious fact that the road to federalism was a tortuous one.

4:2:3 The Need to Protect the Minorities

Besides the desire of each ethnic group to retain its own identity and independence, the minority factor also gave further impetus to the establishment of a federal structure. The minority ethnic groups such as the Tiv, Edo, Ibibio, Igala and Idoma to mention a few, for fear of domination by the

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[22] Sir Ahmadu Bello, My Life (Cambridge: CUP, 1962), pp.110-111.

[23] Obafemi Awolowo, Path to Nigerian Freedom, op.cit., pp.47-48.

[24] See Zik: A Selection from the Speeches of Nnamdi Azikiwe (Cambridge: CUP, 1961).

[25] See Jide Osuntokun in Akinyemi, Bolaji A., et al. (ed.), op.cit., p.99; and Taylor Cole, "Emergent Federalism", in Brett, Justice L. (ed.), Constitutional Problem of Federalism in Nigeria (Lagos: Daily Times 1961), p.2.

majority ethnic groups (the Hausa/Fulani, Yoruba and Ibo)[26] embarked on vigorous agitations for the creation of separate and distinct states of their own. It should be remembered that more than 300 ethnic groups were merged into two Protectorates in 1914 and later aggregated into three Regions in 1946 by the British imperial power. Each of the Regions displayed a core area of one particular homogeneous majority group characterized by high level of economic development in the midst of peripheral zones sparsely inhabited by a variety of minority ethnic groups often at a relatively lower level of development, especially in terms of social amenities. The marginalisation of the latter by the former stimulated the minorities' movement for "self-determination". As Professor Rothchild rightly observes, "Nigeria has the makings of a minority problem which by comparison makes pale those in the Western World".[27]

In the circumstances, it was thought that only a federal machinery can provide the desirable elasticity to weld together the diverse elements and communities who are at differing stages of development. Federalism greatly reduces the powers of the majority groups who usually control the central government and thus minimizes the danger of the minorities being subjugated. It also enables each unit to develop at its own pace along its own characteristic lines

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[26] See Map XII (supra). See also Okpu, U., Ethnicity and Minority Problems in Nigerian Politics (Uppsala: University Press, 1977).

[27] Donald S. Rothchild, Towards Unity in Africa: A Study of Federalism in British Africa (Washington, D.C.: Public Affairs Press, 1960), p.142.

within the unity of the whole federation.

In effect, the concomitant advantage that flows from a federal system is that while allowing each ethnic group independent existence, it unites them under a common central government which by reason of its diminished opportunity to become an instrument of total domination is expected to be less opprobrious, and in this way national unity may be strengthened. It was further hoped that entrenched human rights provisions in a written federal constitution would reduce the problems of the minority groups considerably.[28]

4:2:4 Mutual Fear of Domination Among the Major Ethnic Groups

One sentiment which was mobilised in the quest for federalism in Nigeria was the general fear of domination among the three dominant major groups - the Hausa/Fulani, Yoruba and Ibo.[29]

The nature and pattern of fear underlying any federal venture tends to affect the capability of a country in holding its citizens together. Normally, there are two kinds of fear. One is the fear of domination from external foe. This kind of fear was an impelling force behind the introduction of federalism in the United States, Switzerland and Canada. Fear of this nature would compel separate units to join together to present a common front against an outside enemy, real or potential.

On the other hand, there is the fear among nationals of

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[28] See Nwabueze, B.O., Constitutional Law of the Nigerian Republic (London: Butterworths, 1964), p.145.

[29] See Map XIII below.

MAP XIII

DISTRIBUTION OF THE PRINCIPAL TRIBAL NUCLEII IN NIGERIA

Source: J.R.V. Prescott, "The Geographical Basis of Nigerian Federation", op.cit., p.9.

one country - each group apprehensive of being dominated by another. It is this type of fear that we are concerned with here. In the course of competitive political process in Nigeria, each of the aforementioned major ethnic groups feared of being subordinated either politically, economically or bureaucratically. It is this fear that motivated much of their drive towards federalism. The existence of diversity alone cannot provide an adequate explanation for the federal desire for as Rothchild rightly argues, "unless there is a desire to preserve group uniqueness and a fear of submergence, then a unitary system would seem as appropriate for Nigeria".[30]

This fear of inter-ethnic domination appears to be a general phenomenon in the whole of Africa. In Rothchild's account of fear as the main parameter for the adoption of federalism by African countries, he states that:

> "Fear is the connecting thread running throughout. Each ethnic group has its own distinct character, but at the bottom of each is fear, making men irrational, arrogant, uncompromising, at times plainly stupid. Fear is to African federalism what profit motive is to capitalism. It is not the sole rationale, but it is a primary one."[31]

In the context of Nigerian experience, the Northern majorities (Hausa/Fulani) desired a federal structure because they feared under a unitary system the Southern majorities (Yoruba and Ibo) would occupy most of the country's key offices by virtue of their high skill acquired through early access to Western education. On the other hand, the Southern

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[30] Donald S. Rothchild, op.cit., p.169.

[31] Ibid., p.192.

majorities (comprising the Ibos of the East and the Yorubas of the West) teamed up to champion the cause of federalism due to apprehension of domination by the North because of its enormous size in landmass and in population. Thus, while the North feared Southern economic and bureaucratic domination, the South feared Northern political supremacy.

This state of mutual fears, apprehension and suspicion that partly dictated the choice of federalism in 1954 is still evident in Nigeria today. As Professor Kirk-Green aptly puts it,

> "the North, apprehensive of its Southern counterparts, always embark on northernisation policy (meaning discrimination against Southerners) while the South is half afraid, half-contemptuous, and wholly ignorant of the North; each with sinister undertones of tension, irreconcilability and threatened withdrawal".[32]

It should be noted however that these fears and tensions among the major groups arose from the rivalry to protect their group interests against possible invasion by other groups in the country's competitive political process with a view to inheriting the reigns of power bequeathed by the departing British colonial government. This experience is not peculiar to Nigeria. According to Professor MacMahon, "in most federal undertakings, fear has either been a dynamic force or at least a catalyst".[33]

But in the Nigerian situation, one may advocate that if diversity is so prominent as to militate against unity, the

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[32] A.H.M. Kirk-Greene, Crisis and Conflict in Nigeria (London: OUP, 1971), p.5.

[33] Arthur W. MacMahon (ed.), Federalism: Mature and Emergent, op.cit., p.8.

best course would have been to divide the country into several independent nation states. Such an argument though attractive does not seem to be a viable alternative for many obvious reasons: firstly, it is inconceivable, illogical and economically counter-productive to carve out about 300 nations on ethnic or linguistic basis; secondly, since there are no natural geographical boundaries between the contiguous subnational units in most cases, it would be very difficult, if not possible, to create new and wholly homogenous 'nations'; thirdly the division of the country into more sovereign states would not put an end to the diversity in individual regions or states; fourthly, any argument for such fragmentation ignores the advantages of economy of large scale that might accrue to the regions if allowed to co-exist as a single geographical entity. One of such advantages is military security or defence which is best entrusted to a central authority like the federal government. With the conglomeration of autonomous regions into a federal union, a country becomes bigger, and its potential military prowess may deter would-be external aggressors. Fifthly, another intangible benefit is international recognition and prestige. It has been argued that even though the same recognition and diplomatic courtesies are accorded to all sovereign states large or small in international affairs, modern diplomacy tends to attach greater influence and prestige to the representative(s) of a country with enormous population.[34]

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[34] See Odumosu, Oluwole I., The Nigerian Constitution: History and Development, op.cit., p.232; and C. Ogwurike, "The Aims of Nigerian Federalism", Nigerian Law Journal, 1

Nigeria being the largest country in Africa can obtain such an honour only as a federation. Finally, with Nigeria as one federal entity, certain subject matters of crucial national importance are kept under the custody of one central government to enhance efficiency and to avoid duplication of efforts and resources.

4:2:5 Differences in Religious Beliefs

Nigeria's diversity is also reflected in religion. There is a variety of religious beliefs and practices, which to a great extent are still resistant to the proselytizing influence of Christianity and Islam. These beliefs vary not only from one ethnic group to another, but also within members of the same group.

In Northern Nigeria, which is predominantly occupied by the Hausa/Fulani ethnic groups, the main religion is Islam, while in the South the dominant religion is Christianity. Christianity, Islam and Paganism exist in juxtaposition in the West, the home-base of the Yorubas, whereas Christianity and Paganism thrive in the East which is mainly occupied by the Ibos. Besides these major ethnic groups, there are other significant minority groups such as the Kanuri, the Tiv, the Edo, the Ibidio, the Igala and Idoma who practise any or a combination of the aforementioned religions.[35] Religion more than anything else has accentuated Nigeria's problem of disunity. It is partly responsible for the desire of the component units to remain separate and autonomous within a

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(1964), pp.194-201.

[35] For more details, see Map XIV below.

federal union.[36] For example, the Northern leaders are not only fearful of economic and bureaucratic domination of the Christian dominated and more advanced South, but they are also apprehensive that without a federation any other form of political unity would endanger their Islamic faith.[37]

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[36] For an elaborate discussion on the role of religion towards negation of unity in Nigeria, see Bishop John Onaiyekan, "Secularism and the Nigerian State", Seminar on Federalism, Zaria Nigeria, 11 June 1987.

[37] See K.M. Buchanan, "The Northern Region of Nigeria: The Geographical Background of its Political Duality", Geographical Review, 43 (1953) pp.451-52.

MAP XIV

DIFFERENT RELIGIOUS GROUPS IN NIGERIA

Note: Areas are shaded according to the density of population of each religious group.
Source: Eleazu, Uma O., Federalism and Nation Building: The Nigerian Experience, op.cit., p.94.

4:2:6 Lack of Uniformity in Traditional Administrative Practices

The existence of marked differences in traditional administrative practices long before colonialism started constituted a potent argument in favour of federation. The strong influence of Islamic religion on the autocratic feudal system of the Fulani administration in the North made it less

susceptible to the European administrative bureaucratic model that had for many years permeated the South. Islamic faith and feudalism are so rigidly entrenched in the North that the British Colonial Government decided initially to embark on administrative seclusion of the Northern from the Southern Nigeria. According to Sir Donald Cameron, a former Governor of Nigeria:

> "The policy accepted for some considerable time is that the Moslem Administrations should be sheltered from contact with the world... an unreformed feudal aristocracy could not be expected to stand up against the natural forces of Western civilization."[38]

The above passage shows clearly that originally there was no uniformity in administrative practices throughout the country. Even the so-called Indirect Rule system which Lord Lugard introduced in the North was given a cold reception in the South. While the pre-colonial administration in Northern Nigeria was dominated by oligarchical aristocratic class, that of the East and West was based on republicanism. This dichotomy in traditional administrative practices gave rise to the preference for federalism to unitarism.

4:2:7 Incompatibility in Social and Cultural Values

Differences in socio-cultural values could have an adverse effect on the unity of a country. Nigeria's problem was compounded by the existence of uneven development and disparity in the degree of exposure to external influences. This is exemplified by the fact that while the South which had

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[38] Sir Donald Cameron, The Principles of Native Administration and Their Application in Nigeria (London: Longman, 1935), p.13.

already imbibed Western culture was more socially mobilised and progressive, the North which was rather insulated from outside influences (except the Middle East connection) exhibited conservative tendencies. These social differences induced in the citizens a strong desire for autonomous existence, that provided the motivation for a federal form of government. In paying tributes to the British for averting the disintegration of Nigeria, one of the architects of Nigerian federalism and an elder Statesman, Chief Obafemi Awolowo, recounts that:

> "If these differences had not been restrained and skilfully canalized by the British, they would have led to the emergence of several independent sovereign states in the place of ONE NIGERIA..." The credit for sublimating these natural desires and tendencies of the various ethnic groups for separate existence and hitching them to the concept of ONE NIGERIA must forever belong to the British".[39]

4:2:8. Educational Disparity

Educational disparity between the North and South was a potent factor that influenced Nigeria's choice of federalism. By the time the British Government officials arrived in the country to rule, Western education had already been firmly established in the South as a result of the evangelizing activities of the European Christian missionaries which predated colonialism.[40]

In the case of the predominantly Muslim areas of the far North, educational developments were somewhat retarded. The

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[39] Obafemi Awolowo, Thoughts on Nigerian Constitution, op.cit., p.25.

[40] See A.H.M. Kirk-Greene, "The Peoples of Nigeria", Journal of the Royal African Society, 66 (1967), p.4.

Fulani jihad (Muslim 'holy war') of 1804 had already established Islamic theocracies and Koranic schools. But the degree of formal education in these schools varied greatly. Essentially Koranic schools were set up to train and produce Muslim scholars (Mallams) as well as providing religious instruction to people to know their correct obligation to Allah (God) and their leaders, especially the Emirs (Allah's representatives on earth). Thus, adherence to Islamic theology to the exclusion of secular education marked the beginning of the educational backwardness of Northern Nigeria.

When the Northern theocracies were conquered by the British in the 1890s, one would have expected a radical change in the existing system. Surprisingly, the educational policy of the colonial administration more than anything else polarized the cleavage between the North and the South, both in intellectual and psychological orientation of the people. It was part of the settlement reached between the traditional rulers (the Emirs) and Lord Lugard (the British colonial administrator) that there would be no attempt to christianize the native inhabitants, nor would their Islamic religion be tampered with. Consequently, Lugard and his successors consistently kept the European missionaries and their activities out of the North. As a matter of priority, Lugard preferred inculcation of moral precepts to training of intellect as a means of achieving social stability because he felt Christianity which embraces Western civilisation might undermine the respect which the Emirs (the instruments of his Indirect Rule) cherished so much. In the South, Christian

missionaries who championed the cause of giving formal education to their converts, taught them not only to worship the 'true God' but also to despise traditional rulers and other indigenous social institutions that were considered morally and spiritually inferior to Jesus Christ and His teachings in the Bible. Consequently, Lugard cautiously avoided the 'mistake' of allowing the missionaries entry to the North which is fundamentally traditional and conservative. He reinforced his promise to the Northern Emirs that his government would studiously refrain from any action which could interfere with the Islamic religion or oppose its precepts.[41] Even after Lugard's retirement in 1919 his successors carried the northern protectionist policy to its logical conclusion through absolute prohibition of any Christian enterprise in the emirates. It was argued that if British missionaries were granted permission to proselytize Christian religion, the Emirs would regard such move as a breach of Lugard's pledge; secondly, any action that weakened the authority of the Muslim religion would also weaken the authority and prestige of the Emirs and would thus imperil the system of indirect administration; thirdly, the British administrators feared that introduction of Christianity might generate Islamic fanaticism which could endanger colonial administration. The North was so much secluded from foreign influences such that by 1926 all Christian missions were denied permission even to build schools and hospitals within

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[41] See Lugard, Sir F.D., Report on the Amalgamation of Northern and Southern Nigeria and Administration 1912-1919, op.cit., p.733.

an emirate.[42]

The resultant effect of all these policies was the denial to the North (except non-Moslem areas) of formal Western education. The protectionist policy of the Colonial Administration had a negative boomerang effect such that at the terminal period of colonial rule the North was at a disadvantage to the extent that by 1954 when federalism was formally adopted and when educational development in the Western and Eastern Regions had accelerated, the North was conspicuously trailing behind - an imbalance which was later regarded as a threat since education, the Northerners argued, enhances political and bureaucratic opportunities especially on the departure of the British. Southern domination would be a 'calamity' for the Northerners, for what the South gains, as it were, the North loses - a zero-sum conflict in which people hardly have a feeling of belongingness. Alhaji Ahmadu Bello, the Premier of Northern Region expressed the feelings of the North:

> "If the British Administration had failed to give us the even development that we deserved and for which we craved so much... what had we to hope from an African Administration (of the Southerners) probably in the hands of a hostile party..."[43]

This statement shows how disparity in educational opportunity exacerbated the existing ethnic differences and misgivings. It instilled fear and distrust in the Northerners who after some hesitance to agree to any form of union at all,

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[42] See Awa, Eme O., Federal Government of Nigeria (Berkeley: University of California Press, 1964).

[43] Sir Alhaji Ahmadu Bello, My Life, op.cit., pp.110-111. The words in parentheses are mine.

finally preferred a federated independent Nigeria to an independent Nigeria which continued unitary government. A federal compromise, it was argued, would afford each section of the country to advance educationally at its own pace.

It must be emphasised that the North learnt some important lessons. Though belatedly it embarked on educational expansion by establishing schools and colleges in which western-type education could take place. It gave ample opportunity to all children of school age with a view to bridging the educational gap.[44]

Finally factors that supported a measure of regional independence in the formation of the Nigerian Federation could be summed up in the words of Professor Kirk-Greene that:

> "The Nigerian tragedy has been bedevilled by a set of oppositions: North versus South, Islam versus Christianity, alleged feudalism versus assumed socialism, federal versus unitary preferences, traditional authority versus achieved elitism, and haves versus have-nots..."[45]

4:3 The Capacity for Working a Federal System

Unless the people who desire federal union have also the capacity to work it, Professor Wheare maintains that federal government is not suitable for them.[46] The existence of such capacity, at least, in terms of resources both human and material is necessary to run the federal state because of its

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[44] E.g. in the 1970s, Schools of Basic/Preliminary Studies were set up in each of the Northern States to run pre-degree and remedial courses. Among them are Schools of Basic Studies in Zaria, Sokoto, Makurdi, Ilorin and Yola respectively.

[45] A.H.M. Kirk-Green (supra), p.5.

[46] See Wheare, Kenneth C., Federal Government, op.cit., p.44.

dual government - national and regional. Nigeria has a large population for supply of manpower and a reasonable amount of economic resources to sustain a federal system.[47]

The capacity of a country to operate a federal system is also determined by its ability to contain both centrifugal and centripetal forces within the society. The constitutional provision that the composition of the Government of the Federation or any of its agencies must reflect the federal character of Nigeria further gives the country the potentiality to operate federalism.[48] Besides, British colonial rule which bestowed on the whole country common system of government, administrative practices, lingua franca, legal system, education, currency, and communication systems has brought about a marked degree of unity. In addition, there has emerged among the new generation of Nigerians, particularly the educated elite, a stronger sense of national loyalty.[49]

4:4 The Uniqueness of Nigerian Federalism

The Federation of Nigeria differs from other contemporary federations in certain respects.

Firstly, whereas the older federations like the United States, Canada, Australia and Switzerland owed their development to factors such as the previous existence of the component states, geographical contiguity, military

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[47] See Chapter Three (ante, 3:1 - Chart B), and Item 4:1:1 (Map VIII) above.

[48] See the 1979 Constitution, s.14(3).

[49] See Chapter Nine (infra, 9:1:5) for details.

insecurity, diversity in race or religion, similarity of social and political institutions, hope of economic and administrative advantage, and committed leadership, Nigerian federalism by contrast was born through the fiat of British colonial powers and, therefore, unique both in conception and growth.

Secondly, instead of the separate and independent regions surrendering some of their powers to the federal centre for the benefit of all in line with the conventional practice, in the case of Nigeria, a reverse process was adopted, with devolution of powers from the Centre to the Regions. This seems to contradict Dicey's and Wheare's "previous existence of states" as a precondition for the formation of a federation.[50] Although, prime facie, this might suggest that the process by which the Nigerian Federation was formed is unorthodox; on the contrary, it buttresses the argument that every federation is a product of its own environment.[51] No federal system can emerge and/or survive without taking cognisance of the social milieu in which it operates.

Thirdly, 'dualistic federalism', typical of the American and Canadian federations does not exist in the country because the Nigerian Federation is neither a "contract between the component states" nor a "voluntary union of a number of

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[50] See A.V. Dicey, The Law of the Constitution, op.cit., p.141; and K.C. Wheare, Federal Government (supra), p.40.

[51] William S. Livingston, Federalism and Constitutional Change, op.cit., p.1.

originally independent states".[52] Federalisation in Nigeria is a political development from an amalgam of the hitherto unitary colonial structures. The pre-colonial formations were composed of communities variously described as empires, city-states, Kingdoms or chiefdoms and 'village republics' of varying territorial sizes and organisations.[53]

Fourthly, unlike the experience of the Anglo-Saxon federations where the adoption of federalism was motivated by the dualism of regional and national feelings which expressed themselves as "states' rights" versus "federal rights", the Nigerian federal experiment was not propelled by any strong competing federal-state demands. The introduction of federalism in Nigeria in 1954 did not reveal any deep-seated conflict of interests exhibited by the American colonies, the Canadian Provinces of Quebec and Ontario, the 'princely states' and the Union Government of India, or the provincial states and the Australian Commonwealth Government. Such competing multiple solidarities as existed in the formative years of the American Federation would have compounded the problems which diversities and socio-political dynamics posed for Nigerian federalism.[54]

Finally, Nigeria has never witnessed the metamorphic development of federalism as experienced by the United States, Australia and other federations of similar status. By this we

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[52] Peter J. Mackintosh, "Federalism in Nigeria", Political Science Studies, 10 (1962).

[53] For details, see Chapter Three (ante, 3:2:2.).

[54] See Oyovbaire, Sam Egite, Federalism in Nigeria, op.cit., pp.14-18.

mean that the historical development of mature federations like America, which has undergone different experimental phases, such as "creative", "dualistic", "new deal", "organic", "cooperative", "permissive", or "centralised" federalism,[55] have never existed as separate and distinct stages in Nigeria. Instead, in an attempt to work out acceptable formulae and conditions conducive to the development of national integration and political stability these phases were fused into one.

4:5 Summary

This chapter has identified a number of factors that constitute the raison d'etre for Nigeria's adoption of federalism. Such factors include the common imperial social structures and ideological patterns of British colonialism; the vastness of the country; political awareness and emergent nationalism; prospect of economic, political and administrative advantages; the desire for common security and defence; the force of imitation; ethnic pluralism; diversities in topography, climate, religious beliefs, traditional administrative practices, cultural and social values; educational disparity, and inter-ethnic/regional fear

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[55] See Sawer, Geoffrey, "The Stages of Federalism", in Modern Federalism, op.cit., pp.98-108; and James M. Banovetz, "Federalism and Intergovernmental Relations: The American Experience", Quarterly Journal of Administration,, 14, 2 (1980), pp.141-56. In America, the developmental models of federalism are: to 1789 (the pre-contractual stage); 1989-1860 (the contractual stage); 1860-1865 (the critical stage); 1865-1832 (the period of consolidation); 1932-1965 (the integrated federation); and 1965- (cooperative federalism). For a detailed account of these stages and their differences, see Professor M.J.C. Vile, "Federal Theory and the New Federalism", in Jaensch, Dean (supra), pp.1-14.

of economic and political domination. All these provide the fundamental basis for the Nigerian Federation.

At this juncture, we shall turn to Chapter Five to compare and contrast federalism and military rule.

CHAPTER FIVE

THE CONTRADICTION BETWEEN FEDERALISM AND MILITARY RULE

The thrust of this Chapter is both comparative and theoretical: it outlines the essential characteristics of federalism and military rule and argues that constitutionally, the two are fundamentally different kinds of political system.[1]

Whereas federalism is normally characterised by democratic constitutionalism: a written constitution, plural leadership, division of authority, separation of powers, rule of law, bill of rights, political parties, free press and criticism, cultural dissensus and dynamism; military rule on the other hand, is more often than not based on unity of command, coercion, penchant for discipline, concentration of authority, specialisation, hierarchy of relations, network of communications, *esprit de corps*, and conservatism.[2]

5:1 Characteristics of Federalism

Federalism as a constitutional and political device emphasises on the primacy of bargaining and negotiated coordination among governmental units within a single polity, and stresses the virtues of dispersion of authority among them with a view to safeguarding individual

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[1] Detailed discussions on these characteristics and their implications for federal-state relations are provided in Chapters 6-11.

[2] Note that some of these characteristics are interrelated or overlapping. For the definition of "military" and "military rule", see Item 5:2 (infra).

autonomy.[3] The following are the essential distinguishing characteristics of federalism.

5:1:1 Written Constitution

A federal relationship is usually established through a perpetual covenant of union, inevitably embodied in a written constitution that outlines, among other things, the terms by which power is shared in a political system and which can be altered only by special procedures. Every federation must possess a written constitution, incorporating the federal principle as well as the fundamental laws of the country. Juridically, a federal constitution is a very important document, because it serves as a contract not only between the rulers and the ruled, but also between the national and sub-national governments. In fact, to Professor Wheare, "a written constitution is essential if federal government is to work well".[4]

But in contradistinction, a military regime which normally comes to power through coup d'etat, possesses no formal constitution. It rules by means of decrees and edicts, including other subsidiary legislation, and is not bound by any constitutional limitations.[5]

5:1:2 Division of Authority

The diffusion of authority among different centres of decision-making is the antithesis of totalitarianism or

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[3] See Chapter Two (ante, 2:2) for a more elaborate definition.

[4] K.C. Wheare, op.cit., p.54.

[5] In Nigeria, the military rules by decrees, edicts and the unsuspended portions of the pre-existing civilian constitution.

absolutism. In a federation, the powers of government are divided substantially according to the principle that there is a single independent authority for the whole nation in some matters while there are independent regional authorities for others, each set of authorities deriving its power from the constitution and being coordinate with but not subordinate to the others in its own prescribed sphere. This diffusion of power is the fundamental feature of a federal government. It should be noted that division of authority (or non-centralisation as referred to by political scientists) differs from decentralisation, the latter being a conditional diffusion of specific powers to subnational governments by a national government, subject to unilateral revocation. It is also different from devolution which is a special grant of powers to subnational units by a central government, not normally rescindable. "Division" or "non-centralisation" ensures that whatever form a distribution of power between the central government and the constituent states may take, the authority to participate in exercising them cannot be taken away from either without mutual agreement. According to Professor Elazar, non-centralisation demands that constituent polities in federal systems are able to participate as partners in national governmental activities and to act unilaterally with a high degree of autonomy in areas constitutionally open to them - even on crucial questions and, to a degree, in opposition to national policies, because they possess effectively irrevocable

powers.[6]

This distinction is very important because as we shall see in subsequent chapters, military governments often equate "delegation" or "decentralisation" with "division" in their claim of operating a federal system. Under military rule, the idea of unity of command based on pyramidal hierarchy makes centralisation of authority inevitable.[7]

5:1:3 Plurality of Leadership

According to K.C. Wheare, "plural leadership is essential if federal government is to work at all".[8] As a form of government, federalism unites separate polities within an overarching political system so as to allow each to maintain its fundamental integrity, by distributing power among the leaders of the national and subnational governments. By requiring that basic policies be made and implemented through some kind of negotiation, federalism enables all the levels of government to share in the country's decision making and decision executing processes. The result of such decisions does not inhere in any hierarchy as is typical of a military organisation. It emanates from intensive consultation and/or joint deliberations. Furthermore, decisions taken by the leaders are invariably accepted as authoritative, not because of dogmatic or unreflective obedience to superior orders with

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[6] Elazar, Daniel J., "Federalism", in Sills, David L. (ed.), International Encyclopaedia of the Social Sciences, Vol.5 (New York: Macmillan, 1968), p.357. See Chapter Six (infra, 6:1, 6:1:1 and 6:1:2) for division of authority under civilian administration in Nigeria.

[7] See Chapter Eight (infra, 8:1:1 - Charts E & F).

[8] Wheare, Kenneth C., op.cit., p.88.

which the military is noted, but because such decisions are considered sufficiently representative of the constellations of the various power centres that make up the federation. This contrasts markedly with military administration where the circle of decision-makers is an exceedingly narrow one - mainly the senior officers. The fact that the military usually comes to power with the assumption that the polity is a chain of command, and governance a matter of hierarchy, makes it difficult for the military government to come to terms with the type of social plurality which exists in a federation and the cumbersome process needed to reconcile it.

5:1:4 Separation of Powers

Experience in modern constitutional government has shown that the federal structure of a state is primarily evidenced by the line of demarcation drawn between the jurisdiction of the central authority and that of the component states as well as between their respective functionaries. The doctrine of separation of powers ensures that the three organs of government, namely, the legislature, the executive and the judiciary are organised in such a way that none of them unilaterally interferes with or encroaches on the functions of the other. Its three cardinal principles are that: (a) there must be no interference in the affairs of one organ by the other; (b) no person should be a member of or perform functions in more than one organ; and (c) no one organ shall usurp or exercise the functions of another. A federal system of government upholds the doctrine of separation of powers thereby preventing concentration of power in one person or

in one organ of government(s). By this, it avoids tyranny and guarantees states' rights against federal encroachment.[9]

The doctrine of separation of powers receives little or no recognition under military rule.[10] The military, in keeping with its own system of centralised command, always tends to unify governmental institutions and their functionaries.[11] The machinery of military government in Nigeria in which the Supreme Military Council, the highest policy-making body in the country, exercises unlimited legislative and executive powers simultaneously, is a classical example of a breach of the doctrine of separation of powers and marks a significant departure from the federal principle.[12]

5:1:5 Cultural Dissensus

The political life of many a federal society is dominated by cultural dissensus rather than esprit de corps of the military. This dissensus manifests itself in such recurrent phenomena as political competition, internal dissensions, intergovernmental disputes, conflicts, struggles, agitations, dissidence, violence, resistance, rebellion, secession, civil war, partition, electoral

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[9] See, for example, the American Constitution, 1787, Article 4; and the Nigerian Constitution, 1979, ss.4-6. See also Chapter Six infra, 6:5) especially Table A.

[10] For typical examples in Nigeria, see Chapters 8, 9, 10 and 11 (infra).

[11] See Rappaport, David, "A Comparative Theory of Military and Political Types", in Huntington, Samuel P (ed.), Changing Patterns of Military Politics (New York: The Free Press, 1962).

[12] See Chapters 8-10 for fuller discussions.

malpractices, etc.[13] The geographical, ethnic, linguistic, religious and even racial differences and tensions which were responsible for the preference of a federal to unitary system in the first place, prevent a federal society from achieving the military type of cohesion and organic solidarity, while at the same time accounting for its dissensual character.[14] According to Adekanye:

> "Once established, federalism always has its own propelling dialectical momentum that works to institutionalise this cultural dissensus, particularly if such governmental apparatuses as the legislative, executive and higher bureaucracy have self-interest in keeping this cultural dissensus sustained."[15]

5:1:6 Compromise

A federal system of government is usually the result of compromise between centrifugal and centripetal forces. It rests on the attitudes of the peoples of the federating units who desire "union but not unity".[16]

Attempts to prevent or minimise cultural dissensus require an approach based on conciliation of divergent powers, values, interests and aspirations. The country's resources, both human and material, including political, bureaucratic, financial and even military, should be equitably distributed among the component units of the federation.[17] Compromise may also take the form of a

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[13] See Deutsch, Karl W., Nationalism and Social Communication (Cambridge, Mass: The MIT Press, 1953).

[14] See Adekanye, Bayo, "Military Organisation and Federal Society", Quarterly Journal of Administration, 16 (1982).

[15] Ibid., p.15.

[16] Dicey, A.V. (supra), p.137.

[17] See, for example, the entrenchment of the "federal character" principle in the Nigerian Constitution, 1979, s.14(3)(4).

coalition government, proportional representation, quota system, mutual veto and concessions. By ensuring "unity in diversity" through bargain, federalism differs from military rule which is often dictatorial. Federalism has been aptly described as "an institutionalisation of compromise relations".[18]

5:1:7 Rigid Constitutional Amendment

One of the essential characteristics of federalism is the existence of special constitutional amending process which differs from ordinary law-making. In a federal system, division of powers between the national and regional governments is made in a constitution with a fair degree of rigidity, so that its basic terms cannot be amended or altered at the sole discretion of either level of government. Thus, a federal constitution is considered as rigid where there are special procedures (usually by not less than two-thirds majority) for altering, amending or repealing its provisions while a flexible constitution can be amended like any other legislation by simple majority.[19]

In contradistinction, a military government which often assumes power through 'the barrel of guns' has no constitutional legitimacy and, therefore, pays little or no respect to constitutional provisions, not to talk of the amending process. A military 'usurper' rules by decrees and such decrees are capable of abrogating, repealing,

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[18] Mazrui, Ali A., "Pluralism and National Integration", in Kuper, Leo and Smith, M.G. (eds.), Pluralism in Africa (Berkeley: University of California Press, 1969), p.338. The military does not attach much importance to compromise, it relies mainly on the use of force.

[19] See Chapter Six (infra, 6:4) for more discussion on rigid constitutions.

suspending or modifying the provisions of a pre-existing constitution.[20]

5:1:8 Democracy

Federalism is said to be the "territorial dimension of democracy".[21] The institutional and procedural indices of democracy are as follows:

(a) basic power must stem from the people (the electorate);

(b) those who exercise the power must submit their programmes and policies to periodic popular elections;

(c) such election must be competitive between at least two parties;

(d) the parties must be voluntary associations of citizens;

(e) basic rights of these citizens must be firmly guaranteed;

(f) the rule of law must be recognised; and

(g) the government must be prepared to face criticism, and give way to a successor if the citizens so desire.[22]

It is also an essential feature of a federal system that both the national and regional governments are elected

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[20] E.g. see the Nigerian Constitution (Suspension and Modification) Decrees No.1 of 1966 and 1984 respectively.

[21] Duchacek, Ivor D., Comparative Federalism: The Territorial Dimension of Politics (New York: Holt, Rinehart & Winston, 1970), pp.334-35.

[22] For a fuller discussion of the essentials of democracy, see Friedrich, Carl J., Constitutional Government and Democracy (New York: Blaisdell Publishing Co., 1964). Military rule, no matter how benevolent and effective, is still an undemocratic government which came to power through instruments of coercion. Whatever support it gets from the citizens is an act of necessity or prudence, not of will.

by the same people, indicating the fact that sovereignty can be equated with the will of the people. Proportional representation is given to the regional governments in the national parliament by means of a First Chamber (the House of Representatives) and equal representation in the Second Chamber (the Senate), both spatially elected to reflect, formally, the wishes of their electorates.[23]

A number of scholars have emphasised the importance of democratic leadership in a federation. According to Professor Watts, the first requirement for federal stability is that "the federal structure must enable the political desires for regional diversity to express themselves adequately, otherwise secession or fragmentation is likely to result".[24] Duchacek also lists among his ten yardsticks of federalism two pertinent criteria, viz: "Is the collective sharing in federal rule-making adequately secured by equal representation of unequal units in a bicameral system?" and "What are the constitutional provisions for collective sharing in the executive and judicial rule implementation?"[25]

A military regime lacks the essentials of a true federal government which is founded on the democratic

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[23] See, for example, Chapter Eight (infra, 8:1:1 - Chart D, and 8:3:3 - Tables B & C); including Chapter Nine (9:1 - Tables D & E).

[24] Watts, Ronald L., Administration in Federal Systems, op.cit., p.13.

[25] Duchacek, Ivor D., Comparative Federalism (supra), p.207. Under s.14(3) of the Nigerian Constitution 1979, it is expressly provided that the composition of the Government of the Federation or any of its agencies shall be carried out in such manner as to recognise the diversity of the country and that there shall be no predominance of persons from a few states or ethnic groups.

principles of free elections, free press and criticism, liberty, the rule of law, and representative institutions.[26] As a form of government which sets limits on the general and regional governments, federalism is incompatible with autocracy or totalitarianism for which the military is notoriously known.[27]

5:1:9 Judicial Review

Most federal systems accept the principle of judicial review and the possibility of such review is the most reliable sanction for the preservation of a federal structure. Judicial review can be effective only if the law and decisions of courts are habitually observed and treated with respect. But more often than not, the military (in Nigeria in particular) promulgate decrees which oust the jurisdiction of the courts or nullify decisions that are unfavourable to them, transfer cases to military tribunals or remove non-compliant judges arbitrarily.[28] This is a clear contradiction of the federal principle.

It is the requirement of federalism that the division of power between the national and regional governments should be interpreted and policed by a judicial authority which can make authoritative determination as to the

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[26] The military has no political mandate from the people to rule.

[27] The fact that a military government has no term of office is a caricature of democracy. See Cardoso, Henrique, "The Characteristics of Authoritarian Regimes", in Collier, David (ed.), The New Authoritarianism in Latin America (Princeton: Princeton University Press, 1979), pp.37 et seq.

[28] For a fuller account, see "The Judiciary Under the Military", in Chapter Ten (infra, 10:5:4-10:5:8).

validity of governmental acts where such acts are alleged to be beyond the competence of one of the governments or where the conflict rules referred to have to be applied.[29]

5:1:10 Supremacy of the Constitution

A constitution is a legal and a political document containing the terms of agreement upon which the federal-state relationship is built. If the central and state governments are to be coordinate with each other, neither of them must be in a position to override the terms of the agreement with respect to the power and status which each government enjoys, because the constitution is supreme.

The rationale for constitutional supremacy lies in the fact that a constitution which expresses the will of the people is superior to the government elected by them. This is logical because under the federal system, no democratic government can come into being without the support of the electorate. As Alexander Hamilton, one of the founding fathers of American federalism puts it:

> "There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the Commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution can be valid ..."[30]

Since the military governs without any formal constitution, the issue of constitutional supremacy does not arise. In fact, decrees and edicts of the military always prevail over any other laws including the

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[29] Sawer, Geoffrey (supra), pp.1-7.

[30] The Federalist, No.2 (Cambridge, Mass: Belknap Press, 1961), p.11. See also the Constitution of the United States of America, 1787, Article 4(2). But note that under the British constitutional convention, the Parliament is supreme.

unsuspended portions of the pre-existing civilian constitution.[31]

5:2 Military Rule

The term military is derived from the Latin word milites meaning soldiers. It denotes the entire membership of the armed forces excluding the police. It is a body of men raised and organised for the defence of a nation.[32] In the Nigerian context, this body comprises the army, the navy, and the air force.[33]

5:2:1 The Nature of the Military

The study of the military in political development in many parts of the world has identified three main kinds of soldiers:

> "(i) The classical professional soldier, found mostly in the Western countries, that is apolitical, not disposed towards seizing power but very influential in the national security policy-making process; (ii) the praetorian soldier, found in the coup-prone areas, especially Africa, Asia and Latin America, political and obsessed with seizure of power; and (iii) the revolutionary soldier, found in most socialist countries, political but, under the strict control of the party and state, and not disposed towards taking over the reins of government".[34]

The common feature of all these soldiers is that each, to

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[31] For details, see Chapter Seven (7:3:2) and Chapter Eight (8:3:3).

[32] See Sykes, J.B. (ed.), The Concise Oxford Dictionary, 7th edn. (Oxford: Clarendon Press, 1982), p.641. See also, Bhatia, H.S. (ed.), Military Dictionary and Encyclopedia (New Delhi: Deep & Deep, 1980), pp.111-13.

[33] See the Nigerian Army Act 1960, Navy and Air Force Acts 1964 respectively.

[34] Peters, Jimi, "The Professional Soldier and Political Rule", in Sanda, A.O. et al. (eds.), The Impact of Military Rule on Nigeria's Administration (Ile-Ife: University of Ife Press, 1987), pp.300-301; Perlmutter, Amos and Bennett, Valerie Plave (eds.), The Political Influence of the Military (New Haven: Yale University Press, 1980), p.9.

a certain extent, plays an important role in government, either indirectly by the influence they exert in national security policy-making process, or directly, by political involvement in the actual running of government.[35]

A military that abandons its professional and traditional role as the watchdog of its country's territorial integrity[36] in favour of political governance is said to be praetorian.[37] A praetorian military falls into two categories - the "caretaker" and the "ruler". The "caretaker" (or "arbitrator") military government wields political power on behalf of a suspended or dethroned civilian government. It is a military government of a constitutional system resulting from an emergency, but having the characteristic features of a dictatorship. It is not bound by constitutional limitations but partakes of the "constitutional morality" of the suspended or overthrown government. It accepts the existing social (but not legal) order; it has no independent political organisation, sets a time limit for its regime; and it is willing to return to the barracks. Such a military has a general tendency to exert subterranean influence as a pressure group, but with a fear of civilian retribution.

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[35] For a detailed account of the nature of the military, see among others, Finer, Samuel E., The Man on the Horse: The Role of the Military in Politics (New York: Praeger, 1962); and Perlmutter, Amos, The Military and Politics in Modern Times (New Haven: Yale University Press, 1977).

[36] See Chapter Seven (infra, 7:1).

[37] Praetorianism is a situation where the military class of a given society exercises independent power by virtue of an actual or threatened use of force. In such societies, the military offers itself as an alternative centre of political authority, see Perlmutter, Amos and Bennet, Valerie Plave (eds.), op.cit., pp. 9 et seq.

This type of military rule is common in Africa.[38]

The "ruler" type on the other hand, is an authoritarian military regime. It is "an extension of the authoritarian methods to an enemy population which as experienced in contemporary totalitarian dictatorships means the application of the terroristic secret police state techniques with their characteristic total disregard for the basic human rights of all who are subject to their control".[39] It rejects both the existing social and legal orders that challenge its legitimacy, totally lacks confidence in civilian rule and has no expectation of returning to the barracks, has political organisation, and tends to maximize military rule, is convinced that military rule is the only political alternative for peace and good government, politicises professionalism, operates in the open, and has little fear of civilian retribution.[40]

Military rule in Nigeria, the subject matter of this study, is a government that partakes of a 'constitutional

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[38] Perhaps Egypt and Libya, where the military have tried to establish their own political institutions as a way of competing with civilians or perpetuating themselves in power, provide an exception. In Nigeria, all the military Heads of State have been under considerable pressure from the public to demonstrate positive action towards re-instituting civilian rule. For a detailed fascinating analysis of military typology of government, see Friedrich, Carl J., "Constitutional Dictatorship and Military Government", in Constitutional Government and Democracy, op.cit., pp.488 et seq; and Decalo, Samuel, Coups and Army Rule in Africa: Studies in Military Styles (New Haven: Yale University Press, 1976).

[39] See Friedrich, Carl J. (supra), p.588; and footnote 34 above.

[40] Striking examples include the military governments of General Idi Amin of Uganda, and General Muhammad Zia of Pakistan and President Saddam Hussein of Iraq. In recent times, Asia and Latin America seem to have become the repositories of this type of military rule.

morality' though a dictatorship by its very nature. From the characteristics of the two praetorian military types discussed above, it could be regarded as an interim "caretaker" government in that since 1966 each successive military regime has made it abundantly clear that power would be returned to democratic civilian government as soon as the exigencies of the intervention dictated.[41] Its "caretaker" role is demonstrated by the fact that its efforts have always been directed toward the maintenance of a constitutional government which is committed to the constitutional traditions of the people (for instance, the retention of some parts of the pre-existing Constitution),[42] although these efforts have been substantially thwarted by the inherent characteristics of military organisation.[43]

The tendency to run an interim government is further evidenced by the fact that all the military regimes in Nigeria have arrogated to themselves the corrective role of a 'redeemer' - saving the country from a deteriorating and unacceptable decline, to be entering reluctantly into the political area only after long provocation, to be a temporary bridge between the excess of the overthrown regime and a future democratic dawn; to clear the state from the iniquities of corruption, mismanagement, nepotism, extravagance and incompetence; or to rid the country of a

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[41] But experience has shown that each military administration has exhibited tendencies of shifting from the "caretaker" to "ruler" model.

[42] See, for example, the Constitution (Suspension and Modification) Decrees No.1 of 1966 and 1984 respectively.

[43] See the general characteristics of military rule discussed below.

whole political class considered by its very nature to be irredeemably venal.[44]

Indeed, Major Patrick Chukwuma Kaduna Nzeogwu, the leader of the first military coup, asserted in his maiden speech that the aim of his Revolutionary Council was to establish a strong, united and prosperous nation, free from corruption and internal strife, adding that as soldiers and not politicians, neither he nor any of his colleagues was interested in governing the country. He promised that they would hand over to civilians of proven integrity and efficiency and that the armed forces would go back to the barracks as soon as their mission was achieved.[45] Although Nzeogwu's reign (at least in the Northern Region where he successfully captured power) was short-lived, he did indicate to run a "caretaker" administration.

Also, Major-General J.T.U. Aguiyi-Ironsi, the first military Head of State, announced that military administration would cease after corruption and dishonesty in public life were stamped out and integrity and self-respect restored.[46] His successor, General Yakubu Gowon in his 1970 nine-point programme promised to hand over by 1976 but in his Independence Anniversary broadcast of October 1, 1974, the return to the barracks was postponed

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[44] For details, see the reasons for military intervention in Chapter Seven (infra, 7:2).

[45] The full text of Nzeogwu's broadcast is reproduced in Panter-Brick, S.K. (ed.), Nigerian Politics and Military Rule: Prelude to the Civil War (London: Athlone Press, 1970), pp.184-6; and the interview between Major Nzeogwu and Dr. Tai Solarin, reprinted in the Nigerian Tribune (Ibadan), 2 July 1967.

[46] See Government Notice No.147 dated January 26, 1966 (Lagos: Federal Ministry of Information, 1966).

indefinitely.[47] Gowon suffered from procrastination by reneging on his earlier promise. He also tolerated an increase, rather than effecting any decrease, in corrupt practices.[48] General Gowon's deposition on July 19, 1975 and the action taken by his successor, General Murtala Ramat Muhammed, in fixing October 1979 as the date for return to civilian rule, gave Nigerians some optimism. He said:

> "The present military leadership does not intend to stay in office a day longer than necessary, and certainly not beyond this date."[49]

Generals Muhammadu Buhari,[50] and Ibrahim Babangida (the current Head of the Military Government)[51] were also committed to handing power to elected politicians. In conformity with the tradition of 'caretaker'

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[47] General Gowon claimed that 1976 was "unrealistic". For the full text of his speech, see his Independence Anniversary Broadcast of 1 October 1974 (Lagos: Federal Ministry of Information, 1974). Gowon ruled for nine years.

[48] For a detailed account of Gowon's propensity to stay in power ad infinitum, see Valerie P. Bennett and A.H.M. Kirk-Greene, "Back to the Barracks: A Decade of Marking Time", in Panter-Brick, Keith S. (ed), Soldier and Oil: The Political Transformation of Nigeria (London: Frank Cass, 1978), pp.13-26.

[49] See the text of his nation-wide Independence Day Broadcast of 1 October 1975 (Lagos: Federal Ministry of Information, 1975). Even though General Muhammed was assassinated on 13 February 1976, his deputy and immediate successor, General Olusegun Obasanjo executed all the programmes to the letter and civilian rule was restored on 1st October 1979.

[50] See Moment of Truth: Collected Speeches of Major-General Muhammadu Buhari (Lagos: Federal Ministry of Information, 1985). General Buhari ruled between December 1983 and August 1985.

[51] For the full text, see Collected Speeches of the President, Major-General Ibrahim Badamasi Babangida (Lagos: Federal Ministry of Information, 1986); and an editorial "Twenty Years of Military Rule in Nigeria", Newswatch Magazine (Lagos) January 20, 1986, pp.16-17.

administration, President Babangida inaugurated a Political Bureau on January 3, 1986, charged with the responsibility of working out the modality for transition to civil rule in 1990 (later changed to 1992).[52] The Bureau and its successor, the Constitution Review Committee (CRC) submitted their Reports in 1987 and 1988 respectively, and the Constitution for the Third Republic which will take effect from 1992 has been prepared by the Constituent Assembly and ratified by the Armed Forces Ruling Council.

The foregoing pronouncements of the military leaders have been cited to demonstrate the fact that the system of military rule in Nigeria has been that of an interim administration - often considered as an aberration but a necessary evil tolerated only for the sake of bringing sanity and sense of direction to the country's polity. This does not, however, preclude the likelihood that some of these statements were made for public relations purposes. Transition has always involved a lengthy period of military rule before power is transferred to civilians, the justification being that comprehensive systematic reforms are needed. In fact, since 1966 Nigeria's military rulers have been reformulating and readjusting their target dates for return to civilian government. The early beliefs in a 'caretaker' administration and a speedy transition proved illusory.[53] The Nigerian military government has enlarged its objectives from the initial 'caretaker' to a

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[52] See Federal Republic of Nigeria: Report of the Political Bureau (Lagos: Federal Government Printer, 1987).

[53] E.g. whereas General Yakubu Gowon refused to hand over power by 1976 as earlier envisaged, General Ibrahim Babangida has shifted his target date from 1990 to 1992.

reformist 'corrective' role through dictatorial and authoritarian rule. The programme of return to civil rule has always been characterised by an ebb and a flow of expectancy and scepticism. It is a classic example of Professor Gutteridge's theory that,

> "once army has taken direct political action, the pretence of acting in defence of the constitution becomes difficult to sustain."[54]

But the delay in handing over power to civilians does not change the 'caretaker' character of the Nigerian military administration. Hence, it has never established its own political institutions as a way of competing with civilians for political powers. Secondly, although the country is governed by the military, the majority of the officers do not participate in the actual running of government, instead they perform purely military duties. Thirdly, even those that rule, do so through the instrumentality of civilian administrators. In effect, the Nigerian military sees itself more of a 'caretaker' regime and a guarantor of political stability rather than as an alternative to civil rule.

5:2:2 Characteristics of Military Rule

Having discussed the nature of the military in general and that of Nigeria in particular it is necessary to identify the main characteristics of military rule with a view to contrasting it with those of federalism earlier considered.

Military rule is a form of political organisation in which the machinery of government, functions and

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[54] Gutteridge, William, Power and Conflict Studies, No.62, October 1975, p.4.

functionaries, including its modus operandi are predominantly military in character. It is basically a government by decrees in which the Rule of Law and respect for human rights are honoured more in breach than in observance. This is due to its traditional inclination towards the use of force.[55] The muzzling of the press, detention without trial, and intimidation of the judiciary that characterise military administrations in many parts of the Third World, particularly in Iraq, Ghana, Zaire, Panama, Burma, Pakistan and Chile, provide sufficient evidence of the absolutist and despotic nature of military rule. A military regime is not a government of the people in the constitutional sense, it implies an armed subjugation of the people and the forceful takeover of their sovereignty. It always destroys the pre-existing legal order and has no elaborate guiding ideology.[56]

The main features of an ideal military include, inter alia: unity of command, coercion, autocracy, dictatorship, conservatism, concentration of authority, specialisation, hierarchy of relations, penchant for discipline, network of communications, and esprit de corps.[57] An examination of these features will demonstrate the contrast between

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[55] Linz, Juan, "An Authoritarian Regime", in Allard, E. et al (eds.), Cleavages, Ideologies and Party Systems (Helsinki: Westmark Society, 1964), p.297.

[56] See Janowitz, Morris, The Military in the Political Development of New Nations: An Essay in Comparative Analysis (Chicago: Chicago University Press, 1964). Although it may be argued that in comparison with other military regimes in Africa and Latin America, the Nigerian military enjoys a relatively much freer press, such relativity does not erase the usual antimony between military totalitarianism and civil liberties.

[57] See Mooney, James D., The Character of Military Organisation (New York: Harper & Row, 1939).

federalism and military rule.

5:2:3 Unity of Command

This has long been recognised as the fundamental principle of military organisation. Members of the armed forces are trained to pursue their careers in unified and centrally controlled administration. The basic principle of military organisation is that "an army should have but one Chief, a greater number is detrimental".[58] Military formation is essentially a chain of command whose members are integrated in a strict relationship of subordination and super-ordination. Its processes of communication and channel of command are characteristically pyramidal, with downward flow of authoritative messages from the highest echelons, for example, Field Marshal or General to the lowest ranks such as Corporal or Private.[59]

But the principles of unity of command which gives rise to centralisation of authority and power within the military administration is antithesis of federalism which is founded on plural leadership.

5:2:2 Coercion

The military has traditional inclination towards coercion. It is addicted to the use of force or what has

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[58] The main reason is that with a unified chain of command, mobilisation and coordination of forces, including discipline, especially in war situations would be more effective. It is for this purpose that the British and other allied forces currently in Saudi Arabia under the auspices of the United Nations have accepted the leadership of America to provide a General Commander in the enforcement of U.N. sanctions against Iraq for its invasion and annexation of Kuwait.

[59] See, for example, Charts E and F, in Chapter Eight (infra, 8:1:1).

been termed as "speciality in violence".[60] Apart from exhibiting coercive tendencies within itself as an organisation, the military also extends its coercive attitude towards the civilian population simply because it enjoys the monopoly of possessing the coercive apparatus of the state. In the words of Professor Dent:

> "Military regime is one of military order rather than persuasion: although it seeks in general to retain the trust of the people, it insists that in particular it is not responsible to public opinion and must act as an army commander acts in his unit, by orders issued firmly at his own discretion, according to military principles and coercively enforced if necessary."[61]

This element of coercion which is the dominant mechanism of administration in the military destroys the fundamental basis of federalism - compromise.

5:2:3 Penchant for Discipline

A German political sociologist, Professor Weber, defines discipline as :

> "The consistently rationalised, methodically trained and exact execution of the received order, in which all personal criticism is unconditionally suspended and the actor is unswervingly and exclusively set for carrying out the command."[62]

Military rule is characterised by penchant for discipline. Dogmatic and unreflective obedience to the lawful order of a superior officer is an entrenched principle of military law, and failure to obey or carry out such orders is often visited with sanction. The obligation

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[60] Luckham, Robin, The Nigerian Military: A Sociological Analysis of Authority and Revolt (Cambridge: CUP, 1971), p.287.

[61] Dent, M.J., "Corrective Military Government: Military Rule in Perspective", in Panter-Brick, S.K. (supra).

[62] Weber, Max, Essays in Sociology (New York: OUP, 1946), p.253.

of unquestioning and prompt obedience must be total and uncompromising for according to Lord Mansfield,

> "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives; he must obey, nothing can excuse him but a physical impossibility. The wisdom or morality of the order cannot be questioned."[63]

Thus, in the military, desertion is punished, and if such an offence is committed during the period of war, it may incur a death penalty. Other offences include treachery, aiding or being in communication with the enemy, cowardice, spreading false rumours calculated to create despondency or unnecessary alarm within the force, disobedience of superior order, wilful neglect, looting, mutiny, insubordination, absence without leave, (AWOL) malingering, drunkenness, and stealing.[64] These military offences attract heavy penalties ranging from demotion in rank, reduction or loss of pay, imprisonment, dismissal from service with or without benefit, to death either by hanging or by firing squad if convicted by a Court-Martial.

It should, however, be noted that a soldier is only required to obey commands which are lawful.[65] Obedience to superior military order does not extend to orders that are patently illegal. Thus, the defence of superior orders was

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[63] Johnstone v. Sutton [1786] L.T.R. 493 at p.498. Under the British Mutiny Act 1717, s.1, a soldier could be condemned to death by court-martial for refusal to obey the orders of his superior officer.

[64] See, for example, the British Army Act 1955, ss.24-243; and the Nigerian Army Act 1960, ss.30-71.

[65] See, for example, the Nigerian Army Act 1960, the Air Force Act, 1964, and the Naval Act, 1964 respectively. See also s.34 of the British Army Act 1955. Mandatory obedience to superior orders must be limited to times of war with an enemy. This was probably implied in the pronouncement of Lord Mansfield in Johnstone v. Sutton (supra).

rejected at the Nuremberg war trials where the International Military Court tried and convicted those persons charged with World War crimes, especially the massacre of millions of innocent citizens.[66] Also in the Nigerian case of The State v. Pius Nwaoga,[67] the court held that the orders given by Major Sam Nwoye to the accused (his subordinate) to eliminate the deceased were unlawful and obedience to them was a violation of the law. The accused's defence of superior orders was considered untenable.

But the insistence by the military on discipline as a fundamental professional norm brought to bear on political governance infringes individual liberty and human rights that are so much cherished under the federal system.[68]

5:2:6 Concentration of Authority

Whereas civilians accept the authority of the federal government because they are convinced it is legitimate; under the military, such acceptance emanates from unity of command, hierarchy and discipline. The authority is usually concentrated in few senior officers. The orders of hierarchical superiors are induced by sanctions in the event of non-compliance. In Nigeria for example, authority lies with the Head of the military government who is also

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[66] See Manual of Military Law (Part I) (London: H.M.S.O., 1972), pp.296 et seq.

[67] [1972] 3 S.C. 6. Similarly, in America, a soldier will not be guilty of a superior order if the order was manifestly or plainly illegal; see Keighley v. Bell, 4 F & F 763, 790 (1866).

[68] For a comprehensive analysis, see Adekson, Bayo, "Military Organisation in Multi-Ethnically Segmented Societies: A Theoretical Study", Brandeis University: Waltham, U.S.A., May 1976.

Commander-in-Chief of the Armed Forces, his service chiefs and members of the Supreme Military Council. In addition, he is the Chairman of the country's legislative and executive bodies.[69]

But concentration of authority which accords well with military tradition is a negation of federalism which emphasises dispersion of authority.

5:2:7 Authoritarianism

Military rule, especially in Africa, Asia, Latin America and the Middle East, demands absolute loyalty and obedience from the citizenry, particularly soldiers. It brooks no opposition or dissent. As an authoritarian regime, the military runs government in terms of giving orders similar to those given on parade grounds or battle-fields. It does not place much value on detailed consultation or discussion, political negotiation or consensus - the leaders decide, the led comply. The military's insistence on conformity nurtures a culture of silence and mediocrity, at least among the civilian population. The authoritarian character of the military is usually expressed in the use of arbitrary power through the instrumentality of decrees. The Nigerian experience provides classic examples.

In Nigeria, the legislative absolutism and supremacy of military decrees is an incontrovertible fact. Right from its inception in 1966 the military has conferred on itself unlimited and unquestionable powers under individual decrees such that some of its acts both legislative and

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[69] See Chapters Eight (8:3:1) and Chapter Nine (9:1:2, 9:1:3) for more details.

executive cannot be questioned in any court of law.[70] S.3 of Decree No.24 of 1967 which is identical with Decree No.2 of 1984 provides that the Chief of Staff of the Armed Forces or the Inspector-General of Police may if he is satisfied that any person is or recently has been concerned in acts prejudicial to public order, or in preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him, he may by order in writing direct that that person be detained in a civil prison or a police station for six months without trial.[71] As can be seen from this enactment, the scope of this provision is so wide that unless sufficient care is exercised in its application it could easily be abused through arbitrary and vindictive detention of innocent citizens. Although it was originally meant to operate during a state of emergency, the military has abused its use on several occasions.[72] One curious thing about this Decree is that the jurisdiction of courts of law is ousted

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[70] See, among others, the Constitution (Suspension & Modification) Decrees No.1 of 1966 (ss. 3 and 6) and 1984 (ss. 3 and 5) respectively; the Armed Forces and Police (Special Powers) Decree No.24 of 1967; State Security (Detention of Persons) Decree No.2 of 1984; and the Public Officers (Protection Against False Accusation) Degree No.4 of 1984. The role of the judiciary as the final arbiter has to a large extent been eroded, see Chapter 10 for details.

[71] In the case of Decree No.2 of 1984, the person should have been concerned in acts prejudicial to security or has contributed to the economic adversity of the nation.

[72] The author has witnessed a lot of atrocities committed by the authoritarian military regimes in Nigeria. For example, on 4th October 1974, I saw a well-known educationist, Dr. Tai Solarin being detained for criticising the government in an article "The Beginning of the End", even though the content was not subversive or seditious. In fact, the Inspector-General of Police put the number of such detainees in 1975 at 33, see Sunday Times, 7 September 1975, p.5.

once it is shown that the detaining police officer or army officer has fully complied with the procedures prescribed under the Decree. Furthermore, even if the courts were allowed to entertain such action, the fact that the discretion to detain an accused person is highly subjective makes it difficult to challenge the action in a court of law. To avoid or minimise unnecessary arbitrariness and vindictiveness on the exercise of such wide and unfettered power, it is argued that only an independent judicial tribunal could carry out an objective test. Instances of abuse or misuse of the power of detention are as follows.

In 1975, one Mr. Aper Aku who was perturbed by the corrupt practices of the Military Governor of Benue Plateau State, Mr. Joseph Gomwalk, swore to an affidavit in support of his allegations. Thinking that the scandals might damage the image of the military, the Head of the Federal Military Government, General Yakubu Gowon, refused to remove the Governor or take any other appropriate disciplinary measures against him even in the face of hard evidence. Instead, the Inspector-General of Police, Alhaji Kam Salem detained Aper Aku under the provisions of Decree No.24 of 1967 and released him only after six months without any formal charge. The detention of Mohammed Olayori and his colleagues under the same Decree demonstrates clearly the grave dangers of authoritarian rule. Olayori and others who had defaulted in supplying foodstuffs to military establishments as contracted were locked up and detained under the provisions of Decree No.24 of 1967 for a mere breach of contractual obligations. The

court held that the detention was illegal.[73] A prominent Lagos-based lawyer and a social crusader, Chief Gani Fawehinmi, Alhaji Babrabe Musa (former Governor of Kaduna State), and student union leaders in universities were similarly detained between April and June 1989 under Decree No.2 of 1984 for criticising the economic policies of the military administration and promising to provide better alternative. They were all kept in detention without trial for several months.[74]

The promulgation of the Federal Military Government (Supremacy and Enforcement of Powers) Decrees Nos.28 and 13 of 1970 and 1984 respectively not only affirms the supremacy of the legislative and executive power of the military government and the unquestionability of its enactments, it also precludes any legal proceedings to challenge any act done or purported to be done under a decree of an edict, notwithstanding that the act in question contravenes the human rights guaranteed in the unsuspended sections of the pre-existing civilian constitution.[75] Furthermore, any such proceedings pending at the time the Decree came into force or which might thereafter be instituted shall abate, be discharged and

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[73] Re Mohammed Olayori & Others [1969] 2 All N.L.R. 298. For the reaction of the people against the obnoxious Decree No.24 of 1967, see among others, Dr. Olu Onagoruwa, "Detention Laws Should Go", Sunday Times, 7 September 1975; and the New Nigerian editorial, 8 April 1975.

[74] The Nigerian Bar Association has petitioned the Federal Military Government to repeal Decree No.2 of 1984. The Association has also deployed a team of its members to defend those persons charged to court under the Decree. See the details in Newswatch, 11 September 198, pp.15-20; and West Africa (London) 23-29 October 1989, pp.1777-79.

[75] The Constitutions of the Federal Republic of Nigeria, 1963 and 1979, Chapters III and IV respectively.

made void.[76]

Our argument is that although the passage of the foregoing Decrees was necessary at the initial period of the military administration, especially during the period of state of emergency or the civil war (1967-70) for maintaining law and order, peace and tranquillity, those circumstances that gave rise to the promulgation of these Decrees have virtually ceased to exist and their retention now can hardly be justified.

The authoritarian nature of the military government in Nigeria is further demonstrated by its intolerance of the criticism of the media and resort to repressive measures against the press, especially the detention of journalists. The case of one Minere Amakiri is illustrative. Amakiri, a newspaper correspondent, wrote an article in Nigerian Observer titled "Rivers State Teachers on Warpath". It was alleged that this article was distasteful because the date of its publication coincided with the birthday anniversary of the State's Military Governor. Amikiri was brutally taken by the Aide-de-Camp (ADC) to the Military Governor to the State Government House where at the instruction of the ADC his hair was shaved with a broken bottle and he was given 24 strokes of the cane. He was further detained for about 27 hours before being released. After this ordeal, Amakiri lodged a complaint with the police for investigation and possibly criminal prosecution of the ADC for grave bodily harm and torture bordering on gross abuse of power, but the police refused to take any action and

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[76] See the Preambles to Decrees No.28 of 1970 and No.13 of 1984, including s.1(2)(b) of Decrees No.24 of 1967 and No.13 of 1984 respectively.

maintained solidarity with the military, both being instruments of state power.[77] The only option available to Amakiri was an action for civil remedy in the High Court where he was awarded damages for false imprisonment, assault and battery.[78] The ordeal of Minere Amakiri which could be likened to Nazi-style torture at the Concentration Camps during World Wars is a sufficient evidence of the authoritarian character of the military rule under General Yakubu Gowon (1966-75).

The most blatant of the military's repressions against the press was the Public Officers (Protection Against False Accusation) Decree No.4 of 1984 which punished "any person who publishes in any form, whether written or otherwise, any message, rumour, report or statement which is false, in any material particular, or which brings, or is calculated to bring the Federal Military Government, or the Government of a State, or a public officer to ridicule or disrepute, shall be guilty of an offence".[79]

To imprison a person for saying something that merely discredits or ridicules the government or public officer without any intention of exposing it or him to contempt, hatred or disaffection and without regard to the truth or falsity of the statement or being availed of the defence of "fair comment" is nothing but a denial of citizens' right to express themselves freely on matters of public interest. The United States Supreme Court has held that the falsity

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[77] For a fuller account, see the Headlines (Lagos) No.15, June 1974, pp.10-13.

[78] Minere Amakiri v. R.M. Iwowari [1986] 1 N.L.T.R. 145.

[79] Section 1(1).

of a statement concerning the conduct of government or a public officer does not justify punishment, because erroneous statements are inevitable in free debate of public affairs.[80] Thus, the prosecution and imprisonment of two journalists, Tunde Thompson and Godwin Irabor, of the Guardian Newspaper, under Decree No.4 of 1984, for two years without option of fine under General Muhammadu Buhari in 1984[81] was a blot on the image of the military.[82]

Also in July 1989, the members of the Nigerian Bar Association went on a one-week boycott of the courts in protest over what they regarded as arrogant disregard of the Rule of Law and the contempt of the judiciary by the military. This was a reaction to the attitude of Wing Commander Isa Mohammed, the Military Governor of Gongola State, who disregarded court rulings to swear in new chairmen in place of two others whose elections were declared null and void by a high court and a Court of Appeal.[83] General Babangida also, by the promulgation of Newswatch (Prescription and Prohibition from Circulation) Decree No.6 of 1987, banned the publication and circulation of Newswatch Magazine for allegedly publishing classified documents. But why was the paper not charged to court?

The foregoing authoritarian and despotic attitudes of

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[80] See New York Times v. Sullivan, 376 U.S. 254 (1964); and Garrison v. Louisiana, 379 U.S. 64 (1964).

[81] The proceedings and verdict of the Military Tribunal are fully reprinted in The Guardian (Lagos) 22 March 1985, pp.7-9.

[82] Buhari's successor, General Ibrahaim Babangida has since repealed Decree No.4 of 1984; see Public Officers (Protection Against False Accusation) (Repeal, etc.) Decree No.20 of 1985.

[83] See Newswatch Magazine, 11 September 1989, pp.1-20.

the military government cannot be reconciled with he practice of federalism. As Professor Nwabueze aptly remarks:

> "In their autocratic, martial-like attitude to government, the military tend to forget that decisions about a modern complex society and military orders are two fundamentally different things."[84]

5:2:8 Esprit de Corps

Another characteristic of the military is esprit de corps. Members of the military tend to be inspired by corporate spirit of unity and solidarity; they always act in unison to protect their corporate interest.

A number of factors are responsible for this seemingly apparent cohesion within the military profession. These include the peculiar nature of its establishment as a corporate group, socialised within exclusive structures and sharing common values and doctrines, nurtured by camaraderie, mutual interdependence, shared experiences of danger and apprehension of immediate death.

Other attitudes inculcated by membership of the armed forces are loyalty, strong sense of devotion to duty, good companionship generated by such ideas as being course-mate in the same military academy, serving in the same area or under the same command, common social life in the barracks or officers' mess, coupled with the deliberate policy of protecting and promoting the general image of the military as an institution.

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[84] Nwabueze, B.O., "Nigeria In Search of a Future", a paper presented at the University of Nigeria, Nsukka, 1985. The situation is further aggravated by the fact that there is no sufficient guarantee for protection of human rights under military rule because many Decrees have ousted the jurisdiction of the judiciary, see Chapter Ten (infra, 10:5:7) for concrete examples.

Nordlinger argues that soldiers are not agents of modernisation as often asserted, that their 'corporate self-interest' tends to guide their political and economic decision-making once in office. He further contends that the enormous political power frequently enjoyed by the military to their corporate interests comes as no surprise because the military always act to maintain or increase their wealth and prerogatives even when these values conflict with the aspirations and interest of the larger segments within the society.[85] This assertion seems to be true and is even of more relevance to Nigeria where the military always probe their civilian predecessors, whereas ex-military governments are not always investigated for fear of damaging the image of the military as a corporate group.

In addition to the communal character of military life, soldiers have less employment opportunities outside military vocation. Compared with his counterparts in law, medicine, engineering, whose skills to a marked degree enjoy horizontal mobility and elastic marketability, a soldier cannot with similar ease transfer his skill to some other agency than the state. In essence, the military is a 'trapped' profession.[86] According to Adekanye, this explains both the collective action of the military and a soldier's typically overactive defence of his organisation which often results in the development of a greater sense

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[85] Professor E. Nordlinger, "Soldiers in Mufti: The Impact of Military Rule Upon the Economic and Social Change in Non-Western States", American Political Science Review, 64 (1970), p.1134.

[86] See Finer, Samuel E., The Man on Horseback (London: Pall Mall, 1962), pp.47 et seq.

of camaraderie and esprit de corps than in any other profession or social organisation.[87]

The Nigerian military, especially the officer corps, has remained a relatively well-integrated corporate group. Even though the civil war of 1967-70, including intermittent coups and counter-coups, have tended to weaken or destroy its esprit de corps,[88] it is more solidary than any section of the Nigerian elite. In the words of Major-General Aguiyi-Ironsi, "The Army is brotherhood and I cannot emphasise too strongly the need for corporate life among its members".[89] This integration is strengthened by the fact that the majority of the senior officers received their training from the same or similar military institutions, for example, Sandhurst, Mons, and Camberley in Britain; and other military academies in the United States, Canada, India and Pakistan. As Luckham puts it:

> "The bonds formed with course-mates have been a most persistent influence on (their) behaviour, even under

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[87] See Adekanye, Bayo (supra), pp.10-11.

[88] "Once an army enters government the possession of power proceeds to divide it, army cohesion disappears as soon as the army stops performing the role for which it was drilled" - First, Ruth, Power in Africa (New York: Pantheon, 1970), p.436. In Nigeria, the spectre of a military establishment facing disintegration due to long involvement in politics was demonstrated clearly in both the successful and abortive coups of 1975, 1976, 1985, 1989 and 1990 respectively. For a detailed account of the civil war and some of these coups, see Panter-Brick, S.K. (ed.), Nigerian Politics and Military Rule: Prelude to Civil War (supra); and Kirk-Greene, A.H.M., Crisis and Conflict in Nigeria: A Documentary Source Book, 1966-1970 (2 volumes) (London: OUP, 1971). See also the discussion on "Challenges to Nigerian Federalism", in Chapter Eight (infra: 8:1).

[89] Foreword by Major General Ironsi in Nigerian Army Magazine (Lagos) 111 (December 1965).

the most adverse circumstances."[90]

The growth of esprit de corps among the members of the armed forces in Nigeria derives also from the policy of quartering troops in barracks and providing them with special facilities such as schools, health centres, clubs, and recreational equipment distinct and separate from those of the wider society. Furthermore, these amenities are backed up by the most sustained programme of military education and indoctrination aimed at resocialisation of new recruits who have come from divergent family and social backgrounds into one distinctive lifestyle to enhance group cohesion and loyalty to the profession.

However, this esprit de corps, which is a distinctive feature of the military, is difficult to achieve in a democratic civilian federal system which is more often than not founded upon conflicts and consensus.

5:2:9 Conservatism

Most military administrations are by tradition conservative, effecting changes, if any, with cautious optimism. Because of the discipline, structured hierarchical relations, the insistence on obedience to superiors and the corporate sense of officers and ranks, the armed forces tend in principle to support the status quo, to prefer the 'known' to the 'unknown'; and except where their corporate sense is threatened, the military hardly shed their conservatism.[91] The aim of many military

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[90] Luckham, Robin, The Nigerian Military (Cambridge: Cambridge University Press, 1971), p.132. The word in parenthesis is mine.

[91] See Dudley, Billy J., "The Military in the New States of Africa", Nigerian Journal of Economic and Social Studies, 6, 3 (1964), p.352; and Nordlinger, E., "Soldiers

rulers, says Professor Mazrui, "is not at modernisation, but at retribalisation or retraditionalisation of society".[92] Even army officers admit that the military is necessarily a conservative organisation.[93]

By contrast, federalism is a dynamic social and political phenomenon. Federal unions are fluctuating relations, and every federally organised society must provide itself with instrumentalities for recurrent revision of its pattern or design. It is only by doing so that the shifting balance of common and disparate values, interests, and beliefs can be effectively reflected in more differentiated or more integrated relations.[94]

5:3 Summary and General Observation

This chapter has attempted to show the contrasts between federalism and military rule. It argues that whereas federalism operates in a horizontal manner, military rule with its hierarchy of command, strict control and discipline, operates vertically along a chain of command. The conclusion that emerges is that it would be impracticable for the military to provide a federal system of government unless and until its traditional structure of

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in Mufti: The Impact of Military Rule on Economic and Social Change in Non-Western States" (supra), p.1134.

[92] Mazrui, Ali A., "The Lumpen Proletariat and Lumpen Militariat: African Soldiers as a New Political Class", Political Studies, 21, 1 (March 1973), pp.1-12.

[93] Lt.-Colonel D.A. Ejoor, "Head with Creative Thinking", Nigerian Army Magazine (Lagos) II (October 1984), p.12.

[94] It should, however, be noted that there are others who regard the armed forces as modernising agents. See Johnson, J.J. (ed.), The Role of the Military in Underdeveloped Countries (Princeton, New Jersey: Princeton University Press, 1962), pp.78-82; and Dent, M.J., "Corrective Military Government" (supra).

vertical, autocratic and authoritarian communication and command which may be useful in conventional warfare is scrapped and replaced with managerial operation and control. While it is the essence of federalism to be pluralistic, it is the essence of military rule to be monolithic or unitary.

It should however be borne in mind that the aforementioned contrasting characteristics are theoretically formulated on the supposition of classical federalism and an ideal military rule. In practice, notwithstanding their inherent contradictions, the military in the bid to seek legitimacy, do apply some 'tinges' of federalism through a mixture of centralised and decentralised policies. But it would be tantamount to debasing the currency of political terminology to equate military rule with federalism.

CHAPTER SIX

THE STATUS OF NIGERIAN FEDERALISM UNDER CIVIL RULE

In Chapters 3 and 4 we looked at the circumstances surrounding the adoption of federalism as a form of government in Nigeria. However, in order to appreciate fully the impact of military rule, it is necessary to examine the status of Nigerian federalism in the civilian era. This chapter therefore serves as a point of reference for the subsequent discussions and analyses on military rule.[1] Based on the essential characteristics of federalism identified in Chapter 5 and using the United States of America as the classical model,[2] it examines the Nigerian political process in the period immediately preceding the commencement of military rule (the First Republic: 1963-66) and during the Second Republic (1979-83).[3] It will be suggested that there was in existence in the country a true dynamic federalism that, in the main, maintained a balance of power between the national and regional governments.

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[1] See in particular Chapters 8-11 (infra).

[2] "The modern idea of what federal government is has to be determined by the United States of America": Sir K.C. Wheare (supra), p.1.

[3] Although our emphasis will be on the 1963 and 1979 Nigerian Constitutions, reference will be made to their predecessor, the Independence Constittion of 1960, as and when necessary.

Nigeria, under the First and Second Republics, was generally speaking an orthodox federation by virtue of her adoption of most of the procedural mechanisms of classical federalism: a system of government in which the national and subnational units are autonomous; each level of government being constitutionally invested with powers for legislation, execution, arbitration, and fiscal self-sufficiency, and within their allotted spheres, neither of the governments could encroach on each other's area of competence. Indeed, the federal principle was the dominant factor in Nigerian government.

6:1 Division of Powers Between the National and Regional Governments

Division of powers between the national and regional governments is the pivot upon which the concept of federalism revolves. There can be no autonomy if one level of government can override the other in all matters. Thus, according to Professor Wheare,

> "if there is to be federalism one condition must be fulfilled. There must be some matter, even if only one matter, which comes under the exclusive control, actual or potential, of the general government and something likewise under the regional government. If there were not, that would be an end to federalism."[4]

The rationale for division of powers rests on two assumptions: first, the national government has a plenary jurisdiction over certain sectors of policy-making; and second, certain other sectors of decision-making are reserved

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[4] K.C. Wheare, op.cit., p.75. See also A.V. Dicey, The Law of the Constitution, op.cit., p.143.

in equally plenary fashion to the peripheral units (the states). It is irrelevant where the residual power remains. What is important is that the totality of governmental powers and functions - legislative, executive and judicial should be shared among the two tiers of government with substantial areas of exclusive competence reserved for each of them. The weight of authority conferred on the individual level of government is also not of crucial importance.[5]

Even though there is no universally accepted formula for sharing powers among governments, historically two methods are employed. The first is that the constituent states, while delegating certain powers to a new central government, retain under their original constitutions the residue of powers not expressly or impliedly delegated to the centre. This formula was adopted by the United States and the Australian Commonwealth. The second method, which was chosen by Canada and India, is that whereby self-contained states agree to delegate their powers to a common national government with a view to having new constitutions for the federal and provincial governments. The new constitutions would grant the provinces or states only enumerated powers leaving the residue with the new central government.

The Nigerian Constitutions of 1960, 1963 and 1979 exhibited many similarities to the Constitution of the United States of America, 1787. It should, however, be noted that there are significant differences which not only reflect

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[5] See Milton R. Konvitz, "Constitutionalism and Federalism", International Encyclopedia of the Social Sciences, 3 (1968), p.302.

Nigeria's peculiar social and political circumstances but also represent a conscious attempt on the part of the country to improve upon the American constitutional practice. The Nigerian Constitutions were much longer and more detailed than their American counterpart. For example, they were more specific in enumerating fundamental rights and the qualifications that condition these rights, and more specific in setting out legislative powers of the Federal Legislatures vis-a-vis State Legislatures. Secondly, the Nigerian Constitutions did not establish separate federal and state judicial systems. Thirdly, the 1960 and 1963 Constitutions of the First Republic incorporated many conventions of British constitutional practice, principally due to Nigeria's adoption of "Westminster model" of government.

6:1:1 Division of Legislative Powers

The division of legislative powers in Nigeria under the First and Second Republics was similar to those provided by the American and Australian Constitutions, with delegated powers being conferred on the Federal Government and reserved powers remaining with the states. Sections 69(2) and 4(2)(3) of the 1963 and 1979 Constitutions respectively granted to the Federal Legislature competence to make laws to the exclusion of regional/state legislatures with respect to any of the items specified in the Exclusive Legislative List. The list includes such matters of national significance as aviation, currency, coinage and legal tender; customs and excise duties; defence; deportation, external affairs, incorporation, maritime; naval, military and air forces; passports and

visas.[6] These are similar to the powers expressly granted to Congress under Article I of the United States Constitution.[7]

Under the Nigerian Constitutions, the Federal Legislature shared with the States' Legislatures competence to legislate on matters enumerated in the Concurrent Legislative List, among which are, agriculture, antiques and monuments, archives, exhibition of cinematograph films, higher education, health, local government administration, scientific and technological research, industrial and commercial development, and statistics.[8] In the event of conflict or inconsistency, the laws of the Federal Government prevailed over those of the Regional/State Governments, and the former void to the extent of the inconsistency.[9] Similarly in America, the authority of the states to act on matters within the Concurrent List (for example, education and commerce) is qualified by the rule that any exercise of legislative power within these areas which is incompatible with that of the Federal Government is invalid.[10]

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[6] See Part I of the Exclusive Legislative List, Constitution of the Federation 1963, No.20, pp.A167-A169 and Part I of the Second Schedule to the 1979 Constitution, pp.104-107.

[7] See also the Commonwealth of Australia Constitution (as amended) 1986, ss.1-6.

[8] The 1963 Constitution, Part II, pp.A170-A171, and the 1979 Constitution, Part II of the 2nd Schedule, pp.198-113.

[9] The Constitutions of the Federal Republic of Nigeria, 1963, s.69(4) and 1979, s.4(5); see also Governor of Imo State v. G.C. and E.A. Ltd. [1985] 3 NWLR (Part 11) 71 and Anretiola v. Labiyi [1987] 4 NWLR (Part 36) 473.

[10] Gibbons v. Ogden [1824] 22 U.S. (9 Wheat) 1. See also the Constitution of the Commonwealth of Australia 1901, s.109.

It should be borne in mind that even though the United States Constitution, like its Nigerian counterparts, confers exclusive authority over some matters to the Federal Government, the grant of that authority is not so explicit or extensive as that given by the Nigerian Constitutions.[11] The United States Constitution does not expressly classify the powers delegated to Congress as exclusive or concurrent, but those powers which the states are absolutely prohibited from exercising without the consent of Congress are exclusive Congressional powers. As a corollary, powers granted to Congress are never exclusive of similar powers being vested in the states unless they are made the prerogatives of Congress or the exercise of like power is absolutely prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of such powers by the states.[12]

In Nigeria, all items not expressly mentioned as exclusive or concurrent were treated as residual and they belonged to the states.[13] In America, the Federal Government has authority over the enumerated or expressed powers while the states are conferred with "residual powers". The Tenth Amendment to the United States Constitution provides that all powers are reserved to the states which are neither granted to the Federal Government nor prohibited to the states.

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[11] This does not however suggest that in practice Nigeria had a better federal system, it is the contrary.

[12] Houston v. Moore [1820] 18 U.S. (5 Wheat) 1 at p.22.

[13] Legislation over residual matters embraced a variety of social relations like customary marriages, divorce, contract and tort.

Besides the allocation of Exclusive, Concurrent and Residual powers, the Nigerian Constitutions under the First and Second Republics also granted the national and regional legislatures the power to legislate on any matter that is "incidental or supplementary to" those items enumerated in the Legislative Lists.[14] The idea of incidental power is based on the premise that the mere grant of authority imports all further powers reasonably necessary in the furtherance of achieving the main objective. In essence, "incidental power" implies that there must be a nexus between it and the main power to which it is sought to be attached. Lord Devlin, delivering the judgment of the Privy Council in the Nigerian case of Balewa v. Doherty[15] pointed out that:

> "Some connection must be shown between the two matters and when shown, it must be examined to see whether the one is sufficiently close to the other to be called incidental or supplementary."[16]

This "incidental powers" clause in the Nigerian Constitution provides flexibility for the extension of federal authority similar to that granted by the United States Constitution, to wit: "Congress shall have the power to make all laws necessary and proper for the execution of the enumerated powers".[17] Thus, the Federal Government (and even

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[14] 1963 Constitution, s.69(3); and 1979 Constitution, s.4(2)(4). See also items 45 and 29 of the Exclusive and Concurrent Lists set out in the 1963 Constitution, and items 66 and 67 of Parts I and II of the Second Schedule to the 1979 Constitution.

[15] [1963] 1 W.L.R. 949.

[16] Ibid., p.961.

[17] Article 1, s.8. There is a similar provision in the Australian Constitution 1901, s.7.

the states) could exercise powers, not only those enumerated but also those that could be implied from them. The most authoritative exposition of "incidental power" comes from Chief Justice John Marshall of the U.S. Supreme Court. Explaining the constitutional position in America, he says:

> "This government is acknowledged by all to be one of enumerated powers ... But we think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers are to be carried into execution ... in the manner most beneficial to the people; ... all means which are appropriate, ... and which are not prohibited but consistent with the letter and spirit of the Constitution are constitutional."[18]

Thus, in terms of division of legislative powers, Nigeria under the First and Second Republics borrowed heavily from the American experience.

6:1:2 Division of Executive Powers

The division of executive powers under a federal constitution presents no separate formula from that of the division of legislative powers, for once a scheme for the latter has been worked out, the former follows mutatis mutandis. Thus, the 1963 and 1979 Constitutions provided that the executive authority of the Federal Government should extend to the execution and maintenance of the Constitution of the Federation and to all matters within the legislative competence of the Federal Parliament, while the executive authority of the Regions was similarly defined. The executive power of the Federation was vested in the President and Prime Minister, and that of the region in the Governors and Premier

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[18] McCulloch v. State of Maryland, 17 U.S. (4 Wheat) 315 at p.404 (1819).

respectively under the First Republic based on the Westminster model,[19] and in the Executive President and State Governors under the Second Republic based on "Washington model".[20]

6:1:3 Division of Judicial Powers

Judicial powers were vested in the Federal and Regional Courts with the Supreme Court as the highest court of the land. As a matter of fact, the introduction of federalism in 1954 was accompanied by regionalisation of the country's judiciary. Thereafter, federal judges were appointed and removed by the Federal Judicial Service Commission while judges in the Regions were appointed and removed by the Regional Judicial Service Commissions subject to the approval of the Federal and Regional Legislatures.[21]

In sum, under the civilian rule, there was division of legislative, executive and judicial powers between the Federal and State Governments and their respective exclusive area of competence was substantial enough to give meaning and reality to the autonomy of the individual government. The guarantee of such autonomy determines the place of a system on the federal spectrum.

6: 2 Bicameralism

During the civilian administration, the Federal

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[19] See the Constitution of the Federation 1963, ss.84-87.

[20] See the Constitution of the Federal Republic of Nigeria 1979, ss.5, 122-136, 162-174. Note that under the Second Republic (1979-83) Nigeria changed from parliamentary to presidential system.

[21] See, for example, the 1963 Constitution, ss.112, 113, 123, 124; and the 1979 Constitution, ss.211, 218, 229, 235, 241, 246 and 256.

legislature was divided into two Houses - the Senate and the House of Representatives.[22] Like in the United States of America, representation in the House of Representatives was based on population, and since one constituency was required to be relatively equal to the others,[23] the more populous states had more constituencies and consequently more seats in the House. Nigeria had 312 constituencies under the First Republic[24] and 450 under the Second Republic.[25]

On the other hand, representation in the Senate was based on equality of states irrespective of size, both in territory and population. Under the 1963 Constituiton, each Region was represented by 12 Senators selected at a joint sitting of the legislative houses[26] of that Region from among persons nominated by the Governor.[27] It should be remembered that before the Seventh Amendment made U.S. Senators subject to popular elections, they were likewise elected by their state legislators. Furthermore, the position under the 1979 Constitution whereby each State in Nigeria elected a fixed equal number of 5 members into the Senate accords with the current American federal practice.[28] As in the United States

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[22] Ibid., s.41, and ss.4(1) and 43 respectively.

[23] Ibid., s.51, and s.66.

[24] The Constitution of the Federation 1963, s.43.

[25] Ibid., 1979, ss.45 and 65(b).

[26] The Legislature of each Region was bicameral, consisting of the House of Assembly and House of Chiefs.

[27] Section 42(1)(a).

[28] Sections 44 and 65(a).

Congress, in Nigeria, the greater influence of the more populous states in the House of Representatives was offset by equality of representation in the Senate.

Another similarity between the American and Nigerian legislative houses is that in both Congress and Nigeria's Federal Legislature (known as the Parliament under the First Republic and National Assembly under the Second Republic), each House can initiate a bill. In addition, before such bills become law, they have to receive the approval of both the Houses of Representatives and Senate before the President gives his assent.[29] It should, however, be added that unlike the 1979 Constitution, under the 1963 Constitution, the Nigerian Senate could not stop legislation by refusing its approval[30] - a position analogous to that of the British House of Lords which can only delay passage of legislation but without veto power.

6:3 Constitutional Supremacy

The doctrine of constitutional supremacy is one of the essential features of a federation, and to Wheare a supreme constitution is imperative if a government is to be federal at all.[31] The doctrine rests on three basic principles: first, on anteriority - that the constitution precedes the parliament and creates it, vesting it with powers as it has, as well as setting the limits to such powers and prescribing the manner

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[29] See the United States Constitution 1787, Article I, ss.6(2) and 7(2); and Nigerian Constitutions, 1963, s.62(2)(3) and 1979, s.54(2)(3).

[30] Section 64.

[31] Wheare, Kenneth C., op.cit., p.54.

of their exercise; secondly, that a federal system being a limited government can maintain checks and balances on the centre and the states only if they are subordinate to the constitution; and thirdly, it is predicated on the hypothesis that a constitution is a social contract embodying unalterable rules prescribed by national justice.[32]

In America,[33] Australia[34] and Canada,[35] the supremacy of the constitution as the fundamental law is recognised by vesting in courts the power to declare void legislative and executive acts repugnant to the constitution.

The Republican Constitutions of 1963 and 1979 explicitly provided for constitutional supremacy by stipulating that the "Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria".[36] The supremacy of the constitution over any other law in Nigeria was amply demonstrated in the famous case of Balewa v. Doherty (supra) where a federal legislation was declared ultra vires, null and void for purporting to limit the jurisdiction of the courts in hearing

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[32] See B.O. Okereke, "The Constitutionality of Incorporating Certain Decrees into the 1979 Nigerian Constitution", Nigerian Bar Journal, 16 (1980), pp.47 et seq.

[33] Marbury v. Madison, 1 Cranch 137 U.S. [1803]. Article II of the U.S. Constitution also provides that the Constitution shall be the supreme law of the land.

[34] R. v. Burah [1878] 3 A.C. 904. See also Weynes, W.A., Legislative, Executive and Judicial Powers in Australia (Melbourne: Australasia Books, 1956), pp.19 et seq.

[35] Shannon & Others v. Lower Midland Dairy Products Board & Attorney-General for British Columbia [1938] A.C. 708.

[36] 1963 Constitution, s.1; and 1979 Constitution, s.1(1).

and determining civil rights and also for empowering a Commission of Inquiry appointed by the Prime Minister to impose the penalties of fine or imprisonment contrary to the provisions of the Constitution. An attempt by Dr. T.O. Elias, the Attorney-General of the Federation, to claim parliamentary supremacy was rejected by the Federal Supreme Court[37] and the Privy Council.[38] Similarly, in Tony Momoh v. Senate of the National Assembly and Others,[39] the Supreme Court declared null and void section 31 of the Legislative (Powers and Privileges) Act Cap.102, Laws of the Federation and Lagos, 1958 which provides that court's processes cannot be served within the Legislative Chambers or its precincts while the Legislature is in session because it is inconsistent with section 42 of the 1979 Constitution. Another important decision is Attorney-General of Bendel State v. Attorney-General of the Federation and Others[40] where the Court also declared void the Allocation of Revenue (Federation Account etc.) Act No.1 of 1981 for not being passed in accordance with the procedure laid down by the 1979 Constitution.

In contradistinction, the foregoing position has been changed by military rule. One of the earliest decisions taken by the military on assumption of office was the suspension and/or modification of the provisions of the 1963 and 1979 Constitutions that conferred supremacy on the constitution.

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[37] [1961] All N.L.R. 604.

[38] [1963] 1 W.L.R. 949.

[39] [1981] 1 N.C.L.R. 21.

[40] [1981] 10 S.C. 1.

The modification is to the effect that no constitution shall prevail over a Decree, and that nothing in a constitution shall render any provision of a Decree void to any extent whatsoever.[41] This demonstrates beyond reasonable doubt that a military decree is supreme over any other law including the constitution in Nigeria.

But initially there was some misunderstanding in the judicial circle about the true constitutional aspect of the military take-over. In the Case of Adamolekun v. The Council of the University of Ibadan[42] the Supreme Court held that it cannot question the validity of a Decree of the Federal Military Government but added that it has jurisdiction to declare an Edict of a State Military Governor void if it is inconsistent with a Decree or the Constitution. In E.O. Lakanmi and Another v. Attorney-General of Western State,[43] the Western State Court of Appeal held that the military government is not a creation of the pre-existing Constitution and cannot necessarily be bound, adding that after its establishment, the military administration can by a decree suspend or modify the provisions of the Constitution. According to the Court, the military "who makes can unmake". But the rejection of this view by the Supreme Court later on further appeal that a Decree is supreme over the pre-existing

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[41] See the Constitution (Suspension and Modification) Degrees No.1 of 1966, s.1(2); No.32 of 1975, s.4; and No.1 of 1984, s.5; Laws of the Federal Republic of Nigeria, 1966, 1975 and 1984 respectively.

[42] [1968] N.M.L.R. 253.

[43] [1971] 1 U.I.L.R. 201. For a detailed account of the Lakanmi case, see Chapter Seven (infra, 7:3:2).

Constitution was met with adverse reaction from the military, leading to the promulgation of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970 which unequivocally stated that the military revolution of 1966 constituted an abrupt political change which conferred on the military government absolute powers and that the provisions of the 1963 Constitution were to remain in operation as supplementary to any decree that might come into force from time to time.[44] Decree No.13 of 1984[45] which is still operative in Nigeria is a re-enactment of Decree No.28 of 1970. Thus, it is now a settled law that under military rule, there exists supremacy of Decree instead of the constitution.[46]

6:4 Rigid Constitutional Provisions

For a federal constitution to be supreme as seen above, some restrictions must be imposed on its alteration. This restriction takes the form of rigid amendment procedures; neither the national nor the regional government, acting alone can alter it so far at any rate as the distribution of power between them is concerned. The need for the rigidity arises from the premise that the constitutional instrument proceeds from a source different from that whence spring other laws. It is enacted, not by the ordinary legislative authority, but

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[44] See the Preamble to Decree No.28 of 1970, Laws of the Federal Republic of Nigeria, 1970, p.A129.

[45] The Federal Military Government (Supremacy and Enforcement of Powers) Decree No.13, 1984.

[46] See, among others, Ogunlesi & Others v. Attorney-General of the Federation Suit No.LD/28/69 of 1970 (unreported); and State v. Nwaoga & Okoye [1972] 3 S.C. 6.

by some higher or specially empowered person or body; it can be changed only by that authority or by that special person or body.[47]

Most federal states adopt rigid procedures in amending their constitutions. The oldest example is the United States of America where no new state can be created or erected within the jurisdiction of any other state, nor can any state be formed by the junction of any two or more states or parts thereof without the concurrent approval of the Congress and the Legislatures of the states concerned.[48] An amendment to the United States Constitution requires for its validity proposal by two-thirds majority of both Houses of Congress or application by Legislatures of two-thirds of the states to Congress to call a convention for proposing amendments. In each case, the amendment becomes valid only when it has been ratified by either the legislatures of three-foruths of the states or by conventions, called for the purpose in three-fourths of the states whichever is applicable.[49] Another good example of a rigid constitution is that of Australia where the procedure for constitutional amendment requires approval at a referendum by the majority of the electors as well as the concurrence of the legislative Houses of both the

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[47] See generally Wheare, Kenneth C., Modern Constitutions (London: OUP, 1966).

[48] United States Constitution, Article IV, s.3.

[49] Ibid., Article V.

Commonwealth and the states.[50]

The Nigerian Constitution of 1963 prescribed a cumbersome process for amending any entrenched clause; no provision could be altered with less than two-thirds majority of the members of the Federal and Regional Legislatures.[51] In addition, the provisions on fundamental human rights and creation of new states were doubly entrenched such that any law seeking to amend them could not be passed without the concurrent ratification of the Federal and Regional Legislatures. Consequently, as Nigeria was then a Federation of four Regions, a law of the Federal Parliament amending an entrenched provision of the country's constitution must be approved by the legislative Houses of at least three Regions. Similarly, a law amending a Regional Constitution must be ratified by a resolution passed by a two-thirds majority of the members of both Houses of the Federal Parliament.[52] The creation of Mid-Western Region out of the defunct Western Region in August 1963 illustrates this point. In fact, when the first motion was passed for the creation of the Mid-West, no count, as required by the Constitution was taken. The coalition government of Northern Peoples Congress (NPC) and National Convention of Nigerian Citizens (NCNC) was under the impression that because it had more than two-thirds majority

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[50] The Australian Commonwealth Constituiton, ss.3 and 128. Similar rigid amendment procedures are contained in the Swiss Constitution of 1848, Article 120; and the Indian Constitution of 1949, Article 368.

[51] The Constitution of the Federation 1963, s.4.

[52] Ibid., ss.18-36.

in the Federal Parliament, a unanimous vote by its party members without counting was enough. It was held that since the Constitution was a rigid one, specific counting was imperative.[53]

The extent of the rigid nature of the Nigerian Constitution of 1963 was best exemplified in Balewa v. Doherty[54]where two attempts to set up a judicial inquiry into an indigenous bank by the Federal Government were foiled by the courts which declared them unconstitutional.

Like the U.S. Constitution, the 1979 Presidential Constitution of Nigeria was rigid. None of its provisions could be altered with less than two-thirds majority. The Federal Legislature (comprising the Senate and House of Representatives) could not alter any of the provisions of the Constitution unless the proposal was supported by the votes of not less than two-thirds majority of its members and approved by resolution of the Houses of Assmebly of not less than two-thirds of all the states of the Federation.[55] Legislation for altering the sections relating to amendment itself, creation of new states and fundamental human rights could not be enacted by either House of the Federal legislature unless the proposal was approved by the votes of not less than four-fifths majority of all the members of each House, and also

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[53] See Daily Times, 31 October 1961; and Federation of Nigeria: Parliamentary Debates, House of Representatives, Third Session, April 1962.

[54] [1963] 1 W.L.R. 949.

[55] The Constitution of the Federal Republic of Nigeria 1979, s.9(1)(2).

approved by resolution of the Houses of Assembly of not less than two-thirds of all the States. The same rule applied mutatis mutandis to State Legislatures (the Houses of Assembly).[56]

An act for the creation of a new state could be passed only if certain conditions were met: firstly, a request must have been made by the majority of members representing the area demanding the new state in each of the following bodies: the Senate and the House of Representatives; the House of Assembly and Local Government Councils in the area; secondly, a proposal for the creation of the state must thereafter be approved in a referendum by at least two-thirds majority of the people of the area; thirdly, the result of the referendum must be approved by a simple majority of members of the Houses of Assembly of the States; and finally, the proposal must be approved by a resolution passed by two-thirds of each House of the Federal Legislature.[57] This provision made it extremely difficult and even impossible for any new state to be created during the Second Republic notwithstanding the spate of agitations for them.

The foregoing analysis reveals that not only were the provisions of the Nigerian Constitutions under civil rule rigid, they were also cumbersome.

By contrast, the position under military rule differs

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[56] Ibid., s.9(3).

[57] Ibid., ss.8 and 9(3).

significantly. The laws[58] by which the military established their legal authority and control of the country and government suspended immediately after the military take-over section 4 of the 1963 Constitution and sections 8 and 9 of the 1979 Constitution which dealt with special procedures for amending the Constitutions. Since the military government is a product of revolution, and not a creation of the pre-existing constitution,[59] it is not bound by any constitutional limitations, including the amendment procedures. Under the military, there is only one general mode of exercising legislative powers. With respect to the Federal Government, it is provided that the power to make laws shall be exercised by means of Decrees signed by the Head of the Federal Military Government; and in the case of a state, by means of Edict signed by the Military Governor.[60] The fact that this is the only method of legislation prescribed by the military, means that all laws, including the constitutions, are treated in the same manner for the purposes of amendment and repeal. Hence, when the military government created 12 states in 1967,[61] 19 in 1976,[62] and 21 in 1987,[63]

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[58] The Constitution (Suspension & Modification) Decree No.1, 1966; the Constitution (Basic Provisions) Decree No.32, 1975; and the Constitution (Suspension & Modification) Decrees No.1 of 1984 and No.17 of 1985 respectively.

[59] See Chapter Seven (infra, 7:3) for details.

[60] See, for example, ss.3(1) and 4(1) of Decree No.1 of 1984. For a fuller account, see Chapter Eight (infra, 8:3:3).

[61] See the State (Creation and Transitional Provisions) Decree No.14, 1967.

[62] Ibid., No.12, 1976.

it neither adopted its own special procedure nor followed that provided by the pre-existing civilian constitutions. Similarly, the military has on many occasions, by ordinary process of legislation suspended human rights provisions entrenched in the 1963 and 1979 Republican Constitutions.[64]

Therefore, to the extent that the Nigerian Constitution can be amended in the same way as any other law by the military, its rigidity has been removed.

6:5 Separation of Powers

As indicated in Chapter Five,[65] federalism is based on pluralism of government and if conflicts are to be avoided there must be clear demarcation of powers, functions and functionaries. In modern political terms, the doctrine of separation of powers means that none of the institutions of government, namely, the legislature, the executive and the judiciary, including their functionaries should exercise the functions of the other. The essence is to provide checks and balances of one organ of government over another with a view to preventing tyranny and despotism arising from undue concentration of powers n any one single organ, person or body of persons.[66] As Madison rightly argues:

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[63] Ibid., 1987.

[64] Striking examples include the Federal Military Government (Supremacy and Enforcement of Powers) Decrees No.28 of 1970 and No.13 of 1984, and the State Security (Detention of Persons) Decree No.2 of 1984.

[65] Chapter Five (ante, 5:1:2, 5:1:3 and 5:1:4).

[66] See generally Dicey, Albert Venn The Law of the Constitution, 10th edn. (London: Macmillan, 1959); and Finkelman, J. "Separation of Powers", Toronto Law Journal, 2 (1965), p.313.

"The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may justly be pronounced as the very definition of tyranny."[67]

A contemporary study of the doctrine of separation of powers will enable us to appreciate its position in Nigeria under the civilian era. In Britain, the Parliament is supreme and can enact any law whatsoever.[68] The Cabinet headed by the Prime Minister works closely with the Parliament but a vote of no confidence in the Prime Minister could lead to the dissolution of the Parliament. The House of Lords (an integral part of British Parliament) carries out a judicial function as the highest Court of Appeal in England, but only the Law Lords sit when an appeal is being heard. The Cabinet is accountable to the Parliament for its executive functions, but the Cabinet through the party in power could also control to some appreciable extent, the activities of the Parliament.[69] In effect, the operation of the doctrine in England means no more than an independent judiciary.[70]

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[67] John Madison, The Federalist, No.2 (Cambridge, Mass.: Belknap Press, 1961).

[68] See Edinburgh and Dalkeith Railway Co. v. Wauchope [1842] 1 Bell 252; and Bowles v. Bank of England [1913] 1 Ch.57.

[69] For an elaborate analysis of the check and balances between the Legislature and the Executive in Britain, see among others, Griffith, J.A.G. and Street, H. Principles of Administrative Law (London: Pitman, 1973); De Smith, S.A. Constitutional and Administrative Law, 5th edn. (London: Pelican Books, 1985); and Wade, E.C.S. & Bradley, A.W., Constitutional and Administrative Law, 10th edn. (London: Longman, 1985).

[70] For the meaning of the term "an independent judiciary", see Chapter Ten (infra, 10:5).

The Constitution of the Federation of Nigeria, 1963 though structurally federal, contained some striking features of the British constitutional practice. Section 87 of the Constitution which provided that there should be a Prime Minister to be appointed by the President[71] added a British constitutional convention that the President should whenever the occasion arose appoint a member of the House of Representatives (the equivalent of the House of Commons) who appeared to him likely to command the support of the majority of the members of the House as the Prime Minister.[72] Section 89(1) enjoined the President (as the Queen of England is enjoined by convention) to act in accordance with the advice of the Prime Minister in matters pertaining to the Government of the Federation (save where the President was expressly required to act in accordance with his personal judgment),[73] while section 94 by way of reciprocity directed the Prime Minister to keep the President informed on matters concerning the government.[74] Section 87(3)(6) established a Cabinet on the Westminster model, requiring all ministers to be appointed from either the Senate (the equivalent to the English House of

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[71] The corresponding provisions in the Regional Constitutions of 1963 were: Northern Region, s.34(1); Eastern Region, s.33(1); Western Region, s.33(1); and Mid-Western Region, s.33(1)

[72] Ibid., s.34(2); s.33(2); s.33(2); and s.33(2) respectively.

[73] Ibid., s.36(1); s.36(1); s.34(1); and s.34(1).

[74] Ibid., s.41; s.41; s.39; and s.39.

Lords) or the House of Representatives.[75] The Nigerian Constitution, as in England, made the Executive accountable to the Legislature. This accountability to the Parliament, together with the British parliamentary convention of collective ministeral responsibility were set out in section 90(1) which stipulated that "the Council of Ministers shall be collectively responsible to Parliament".[76]

Section 68 conferred on the Parliament the necessary sanction over the Executive in the form of power of dissolution. Ordinarily, the President could dissolve the Parliament on the advice of the Prime Minister, but if the House of Representatives passed a resolution of no confidence in the Government and the Prime Minister did not within three days resign or advise dissolution, it was mandatory on the President to dissolve the Parliament.[77]

On the whole, the fusion of powers under the 1963 Nigerian Constitution characteristic of the British model was not in consonance with the principle of separation of powers found in the American federal governmental structure.

Under the American Presidential system, the legislative and executive organs of government are separately elected, and each of them is responsible to the electorate directly and not to the other unless otherwise expressly required by the Constitution. There is no direct and continuous

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[75] Ibid., s.34(3)(4), s.33(3)(4); s.33(3)(4); and s.33(3)(4).

[76] Ibid., s.38(1); s.37(1); s.35(1); and s.35(1).

[77] Ibid., s.32; s.31; s.31; and s.32.

responsibility of the Executive to Congress. The President who is the executive head of the national administration holds his office for a fixed term and he is practically irremovable even if his government is ineffecient or unpopular until the time of a new election comes. He need not be a member of the political party which has the majority in either or both Houses of Congress. Neither the President nor his Cabinet can sit or vote in Congress. The Federal Supreme Court could declare actions of either the Executive or Congress unconstitutional or invalid, and is independent of both. The judges are however appointed by the President with the consent of the Congress.[78]

In comparing the United States constitution and the Nigerian Constitution under the First Republic, it should be noted that the two are not explicit on the doctrine of separation of powers, but it can be implied from their provisions which separately assign legislative, executive and judicial powers to the various organs of both the federal and state governments.[79]

The Nigerian Constitution of 1979 which was the basic law during the Second Republic (1979-83) was greatly influenced by

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[78] For a fuller account of the American Presidential system, see Vile, M.J.C. The Structure of American Federalism (London: OUP, 1961); and Schwartz, Bernard American Constitutional Law (New York: Greenwood, 1979).

[79] U.S. Constitution 1787, s.1 of Articles I, II and III. See also the American case of Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) where the Supreme Court held that Congress may not delegate its legislative power to the executive. The parallel examples under the Nigerian Constitution 1963 are Chapter V, Part 4; Chapters VI-VIII; and Balewa v. Doherty [1961] All N.L.R. 604.

American constitutional practice. It gave full recognition to the doctrine of separation of powers by expressly vesting the legislative powers of the Federation in the central legislature (the National Assembly), consisting of a Senate and a House of Representatives; and the legislative powers of the State in a House of Assembly.[80] The executive powers of the Federation were vested in the President which powers he could exercise either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation,[81] while the executive powers of a state were vested in the Governor who was authorised to exercise them or through the Deputy-Governor and State Commissioners, or officers in the public service of the state.[82] The Constitution further provided that the power of a State Governor to execute the Laws of the State should be so exercised as not to impede or prejudice the exercise of the executive powers of the Federation or to endanger the continuance of a Federal Government in Nigeria.[83] The judicial powers of the Federation were vested in the courts established for the Federation whereas those of a state resided in the state courts.[84]

The Nigerian courts took judicial notice of the

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[80] Section 4(1)(b).

[81] Section 5(1)(a.

[82] Section 5(2)(a).

[83] Section 5(2)(b).

[84] Section 6(1)(2). For the application of the doctrine of "Separation of Powers" under the Second Republic, see Table A below.

(Checks and Balances)

Schematic Representation

Agency Checked	Constitutional Power	Checked by	Nature of Check(s)
Presidency	Declaration of War	National Assembly	Supporting resolution by both Houses sitting in joint session
	Appointment of Ministers of the Government	Constitutional Provision	Quota: at least one Minister from each State
		Senate	Confirmation
	Deployment of Armed Forces	Senate	Must give prior approval for deployment outside the Federation
	Maintenance of Law and Order	Constitutional Provisions	Guarantees of individual rights and freedoms
	Administration of Budget	National Assembly	Power to authorize expenditures
	Administration generally	National Assembly	Investigating powers, including appointment of Commissions
		Constitutional Provision	Must step down after two four-year terms of office
	Provision of good government	National Assembly	Impeachment powers in event of "gross misconduct"
	appointment of Federal Councils and Commissions, and of Key Public Service personnel	National Assembly	Power to impeach any appointed officials
	Commander-in-Chief of Armed Forces	National Assembly	Legislation of all such powers
	Proclamation of a State of Emergency	Constitutional Provision	Delimitation of "state of emergency" by definition; time limit = six months
		National Assembly	Must assent with 2/3 majority
National Assembly	Lawmaking	President	Veto (delaying)
		Judicature	Power to declare constitutionality
		State Assemblies	Concurrent Legislative List
	Creation of New States	National Assembly	2/3 majority approval in both Houses
		State House of Assembly	Request for state creation
		Local Government Councils	Request for state creation
		People of area affected	2/3 majority approval by referendum
		All States of Federation	Approve by simple majority
	Constitutional Amendment	Special Provisions	2/3 majority approval, both Houses (4/5 on special issues)
			Approval by at least 2/3 of State Houses of Assembly
Judicature	Declaration of Constitutionality of Legislation	Constitution	Any decisions relating to "Fundamental Objectives and Directives of State Policy" removed from courts' jurisdiction
	Imposition of penalties and sentences	President	Prerogative of mercy
	General exercise of judicial powers	President	Power to appoint leading members of Judicature
		National Assembly	Power to legislate certain High Court practices and procedures
State Governor	Good government	House of Assembly	Impeachment for "gross misconduct"
	Maintenance of Law and Order etc.	Judiciary	Judicial review of administrative action
State Assembly	Law-making	Governor	Veto (delaying)
		Judiciary	Power to declare constitutionality
State Judicature	Adjudication	House of Assembly	Appointment and removal of judicial officers
		Governor	Appointment, removal and prerogative of mercy

recognition given to the doctrine of separation of powers by the 1979 Constitution. Thus, in the case of Ekeocha v. The Civil Service Commission, Imo State,[85] where the Imo State House of Assembly attempted to challenge the legality of the retirement of the plaintiff/applicant by the defendant/ respondent, the Chief Judge of Imo State, Justice C. Oputa, held that the Presidential system entrenched in the 1979 Constitution deliberately separated and balanced powers among the Legislature, the Executive and the Judiciary. He added that, for the Legislature to interpret the Constitution or the laws it enacted, would be tantamount to usurpation of judicial powers. And once a matter is submitted for adjudication by a court in due exercise of judicial powers, neither the executive nor the legislature can interfere until a judicial decision has been made.[86] Similarly, in Senator B.C. Okwu v. Senator Wayas and Others,[87] the Chief Judge of Lagos State, Justice J.A. Adefarasin, held that the constitutional role of the judiciary is to adjudicate and that no court of law can interfere in the internal affairs of the legislative and executive arms of government.

It should be pointed out that while the American and Nigerian Constitutions recognise the need for observance of the doctrine of separation of powers, they at the same time

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[85] [1981] 1 N.C.L.R. 155.

[86] Ojukwu v. Governor of Lagos State [1985] 2 N.W.L.R. (Part 10) 806; and Akeredolu v. Akinremi [1986] 2 N.W.L.R. (Part 25) 710.

[87] [1981] 2 N.C.L.R. 522. See also Sule Balogun v. Attorney-General of Lagos State & Others [1981] 2 N.C.L.R. 589.

appreciate the fact that no government can function properly if the doctrine is strictly adhered to. It is difficult, if not impossible, to run a federal system of government successfully with its various organs operating in water-tight compartments. There is always a need for interdependence, integration and cooperation. Consequently, both the United States Constitution and the Nigerian Constitutions provide that the legislature can delegate its legislative functions to the executive if adequate standards are provided.[88] In particular, the 1979 Nigerian Constitution established for the Federation such bodies as Council of State, National Defence Council, National Economic Council, National Population Commission, National Security Council, and Federal Electoral Commission.[89] These federal executive bodies set up to serve the Federal Government were also responsible for guiding and advising it on matters relating to the states. The Federal Electoral Commission (FEDECO), for example, was charged with the organisation, supervision and control of all elections: the National Assembly (the Senate and the House of Representatives), State Houses of Assembly, President, Vice-President, Governors, and Deputy-Governors of States.[90] The FEDECO maintained uniformity of standards in elections and electoral matters, facilitated the smooth running of the

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[88] See Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935), and the Nigerian Constitutions: 1963, s.85; and 1979, ss.63(2), 102(2), 82, 83, 120 and 121.

[89] Section 140.

[90] See s.140(1)(c) and Part I(C)(6) of the Third Schedule to the Constitution.

administrative machinery of the country as a whole, as well as ensuring better coordiantion of policy and action between the Federation and the States. In addition, the composition of the Electoral Commission was made to reflect the federal character of the country by virtue of the requirement that one member must come from each of the states of the Federation.[91] This inter-governmental cooperation shows that the doctrine of separation of powers is nothing but a "smoothly transmitted platitude".[92]

Finally, in spite of the fact that the 1963 Nigerian Constitution of the First Republic departed fundamentally from the American model in requiring the ministers of government to be members of the legislature, and in the control the legislature exercised over the executive, there was much similarity in the delegation of legislative functions to executive as well as in the interdependence between the Federal and State Governments. More significantly, the 1979 Presidential Constitution of the Second Republic was a prototype of the United States Constitution, 1787 both in the theory and in the practice of the principle of separation of powers.

6:6 Existence of Umpire

One of the essential characteristics of a federal constitution is the special position of an umpire. The federal constitution being the supreme law of the land,

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[91] Part I(C)(5) of the Third Schedule to the Constitution.

[92] Corwin, Edward Samuel (ed.), The Constitution of the United States of America: Analysis and Interpretation (Washington: Government Printing Office, 1953), p.155.

embodying the definite terms of contract between the national and subnational governments makes special provision for an arbiter to ensure that the division of power laid in the constitution is not violated by any of the governments. The arbiter for which most federations make provision is the Supreme Court, which is usually charged with the sole authority of settling all disputes between the national and regional governments on one hand, and among the regional governments inter se on the other.

The Nigerian Constitutions of the First and Second Republics recognised the importance of the judiciary and established a Supreme Court with power to determine questions involving constitutional interpretation as well as judicial review of administrative actions.[93] The Supreme Court of Nigeria, like its American counterpart, was given original jurisdiction in disputes between the Federation and a State or between States.[94] Similarly, in both countries, the substantial part of the jurisdiction of the Supreme Court is appellate.[95]

It should be pointed out, however, that although the role

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[93] The Constitutions of the Federation: 1963, ss.111, 117(2)(c)(d); and 1979, ss.210, 213(2)(b)(c); see also Chief S.L. Akintola v. Sir Adesoji Aderemi [1962] W.N.L.R. 185; Adegbenro v. Akintola [1963] 3 All E.R. 544; and Awolowo v. Shagari [1979] 6-9 S.C. 51.

[94] 1963 Constitution, s.114; 1979 Constitution, s.112; and the U.S. Constitution 1787, Article II, s.2(2). See also the Nigerian cases of Attorney-General for Eastern Region v. Attorney-General for the Federation [1964] All N.L.R. 224; and Attorney-General of Bendel State v. Attorney-General of the Federation [1981] 10 S.C. 1.

[95] 1963 Constitution, s.117; 1979 Constitution, s.213; and the U.S. Constitution, Article III, s.2(1).

of the American and Nigerian Surpeme Courts was virtually the same, the latter had broader appellate jurisdiction than the former. There was also another basic difference in the judicial systems of the United States and Nigeria. Whereas there is in the U.S.A. a federal judicial system separate and distinct from state judicial systems, each with its own hierarchy of appellate courts, the Nigerian Constitutions provided for a single judicial system with appeals from the state courts and federal courts of coordinate jurisdiction to the Supreme Court.[96] This single judicial system is strengthened by the fact that the decisins of the Supreme Court are binding on all courts in Nigeria.[97] If the federal principle were to be strictly applied one would expect a dual system to be established in the Nigerian Federation, one set of courts to apply and interpret the law of the national government and another to apply and interpret the law of each state.[98]

6:7 Fundamental Rights

The similarity between the American and Nigerian federal systems becomes more profound if one considers some of the Fundamental Human Rights that were articulated in Chapters III and IV of the 1963 and 1979 Constitutions respectively which are more or less identical with the American Bill of Rights. Section 23 of the 1963 Constitution and s.34 of the 1979

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[96] See Chapter 10, Chart H.

[97] 1963 Constitution, s.121; and 1979 Constitution, ss.213 and 215.

[98] See K.C. Wheare Federal Government, op.cit., p.65.

Constitution guaranteed and protected the right of privacy of and respect for citizens, their homes, family life, and correspondence. The American equivalent is the Fourth Amendment, which establishes "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures". This right, which has been fortified by the due process clause of the Fourteenth Amendment,[99] is limited to the reasonable exercise of legislative power.[100]

Under Nigeria's First and Second Republics, s.24 of the 1963 Constitution, and s.35 of the 1979 Constitution provided that "every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion, to manifest and propagate it in worship, teaching, practice and observance". Section 10 of the 1979 Constitution added that "The Government of the Federation or of a State shall not adopt any religion as State Religion". These provisions compare with the general idea of freedom of thought and conscience which is implicit in the First Amendment that provides for religious freedom in America.[101] Article I of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion". This clause has been interpreted as prohibiting government aid to religious

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[99] Wolf v. Colorado, 388 U.S. 25 (1949).

[100] Frank v. Maryland, 359 U.S. 35 (1959).

[101] See also Everson v. Board of Education, 330 U.S. 1 (1947); and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

groups.[102] This, however, contrasts with the Nigerian Constitutions which, though guaranteeing freedom of religion and conscience, did not explicitly provide for a complete separation of religion and state.[103] In fact, the Federal Government of Nigeria set up Pilgrims Welfare Boards throughout the country to cater for Christians and Muslims intending to go on holy pilgrimage to Jerusalem or Mecca. In addition, it has given N10 million each to Christians and Muslims to build a national church and a national mosque at Abuja, the new Federal Capital.[104]

In regard to freedom of expression, the Nigerian Constitutions under civil rule provided 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".[105] This right was further safeguarded by the clauses that every citizen was entitled to move freely without being discriminated against, or given privilege, only on ground that he is of a particular commnity,

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[102] McCollum v. Board of Education, 333 U.S. 203 (1948).

[103] For a critique of the Nigerian experience, see Professor J.S. Read, "The New Constitution of Nigeria, 1979: The Washington Model?", Journal of African Law, 23 2 (1979), pp.148 et seq.

[104] This information was obtained in an interview with the Archbishop of Northern Dioceses of Nigeria, Dr. Peter Y. Jatau, in London in June 1989. See also John Onaiyekan, "Secularism and the Nigerian State", Seminar on Federalism, Zaria, 11 June 1987.

[105] The Nigerian Constitutions: 1963, s.25; 1979, s.36(1). A state law prohibiting the establishment of private schools was held to be in breach of s.36(1) and therefore unconstitutional; see Archbishop Okogie v. Attorney-General of Lagos State [1981] 2 N.C.L.R. 337.

tribe, religion or political opinion.[106] Besides, no citizen was to be deprived of his life or personal liberty or forced to give evidence at his trial. Furthermore, an accused person was required to be given a fair public hearing within a reasonable time during which he shall be presumed innocent until proven guilty, shall be informed promptly of the nature of his offence; and shall be given adequate time and facilities to prepare for his defence.[107] By comparison, the First Amendment to the U.S. Constitution provides that "Congress shall make no law prohibiting the freedom of speech or of the press". These freedoms, as in Nigeria, are protected by the due process clauses of the Fourth, Sixth and Fourteenth Amendments which stipulate that no state shall deny to any person the equal protection of the laws.

Property rights were protected by sections 31 and 40 of the 1963 and 1979 Constitutions which provided, inter alia, that "no property movable or immovable shall be acquired compulsorily except by law that requires the payment of adequate compensation". Any person claiming such compensation was granted access to High Courts for the determination of his interest in the property and the amount of compensation.[108] Similar protection is offered by the Fifth and Fourteenth Amendments to the U.S. Constitution which prohibit the Federal

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[106] Ibid., ss.27 and 38; and ss.38 and 39. These rights were upheld in the celebrated case of Federal Minister of Internal Affairs v. Alhaji Shugaba Darman [1982] 3 N.C.L.R. 905.

[107] Ibid., ss.18-22; and ss.30-33.

[108] Ibid., s.32; and s.42. See Salihu Gwanto v. The State [1982] 3 N.C.L.R. 312.

Government from taking private property "without just compensation".[109]

It should be noted too that the fundamental rights guaranteed under the Nigerian and American Constitutions are not absolute. They can be derogated from by any exercise of legislative power which is "reasonably justifiable in a democratic society" or in the interest of defence, public safety, public order, public morality, public health, state emergency, execution of judgment, or for the purpose of protecting the rights of other persons.[110] Though the Nigerian Constitutions did not define what is meant by the phrase "reasonably justifiable in a democratic society", in practice the Nigerian Courts have followed the American, Australian and even British precedents,[111] including the European Convention[112] and the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly resolution 217(111) of 10 December 1948.

In sum, the establishment and observance of fundamental human rights under the civilian rule in Nigeria on the model

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[109] Cammeyer v. Newton, 94 U.S. 225 (1876).

[110] See the Nigerian Constitutions: 1960, ss.22, 23, 25, 26 and 27; 1963, ss.21(5), 23, 24(4)(a)(b), 25(2)(a)(b)(c), 26, 27, 28 and 29; and 1979, ss.30(2), 32(1), 36(3), and 38(2); and Chike Obi v. D.P.P. [1961] 1 All N.L.R. 186. See also U.S. Constitution, First amendment; Frohwerk v. U.S., 249 U.S. 204 (1919); and Gitlow v. New York, 268 U.S. 652 (1925).

[111] See Cheranci v. Cheranci [1960] N.R.N.L.R. 24; Arzika v. Governor, Northern Region [1961] N.N.L.R. 65; and Williams v. Majekodunmi [1962] F.S.C. 166.

[112] See the European Convention on Human Rights 1953, Articles 5 and 6.

of the American Bill of Rights[113] reflected modern conceptions of the rights and liberties of the individual in most federal states of the world. But as indicated earlier,[114] some of these cherished and inalienable rights have been taken away by the authoritarian adminsitration of the Nigerian military government mainly by putting burden of proof in criminal trials on the accused, exclusion of courts' jurisdiction, detention without trial, trial by tribunals, press censorship, retrospective legislation, and acquisition of private property without compensation.[115] This does not however suggest that breaches of fundamental rights were not committed during the civilian era, rather it is intended to show that under the military dispensation these rights are more honoured in breach than in observance.

6:8 The Rule of Law

The rule of Law is an integral part of federalism. It has two essential meanings: firstly, absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or even of wide discretionary power on the part of the government; and secondly, equality before the law or equal subjection of all classes to the ordinary law of the land administered by the ordinary courts.[116] Although the political and social conditions at the time of Dicey, the

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[113] Note however that the Nigerian Constitutions spelt out their Bill of Rights with much greater detail.

[114] Chapter Five (ante, 7:2:7).

[115] For a fuller account, see Chapters 7 and 10.

[116] See Dicey, A.V., The Law of the Constitution (supra) especially Chapter IV.

exponent of the principle of the Rule of Law, have changed profoundly in the light of the complexity of the practice of modern government, some of his propositions are still valid.[117] What is important in the Rule of Law is not that discretionary powers shall not be granted, but that they should be strictly exercised in accordance with the law and the constitution, and that any delegated legislation must be fairly and reasonably ascertainable to enable citizens to regulate their conduct in accordance with it. The government and the governed must be bound by law; all governments must respect individual rights and provide effective means of enforcing them; disputes involving the legality of government actions must be decided by courts whose independence is guaranteed; no-one should suffer punishment outside the authority of the law; and finally, that judges should adjudicate without fear or favour.[118]

The Nigerian civilian constitutions embodied the Rule of Law. Subject to certain exceptions (such as state of emergency), not only were all equal before the law, the courts had power of judicial review over legislative and executive

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[117] For a general criticism of Dicey's idea on the Rule of Law, see Griffith, J.A.G. & Street, H., Principles of Administrative Law (London: Pitman, 1973); and Wade, E.C.S. & Bradley, A.W., Constitutional and Administrative Law (London: Longman, 1985).

[118] See the Delhi Declaration of the International Commission of Jurists on the Rule of Law, 1959 in Journal of International Commission of Jurists, 2, 1 (1959). The Lagos Conference held in 1961 also expressly reaffirmed the principle that retroactive legislation, especially in criminal matters, is inconsistent with the rule of law.

actions.[119] Under the 1963 Constitution, the President, vested with the executive authority was enjoined to act in accordance with the advice of the Prime Minister save where dissolution of the Parliament was involved.[120] The Prime Minister and his Cabinet were made accountable to the Parliament.[121] The Legislature had no arbitrary powers - its law-mking power was to be exercised in accordance with the provisions of and subject to limitations imposed by the Constitutions. The fundamental rights provisions and those relating to creation of new states in particular were doubly entrenched to prevent their abrogation easily, and any infringement on them was challengeable in courts.[122] These, in effect, constituted checks and balances on the national and subnational governments, and to a marked degree, observance of the Rule of Law.[123]

Lord Denning after observing that one of the important features of the Nigerian Independence Constitution was the provision for the Rule of Law, said:

> "After about a hundred years had elapsed since the British advent, the legacy of the Rule of Law which is to be left in Nigeria has been embodied in the Constitution - that is, the instinct of justice and liberty; that right not might is the true basis of society; free will

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[119] 1963 Constitution, ss.115-120; and 1979 Constitution, ss.4-6, 212-215.

[120] Ibid., s.68.

[121] Ibid., ss.84-87.

[122] Ibid., ss.18-32 and 69-72. For identical provisions on the Rule of Law under the 1979 Constitution, see ss.5, 30-42, and 122-127.

[123] E.g. see Table A (ante, 6:5).

and not force is the basis of government."[124]

Sir Adetokunbo Ademola, a one-time Chief Justice of Nigeria, re-echoed the views of Lord Denning when he noted that "one important heritage British would be leaving for Nigeria after Independence was the Rule of Law".[125]

Thus, it could be argued that the Nigerian civilian government like the American, Australian and Canadian governments was one under the Rule of Law. But as we shall see in subsequent discussions, the nature of military administration has made the strict observance of the rule of law impossible in certain cases.

6:9 Democratic Constitutionalism

Federalism is a manifestation of democratic constitutionalism, involving division and limitation of governmental powers, political pluralism, decentralisation of policy decisions and administration, bargains and compromises.[126] In the famous words of the great American President, Abraham Lincoln, democracy means "a government of the people, by the people, and for the people".[127] It implies that people should be allowed to determine their political

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[124] Lord Alfred Denning, Master of the Rolls, in Brett, Justice Lionel (ed.), Constitutional Problems of Federalism in Nigeria (Lagos: Times Press, 1961), p.135.

[125] Ibid., p.134. Both the Court of Appeal and the Supreme Court re-echoed this statement in Ojukwu v. Governor of Lagos State [1985] 2 N.W.L.R. 806, and [1986] N.W.L.R. 621 respectively.

[126] For a comprehensive discussion, see "Characteristics of Federalism", in Chapter Five (ante, 5:1).

[127] Cited in Basset, R., The Essentials of Parliamentary Democracy, 2nd edn. (London: Cassell, 1964), p.39.

destiny and that the powers of government must be exercised for their benefit.

Some of the usual methods of demonstrating democratic principles are the establishment of political parties, election, and referendum, fortified by the existence of public opinion and free press. The Nigerian Constitutions of the First and Second Republics provided for the formation of parties and periodic elections at both federal and state levels to enable the citizens to elect their representatives to the legislative and executive offices.[128] They also provided for independent Electoral Commissions to delimit boundaries and constituencies, and arrange for free and fair elections with a view to ensuring that the consent of the ruled was always obtained by the rulers.[129] This is the essence of democracy, for according to Sir Ivor Jennings:

> "Democracy rests not on any particular form of government, but on the fact that political power rests in the last analysis on free elections, carried out in a state where criticism of the government is not only permissible but a positive merit, and where parties based on competing policies or interests are not only allowed but encouraged...; a government that fails to persuade public opinion will be overthrown at the next election.[130]

Speaking about the democratic nature of the Nigerian federal

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[128] The Constitution of the Federation 1963, s.68(2); Northern Region, s.32(2); Eastern, Western and Mid-Western Regions, s.31(2); and 1979 Constitution, ss.60(1) and 127(2).

[129] The Constitution of the Federation 1963, ss.50-53; Northern region, ss.14-17; Eastern, Western and Mid-Western Regions, ss.13-16 respectively; and 1979 Constitution, Third Schedule, Part I(C).

[130] Jennings, Ivor D. The Law and the Constitution (London: Macmillan, 1959), p.61. See Chapter Five (5:1:8) for more discussions on democracy.

system under the First Republic, the Chief Justice of Nigeria, Sir Adetokunbo Ademola pointed out in Akintola v. Adegbenro[131] that:

> "Ours is a constitutional democracy ... imbued with a spirit of tolerance, compromise and restraint. Those in power are willing to respect the fundamental rights of everyone, including the minority and the majority."[132]

In sum, the cardinal objective of democracy to ensure that the people are governed with their consent was given both statutory and judicial recognition in Nigeria during the civilian era.

6:10 Separate and Independent Existence of National and Regional Governments

The existence of separate independent levels of government is said to be the most reliable index of the operation of a true federal system.[133] The principle of individual governmental autonomy was entrenched in the 1963 Constitution. The Constitution, which lasted until 1966, provided for two separate and distinct levels of government - the Federal Government and the four Regional Governments of the North, East, West and Mid-West. The sharing formula was so weighted as to create a reasonable balance between the national and subnational governments. The Constitution forbade not only the federal executive but also the legislature from entrusting functions and/or imposing duties on the functionaries of a regional government without the

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[131] [1962] All N.L.R. 442.

[132] Ibid., at p.455.

[133] See Davis, Rufus S., The Federal Principle, op.cit., pp.29-31; Sawer, Geoffrey, Modern Federalism (supra), pp.1-7.

consent of the latter.[134]

6:11 Existence of Federal and Regional Constitutions

Federalism is predicated upon the separateness and independence of the constitution of the federation and those of the component units.[135] According to the Judicial Committee of the Privy Council in Attorney-General v. Colonial Sugar Refining Co. Ltd.,[136]

> the natural and literal interpretation of the word "federal" confines its application to cases in which the states, while agreeing on a measure of delegation, yet in the main, continue to preserve their original constitutions.[137]

The Court held that the constitutions of the governments of the constituent states pre-dated that of the Australian Commonwealth and should continue to have independent and separate existence. That is the constitutional form in which federalism was introduced in America (the progenitor of modern federations).

Notwithstanding the fact that the Nigerian Federation was formed through a reverse process, with the unitary Central Government devolving part of its power to the regions, it nevertheless had two separate and independent constitutions

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[134] See the Constitution of the Federal Republic of Nigeria 1963, ss.69-83, 99, 100, and Parts I and II of the Appendix attached thereto; and the 1979 Constitution, ss.4-6, and the Second Schedule (Parts I and II).

[135] Note however that provision for separate constitution, though useful, is not indispensable to the formation and sustenance of a federal system.

[136] [1953] A.C. 237.

[137] per Lord Haldane at p.253. For this reason, he declared that Canada was not a true federation; the United States of America and Australia on the other hand, he said, are truly federal.

(federal and regional) under the First Republic and subject to not being inconsistent with the Federal Constitution, each regional constitution operated as the supreme law of the region to which all other laws must conform in order to be valid.[138] In addition, there was an entrenched provision to the effect that the federal principle would be violated if the constitutions of those regions were established for them by the Federal Government.[139]

6:12 Equal Jural Status Between the National and Regional Governments

The idea that in a federation the national and regional governments are equal, coordinate and independent means no more than equality of status as government, entitled to equal say in the affairs of the country. Each government derives its powers from the constitutions and is independent within its own sphere of action. Both governments act directly on the people and neither is subordinate to the other. Such relationship is known as vertical equality.[140]

Under the First and Second Republics, the Federal and Regional Governments in Nigeria had equal jural relations. The Constitutions provided that "Nigeria shall be a Federation

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[138] The Republican Constitution of Nigeria 1963, s.9. Note that under the Second Republic, Nigeria had only one Constitution with appropriate provisions pertaining to the Federal and State Governments; see the 1979 Constitution, s.4(5).

[139] Ibid., s.5(1); and ss.4-6.

[140] See Wheare, Kenneth C., op.cit., pp.1-14.

comprising Regions and a Federal Territory".[141] The territorial integrity of the Regions/States was protected by making the amendment of the entrenched clauses of the Constitutions the only means by which new states could be created or boundaries of the existing ones altered.[142] The political integrity of the states was protected by stating that regional constitutions should have the force of law throughout their resepctive territories.[143]

But equality in jural status should not be construed as equality in all aspects of the federal union. It is a notorious fact that in a federation the national government is much bigger than the regional government in terms of territory, resources, administration and responsibility. The range of their respective powers need not, and cannot be equal. For example, In Nigeria, apart from the differences in power sharing in the legislative lists which weighed heavily in favour of the central government, the Federal legislature was granted additional special powers to meet emergency situations such as war and subversions, and to preserve the Federation where a state attempted to endanger the continuance of the Federal Government of Nigeria.[144] Furthermore, as pointed out earlier, in the event of a state law being inconsistent with the Federal law, the former was void to the

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[141] 1963 Constitution, ss.2 and 3; and 1979 Constitution, s.2(1)(2).

[142] Ibid., s.4; and s.9 respectively.

[143] Ibid., s.5.

[144] Ibid., ss.86 and 170; and ss.5(2)(b) and 265.

extent of the inconsistency.[145] These declarations by the Nigerian Constitutions parallel Article II of the U.S. Constitution which makes the Constitution the supreme law of the land. These differences of course, do not vitiate the federal principle for according to Professor Nwabueze, the essence of federalism is to accommodate a certain amount of inequality in powers and resources between the national and regional governments so long as any preponderance in favour of one is not such as to reduce the other relatively to virtual impotence.[146]

6:13 Equality Among the Regional Governments

Equality among the subnational governments (otherwise known as horizontal equality) is one of the cardinal principles of federalism. Equality in this sense implies a kind of relationship that subsists between the central government and the peripheral states collectively, such that the latter are given equal treatment by the former. The underlying reason is that lodging greater powers in one regional government would tend to produce in it an attitude of superiority towards the others, and thus destroy the equilibrium which ought to have existed among them.

It is therefore not surprising that the Constitution of Uganda of 1962 under which Buganda, one of the five regional governments, was accorded a special position in terms of political representation and financial grants, has been

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[145] The Constitutions of the Federation of Nigeria, 1963, s.69(4); 1979, s.4(5).

[146] Nwabueze, B.O., Federalism in Nigeria, op.cit., p.3.

described as an aberration of federal practice.[147] The boomerang effect was the eruption of political crisis which led to a military coup and the overthrow of the Constitution itself in 1966.

It is essential to a government if it is to be federal that the regions should have equal representation in some national affairs. In the Federations of America, Australia, Canada and Switzerland, the principle of horizontal equality has been put to use especially in the upper chamber of the federal legislature (the Senate) which always has an equal number of representatives from each of the component states.

Under the Nigerian Constitutions of 1963 and 1979 all the regions had the same constitutional rights: proportional representation in the House of Representatives; equal number of candidates in the Senate; the same right to participate in federal elections; and the same amount of control over the structure of their respective governments. All the regional governments had the same power of legislation and execution and arbitration at subnational level.[148]

Thus, notwithstanding the demographic, economic and territorial variations, on a strictly political basis, all the Regions were equal.

6:14 Existence of Balanced Component States

This refers to the size and numerical strength of the constituent units necessary for sustenance of a viable

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[147] Ibid., p.18.

[148] See the discussion on "Bicameralism" (ante, 6:2) for a fuller account.

federation. Although there is no absolute constitutional criterion, if federalism is to achieve its primary objective of sustaining "unity in diversity", an establishment of regional governments with reasonably balanced territories and population would seem desirable.

Professor K.C. Wheare maintains that the capacity of states to work a federal union is greatly influenced by their size. It is undesirable, he says, that one or two units should be so powerful that they can overrule the others and bend the will of the federal government to themselves.[149] This implies that there must be some sort of reasonable balance between the units in area, population and wealth, which will insure that each of the component states can maintain its autonomy within the sphere allotted to it without fear of being dominated by others.

Nigeria which had four Regions in the period preceding 1967 experienced some structural imbalance because one of the Regions (the North) was much larger than the rest put together, accounting for more than 60 per cent both in landmass and in population.[150] The Northern Region Government was able, by reason of its disproportionate size, to dominate the national government, almost turning it into an extension of itself - a situation which partly led to the overthrow of the civilian government in 1966.[151]

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[149] K.C. Wheare, op.cit., p.52; and J.S. Mill, Representative Government (supra), pp.50-51.

[150] see Nwabueze, B.O (supra), p.19.

[151] For a comprehensive account of the military intervention, see Chapter Seven (infra, 7:2).

The major cause of the lopsided nature of Nigeria's federal structure under the First Republic was the retention at Independence, 1960, of the tripartite structural configuration of the country delineated by the Richards Constitution of 1946[152] which, of course, could not provide the much needed unity or national consciousness as each of the regions created an attitude of self-sufficiency, of separatism and of intolerance. As if they were determined to vindicate Wheare's and Mill's views, the Northern and Eastern Regions on many occasions formed coalition governments and united against the Western Region that controlled the Opposition Party (the Action Group), so much so that the West became an object of domination and victimization especially with the creation of the Mid-Western Region in August 1963.

But notwithstanding the existence of this imbalance, the fact that Nigeria had multiple regional governments under the First and Second Republics is an evidence that she kept to the spirit and purpose of federalism. Credit should however be given to the military for redressing the imbalance by creating twenty-one states in the country.[153]

6:15 Indivisibility and Indissolubility of the Corporateness of the Federation

The principle of noncentration of authority at one level of government[154] is maintained to the extent that there is

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[152] See Chapter Three (ante, 3:5:10).

[153] See the States (Creation and Transitional Provisions) Decrees of 1967, 1976 and 1987 respectively.

[154] See Chapter Five (ante, 5:1:2).

respect for the federal principle within the federal system. Such respect is necessarily reflected in the immediate recognition by the decision-making public that the preservation of the constituent polities is as important as the preservation of the federation as a whole. In the words of the American Chief Justice Salmon P. Chase, "federalism looks to an indestructible union, composed of indestructible states".[155] The recognition of indestructibility of a federal union, says Professor Elazar, is based on an understanding of the role played by federalism in animating the political system along certain unique lines.[156] The point being made is that in a classical federation no right of secession should be conferred on the federated units. The underlying reason is that "if such actions are permitted the general government might be subordinated to regional governments or vice versa and that is an end of federalism".[157]

In the context of Nigerian experience, there were constitutionally entrenched provisions for the preservation of the Federation as a single entity. The Constitution created special powers of Federal intervention. It was expressly stipulated that the Federal Parliament could, by a resolution of a two-thirds majority, keep a region within the limits of its power, or declare a state of emergency, depending on the

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[155] Texas v. White, 7 Wallace (1869).

[156] Daniel J. Elazar, "Federalism", op.cit., p.360.

[157] Sir Kenneth Wheare, Federal Government (supra), p.86. Emphasis is mine.

nature and gravity of the situation.[158] "Period of emergency", according to the Constitution, means "any period during which the federation is at war; or there is in force a resolution of each House of Parliament supported by the votes of not less than a two-thirds majority of all the members declaring that democratic institutions in Nigeria are threatened by subversion; or there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists".[159] The resolution, subject to renewal, was to last for a period of 12 months.[160]

Using similar provisions under the 1960 Constitution, the Federal Government on 25 May 1962 declared a state of emergency in Western Region which was engulfed in intra-party violence and fatal squabbles with a view to preserving the Nigerian federal system.[161] The 1960, 1963 and 1979 Constitutions also stated, among other things, that "the people of Nigeria had firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation".[162] These provisions are clear affirmations of the country's willingness to maintain a united

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[158] The Constitutions of the Federation: 1963, s.86; 1979, s.265.

[159] Ibid., s.70(3); and s.265(6)(b) respectively.

[160] Ibid., s.71(1)(2). Under s.265(6)(c) of the 1979 Constitution, the period was 6 months.

[161] For details, see s.70 of the 1960 Constitution. See also Williams v. Majekodunmi [1962] 1 All N.L.R. 413, and Alhaji D.S. Adegbenro v. Attorney-General of the Federation and Others [1962] W.N.L.R. 160.

[162] The Preambles to the 1960, 1963 and 1979 Federal Constitutions.

and indestructible federation.

6:16 Fiscal Autonomy

One of the indices of federalism is the fiscal and financial autonomy which both national and regional governments enjoy. According to Professor Wheare, both the general and regional governments should each have sufficient financial resources to perform its exclusive functions. It is not enough that the general government should be able to finance itself, it is equally essential that the regional government should be able to do likewise.[163]

The 1963 and 1979 Constitutions conferred on the Federal and State Governments independent sources of revenue, and jurisdiction over a wide range of items from which taxes were collected. They also provided a reasonable formula for sharing centrally collected revenues between the national and regional governments on one hand, and between the regions inter se on the other. Each government had sufficient financial resources to discharge its constitutional responsibilities although the criteria used in the revenue allocation weighed heavily in favour of the regions.[164]

6:17 Summary

This chapter has demonstrated empirically that under the civilian administration there was in Nigeria an orthodox federal system of government, its imperfection

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[163] See Wheare, Kenneth C. (supra), pp.51 and 97.

[164] See ss.136-45 of the Republican Constitution of 1963 as amended by the Allocation of Revenue (Constitutional Amendment) Act, 1965; and the 1979 Constitution, ss.149-55. See Chapter 11 for further details.

notwithstanding. This is exemplified by the fact that the national and regional governments had some reasonable degree of autonomy, equal jural status, division of powers, divided sovereignty, supreme and rigid constitutions, organised party system, a supposedly impartial and independent judiciary, fiscal autonomy and financial self-sufficiency, and constitutionally entrenched provisions for the preservation of the Nigerian state as one indivisible and indissoluble entity.

Even though the Constitution of the First Republic was an amalgam of the "Whitehall" and "White House" models, it nevertheless provided for a federal structure of government, and contained a Bill of Rights to prevent arbitrary use of governmental power. The methods for amending the entrenched provisions were similar to the procedure adopted by the United States Constitution. Besides, the dual polity with a federal government at the centre and the States at the periphery, each endowed with powers of its own exercisable within the field assigned to it, as practised in America, formed the very structure of the Nigerian governmental system. It is, therefore, not surprising that in the case of Balewa v. Doherty both Federal Supreme Court[165] and the Privy Council[166] held that Nigeria was a "true federation". This view has been confirmed by Professor Oyovbaire who contends that both the letter and spirit of federalism were observed

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[165] [1961] All N.L.R. 604 at p.609.

[166] [1963] 1 W.L.R. 949 at p.152.

under the civilian government.[167]

We shall now verge to consider the advent of military rule in Chapter Seven.

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[167] Oyovbaire, Sam Egite Federalism in Nigeria, op.cit., p.69. But it must be remembered that even though in the application of the federal principle the Nigerian Constitutions under the civilian era were to a very large extent derivative of the United States Constitution, there were departures, the most important being the attempt by the Nigerian Constitutions to combine federalism on the American pattern with the Westminster system of responsible government. The Government of the First Republic, for instance, had the parliamentary executive, while the American Constitution has a non-parliamentary executive.

CHAPTER SEVEN

THE ADVENT OF MILITARY RULE IN NIGERIA

Seizure of political power by armed forces has become a common phenomenon of Third World politics. The quantum and frequency of coups and the concomitant military rule in the continent of Africa and Nigeria in particular is alarming. Since the beginning of 1960 more than one hundred successful and abortive coups have occurred, notably in Algeria (1965); Benin Republic (1963, 1967, 1970, 1972); Burundi (1965, 1966, 1976); Burkina Faso (1966, 1980, 1983, 1987); Chad (1975, 1982); Congo (1963, 1977); Central African Republic (1966); Equatorial Guinea (1979); Ethiopia (1974); Egypt (1952, 1958); Gabon (1964); Ghana (1966, 1972, 1979, 1981); Guinea-Bissau (1980); Guinea (1984); Kenya (1964); Lesotho (1970); Liberia (1980); Libya (1969); Madagascar (1985); Mali (1968); Mauritania (1980); Niger (1974); Nigeria (January/July 1966, 1975, 1976, 1983, 1985, 1986); Rwanda (1973); Sierra Leone (1967); Somalia (1969); Sudan (1958, 1989); Tanganyika (1964); Togo (1963, 1967); Uganda (1964, 1971, 1979, 1985, 1986); Zaire (1965); and Zanzibar (1974, 1965).[1] Other contemporary examples in the Third World include Argentina, Bangladesh, Brazil, Burma, Chile, Fiji, Haiti, Iraq, Pakistan,

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[1] See, among others, Ali Mazrui, "Lumpen Proletariat and Lumpen Militariat: African Soldiers As a New Political Class", op.cit., pp.1-12; Decalo, Samuel, Coups and Army Rule in Africa: Studies in Military Styles (New Haven: Yale University Press, 1976); and Dele Olojede, "African Nations Under the Gun", Newswatch Magazine, September 9, 1985, p.38.

Syria, Thailand, Turkey, the Philippines, Panama, Korea and Uruguay.[2]

It should however be emphasised that military involvement in governmental administration retards the development of a mature political culture.[3]

7:1 The Traditional Role of the Military

In the developed countries of Europe, America and the U.S.S.R., there seems to be a division of labour in every facet of human life, reflecting a marked degree of professionalism. Thus, they have professional accountants, politicians, bankers, architects, engineers, lawyers, lecturers and even footballers to mention a few. Bound by this system of professionalism, the military in these countries have become highly professionalized with unique, distinct and separate functions, not remotely related to politics. Basically, their role has been maintenance of internal security and national frontiers against external aggression.

In Britain, for instance, three circumstances have been recognised under which the military may assist the civil government. There could be Military Aid to the Civil Power (MACP): (i) when the police cannot cope with civil disorder such as riots or armed terrorism; (ii) when the army assists in

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[2] For the causes and consequences of coups d'etat in some of these countries, see Janowitz, Morris, The Military in the Political Development of New Nations: An Essay in Comparative Analysis (supra).

[3] See Perlmutter, Amos, The Military and Politics in Modern Times (New Haven: Yale University Press, 1977); and Adebayo, Augustus, Principles and Practice of Administration in Nigeria, op.cit., pp.85-86.

civil relief measures during natural disasters like hurricanes or flooding; and (iii) when troops are employed to maintain essential services during industrial disputes. Troops were actively engaged in MACP during the Glasgow general strike, Liverpool police strike and national railways strike, in 1919; coal stoppages in 1920 and 1921; the General Strike of 1926; at the siege of the Iranian Embassy in London in 1980; and the national ambulance strike of 1989. Royal Military Police also undertook patrols against "Irish Republican Army" (IRA) in the early 1960s, and since 1969 British troops have been permanently stationed in Northern Ireland to contain the sectarian attacks among the inhabitants.[4]

And in the USSR, except in a few cases like Armenia, Azerbaijan, and Georgia where there exist ethnic and religious conflicts, there has been hardly no direct military involvement in resolving internal strife or in political administration in recent times.

The repudiation of military intervention in domestic law enforcement is the bedrock of due process upon which American government is built. The idea of military intrusion into the affairs of civil government is profoundly repugnant. Thus, in Laird v. Tatum[5] and Scheuer v. Rhodes,[6] Chief Justice Burger of the United States Supreme Court recalled that the

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[4] See, among others, Keith Jeffrey, "Military Aid to the Civil Power in the United Kingdom: An Historical Perspective", in Rowe, Peter J. and Whelan, Christopher J. (eds.), Military Intervention in Democratic Societies (London: Croom Helm, 1985), pp.51 et seq.

[5] 408 U.S. 1, 15 (1972).

[6] 416 U.S. 232, 246 (1974).

traditional and strong resistance of Americans to any military intrusion into civilian affairs has deep roots in history. He further added that the enforcement of civilian laws by military means is more often than not associated with riots and other civil disorders.[7]

Even the use of the military as an internal security force or as a solid prop for effective government in these advanced countries now seems anachronistic or is taken for granted due to the existence of self-regulating mechanisms in the form of checks and balances. The net result is the predominance of external role and as a corollary a diminishing of internal surveillance. Thus, one hears of British Army detachments in Hong Kong, Gibraltar or West Germany; the American soldiers in South Vietnam, or the Persian Gulf; the French troops in Angola, Mozambique, Algeria or Chad; the Russian Army in Afghanistan, Vietnam, Cuba, Libya or Ethiopia; the Belgian military force in Congo, etc. In all these external military expeditions the military is used either as forces of aggression, especially where the super-powers have vested interests to protect[8] or as instruments of peace-keeping operations along the boundaries of two warring

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[7] Ex parte Milligan, 71 U.S. 2, 127 (1866). See also David E. Engdahl, "Foundations for Military Intervention in the United States", in Rowe, Peter J. and Whelan, Christopher J. (supra), Chapter I.

[8] For example, the escort of Kuwait oil tankers passing through the Persian Gulf by the American and British Naval Warships during the 8-year Iran-Iraq war.

nations.[9] The point being made is that the political maturity of the advanced countries, coupled with their military policy of political neutrality, have therein nurtured peace and stability.

By contrast, in Nigeria and other African countries incessant political upheavals and perennial inter-ethnic conflicts often necessitate military intervention.

In the pre-colonial era, African armies, though rudimentary, were used as weapons of offence and defence in time of war, and as a symbol of authority of the ruling class for containing domestic feuds during peacetime. During the colonial period, the national armies of the African states, though quite small in number, were assigned two main functions: firstly, they were made to assist the colonial governments in maintaining internal security by quelling domestic uprisings; and secondly, to assist the imperial powers in external military defence or aggression worldwide, especially during the two World Wars of 1914-18 and 1939-45 respectively. The experience of modern warfare gained during the colonial days motivated the colonised African states to develop and strengthen their military capability along modern lines. Consequently, in Nigeria, a former British dependency, the role of the military up to 1966 was similar to that

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[9] Such assignment is usually carried out under the auspices of international organisations like the North Atlantic Treaty Organisation (NATO), the United Nations (UN), European Economic Community (EEC), Commonwealth, Organisation of African Unity (OAU) or the West African Economic Communities (ECOWAS). A typical example is the current presence of multinational forces in Saudi Arabia against Iraq's invasion of Kuwait.

performed by Her Majesty's Armed Forces in Britain - the defence of the realm in the event of foreign aggression and internal strife.[10] Constitutionally, the Nigerian military is charged with the responsibility of protecting the country's territorial integrity and security of its borders from violation on land, sea and air. There is also a wide range of powers vested in the Head of State to confer on the military such other duties as he deems fit.[11] None of these functions relate to politics.

Besides similarity in statutory duties, Nigeria's military officers are trained in such British military academies as Sandhurst, Mons and Camberley which to Nigerian soldiers, by standard, are the military equivalents of Oxford and Cambridge Universities. Therefore there is no reason to believe that members of the Nigerian military, especially the senior officers, would not imbibe the British military tradition of professionalism and political neutrality, for according to Decalo, "the training process undergone by the officer corps of many of the new states is such as to produce reference-group identifications with officer corps of the ex-colonial power and concomitant commitments to its set of traditions, symbols and values."[12] Hence, the news of military coup d'etat in Nigeria on January 15, 1966 took the

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[10] See the Nigeria Army Act 1960, including the Navy and Air Force Acts 1964.

[11] Ibid., s.4 See also s.197 of the 1979 Constitution.

[12] Samuel Decalo, "Military Coups and Military Regimes in Africa", Journal of Modern African Studies, 2, 1 (1973), p.122.

whole world and the Western countries in particular by surprise because they had thought that a coup was hardly likely in Nigeria because of the colonial military legacy which Britain bequeathed to her.[13] It does seem therefore that the participation in politics by the Nigerian military is historically anomalous.

7:2 Reasons for Military Intervention in Nigerian Politics

Among the literature on military rule, two schools of thought have attempted to offer some explanations for military intervention in politics. The first school contends that military involvement in government is dictated by external factors as one of the manifestations of the general politicisation of social forces and institutions. It maintains that societies where most social forces are highly politicised, have political clergy, political universities, political bureaucracies, political labour unions, political corporations and, of course, political armed forces, each of which tends to become involved in political issues which affect their particular interest or groups, including matters that affect society as a whole.[14] The second school of thought suggests that military intervention can be explained mainly by reference to the internal structure of the military itself. By this "internal characteristic model" is meant that in order to understand fully the reasons for military

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[13] See Jemibewon, Brigadier David M., A Combatant in Government (Ibadan: Heinemann, 1978), pp.1-25.

[14] See Huntington, Samuel P., Political Order in Changing Societies (New Haven: Yale University Press, 1968), p.194; and Oyediran, Oyeleye (ed.), Nigerian Government and Politics Under Military Rule (London: Macmillan, 1979), p.2.

involvement in domestic politics, recourse must be had to the social background of the officers, the skill structure and career lines, internal social cohesion and cleavages, as well a professional and political ideology of the military establishment.[15]

Since the fall of the First Republic in 1966, Nigeria has experienced five different military regimes. Chronologically, they include the administrations of Generals Aguiyi-Ironsi (January 16-July 29, 1966); Gowon (August 1, 1966-July 29, 1975); Muhammed/Obasanjo (July 29, 1975-September 30, 1979); Buhari (December 31, 1983-August 27, 1985); and Babangida (August 27, 1985 to date).[16] We shall be using the above two models in juxtaposition as tools of analysis in providing the background to military rule in Nigeria.

7:2:1 Political Instability

As indicated in Chapters 3 and 4 the evolution of Nigerian federalism was beset with problems of centrifugalism and centripetalism which originated partly from the social and political structures which British colonialism bequeathed to

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[15] See Janowitz, Morris, The Military in Political Development of New Nations, op.cit., pp.27-29 and Oyediran, Oyeleye (supra), p.1; and Bayo Adekson, Towards Explaining Civil-Military Instability in Contemporary Sub-Saharan Africa: A Comparative Political Model, a seminar paper presented at the University of Ibadan, Nigeria, 1978.

[16] Note that whilst the Ironsi and the Gowon regimes ruled under a substantially similar constitution, the Constitution (Suspension and Modification) Decree No.1, 1966; the Mohammed/Obasanjo and Buhari administrations operated under Decrees No.32 of 1975 and No.1 of 1984 which were identical. Babangida, the current Head of State operates under Decree No.17 of 1985 which is slightly different from its predecessors. For details of these Decrees and their similarities or differences, see Chapters 8-10 (infra).

Nigeria and partly from the inherent nature of the socio-cultural and geo-political entity of the country itself. These problems later expressed themselves in the form of social upheavals and political instability constituting a direct invitation for military intervention.

Nigeria is an artificial creation of British Colonial Administration, with a configuration of over 300 different ethnic groups. Its artificial nature is the core of its political fragility. The British colonial structure which was inherited by independent Nigeria sowed the seed of disintegration which later germinated into political convulsion - coups and counter-coups. It would appear that the attitude of the colonial administrators towards the development of the Nigerian State was that of divide-and-rule. Instead of integrating the various ethnic groups into a coherent whole, different methods of territorial acquisition and administrative polices wre employed initially for Northern and Southern Nigeria for no convincing reasons other than preserving them in their 'natural state'. It should be recalled that in 1939 during World War II Governor Bernard Bourdillon divided Nigeria into three administrative units, namely, Northern, Eastern and Western Provinces. These were retained, strengthened and legalised as 'natural' regions by Sir Arthur Richards in 1946.[17] The post-war political awareness and upsurge of nationalism that emerged were based on this tripartite regional formula dominated by the three major ethnic groups - the Hausa/Fulani, Yoruba and Ibo - so

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[17] For a fuller account, see Chapter Three (ante, 3:2:8).

much so that it was appropriate to say that the departed British colonial officials left behind three 'Nigerias', each with its own bias and bigotry, pride and prejudices, and chauvinism. In the competition to capture political power at the centre, there developed symptoms of political instability as the country was progressively drifting from a strong centre towards strengthening and insulating of regional base of each of the major political parties (the Northern Peoples Congress, Action Group and the National Council of Nigerian Citizens) which incidentally coincided with the above-mentioned major ethnic groups. This gave rise to strained relationship and antagonism between the regions which subsequently culminated into North-South dichotomy, with each side exhibiting separatist tendencies. The unity which existed among the nationalists was doomed after the achievement of their primary objective which was the attainment of political independence from Britain. No sooner was this aim realised than all the political leaders who had firm bases in their different regions fought hard to maximise powers of the regions at the expense of the federal centre. Regionalism and ethnicism on which they rode to power became the bane of politics in total disregard of national unity.[18]

The political climate was very turbulent. In 1962, there

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[18] See, among others, Tamuno, Tekena "Separatist Agitations in Nigeria Since 1914", Journal of Modern African Studies 8, 4 (1970); and Post, K.W.J. and Vickers, M. Structure and Conflict in Nigeria, 1960-1966 (London: Heinemann, 1973). An interview in London with Chief A. Adeleke, one of the politicians of the First Republic, confirmed that the main cause of the inter-regional competition and conflict was the leadership of the federal government.

arose internal dissension within the ruling Action Group party of the Western Region of Nigeria and the crisis eventually led to the detention of its leaders, including Chief Obafemi Awolowo who was then the leader of the Opposition in the Federal Parliament. The consequence was a state of pandemonium in which the politicians engaged themselves in physical assault, killings, arson and treason which necessitated a declaration of a state of emergency in the Western Region by the Federal Government. The leaders of the Action Group party were detained and charged to court for treasonable felony, conspiracy and unlawful importation of arms into the country. By September 1963, they were found guilty of these offences and consequently sentenced to terms of imprisonment ranging from five to fifteen years.[19]

In addition to this deplorable situation in the West, the national population census of 1962 was riddled with malpractices and inflation of figures of such alarming and unreasonable proportions that some sections of the country spearheaded by the Eastern Region rejected its validity. Though this head-count was repeated in 1963, the result was accepted reluctantly with reservations and misgivings.[20]

As if these were not enough, the people of the Middle-Belt area of the North, who were under the oppressive rule of

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[19] See Awolowo v. Federal Minister for Internal Affairs [1962] L.L.R. 177. For more details, see Awolowo, Obafemi, Adventure in Politics: Travails of Democracy and the Rule of Law (London: Macmillan, 1988).

[20] For a fuller account, see Attorney-General for Eastern Region v. Attorney-General for the Federation [1964] 1 All N.L.R. 224.

the Hausa-Fulani oligarchy within the Northern People's Congress party, became increasingly fed up and decided to express their grievances through violent means. The Tiv ethnic group in particular openly rioted for almost three years (1962-65) demanding the creation of an autonomous and independent state of their own. The regional government of the North had to procure the services of the Nigerian Army to pacify the rioters. The Willink Commission under the British colonial regime set up in 1958 refused to recommend the creation of more states on the ground that if new states were to be created, they must be given at least two years to settle down before independence could be granted to Nigeria. This action satisfied regional leaders who determined to preserve their 'empires' intact. The failure to create more states during the era, it could be argued, planted the most potent seed of instability in the evolution of Nigeria as a nation. The Nigerian military acknowledged this fact with dismay when creating 12 states in May 1967.[21]

The most formidable of all the crises was the general election of 1964 which was neither free nor fair. All illegal devices including the use of party thugs were employed by incumbent rulers and their ruling parties in the regions to eliminate opponents. Because of the proven cases of flagrant irregularities, there were resentments and boycotts to such an extent that the President, Dr. Nnamdi Azikiwe, refused to appoint Sir Abubakar Tafawa Balewa whose party had the

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[21] See the statement of the Head of the Federal Military Government, Lieutenant Colonel (later General) Yakubu Gowon in The Struggle for One Nigeria (Lagos: FMI, 1967), p.3.

majority of seats in the Parliament as the Prime Minister. Both the President and the Prime Minister sought the support of the Armed Forces resulting in the 4-day period of interregnum before the matter was finally resolved with a firm undertaking by the Prime Minister to form a broad-based government.[22]

The political problem at the federal level looked 'pale' when compared with the experience of the Western Regional Election of 1965. The West became engulfed with yet another crisis. Electoral malpractices, arson, and indiscriminate killings were pervasive throughout the Region. This state of pandemonium and acts of vandalism brought about a situation near anarchy.[23]

It should be remembered that until 1966 little was known about the Nigerian military, probably due to the peaceful manner in which the country was granted Independence in 1960 by the British imperial power. Independence was attained on the 'platter of gold' through constitutional negotiations as opposed to military struggle or guerrilla warfare experienced by many emergent states in Africa.

The civilian regime's loss of support in the First Republic (1963-66) not only made it easier for its overthrow,

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[22] On 28 December 1964 the Army paraded around the Federal Capital, Lagos, and warned all political parties to be law-abiding. For an elaborate discussion of the political turmoil, see Douglas G. Anglin, "Brinkmanship in Nigeria: The Federal Election of 1964-65", International Journal (Spring 1965), p.173.

[23] The author was a living witness. See also Obasanjo, Olusegun, My Command (Ibadan: Heinemann, 1980), pp.1-16. General Obasanjo was the Head of the Federal Military Government between February 1976 and October 1979.

but also provided the military officers with good motive and justification to take over the government from the politicians who were seen to be hopelessly venal, unable to keep conflicts among themselves within reasonable bounds.

Thus, the first military coup d'etat of January 1966 occurred in an environment of widespread popular unrest and discontent which had roots in deep-seated tensions facilitated by the country's extreme ethnic heterogeneity, imbalance between economic and political power which tended to correspond to the major tribal and ethnic divisions, manifest bribery, corruption and ineffectiveness on the part of the elected political leaders, and most importantly, economic decay which was especially reflected in massive urban unemployment and soaring inflation.[24] The dominant political fact-of-life then, says Professor Nicolas, was stranglehold exercised by the conservative elements over federal decision-making institutions as a result of the parliamentary strength enjoyed by the populous but economically and educationally backward Northern Nigeria. This, according to him, left the more progressive forces in the South without any effective political voice, even though it was they who provided the bulk of Nigeria's administrative, technical, and economic leadership.[25]

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[24] See Post, K.W.J. and Vickers, M., Structure and Conflict in Nigeria, 1960-1966 (London: Heinemann, 1973); and Kirk-Greene, A.H.M., Crisis and Conflict in Nigeria: A Documentary Source Book (Volume 1) (London: OUP, 1971). See also Chapters 3 and 4 (ante).

[25] John N. Nicolas, The Social and Career Correlates of Military Intervention in Nigeria: A Background Study of the January 15, 1966 Coup Group, a seminar paper on Armed Forces

History repeated itself during the Second Republic (1979-83). There were allegations and counter-allegations of election rigging and thuggery by all the political parties. In particular, the results of the 1983 general elections showed that the incumbent President, Alhaji Shehu Shagari and his party (the Nation Party of Nigeria) had not only been returned to power but with increased majority. It was however quite obvious that some of the results were rigged and could never have been so if the elections were fair and free.[26] What followed was a spate of political violence in the form of arson and murder and a flagrant violation of the 1979 Constitution by the politicians, culminating in the emergence of military coup and military government by the end of 1983.

In sum, when a society is out of joint socially and politically, there is bound to be disequilibrium and what may follow is a cataclysm either in the form of a people's revolution or, where there is a political army, a military revolution. A government that is out of touch with the aspirations of the people for a just and egalitarian society,

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and Society, Chicago, October 9-11, 1969. Professor Nicolas teaches at The American University, Washington, D.C. See also, M.J. Dent, "The Military and Politics: A Study of the Relation Between the Army and the Political Process in Nigeria", in Kirk-Wood (ed.), African Affairs (London: OUP, 1969).

[26] Judged by the degree of ethnicism that usually characterises Nigerian politics, it was inconceivable that the National Party of Nigeria (a predominantly Northern-based party) was declared by the Federal Electoral Commission (FEDECO) to have won the 1983 gubernatorial election in Anambra State and in Ondo and Oyo States, the home bases of Dr. Nnamdi Azikiwe and Chief Obafemi Awolowo who led rival parties - the Nigerian Peoples Party and the Unity Party of Nigeria, respectively. The author witnessed so many electoral malpractices.

and out of tune with their instinct of freedom and tranquillity invites its own overthrow and leaves no one to mourn save those who mourn the loss of democracy. It was therefore not surprising that on January 15, 1966 and on December 31, 1983 the Nigerian military staged coups d'etat and seized political power with a view to saving the country, which seemed poised on the brink of complete disintegration.

7:2:2 Corruption

Widespread corruption arising from bad leadership and the insatiable acquisitive tendencies of public servants and politicians constituted a real motivation for military takeovers in Nigeria. Corruption has eaten deep into the fabric of the society and politicians in particular often exhibit propensities for unjust enrichment. It usually takes the form of obtaining gratification for official duties, siphoning of government money to overseas accounts, diversion of public money to personal use or into party coffers through illicit means such as inflation of contracts or invoices or demand for 10-25% "kick-back". In fact, it is the anticipation of these illicit gains that underscored the bitter political rivalries witnessed during the First and Second Republics in the period 1963-66 and 1979-83 respectively. Naked display of affluence and conspicuous consumption through corruptly amassed wealth in the midst of fellow citizens suffering from abject poverty could provoke incitement for military take-over of government.

That corruption provided a justifiable ground for military rule is reinforced by the statement of Major Chukwuma

Nzeogwu, the leader of the January 1966 coup. He said among other things that "our enemies are the political profiteers, the swindlers, the men in high and low places that receive bribes and demand 10 per cent; those that have corrupted our society and put the Nigerian political calendar back by their words and deeds."[27] Also General Yakubu Gowon, the second military Head of State, who ruled Nigeria for nine years (1966-75), listed "eradication of corruption" as one of his 9-point programme to be implemented before returning the government to civil rule.[28] In the same vein, the civilian administration of Alhaji Shehu Shagari (October 1979-December 1983) was brought to an abrupt end due to blatant excesses of the politicians who were sunk in political and material corruption in the pursuit of power and money. In the words of Brigadier Sani Abacha, the coup announcer, "the corrupting quality of power and the resultant manic desire for political control at all events, at all levels of political spectrum, which taints national partisan politics with the dread spectre of national self-destruction"[29] was one of the reasons for military intervention. Nearly all the politicians, including state governors, ministers and advisers were found guilty of corrupt practices and sentenced to various terms of

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[27] Quoted in Panter-Brick, S. (ed.) , Nigerian Politics and Military Rule (London: Athlone Press, 1970), p.185; and Obasanjo, General Olusegun, Nzeogwu: An Intimate Portrait (Ibadan: Spectrum Books Ltd., 1987), p.97.

[28] See General Yakubu Gowon The Struggle for One Nigeria (supra).

[29] Text of a Nation-wide Broadcast, 31 December 1983 (Lagos: FMI, 1984).

imprisonment and/or fines by Military Tribunals estabished under Recovery of Public Property (Special Military Tribunals Decree No.3 of 1984.[30] The Report of the Coker Commission of Inquiry of 1962 into the activities of the Action Group government of Western Nigeria in relation to misappropriation of funds of six statutory corporations also provides further evidence of waste of public resources involved in political corruption and its effect upon economic development in Nigeria.[31] Even as far back as 1956, the Foster-Sutton Commission of Inquiry into the allegations of improper conduct by the Premier of the then Eastern Region and certain persons holding ministerial and other public offices in the Eastern Nigeria in connection with the affairs of the African Continental Bank (ACB), revealed that the conduct of some top functionaries including the Premier "fell short of the expectations of honest people".[32]

7:2:3 Economic Mismanagement

Another reason for military take-overs and the support they received, at least initially, is economic - represented

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[30] See the Views and Decisions of the Federal Military Government on the Report and Recommendations of Justice Uwaifo Special Panel (Lagos: Federal Government Printer, 1986), pp.9-107.

[31] See the Report of Coker Commission of Inquiry into the Affairs of Certain Statutory Corporations in Western Nigeria (Lagos: Government Printer, 1962).

[32] Nigeria (Tribunals of Inquiry) Order-in-Council 1956, p.47. The Foster-Sutton Commission of Inquiry was appointed by Mr. Alan Lennox-Boyd, the Secretary of State for Colonies on August 4, 1956. Note that like in Nigeria, many officers who participated in the 1966 Ghanaian coup against Nkrumah, as well as those who spearheaded Somalia's 1969 coup did so because they felt the incumbent civilian regimes had gone beyond redemption in terms of corruption.

in the hardship the citizens had to bear. For example, in 1983, the prices of foodstuffs and other essential commodities were rising from day to day, and it did not appear that the government had any solution to stop the spiral of the escalating costs. According to Brigadier Abacha, the grave economic predicament and the uncertainty which the inept and corrupt leadership of the Shagari regime imposed on the nation was revealed by "crass corrpution of Cabinet Ministers and the entire political hierarchy who revelled in squandermania in complete disregard of stark economic realities."[33]

7:2:4 High Unemployment and Lack of Social Amenities

When soldiers find their countries beset by seemingly insoluble problems due to maladministration by politicians, they cannot be expected to endure the ensuing chaos passively and remain idle spectators. Rather "they offer themselves as the men of iron to perform the drastic surgery needed to amputate the gangrenous elements in the system."[34] The alarming deterioration of the educational system and the increase in graduate and non-graduate unemployment in Nigeria during the Second Republic motivated the military to sieze power. The situation was further aggravated by lack of basic social amenities especially in the health sector where "hospitals were reduced to mere consulting clinics without drugs, water and equipment".[35] Although the politicians did

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[33] Brigadier Sani Abacha (supra).

[34] Edward Feit, The Armed Bureaucrats (New York: Houghton Mifflin, 1973), p.1.

[35] Bridagier Abacha, op.cit.

not 'invent' these problems their inept and decadent administration made life an unbearable lot under an economy that was hopelessly mismanaged up to the point of total collapse.

7:2:5 Politicisation of the Military

The use of the military by civilian government to pacify internal strife or suppress political opponents is a tacit admission of the government's incompetence to handle domestic conflicts and an indirect invitation for military intervention. The Nigerian military became politicised in the course of being used as the coercive apparatus of the state to maintain law and order. It was used by the Federal and Northern Regional Governments during the 1964-65 general elections in quelling political riots in the Western Region and in the Tiv-land respectively. Such a show of force by government authority increased the antagonism of the military to the political class and soldiers became more and more conscious of the political divisions within the country. With the increasing reliance of the politicians on the military, the latter realised its indispensability to the government in power.[36]

Furthermore, in Nigeria, more than 50 per cent of

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[36] The fact that the President and Prime Minister individually and separately bargained for the loyalty of the armed forces after the December 31, 1964 elections only succeeded in making the soldiers aware that they had a political role to play and so paved the way for the military coup which followed in 1966. For details, see Martin Dent, "The Military and Politics: A Study of the Relationship Between the Army and the Political Process of Nigeria", African Affairs, 3 (1969), pp.113 et seq and footnote 22 above.

soldiers live with the civilian population in the same towns and villages instead of staying in separate military quarters. The result is that social interactions between members of the armed forces and politicians, including political discussions among the officers in their mess, afford the military the opportunity of having an insight into political development with the possibility of future intervention. In addition, some senior military officers have political mentors who in the first place encouraged them to join the army, sponsored their training in and outside Nigeria and probably influenced their promotions through the application of a quota system.[37] The deliberate policy introduced since 1958 to recruit soldiers and officers on a quota basis from various regions (now states), exacerbated by selective promotions, has contributed to the politically divisive tendencies within the military. In order to win the support of some officers, politicians from the various states of the country try to indoctrinate their kith and kin in the army in a bid to ascend to political power. The situation is further aggravated by the fact that civilian governments often seek to ingratiate themselves with the officers through judicious bribes and gifts in the form of increase in pay, presents at festivals and selections for courses overseas. Therefore, by canvassing the support of the military the politicians indirectly

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[37] E.g. in the 1950s, some Nigerian political leaders, namely, Sir Alhaji Ahmadu Bello (North), Dr. Nnamdi Azikiwe (East), and Chief Obafemi Awolowo (West) persuaded the young men of their respective Regions to enlist into the army. For a fuller account, see "Civilian Control of the Military 1958-66", in Luckham, Robin, The Nigerian Military (Cambridge: CUP, 1971), pp.230-51.

undermine their own positions. The fact that soldiers are made susceptible to political pressures and to material reward for their loyalty makes them feel tempted to negotiate their role as the watchdog of the nation. But where the survival of a civilian government depends on armed power, a coup in which the army switches sides is inevitable.[38]

The use of the military by incumbent government to suppress or victimize political opponents is a common phenomenon in Africa. In 1966, when Dr. Milton Obote (the Ugandan Prime Minister) used his country's army to crush his arch-enemy, Sir Edward Mutesa (the Ugandan President and the Kabaka of Buganda) to declare himself the Executive President, Obote never knew he was digging his own grave. By 1971 his government was already toppled by General Idi Amin.[39]

7:2:6 The Need to Remove Unpopular Government

In most countries of the Third World and Africa in particular, unpopular governments and their functionaries often cling tenaciously to power in the face of public resentment and condemnation or amidst official scandals and embarrassments. The rulers, especially politicians, insist on self-perpetuating oligarchy even when they have outlived their

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[38] For further discussions, see, among others, Ohonbamu, Obarogie, The Psychology of Nigerian Revolution (Ilfracombe, Deveon: Stockwell Ltd., 1969); Professor S.C. Ukpabi of the Nigerian Defence Academy, Kaduna, "Military Factor in Nigerian Politics", New Nigerian, 21 June 1986; and Brigadier Oluwole Rotimi, "What Leads to Military Take-Over?", Daily Sketch (Lgos) 3 May 1972.

[39] See Bayo Adekson, Towards Explaining Civil-Military Instability in Contemporary Sub-Saharan Africa (supra); Perlmutter, Amos and Bennett, Valerle Plave (eds), The Political Influence of the Military (New Haven: Yale University Press, 1980).

usefulness. They are always bent on ruling ad infinitum using electoral malpractices. Acquisition of power is considered as a matter of life and death, and political opponents are ruthlessly crushed either through thuggery, victimisation or assassination. Constructive criticisms are regarded as sabotage or subversive. Recent political disturbances in Panama, Burma, Korea, Haiti, Jamaica and El Salvador are cases in point. Typical examples of such leaders in Africa include Patrice Lumumba of Congo, Kwame Nkrumah of Ghana, Modibo Keita of Mali, and Emperor Haile Sellasie of Ethiopia whose regimes were overthrown in 1965, 1966, 1968 and 1974 respectively.

In spite of all the meritorious services Nkrumah rendered to Ghana and indeed the whole of Africa, by 1960 he had become a dictator, obsessed with power and used all means to consolidate it against all forces in Ghana - a situation which eventually led to his overthrow. In Zaire, General Mobutu Sese Seko has been ruling the country since 1964 by regularly purging the army and destroying his civilian and military 'enemies' as well as occasionally executing his opponents. He has survived all the coup attempts to oust him and has converted himself to a civilian President through formation of the country's only political party, the so-called Popular Revolutionary Movement. In Burundi, Michael Micombero's 10 years of horror were punctuated in 1976 by a coup led by Colonel Jean-Bagaza. Micombero, who had established himself to rule ad infinitum, purged his country's army and encouraged a blood-bath of epidemic proportions in which more than 200,000 Hutus were massacred. In November

1968, a group of young Malian officers led by Lieutenant Mousa Taore overthrew the undemocratic government of Modibo Keita, who had ruled Mali since independence 8 years before. The personalist dictationship of Colonel Jean Bokassa of Central African Republic held sway over a decade. He siezed power in 1966 and variously arrogated to himself the titles of "President", "President for Life", "Field Marshall", and lastly "Emperor". Bokassa, who held 10 out of his country's 14 ministries, employed arbitrary arrest, torture, and killing of his opponents, both military and civilian, to perpetuate himself in power.[40]

Similarly, General Idi Amin's reign of terror unleashed various groups and caused a country-wide bloodbath in Uganda. Although thousands of people were being killed whilst others were fleeing the country and the Ugandan economy was devastated, Amin continued to use torture and massacres as a means of consolidating his position. He escaped a variety of assassination attempts and plots until he was finally overthrown in 1979 by the combined forces of Ugandan and Tanzanian armies.[41]

In Nigeria, the government of Chief Samuel Ladoke Akintola of Western Region and that of Sir Alhaji Abubakar Tafawa Balewa at the federal centre claimed landslide victory

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[40] For a comprehensive account of these military take-overs, see Ruth First, Power in Africa (Baltimore: Penguin Books, 1972); Anton Bebler, Military Rule in Africa (New York: Praeger, 1973); and Richard Synge, "The Spread of Military Rule in Africa", Twentieth century, 1, 35 (1988).

[41] See the well-documented atrocities committed by General Idi Amin in Martin, David, General Amin (London: Faber & Faber, 1974).

in the 1964-65 general elections despite the fact that the said elections were massively rigged. In the former case, the government was so unpopular that people took laws into their hands - arson, murder reigned to the extent that Akintola, the Premier of the Region, could not appoint his ministers or guarantee his own personal safety. The Legislature of the Region could not function also. In the latter case, the situation was so tense that the President of the Federation, Rt. Hon. Dr. Nnamdi Azikiwe, refused to appoint Balewa (whose party was declared the winner) as the Prime Minister. In both instances, what existed was a state of political turmoil so much so that the army was called to intercede. The governments had lost legitimacy to rule, but instead of stepping down they stuck to office, using the apparatus of state powers: the military, the police, and the judiciary (especially customary courts), to suppress revolts. By virtue of its size and population the Northern Region and its party (the Northern People's Congress) monopolised the Government of the Federation until 1966 when the Balewa regime was removed.[42]

Also in 1979 and 1983 history repeated itself when Alhaji Shehu Shagari was declared President of Nigeria at the two consecutive elections through what was considered as electoral manipulation. Judged by the universally accepted norms of democracy, the elections could not be regarded as free and

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[42] For an elaborate discussion, see Panter-Brick, Keith S. (ed.), Nigerian Politics and Military Rule (supra), and Kirk-Greene, Anthony H.M., Crisis and Conflict in Nigeria (supra).

fair.[43]

Therefore, where ballot boxes have become totally forgotten or meaningless as a means of electing governments because the ruling elite constitute themselves into a self-perpetuating corrupt oligarchy determined to cling to power at all costs, a government which cannot be changed by constitutional means invites the use of force. This is exactly what precipitated the January 15, 1966 and the December 31, 1983 military coup in Nigeria.

7:2:7 Fear of Career Prospects

Apprehension by soldiers that they are likely to face a disciplinary action before a civilian authority which might result in their demotion or dismissal may motivate a desire for a coup. Thus, the 1971 military coup in Uganda sprang partly from the fear of some officers led by General Idi Amin that their malfeasance was likely to be punished. General Amin, in particular, feared that he might be removed from his post as the country's Army Commander since his authority was progressively diminishing under President Milton Obote. According to Decalo, "it was a classic example of a personalized takeover caused by a General's own fears and ambitions within the context of a widespread civil malaise and a fissiparous fratricidal army rife with corporate

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[43] For a comprehensive analysis of the electoral malpractices, see Adamolekun, Ladipo, The Fall of the Second Republic (Ibadan: Spectrum, 1985); and Falola, T. and Ihonvbere, J., The Rise and Fall of Nigeria's Second Republic, 1979-1984 (London: Zed Press, 1985). The results of the 1983 gubernatorial election in Anambra and Ondo States announced by the Federal Electoral Commission were later declared null and void by the Supreme Court, see Nwobodo v. Onoh [1984] 1 S.C.1; and Omoboriowo v. Ajasin [1984] 1 S.C. 264.

grievances".[44] Similarly, in Algeria Houari Boumedienne's coup was consequent upon the threat of his imminent dismissal by the Head of State, Ben Bella, who had been whittling down his sources of power.[45]

Fear of career prospects for southern officers arising from Northern domination was partly responsible for the first military revolution in Nigeria. The increased intake of Northern cadets as a result of the quota system was regarded by their southern counterparts as a threat to their own career in the military.[46] In addition, rumours that the Minister of Defence, Alhaji Inuwa Wada, was planning to replace some senior military officers from the South with the relatively junior officers from his own Region (North) and/or promote same faster than their contemporaries instilled further fears among the southern officers who took active part in hatching the coup plot of January 1966.[47] This is confirmed by a Northern officer, Mainasara, who maintains that the principal motive of the coup was not to redeem the nation, but to

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[44] Samuel Decalo, "Military Coups and Military Regimes in Africa", op.cit., p.112.

[45] Ibid., p.114. In 1963, the first military coup in West Africa took place in Togo where President Sylvanus Olympio was overthrown for cutting down the military budget as part of the country's austerity measures. The Togolese military accused him of showing profound contempt for the armed forces.

[46] See Gbulie, Ben, Nigeria's Five Majors: First Inside Account of the Coup D'Etat of 15th January 1966 (Onitsha: Africana Ltd., 1980); and Madiebo, Alexander, The Nigerian Revolution and the Biafran War (Enugu: Fourth Dimension Ltd., 1980).

[47] See Adegboyega, Adewale, Why We Struck: The Story of the First Nigerian Military Coup (Ibadan: Evans, 1981), pp.27-48.

dislodge what the south regarded as the feudal Northern oligarchy from participation in the governance of the country.[48]

It should however be borne in mind that the introduction of the quota system in the enlistment, appointment and promotion of military officers is a political expediency, aimed at redressing ethnic/regional imbalance within the military organisation.[49]

7:2:8 Ethnicism

Lack of internal cohesion destroys the esprit de corps of the military. Ethnicism has been the major motivation for the vicious circle of military coups and military rule in the Sub-Saharan African countries, especially Nigeria, Benin Republic, Ghana, Malagasy, Sierra Leone and Togo.[50]

In the context of the Nigerian experience, the second military coup of July 29, 1966, which was spearheaded by the Hausa-Fulani soldiers from the Northern Region, was a calculated revenge or retaliation against the Ibo officers of the Eastern Region who led the January 15, 1966 revolution. There were apparent divisions within the military and personal friendships between senior officers and members of the

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[48] Mainasara, A.M., The Five Majors: Why They Struck (Zaria: Hudahuda, 1982), pp.108-110.

[49] For example, at independence in 1960, out of 81 Nigerian officers, 60 were Ibos. See the detailed statistics prepared by Robin Luckham, The Nigerian Military (Cambridge: CUP, 1971), pp.343-46.

[50] Gutteridge, William, Military Regimes in Africa (London: Methuen, 1975). The Malagasy Head of State, Colonel Richard Ratsimandrava who overthrew General Gabriel Ramanatsoa in 1972 was himself assassinated in 1975 as a victim of ethnic revenge.

political class from their ethnic groups. The idea of a homogeneous, united, professional hierarchical military institution was replaced with ethnic fraternity to the extent that junior officers refused to take orders from non-ethnic senior officers. The military became nepotistic, there was a spectre of ethnicism everywhere with resultant decline in discipline. Things fell apart, mutinies and civil war ensued in 1967.[51]

7:2:9 Political Ambition

Political ambition may also induce in officers the desire to seize power either from civilian or military incumbent governments. Some army officers wanting to make personal power grabs under the guise of redeeming their countries have organised coups in anticipation of political power and other perquisites that might accrue therefrom. The seizure of power by Colonel Jean-Bedel of Central African Republic in 1965, Master-Sergeant Doe of Liberia in 1980; including the abortive coups of Lieutenant Arthur of Ghana in 1967 as well as those of Lt.-Colonel Dimka and Major-General Mamman Vatsa of Nigeria in 1976 and 1986 respectively, are striking examples. The political ambition of the military like any other class in the country emanates from the heavy reliance on state power for influence and affluence.[52] The fact that military rule in

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[51] The fact that all the January 1966 conspirators but one came from one ethnic group, the Ibo, while the majority of the July 1966 plotters were Hausa-Fulani, amply demonstrates the magnitude of ethnicism as a potent instrument of conflict within the Nigerian military.

[52] In reality, Nigerian soldiers nursed political ambition with a view to improving their own lot by having more say in government as well as having more share of the 'national

Nigeria and other African countries is characterised as much by the overthrow of a pre-existing government as by the establishment of a more or less permanent military government buttresses Angell's argument that "the military no longer intervenes to correct the political system; it intervenes to govern".[53]

Nigeria no longer has a ceremonial army who are content to be "relegated" to the barracks. The new military leadership conceives an interventionist role for itself in a bid to acquire political power. Every average Nigerian youth today thinks that the shortest route to leadership is enlistment into the army as an officer cadet. What the Nigerian military ought to do in the event of political crisis is not to take over the government but to install, as in the Philippines in February 1986, the rightful winner in a recent election in place of an incumbent government clinging to power tenaciously through election rigging; or if it chooses to take over power at all, it should set up a provisional

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cake'. In the Nigerian context, "national cake" implies national benefits and these include political authority, power, esteem, prestige, wealth, a variety of economic goods and services, location of federal institutions, and employments such as ambassadorial appointments, Chairmanship of statutory corporations and boards, and appointment of state governors in the case of a military regime. The young Ghanaian officer Lt. Arthur who attempted a counter-coup against Lt.-General Kotoka declared afterwards that he had wished to become the first Lieutenant ever to sieze power from his superiors; see Austin, D. and Luckham, R., Politicians and Soldiers in Ghana, 1966-1972 (London: Frank Cass, 1975), p.3.

[53] Alan Angell, "The Soldier as Politician: Military Authoritarianism in Latin America", in Kavanagh, Dennis and Peel, Gillian (eds.), Comparative Government and Politics (London: Heinemann, 1984), p.116.

caretaker government for such immediate tasks as maintenance of law and order, not to "govern" but to "administer"[54] and to provide the framework within which an elected government can be enabled to set off on a fresh course within a reasonable time.

7:2:10 Personality Conflict

Again, personality conflict within the military hierarchy, even without any exogeneous political influence, could jeopardise the military's corporateness and thus stimulate a coup d'etat. Personality clashes between Ghana's General C.M. Barwah and Colonel E.K. Kotoka led the latter to stage a coup in order to overthrow the former.[55] The assassination of Burkina Faso's Captain Thomas Sankara in 1988 by his Deputy and comrade-in-arms, Captain Blaise Compaore[56] is a classic example of personality contradictions in Africa's armed forces. Such conflicts may arise on ground of differences in ideology, principles and policies, deprivation of certain privileges or unfulfilled expectations.[57]

In the case of Nigeria, the early years of independence witnessed a gradual expansion of the armed forces as it was

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[54] For the distinction between the two, see B.O. Nwabueze, "Constitutional Problems of Military Coups in Nigeria", Legal Practitioners' Review, 2, 1 (1987), pp.31-43.

[55] See Jon Kraus, "Arms and Politics in Ghana", in Welch, Claude E. (ed.), Soldier and State in Africa (Evanston: Northwestern University Press, 1970).

[56] Both of whom planned and executed the 1983 coup that brought them to power.

[57] West Africa (London), 6 June 1988.

considered a mark of national pride to have a sound indigenous standing army that could serve as watchdog of the country's territorial borders. This was followed by rapid indigenisation of the officer corps that would take over the military leadership from the British officers. The resultant effect was that the transition gave rise to unhealthy competition and rivalry among senior officers for the few available senior positions left by the expatriates. These rivalries later expressed themselves in the form of personality clashes, rebellion and coups.[58] The existence of internal dissension resulting from personality clashes within the Nigerian Supreme Military Council in 1985 led to the overthrow of the government of Major-General Muhammadu Buhari by General Ibrahim Babaginda in that year. Clashes of personality and differences of opinion on the policy of the new regime which overthrew the civilian government of Alhaji Shehu Shagari on December 31, 1983 between Buhari and his deputy, Major-General Tunde Idiagbon, on the one hand, and some members of the Supreme Military Council (SMC) notably Generals Ibrahim Babaginda and Sani Abacha on the other, culminated in a coup on August 27, 1985. There developed a tract of internal warfare and since the rift within the SMC was no longer bridgeable, a change of government was imminent for "no nation can achieve meaningful strides in its development where there is absence of cohesion in the hierachy

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[58] E.g. Major-General Aguiyi-Ironsi, including Brigadiers Samuel Ademolekun and M. Maimari engaged themselves in cut-throat competition for the post of General Officer Commanding (GOC), the Nigerian Army. See Luckham, Robin, The Nigerian Military (supra).

of government."[59]

7:2:11 Contagion

Another factor responsible for the endemic nature of military coups in Nigeria and indeed in the entire tropical Africa is the course-mate syndrome or what has been referred to as "the contagion of coup" - a process whereby the occurrence of a coup in one country stimulates the military in another country to stage their own coup. It is the multiplier effect of one coup either in the same country or in another.[60]

Since the beginning of the 1960s there has been a growing tendency among military officers in one African country to emulate their course-mates or contemporaries who have executed successful coups in other countries. The events in East and West Africa vividly illustrate this bandwagon effect.

The East African military coups of 1964 spread like wildfire covering Zanzibar (January 12, 1964); Tanganyika (January 20, 1964); Uganda (January 23, 1964); and Kenya (January 26, 1964). It is emphasised that all these armies developed from a common origin - the defunct Royal East African Rifles. West Africa had similar experience. The coups in Dahomey (now Benin Republic) on October 28, 1963 and December 22, 1965 respectively were followed by those of Upper Volta (now Burkina Faso) on January 4, 1966; Nigeria (January 15, 1966); Ghana (February 24, 1966), Togo (January 13, 1967);

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[59] Per Brigadier Joshua Nimiel Dogonyaro, (the coup announcer), Newswatch, 9 September 1985, p.4.

[60] See Potholm, P.C., The Theory and Practice of African Politics (New Jersey: Prentice-Hall, 1979), p.201.

and Sierra Leone (March 24, 1967). It should be remembered that Colonels E. Kotoka and A.A. Afrifa who led the Ghana coup were both contemporaries of Major Chukwuma Nzeogwu (the leader of the Nigerian coup d'etat) at Sandhurst Military Academy in Britain.[61] The coups in East and West Africa, and Nigeria in particular, are rather imitative. The sequence of their occurrence confirms Potholm's theory that,

> "in situations of social violence geographical contiguity, similarity in military education, and bonds of course-mates could have a most persistent influence on the behaviour of military officers, even under the most adverse circumstances, resulting in social and political contagion."[62]

In sum, it is difficult, if not impossible to state exhaustively the causes of military intervention and military rule in Nigeria.[63] The reasons so far advanced run the whole gamut from factors endogenous and exogenous to military organisation, down to personal motives. The include the need to: repair the ravages of political warfare between opposing political parties; rehabilitate the economy from the damage of mismanagement by the civilian rulers; punish the unbridled corruption of politicians and initiate measures to forestall its future occurrence. The propensity of the military to acquire political authority for self-aggrandisement, coupled with lack of cohesion within its hierarchy also gave rise to its presence on the political arena. But in spite of the fact

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[61] See Jemibewon, David M., A Combatant in Government, op.cit., p.6.

[62] Potholm, P.C. (supra), p.202.

[63] Note that most of the coup planners and executors are already dead and undoubtedly buried with them are a number of factors surrounding the coup.

that the reasons are as numerous as the coups themselves, it is clear from the foregoing discussions that military intervention in governance is an index of a low level of political institutionalisation, a function of inadequate political culture and a gap between governmental policies and the military's perception of the national interest.[64]

7:3 The Legitimacy of the Nigerian Military Government

The word "legitimacy" does not lend itself to any one single meaning. This chapter focuses on the political and constitutional legitimacy of military rule in Nigeria with emphasis on the latter.

7:3:1. Political Legitimacy

Politically, a government is said to be legitimate if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials or leaders of government possess the quality of rightness, propriety or moral goodness to govern them. There must exist a consciousness on the part of the government that it has the right, competence and ability to rule and make binding laws and that these are accepted, at least, by a majority of the governed. It is this consciousness of the government that it has moral propriety to rule and the belief in or acceptance of such claim by those who are being ruled that is the foundation of legitimacy.[65]

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[64] See Decalo, Samuel, Coups and Army Rule in Africa, op.cit., pp.109 et seq for contemporary examples.

[65] For an interesting treatise on "legitimacy", see Dahl, Robert, Modern Political Analysis (New Jersey: Prentice-Hall, 1970), p.41.

In this sense, military rule in Nigeria is, prima facie, not a legitimate government. A military government, no matter how benevolent, is a belligerent exercise involving seizure of power and imposition of military authority. It presupposes actual and effective control of a nation undemocratically, with the ability to impose on the citizens the will of the military commander. Lacking political legitimacy and fearful of genuine acceptance by the people, the Nigerian military on coming to power seeks to hold the society together by creating a semblance of civil-military coalition government, with unfulfilled promises of returning to barracks as soon as the country is brought to a state of normalcy.[66] Such promises are a deliberate attempt to pacify the people in realisation that the government is haunted by a "ghost" of illegitimacy. Due to its sensitivity, any form of criticism is regarded as subversive or as disruptive of the national objectives and interests which the government claims to pursue or protect. This contrasts markedly with the acts of a legitimate regime which thrives on popular participation, respect for public opinion and exchange of information, between the rulers and the ruled.

As Professor Nwabueze rightly points out, regardless of the professed mission of the military government in Nigeria and whatever its accomplishments, military take-over of government represents a break in governmental legitimacy.

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[66] E.g. General Yakubu Gowon who promised that his government shall not stay in power a day longer than necessary ended spending nine years (1966-75) and was even reluctant to leave office until his regime was overthrown.

Military rule, he says, is an armed usurpation, not only of powers of government but also of the most fundamental attribute of the country's sovereignty - the right of the people, by means of a constitution, to institute a government for themselves and to define the extent of the powers exercisable by government. Nwabueze further contends that although military intervention is initially acclaimed, yet the significance of such acclamation is not to legitimize the seizure of power ex post facto, to confer on the military a title or mandate to govern; what the people are acclaiming is the removal of the pre-existing bad government[67] Furthermore, even if the so-called popular acclamation has anything to do with seizure of power as distinct from the removal of bad government, it is often induced by fear for, as indicated in Chapter Five, military governance is characterised by dogmatic and unreflective obedience, dictatorship and coercion. The most tragic consequence of a military take-over of state in the life of any nation is the break in governmental legitimacy. The quest for political legitimacy or popular acceptance has been one of the major problems confronting the Nigerian military.[68]

7:3:2 Constitutional Legitimacy

In constitutional terms, legitimacy means the ability of an individual or a group of persons or an institution to rule

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[67] B.o. Nwabueze, "Constitutional Problems of Military Coups in Nigeria", op.cit., pp.31-32.

[68] See Leo L. Dare, "Nigerian Military Governments and the Quest for Legitimacy", Nigerian Journal of Economic and Social Studies, 17, 2 (1975), pp.95-118.

or govern an independent sovereign state or take over power in accordance with the provisions of the constitution. In this sense, legitimacy, constitutionality and legality are synonymous. A constitutionally legitimate government is characterised by democratic institutions and governs according to the wishes of the people through a process of dialogue.[69] Thus, from a purely constitutional point of view, it would appear that military government in Nigeria is also illegitimate.

But whether or not military rule is legitimate depends on the interpretations given to the events of January 15, 1966 which brought the military into power for the first time in Nigeria's political and constitutional history. If the seizure of power could be justified by reference to the pre-existing 1963 Republican Constitution, the events would be deemed to be a change of government, otherwise, it was unquestionably a revolution. As will be shown in subsequent discussions, the two interpretations would attract different consequences.

At the time the coup took place the 1963 Constitution was the supreme law of the land - "the Grundnorm" or "the ultimate rule of recognition"[70] to which all other laws in the country owed their validity. It had the force of law throughout Nigeria and in the event of conflict with any other law, the

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[69] See Wolf-Phillips, Leslie, Constitutional Legitimacy: A Study of the Doctrine of Necessity (London: Third World Foundation, 1980), Monograph 6; and Dahl, Robert (supra), p.41.

[70] Hart, L.A., The Concept of Law (1961), p.97.

Constitution was to prevail and the other law, void to the extent of the inconsistency.[71] By implication, this provision is tantamount to prohibition of coup d'etat. The 1979 Constitution which succeeded the 1963 Constitution is even more explicit. It stipulates 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 the Constitution.[72] It is obvious from the provisions of the 1963 and 1979 Constitution that a coup d'etat or military revolution is not a legitimate method of taking over the control of the government of Nigeria. In fact, the concept of constitutional legitimacy seems to be the antithesis of military government. We shall now examine the events of January 1966 from its historical perspective.

As a result of the coup d'etat of January 15, 1966, the Prime Minister of the Federation, Alhaji Abubakar Tafawa Balewa; the Premier of Northern Region, Sir Ahmadu Bello; the Premier of Western Region, Chief Samuel L. Akintola; the Federal Minister of Finance, Chief Festus Okotiebo and some senior military officers were killed by the coup plotters. The surviving Federal Cabinet Ministers met on January 16 to appoint an Acting Prime Minister in accordance with s.92 of the 1963 Constitution. The meeting failed as they could not agree on a candidate. Meanwhile, the country was drifting

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[71] The Constitution of the Federation of Nigeria 1963, s.1(1).

[72] The Nigerian Constitution 1979, s.1(2).

towards a state of anarchy, with massive indiscriminate killings, arson, looting and other acts of vandalism. Consequently, the Nigerian Armed Forces, headed by Major-General J.T.J. Aguiyi-Ironsi, decided to take over the control of the Federal and Regional Governments with a view to arresting the deteriorating situation to stop further bloodshed. Ironsi summoned the remaining Ministers to a meeting and told them of the military's intention to seize power. The Ministers accepted the idea and agreed to hand over the administration to the Armed Forces as an interim measure. By the evening of 16th January 1966, the President of the Senate who was the Acting President of Nigeria (as the substantive holder of the office, Dr. Nnamdi Azikiwe was away to Britain for medical treatment) in a nation-wide broadcast informed the Nigerian public that he had been advised by the Council of Ministers to voluntarily hand over the administration of the country to the Armed Forces of the Republic with immediate effect. He then called on General Aguiyi-Ironsi, the General Officer Commanding the Nigerian Army, to make a statement to the nation on the policy of the new administration.[73]

In his own response, Ironsi told the nation that the Government of Nigeria having ceased to function, the military had been invited by the Council of Ministers to form an interim government for the purpose of maintaining law and order, and that he had been formally invested with authority

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[73] See Government Notice No.147 dated January 26, 1966. (Lagos: Federal Ministry of Information, 1966).

as the Head of the Federal Military Government, and Supreme Commander of the Nigerian Armed Forces. He then went on to announce that certain provisions of the Federal and Regional Constitutions of 1963 relating to the offices of the President, the Prime Minister, and Federal Ministers, Regional Governors, Premiers and Ministers were suspended with immediate effect. The Federal Parliament and all the Regional Legislatures were similarly affected. But the Judiciary, the Public Services, the Armed Forces and the Police were left intact.[74]

On January 17, 1966, an enactment known as Constitution (Suspension and Modification) Decree No.1, 1966 incorporating some of the earlier speeches of Ironsi was promulgated by the new government. Section 1 of this Decree, which fundamentally modified s.1(1) of the 1963 Constitution stated, among other things, that the Constitution shall not prevail over a decree and that nothing in the Constitution shall render any provision of a degree void to any extent whatsoever. S.3 of the Decree also empowered the Federal Military Government to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever. Although some portions of the Constitution were retained, the military government did not hide its intentions to invoke its newly acquired unlimited sovereign power to alter or amend it either expressly or impliedly any time, anywhere within the

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[74] See Government Notice No.148 of January 26, 1966. (Lagos: Federal Ministry of Information, 1966), p.103 for the full text of Ironsi's speech. See also the Parliament (Dissolution) Degree No.12, 1967 which took retrospective effect from January 16, 1966.

Federation, warning that the validity of a decree or an edict shall not be challenged in any court of law.[75]

Be that as it may, it is necessary to examine the legal implications of Decree No.1, 1966 vis-a-vis the position of the 1963 Constitution with a view to determining the legitimacy or otherwise of the military government in Nigeria. The opportunity for doing so came in the celebrated case of Lakanmi and Another v. Attorney-General of Western State.[76] In brief, the facts of the case are as follows: In order to rid the Nigerian society of corruption which was one of the reasons that brought the military to power, the Federal Military Government promulgated the Investigation of Assets (Public Officers) Decree No.51, 1966 authorising the seizure of the assets of public officers reasonably suspected or adjudged to have unjustly enriched themselves.[77] In pursuance of this policy of eradicating corrupt practices, one of the states of the Federation, the Western State, enacted Edict No.5, 1967 similar to Decree No.51 of 1966 covering persons other than public officers. The Edict set up Tribunal of Inquiry whose order was not challengeable in any court of law. The Tribunal found the plaintiffs guilty of unjust

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[75] Constitution (Suspension and Modification) Decree No.1 of 1966, s.6, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1966), p.A1.

[76] [1971] 1 U.I.L.R. 201.

[77] Under s.31 of the 1963 Republican Constitution, no right or interest in any property shall be taken possession of or acquired compulsorily except in the manner and for the purpose prescribed by law. See also s.40 of the 1979 Constitution together with the decision in Obikoya and Sons Ltd. v. Governor of Lagos State [1987] 1 N.W.L.R. (Part 50) 385.

enrichment and made an order attaching their personal and real properties. The plaintiffs thereafter filed an application before the State High Court for an order of certiorari to quash the order made by the Tribunal but lost the case. From there they went to the Western State Court of Appeal but while the appeal was pending the Federal Military Government (FMG) promulgated another law called the Forfeiture of Assets (Public Officers and Other Persons) (Validation) Decree No.45, 1968[78] validating the order made by the Western State Inquiry Tribunal. Decree No.45 also precluded any court of law from inquiring into the validity of anything done under any of the investigation enactments throughout the country and completely prohibited any proceedings either at nisi prius or on appeal in any court whatsoever, with respect to matters contemplated by the Decree. Such proceedings, if any, should abate from the date of the commencement of the Decree. The Decree further excluded the application of the provisions of the 1963 Constitution relating to human rights.

The plaintiffs once again proceeded on appeal to the Supreme Court challenging the validity of Decree No.45, 1968 and the action of the FMG. The relevant and fundamental issue to which the Supreme Court addressed itself was the determination of the exact legal status of the military government and the legitimacy of its power to make judicial legislation confiscating the assets of a citizen. The Supreme Court adopted the following tests: If the events of January

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[78] Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1968), p.A165.

15, 1966 were a revolution which subsequently led to seizure of power, then the military government could not be said to be ruling the country under the 1963 Constitution and consequently not subject to any constitutional limitations. If, on the other hand, those events were a mere "transfer of power" rather than a "seizure of power", then the military government could be said to be a government under the Constitution and could derogate from it only on ground of the generally understood limitations of the doctrine of state necessity. The Court cited with approval the Pakistani case of The State v. Dosso[79] and conceded that the military intervention and the grant of power to the armed forces took place by virtue of the doctrine of necessity, having regard to the exigencies of the situation. It added that "no Constitution can anticipate all the different forms of phenomena which may beset a nation". This assertion was based on the premise that the events of January 15, 1966 satisfied both in Private and International law the essential conditions of the doctrine, viz: (i) there must exist an imperative necessity arising from an imminent and extreme danger affecting the safety of the state or society; (ii) action taken to meet the exigency must be inevitable in the sense of being the only remedy; (iii) the action must be proportionate to the necessity;[80] (iv) it must be of a temporary character limited to the duration of the exceptional circumstances; and

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[79] P.L.D. [1958] S.C. 533.

[80] That is, it must be reasonably warranted by the danger which it was intended to avert.

(v) there must be temporary incapacitation of the authority which normally has the competence to act.[81]

The facts of the Dosso case upon which the Nigerian Supreme Court partly relied, were that in 1956 President Iskander Mirza of Pakistan abrogated the country's constitution, annulled it and dismissed the central and the Provincial Cabinets and dissolved both the national Assembly and Provincial Assemblies. He then declared martial law throughout Pakistan and appointed General Ayub Khan, the Commander-in-Chief of the Armed Forces, as the Chief Martial Law Administrator. Thereafter, the President promulgated the Laws (Continuation in Force) Order, which among other things, empowered him and General Khan to make or validate laws in breach of the country's Constitution. The Supreme Court of Pakistan was called upon to determine the legal consequences of the overthrow of the pre-existing Constitution. Muhammad Munir C.J., applying the Kelsenian principle, held that there had occurred an abrupt political change (called a revolution) not within the contemplation of the Constitution and that it had destroyed the pre-existing national legal order. According to him, from a juristic point of view, the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. What is important is that a victorious revolution becomes a law creating fact because its

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[81] See B.O. Nwabueze, "Coups d'Etat and Constitutionalism", in his book Constitutionalism in the Emergent States (London: Hurst, 1973), pp.219-55; and Wolf-Phillips, Leslie, Constitutional Legitimacy: A Study of the Doctrine of Necessity (supra).

legality is judged not by reference to the annulled Constitution, but by reference to its own success.[82] In effect, the legality of a new regime is determined by the efficacy of the change that brought it into being.

Though the Supreme Court of Nigeria relied on Dosso to the extent that the "doctrine of necessity" applied, it nevertheless rejected the contention by the military government that the events of January 15, 1966 amounted to a revolution. Rather the Court took the view that the take-over was dictated only by "necessity", and declared Decree No.45 of 1968 invalid on 24 April 1970 on the ground that it was ultra vires, being in breach of the 1963 Constitution. It held that the military came to power by a mere offer of invitation to form an interim government and could derogate from the Constitution only if the derogation was justified under the "doctrine of necessity". Secondly, that since Decree No.45 sought to validate the order made by the Western State Inquiry Tribunal under Edict No.5 of 1967 (an invalid law), the action of the Federal Military Government was a legislative act which impinged upon the sphere of the judiciary - an unnecessary intrusion - and therefore void.

By this judgment the Nigerian Court refused to adopt fully the ratio decidendi in the Dosso case which has served as a precedent for other Commonwealth countries where there had been a complete collapse of constitutionalism. For example, in the Cyprus case of Attorney-General of the

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[82] PLD [1958] S.C. 533 at pp.538-39.

Republic v. Mustafa Ibrahim,[83] during the political upheaval of 1964, the Supreme Court, owing to the rigid nature of the Constitution, could not form a quorum to dispose of its cases as a result of the refusal of the Turkish judges to sit. The remaining judges in a comprehensive and reasoned judgment which included references to Dosso, French, German, Italian, Greek and English authorities held that in order to save the nation from chaos and anarchy and prevent a collapse of the administration of justice, they could lawfully and properly assume powers under the doctrine of necessity. The Ugandan judiciary was faced with a similar situation in Uganda v. Commissioner of Prisons ex parte Matovu[84] when on an application for a writ of habeas corpus it had to decide on the validity of the 1966 Constitution which was enacted after Dr. Milton Obote (the Prime Minister) had suspended the 1962 Independence Constitution and dismissed the President of Uganda, Edward Mutesa (the Kabaka of Buganda) in contravention of the 1962 Constitution. The Ugandan Supreme Court presided over by Chief Justice Udo Udoma endorsed Dosso and Kelsen's view that a victorious revolution is a proper and effective means of changing a national legal order. The court, accepting the validity of the new constitutional order argued that there had occurred a successful revolution which abrogaged the 1962 Constitution. So also was the decision in the Rhodesian case of R. v. Ndhlovu and Others.[85]

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[83] [1964] C.L.R. 227.

[84] [1966] E.A.L.R.514.

[85] 1968 (4) S.A. 515.

But in Madzimbamuto v. Lardner-Burke,[86] which was earlier decided, the General and Appeallate Divisions of the Rhodesia High Court, like the Nigerian Supreme Court, said they were applying the doctrine of necessity to Ian Smith's 1965 Unilateral Declaration of Independence (UDI) only for the preservation of peace and good government and the maintenance of law and order and not on ground of a successful internal revolution. The General Division argued that Rhodesia was still a British dependency. On further appeal, the Privy Council in London upheld this view,[87] pointing out that Pakistan and Uganda cases, and Kelsen theory, were inapplicable because the United Kingdom Parliament continued to claim sovereignty over Rhodesia. Lord Pearce, however, pointed out that Smith's regime should be accepted on the grounds of "necessity" to avoid the vacuum which would result from a refusal to give validity to the acts of the rebel government. The whole machinery of the administration, he argued, would break down, leading to chaos and anarchy.[88] The same principle was applied in yet another Pakistani case of Begum Nusrat Bhutto v. Chief of Army Staff[89] to justify a deviation from the pre-existing Constitution. In effect,

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[86] 1968 (2) S.A. 284.

[87] [1969] A.C. 645.

[88] Ibid., pp.649-50. Lord Reid expressed similar views.

[89] P.L.D. [1977] S.C. 657. Note that in Asma Jilani v. Government of Punjab, P.L.D. [1972] S.C. 139 the military that staged a successful revolution were treated as "usurpers of lawful authority". It is our contention that this decision is wrong and it is significant to know that it was given after cessation of military rule.

necessity renders validly applicable what would otherwise be illegal and invalid. The doctrine of necessity is applied to save the exposure of the usurped state to anarchy and eventual chaos.

The courageous and devastating judgment of the Supreme Court of Nigeria which differs from those of some other Commonwealth jurisdictions in similar circumstances, should be commended for at least four reasons: first, the Court reaffirmed the independence of the judiciary; secondly, it fulfilled its role as the final arbiter in the country; thirdly, the decision showed that the Court was committed to the maintenance and protection of the constitutional rights of individuals against the tyranny of the State; and fourthly, it upheld the principle of separation of powers.

However, the commendation of and the ovation for the judiciary disappeared when the decision provoked an adverse reaction from the military government which considered the Supreme Court verdict as tantamount to a serious undermining of its legitimacy' and 'authority'. Consequently, on 9 May 1970, barely two weeks after the judgment, the Supreme Military Council (SMC) came out with a draconian legislation entitled the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28, 1970 which in effect rendered the Supreme court's decision null and void <u>ab initio</u>. The Decree declared unequivocally that what took place on January 15-16, 1966 (followed by another coup on July 29, 1966) was a revolution which effectively abrogated the whole

pre-existing legal order in Nigeria.[90] In the follow-up press statement attacking the judgment, the Federal Military Government warned the judges not to forget that the judiciary owes its present existence to the military regime which has always had the powers to abolish it.[91] The Supreme Court's decision was thereby 'buried' with indignity, and since then subsequent military regimes in Nigeria have adopted identical legislations against challenges to their 'legitimacy' and authority.[92] Such a dictatorial act is indicative of the fact that the military government is in practice a coercive and an authoritarian regime.

7:3:3 Analysis, Critique and General Observation

Decree No.28, 1970 and its successors are influenced by Kelsen's theory of revolutionary legality.[93] Professor Kelsen, a jurist and reputed scholar of analytical positivism who is probably the best exponent of the nature and effect of a revolution crisply postulates that a revolution occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, not anticipated by the first order. According to him, a legal order is valid if its norms are by and large effective, with

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[90] See the preamble to Decree No.28 of 1970, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1970), p.A129.

[91] See Sunday Times, 10 May 1970, p.1.

[92] See, for example, the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.13 of 1984, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1984), p.A141.

[93] Hans Kelsen, "The Pure Theory of Law", Law Quarterly Review, 50 (1934).

minimum support of and obedience from the ruled as opposed to obligation vi et armis.[94] Thus, while a revolution may be manifestly illegal at the time of its execution, it acquires the aura of legality as soon as the revolutionaries have effectively seized power and got control of government.

In the context of Nigerian experience, the January 15 1966 revolution which brought Major-General J.T.U. Aguiyi-Ironsi into power; the July 29, 1966 revolution which bestowed on General Yakubu Gowon the office of Head of State; the July 29, 1975 revolution which brought General Murtala Muhammed into power; the December 31, 1983 revolution which saw Major-General Muhammadu Buhari to the pinnacle of national leadership; and finally, the August 27, 1985 revolution which brought the incumbent military leader, General Ibrahim Babaginda into power are legal in the Kelsian sense due to their revolutionary effectiveness. All of them have satisfied both the jurisprudential and customary rules of international law criteria of what constitutes a legal government.[95] It is our contention that the Supreme Court of Nigeria misdirected itself by not adopting fully Dosso's case as precedent.[96] The Court did not fully appreciate the consequence of the

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[94] Ibid., General Theory of Law and State (Cambridge, Mass: Harvard University Press, 1946), pp.111-119.

[95] The Dimka revolution of 13th February 1976 and the Vatsa abortive coup of December 1985 were regarded as illegal and punished because neither of them succeeded.

[96] For a lucid exposition of these and other cases mentioned in the foregoing discussions, see Yash Ghai, "Courts and Coups", in Ghai, Yash et al (eds.), The Political Economy of Law (Delhi: OUP, 1978), pp.264-71; and S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", Western Ontario Law Review, 7 (1968), p.98.

events that took place in January/July 1966. First, the basic constitutional instrument of military government, the Constitution (Suspension and Modification) Decree No.1, 1966 made it abundantly clear that while preserving the 1963 Constitution, the Constitution must not prevail over a decree or render any of the provisions of a decree void to any extent whatsoever. Decree No.1 further stated that the Federal Military Government could make laws for the peace, order and government of the Federation or any part thereof, and that no court of law should entertain any question as to the validity of a decree or an edict.[97] One would have thought this to be enough warning to the judiciary or any other arm of government. Secondly, the military, after a successful coup which brought them into power, had a number of options, viz: (i) set aside the Republican Constitution in its entirety and substitute another for it; (ii) rule without any Constitution whatsoever; or (iii) modify it in the light of the new dispensation. The military chose the last option but that in no way meant it derived its authority from the old Constitution. Thirdly, the contention by the Supreme Court that there was a valid "transfer of power" is untenable as the emergency meeting of a group of the Ministers did not, legally speaking, constitute the Cabinet in the absence of the Prime Minister or an Acting Prime Minister who alone would have been competent to convene a valid Cabinet meeting. Fourthly, considering the exigency of the January 15, 1966 situation,

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[97] Ss. 3 and 6, Laws of the Federal Republic of Nigeria 1966, p.A1.

especially the political temperature of the country, and the motives of the coup plotters (among which was the elimination of the key figures in the Government of the First Republic), it was not unlikely that the Prime Minister, who was kidnapped along with others and taken to unknown destination was already killed[98] at the time the purported meeting of the Council of Ministers took place, in which case the Executive would have been automatically dissolved and the meeting of the so-called Cabinet null and void ab initio. Fifthly, even if the Prime Minister were alive and in attendance at the meeting, it would not have made any difference constitutionally since neither he nor the Cabinet was lawfully competent to transfer power to the military or any other group of persons for that matter.

The claim by the Acting President that he handed over the civilian administration and political power to the military was equally untenable. He was not competent to dispose of the sovereignty of the country for the simple reason that the 1963 Constitution did not permit such exercise. In fact, only the President could dissolve the Parliament on the ground of a vote of no confidence in the Prime Minister and he must summon a new Parliament within three months.[99] Furthermore, for either the President or Prime Minister alone to abdicate the sovereignty of Nigeria to the Armed Forces would have run counter to the federal principle, because in a federation,

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[98] There has been no proof or evidence to the contrary.

[99] A vote of no confidence that the Prime Minister no longer commanded the support of the majority of the members of the Parliament constituted a ground for dissolution under the 1963 Constitution. E.g. see Chief S.L. Akintola v. Sir Adesoji Aderemi and Another [1962] W.N.L.R. 185.

sovereignty belongs to both the national and subnational governments. Therefore, the consent of all the legislative and executive arms of both levels of government must be sought. This is the essence of federalism. Thus, it is constitutionally and politically wrong for the Nigerian judiciary to suggest that one of the constituent units of the Federation (the Central Government) could, to the exclusion of others, unilaterally 'hand over' or 'transfer' the entire sovereignty of the nation to the Armed Forces. That would be tantamount to a mockery of federalism. In law, what took place was a mere formality; a routine, nay polite consultation - an illegitimate exercise. It was absolutely irrelevant for the General Officer Commanding the Nigerian Army, Major-General Aguiyi-Ironsi to have conceded to the 'bogey' of transfer of power from the civilian administration to the military regime. Whatever might have been the terms of the agreement between the civilian and military authorities before the latter took over power, it was clear beyond all reasonable doubt that the 1966 revolutions were not within the contemplation of the 1963 Constitution.

Besides, either by acts of omission or commission, the Supreme Court of Nigeria inadvertently failed to make copious reference to the second coup of July 29, 1966 which was a clear case of revolution without any element of 'hand-over' or 'transfer' of power, and in which the Head of State, Major-General Aguiyi-Ironsi lost his life.

Moreover, the Supreme Court, by accepting Kelsenian theory of revolutionary legality that a victorious revolution

is an internationally recognised method of changing government and that the coups of 1966 brought an abrupt political change which was not within the contemplation of the 1963 Constitution, and yet refused to regard it as a revolution, shows nothing but self-contradiction and inconsistency. As Professor Kelsen rightly argues, "no jurist would maintain that even after a successful revolution the old Constitution and the law based thereupon remain in force on the ground that they have not been nullified in a manner anticipated by the old order itself."[100] Once a Decree has retracted a right which would otherwise be available under the Constitution, it cannot be enforced in an action to challenge the Decree on the ground that it is contrary to the Constitution.[101] Therefore, in promulgating Decree No.45 of 1968, the Federal Military Government did not derive its legislative authority from the provisions of the 1963 Constitution.

A military government is not a creation of statute, but of revolution. It is our submission that the Supreme Court of Nigeria committed fundamental errors in its interpretation of the military takeover. The events of January 1966 and the subsequent ones that consolidated them were undoubtedly successful revolutions which abrogated the pre-existing legal order in Nigeria while substituting military authoritarianism. International Law recognises such successful coups d'etat as

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[100] Hans Kelsen, "The Pure Theory of Law" (supra), p.474.

[101] See T.O. Elias, "Military Decrees in Nigeria and Ghana", Nigerian Law Journal, 5 (1971), pp.129 et seq.

an effective means of changing a government.[102] The Nigerian judiciary cannot modify the course of history, it has to accept the facts. To insist dogmatically as the Supreme Court did, that the independence of the judiciary, the doctrine of separation of powers, and fundamental human rights must be upheld at all cost or that the military regime was still an "interim constitutional goverment" even under revolutionary situations was nothng but excessive indulgence in "profitless legalism"[103] or "jurisprudential sophistry".[104] If accepted, such a decision would have plunged the country into a state of chaos and anarchy.[105] Even though military take-over of government is constitutionally illegal and therefore illegitimate, it would appear that since the coups that brought military rule into being were successful and effective, "their illegality has evaporated".[106]

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[102] See Julius Stone, "Mystery and Mystique in the Basic Norm", Modern Law Review, 26 (1963), p.48.

[103] Frank, J., Constitutional Comparative Process (London: Sweet & Maxwell, 1968), p.22.

[104] S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", op.cit., p.93.

[105] The judgment of the Supreme Court of Nigeria in the Lakanmi case has been widely criticised as being disruptive of political stability and contrary to the principle of International Law. See, among others, T.O. Elias, "the Nigerian Crisis in International law", Nigerian Law Journal, 4 (1971), p.1; Abiola Ojo, "The Search for a Grundnorm in Nigeria", International and Comparative Law Quarterly, 20 (1971), p.118; and A.O. Obilade, "Coups d'Etat and Some Gaps in Legal Theory", University of Jos Law Journal, 2 (1985), pp.23-35.

[106] Professor T.O. Elias, "The Legality of Illegal Regimes in Africa", cited by D.A. Ijalaye, Nigeria and International Law: Today and Tomorrow (Ile-Ife: University of Ife Press,

Furthermore, notwithstanding the fact that the Nigerian military lacked legitimacy in the political sense at its inception, legitimacy should be seen as a dynamic rather than static phenomenon, for an unpopular and unwanted regime at the start may convert its image to one that is positive through its policies. In effect, legitimacy may be acquired over time after the coerced population have learned to trust and respect the new legal order.[107] In this sense, says Justice Karibi-Whyte of the Supreme Court of Nigeria, "the Military Governments in Nigeria surely have acquired legitimacy".[108] Therefore, jurisprudentially (but not constitutionally), the Nigerian military government is legitimate, and has acquired the potency to rule.

1978), p.12.

[107] See M. Lipset, Political Man (New York: Doubleday, 1963), p.64; and his "New Nations and Political Legitimacy", Dialogue, 3 (1968).

[108] A.G. Karibi-Whyte, The Relevance of the Judiciary in the Polity (Lagos, NIALS, 1987), p.20. Justice Karibi-Whyte was not a judge of the Supreme Court when the Lakanmi case was decided.

CHAPTER EIGHT

THE MACHINERY OF MILITARY GOVERNMENT

This Chapter along with Chapters 9 and 10 examine the nature and structure of military government[1] with a view to determining the impact of military rule on Nigerian federalism. The core of its analysis is that the pre-1966 federal-state relationship has been fundamentally altered under military administration such that the enhanced power of the national government has precipitated an almost complete usurpation of the independent policy-making apparatus of the subnational governments. Although the military governs the country at the two levels of government and, of course, retains the same geopolitical entity that existed before the advent of military rule, in terms of machinery of government (office, personnel and function), military government differs radically from its civilian predecessor. There has occurred a situation of federal dominance with a corresponding erosion of state autonomy - what can be regarded constitutionally as a breach of the federal principle.

It should however be added that although the constitutional structure and the nature of all the military regimes in Nigeria are generally the same, there are slight

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[1]. "Military government" is used here as a collective term referring to the various military administrations that have governed Nigeria since 1966.

differences among them both in their styles of administration and in the contents of their legislations. These differences are highlighted in this and subsequent chapters.

In order to establish the changed intergovernmental relationship, it is proposed to use the formal institutions of government, namely, the legislature, the executive and the judiciary as the parameters within which to judge whether or not the military operates a federal system of government. The advantage of this approach is that the nature of the relationship of each of these institutions at the national level with its state counter-part will enable us to determine the degree of operation of federalism.[2]

However before considering the machinery of government under military administration, it seems appropriate to have a preliminary overview of the specific challenges which military rule has so far posed to the Nigerian federal system. This would give us an insight into the military's ambivalence towards federalism as a form of government.

8:1 Challenges to Nigerian Federalism

Since the adoption of federalism in 1954, no serious threat was made to the federal arrangement until 1966 when the military took over the government of Nigeria.

8:1:1 General Ironsi's Unification Scheme

The first challenge came from the first military regime

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[2]. Division of authority and power between the national and regional governments is the hall-mark of a federal system, see Chapters 2, 5 and 6 (ante).

under the leadership of Major-General J.T.U. Aguiyi-Ironsi. On coming to power in January 1966, the Federal Military Government immediately proceeded to abolish all the country's legislative and executive institutions and arrogated to itself the sole political authority.[3]

In May 1966, General Ironsi decided to restructure the country by promulgating the Constitution (Suspension of Modification) Decree No. 34 which made Nigeria a unitary state. The Decree provided that:

> Nigeria shall on 24th May 1966....cease to be a Federation and shall accordingly as from that day be a Republic, by the name of the Republic of Nigeria, consisting of the whole territory which immediately before that day was comprised in the Federation.[4]

The former regions were abolished, and Nigeria was grouped under territorial areas called "Provinces". A national Military Government was established in place of the Federal Military Government, the Federal Executive Council became known as simply the Executive Council while all the Public Services in the Federation were merged into one.[5] According to Ironsi, the rationale for Decree No. 34 was to remove the last vestige of intense regionalism and to produce national

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[3]. For detail, see the Constitution (Suspension and Modification) Decree No. 1, 1966, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1966), p.A1. Note that the Ironsi and the Gowon regimes operated substantially under this Decree.

[4].Decree No. 34 of 1966, s.1, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1966), p.A153.

[5]. Ibid., ss.2 & 3.

unity which was very necessary for achieving and maintaining the paramount objective of the military government.[6] Thus, the unification Decree was intended to give fuller expression to the unitary character of military rule. The unified command of the military more than anything else made it possible for General Ironsi to take such a unilateral action without consulting the people.[7] Ironsi made it abundantly clear that:

> The Military Government can only rule the country as a unified command. It cannot afford to run five governments (the centre and the four regions) as if it were a civilian regime.[8]

Ironsi's imposition of a unitary system of government was outrightly rejected by the people of Northern Nigeria.[9] His claim that he took the action in the interest of national integration was rebutted. It was argued that his real motive was to dismantle the "Northernisation policy" of the late Premier of the Northern Region, Sir Ahmadu Bello, who insisted that "the North must be preserved for the Northerners only" - a measure taken to protect the interest of his educationally backward people against 'invasion' from the

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[6]. See The Republic of Nigeria: Broadcast to the Nation (Lagos: Ministry of Information, 24 May 1966), p.3.

[7] See Charts D, E and F below.

[8]. Government's Press Release No. 686, Lagos, 1966.

[9] The author witnessed a spate of mass protests in several Northern towns and cities between 25-30 May 1966. The Northern Nigeria Emirs sent a joint memorandum of grievances and fears of their people to the National Military Government in Lagos. The Government refused to change its mind, see the reply in the Press Release No.F.686 dated 8 June 1966 (Lagos: National Government Press, 1966).

CHART D

ORGANIZATIONAL CHART OF FEDERAL-REGIONAL RELATIONS
PRIOR TO MILITARY RULE

Note: The military assumed political power on January 17, 1966

Source: Adapted from Oyovbaire, Sam Egite, Federalism in Nigeria (New York: St. Martin's Press, 1985), p.95

Notes:
(1) ⟷ flow of deliberative relations indicating processes of effective mutual decision making
(2) - - - - flow of consultative relations indicating processes in which decisions may or may not be made
(3) ——— flow of command relations in which decisions are made from above.

CHART E

ORGANIZATIONAL CHART OF FEDERAL-REGIONAL RELATIONS
(17 January-24 May 1966, and 1 September 1966-29 July 1975)

Notes:

(1) After March 1967, the title of 'Supreme Commander' was changed to 'Commander-in-Chief"

(2) ◄——► flow of deliberative relations indicating processes of effective mutual decision making

(3) - - - - - flow of consultative relations indicating processes in which decisions may or may not be made.

(4) ——— flow of command relations in which decisions are made from above.

Source: Adopted from Oyovbaire, Sam Egite, Federalism in Nigeria, op.cit., p.95 and Luckham, Robin, The Nigerian Military (supra), p.255

CHART F

ORGANIZATIONAL CHART OF FEDERAL STATE (REGIONAL) RELATIONS
(24 May-31 August 1966)

Notes

(1) Between 24-31 August 1966, Nigeria was run as a unitary state.
(2) ——▶ flow of command relations (decisions taken from above)
(3) ◀——▶ flow of deliberative relations
(4) ——— flow of routine relations
(5) The pre-existing regional ministries converted to ministries of groups of provinces

Source: Oyovbaire, Sam Egite (supra), p.100

more educationally advanced South. A unitary government would mean better job opportunities and career prospects for the South than the North, particularly with the merger of all the public services in the country.[10]

Naturally, the North felt very much incensed by Ironsi's unification exercise and was opposed to the entire spirit of Decree No. 34. On May 27, 1966, the Northerners reacted violently killing many Ibos (Ironsi's tribesmen) who were living in the North. The infamous unification Decree also had a boomerang effect on General Ironsi and his government. The esprit de corps of the military was destroyed and it ceased to be a united institution. On July 29, 1966, the military turned against itself when Ironsi was killed by his own soldiers of Northern origin who in sympathy with their fellow civilians argued that the interest of the North was being jeopardized. Things fell apart, the centre could no longer hold and Ironsi's government collapsed mortally.[11]

It is our submission that the unification which Ironsi had intended to achieve was clearly an under-estimation of the heterogeneous nature of the Nigerian society. By his unitary option he went too far in stressing centripe-talism which threatened the basic values and security of many Nigerians who saw the safeguards embedded in the federal system removed without adequate political arrangements to protect their

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[10]. See, for example, an article written by one Alhaji Suleiman Takuma of the Nigeria Broadcasting Corporation in New Nigerian (Kaduna), 19 April 1966, and an editorial in the same paper on 23 May 1966.

[11]. For a comprehensive account, see Chapter Nine (infra, 9:1:5).

interests.

On August 1, 1966 Lt-Colonel (later General) Yakubu Gowon succeeded the Late General Ironsi as Nigeria's second military Head of State. Gowon detested his predecessor's unification scheme, arguing that the basis of trust and confidence in the experiment of unitary system was not able to stand the test of time. He added that the incidents which followed Ironsi's extreme unification,

> points to one and one thing - that a country as big as Nigeria, comprising such diversity of tribes and cultures cannot be administered successfully under a unitary form of government.[12]

General Gowon then abolished the unitary system and restored federalism through the promulgation of the Constitution (Suspension and Modifications) Decree No. 59, 1966. The Decree which was intended to foster regional autonomy provided, inter alia, that:

> Nigeria shall as from 1st September 1966 again be a Federation.[13]

8:1:2 Confederal Attempt

The second instance of challenge to federalism in Nigeria took the form of agitation for a confederate arrangement.

Given the political chaos in which Nigeria found herself after the death of General Aguiyi-Ironsi, Gowon after enacting Decree No. 59 set up an Ad Hoc Constitutional Committee to

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[12]. For the full text of the speech, see Yakubu Gowon, The Struggle for One Nigeria (Lagos: Federal Ministry of Information, 1967), p.38.

[13]. Decree No. 59 of 1966, s.1(1), Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1966), p.A231.

consider an appropriate and a viable form of government (save unitary) for Nigeria.[14] In pursuance of this an ad hoc Constitutional Conference was held in September 1966. At the Conference, the Northern Region in its memorandum proposed a confederal system of government in which each region should be constituted into an autonomous state, with subjects of common interest to be delegated to a Common Service Commisssion. It also argued that each region should have the right to secede completely and unilaterally from the Union.[15] Like the North,, the Eastern delegation also pressed for a confederation, suggesting that each region should have the right to issue its own currency as well as the right to secede unilaterally.[16] The Western delegation proposed "a confederation or a Commonwealth of Nigeria - a system which is not so loose as to scatter us but is such that it can go with us into a truly federal system".[17] However, the Mid-Western regional delegation believed that a federal system of government was ideal for and practicable in Nigeria, given its linguistic and ethnic heterogeneity arguing that no confederation has ever survived for an appreciable period of

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[14]. See Gowon's Opening Address to the members of the Ad Hoc Constitutional Conference at the National Hall, Lagos, September 12, 1966.

[15]. See Federal Republic of Nigeria: Memoranda Submitted to the Ad Hoc Conference on Constitutional Proposals for Nigeria (Lagos: National Press Ltd., 1966) containing "Form of Political Association for Nigeria by Northern Delegation", pp.1-20.

[16]. Ibid., "Form of Political Association for Nigeria by Eastern Delegation", pp.21-27.

[17]. Ibid., "Constitutional Arrangements for Nigeria by Western Nigera and Lagos Delegation", pp.28-59.

time.[18]

Thus with the exception of the Mid-Western Region, the Northern, Eastern, and Western delegation opted for a confederation as an interim solution to Nigeria's political impasse.[19] The Conference could not arrive at any consensus as the political atmosphere of the country was charged with mutual fear and suspicion. In fact, while the negotiations were going on, there were reported massacre of Ibos in the North and of Hausas in the East. This, of course, compounded the existing tensions, with the result that the Eastern delegation refused to turn up for the subsequent meetings of the Ad Hoc Constitutional Committee. After several adjournments, the Committee's work was postponed sine die. Gowon tried his best to control the situation by engaging in a number of peace initiatives with Lt.-Colonel Odumegu Ojukwu, the Military Governor of Eastern Region, to accept the concept of one Nigeria but Ojukwu was intransigent and adamant in his demand for a confederal union. He refused to recognise the leadership of the Federal Military Government having made up his mind to secede if the demand for confederation was not met.

As a result of the deadlock, all the military rulers including colonel Ojukwu had to move to Aburi, Ghana (a

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[18]. Ibid., "Political Association Suitable for Nigeria in Future by Mid-Western Nigeria Delegation", pp.60-85.

[19]. Sir Kashim Ibrahim led the Northern Delegation; the Eastern Delegation was led by Professor Eni Njoku; Chief Obafemi Awolowo headed the Western Delegation while Chief Anthony Enahoro headed the Mid-Western Delegation. Dr T.O. Elias led the Lagos Delegation, representing the Federal Capital Territory of Lagos.

neutral ground) at the invitation of the Ghanaian military government to find solution to the impasse. The Aburi accord led to the promulgation of a Decree in March 1967[20] which repealed the earlier Decree No. 1 of 1966. In Gowon's attempt to maintain a united Nigeria, Decree No. 8 gave Ojukwu too many concessions. The powers of the Head of the Federal Military Government were to be exercised only with the concurrence of the Regional Governors; the Federal Executive Council was to be composed of regional delegates, while the membership of the Supreme Military Council (SMC) was restricted to only the Military Governors of the Regions. Each Region was to have its own Military Headquarters and Area Command; all diplomatic and consular posts, as well as senior appointments in the Armed Forces and the Police, and as those within the Federal Public Service were required by Decree No.8 of 1967 to be made by the SMC with the Head of State as Chairman.[21]

A cursory glance at the division of powers under the Decree of 1967 shows that Ojukwu won the day at Aburi since virtually all his confederal demands were granted. With all the concessions given to the Governors, the national government became weaker than the regional governments. There was no doubt that Ojukwu, an Oxford graduate, out manoeuvred his military colleagues at Aburi. Many of them did not fully appreciate the fact that Ojukwu's formula which was couched

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[20]. The Constitution (Suspension and Modification) Decree No. 8, 1967, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1967), p.A55.

[21]. Ibid., ss.6(1) and 7(2).

into Decree No. 8, 1967 meant extreme decentralisation as Ojukwu avoided the use of the word confederation. Gowon was later told by his advisers that if every letter of both the Aburi agreement and the Decree were to be followed, that would mean Nigeria's disintegration. Gowon was not in favour of confederalism, but by the terms of the Aburi accord he had committed himself.[22]

In spite of the fact that the powers of the Federal Government was considerably whittled down, Ojukwu was still not satisfied. He had political ambition of becoming a head of state and was determined to break away from the rest of Nigeria. He took a number of unilateral actions including confiscation of the assets of other Nigerians especially the Northerners resident in the Eastern Region. He took over federal institutions such as Air and Sea Ports, Posts and Telegraphs, Railways, Industries and Broadcasting Corporation located within his Region. He also retained all the Federal revenues collected in Eastern Nigeria and continued to issue Edicts to counter federal legislations.[23]

The Federal Government could no longer tolerate the intransigence, incessant provocations and challenges to Federal authority by the Eastern Region, particularly its

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[22] See the Communique of the Meeting of the Nigerian military leaders held at Peduase Lodge, Aburi, Ghana, 4-5 January 1967; and the Comemnts of the Federal Permanent Secretaries and the members of the Federal Executive Council in The Meeting of the Supreme Military Council: Nigerian Crisis, 1966 (Lagos: FMI, 1967).

[23]. For an elaborate account see Ojo, Abiola Constitutional Law and Military Rule in Nigeria (Ibadan: Evans, 1987), pp.177-91.

secessionist bid. On May 27, 1967 barely two months after the coming into effect of the confederal Decree the Federal Military Government promulgated the Constitution (Repeal and Restoration) Decree[24] to abolish the Constitution (Suspension and Modification) Decree No. 8 of 1967 and to restore the federal structure of government as it was originally under Decree No. 1 of 1966. In addition, before Ojukwu could declare secession and lead Eastern Region as a sovereign state, the Federal Government outwitted him by the promulgation of the States (Creation and Transitional Provisions) Decree[25] which immediately broke the existing four constituent Regions into twelve States.[26] The significance of this exercise was the weakening of the area of influence, resources and authority of the secessionists by breaking the Eastern Region into three separate states (East Central, Rivers and South-Eastern) with distinct administrations. Thus, as Gowon did on September 1, 1966 under Decree No. 59 he once again brought the country to the federal path on 27 May 1967.

As was expected, Ojukwu rejected the twelve-state structure, accusing Gowon of attempting to impose his authority over the Eastern Region. General Gowon thereupon dismissed Lt-Colonel Odumegu Ojukwu from the Nigerian Army and

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[24]. Decree No. 13 of 26 May, 1967, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1967), p.A101.

[25]. Decree No. 14 of 27 May, 1967, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1967), p.A103.

[26]. For details, see Map VII in Chapter Three (ante, 3:2:10).

relieved him of his post as the Military Governor of Eastern Region. In this wise Ojukwu became a rebel. But Ojukwu who was now on the defensive thereafter effected secession on 30 May, 1967 by declaring the Eastern Region an independent sovereign state by the name 'Republic of Biafra'. It was the latter action that precipitated a 30-month full-scale Civil War between 1967-70, culminating in the capitulation and surrender of the secessionists in January 1970.[27]

The Civil War appears to have left an indelible mark on Nigerian federalism especially in the structure and separation of government. The determination to prosecute the war at all costs inevitably led to over concentration of powers at the centre at the expense of the states. The twin combination of military administration and war, with their inherent unifying forces almost totally distorted the federal idea. It has not been possible to reverse that trend. Thus, while the country now remains theoretically federal, in practice it is being run like a unitary state.

But in spite of the foregoing challenges posed to federalism, the military government always claims to be operating a true federal system. Almost all the military rulers since 1966 have made such proclamations, but in reality their commitments to federalism as a form of government are more honoured in breach than in observance.

For instance, General Yakubu Gowon who creditably saved the Nigerian Federation from disintegration during the Civil

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[27]. See Panter-Brick, K.S. Nigerian Politics and Military Rule: Prelude to Civil War (London: Athlone Press, 1970).

War stated while creating the twelve states that he believed in a federation, adding that in his new federal set up the central executive would not be so powerful as to be able to trample at will on the interests of the component units of the Federation.[28] But no sooner were the states created than the Federal Military Government became an instrument of total domination. In fact, immediately after the War in 1970, his government enacted Decree No. 28 which abrogated the pre-existing legal order, and conferred on the Federal Government absolute powers to make laws for Nigeria or any part thereof with respect to any matter whatsoever.[29] Decree No. 28 also precluded courts from questioning the validity of government's actions or the Decree itself, including breach of human rights.[30]

Also, while addressing members of the Constitution Drafting Committee on 18th October 1975, Brigadier (later General) Murtala Muhammed who overthrew Gowon's government on 29 July, 1975 told them that his administration was committed to a federal system of government that guarantees democracy and human rights.[31]

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[28] See General Yakubu Gowon's nation-wide broadcast on the creation of states in The Struggle for One Nigeria (supra), p.43.

[29] See also the Off-Shore (Oil Revenues) Decree No.9 of 1971, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1971), p.A37.

[30]. For an elaborate account, see Chapter Seven (ante, 7:3:2).

[31]. Federal Republic of Nigeria: Report of the Constitution Drafting Committee (Volume 1) (Lagos: Federal Ministry of Information, 1976), p.xliii.

Ever since then each successive military regime has claimed to have an unswerving commitment to federalism. However,the words of the military rulers have not been matched with their actions. At best, their pronouncements could be regarded as public relations exercise or self-aggrandizement.

But what is responsible for the ambivalence of the military towards federalism? Why do they find it difficult to stick to their unitary ethos in administering the country? Put differently, why do they see federalism as indispensable? The truth is that even though federalism has faced some serious challenges, the military have learnt from past experience that Nigerians have firmly rejected unitarism in favour of federalism - a system which safeguards their individual and communal interests by accommodating "unity in diversity". The heterogeneous nature of the Nigerian society makes a wholesale adoption of a unitary system of government to which the military is generally accustomed obviously impracticable. The structural peculiarities of the military must give way to the structural peculiarities of the society over which it holds suzerainty.

We shall now examine in detail the modus operandi of the military government.

8:2 The Military System of Administration

The military governs Nigeria without any one single comprehensive constitutional document. The key instruments by which military government is run include decrees,[32] edicts[33]

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[32]. See the Constitution (Suspension and Modification) Decrees No. 1 of 1966; No. 8 of 1967; No. 32 of 1975; No. 1 of 1984; and No. 17 of 1985. Decree No. 1, 1984 is the Principal

and the unsuspended portions of civilian constitutions.[34] These set out the basic framework for the Federal and State Governments, and specify their principal organs - the legislature, the executive, and the judiciary.

8:3 The Legislature

Legislation constitutes an important milestone in the policy-making process and the crystallization of executive plans of action in any system of government. Under the military the main legislative arm of government is the Supreme Military Council.

8:3:1 The Supreme Military Council

The Supreme Military council (SMC) consists of the Head of the Federal Military Government (as the Chairman); the Chief of Staff, Supreme Headquarters; the Minister of Defence and Chairman, Joint Chiefs of Staff; the Chiefs of Army, Naval and Air Force Staff; the Inspector-General of Nigeria Police; the General Officers Commanding the 1st, 2nd, 3rd and 82nd Divisions of the Nigerian Army; the Commander, Nigerian Army Corps of Artillery; the Flag Officers Commanding the Eastern and Western Naval Commands and the Naval Training Command respectively; the Air Officers Commanding the Training, Tactical Air and Logistic Commands respectively; twelve designated members who shall be senior officers of the Armed

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Decree but the Constitution (Suspension and Modification (Amendment) Decree No.17 of 1985 is the Nigerian Grundnorm.

[33]. E.g. the Western State Investigation of Assets (Public Officers and other Persons) Edict No. 5, 1967.

[34]. The Nigerian Constitutions of 1963 and 1979.

Forces; and such other members as the Council may from time to time appoint.[35]

Two important observations could be made about the composition of the SMC; firstly, its membership is drawn from the top echelon of the military hierarchy; and secondly, there is no state representation. The significance of these observations in federal state relationship will be highlighted in subsequent discussion.

8:3:2 The Functions of the Supreme Military Council

The role of the Supreme Military Council (SMC) is similar to that of the ancient royal prerogatives in England. It is the highest legislative, executive and judicial body in the country.

Its functions include, inter alia: determination from time to time of national policy on major issues affecting the country; constitutional matters; all national matters, including the authority to declare war or proclaim a state of emergency or martial law; exclusive responsibility for appointment of the Head of State, Military Governors, members of the National Council of State (NCS) and the Federal Executive Council (FEC); ratification of the appointment of senior public officers; and general supervision of the work of NCS and FEC.[36] Others are consideration and approval of the

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[35]. Decree No. 1 of 1984, s.7. Note that under Decree No. 17 of 1985, the SMC and the Chief of Staff Supreme Headquarters, are redesignated as the Armed Forces Ruling Council and Chief of General Staff respectively.

[36]. Decree No. 1 of 1984, s.9 as amended by Decree No. 17, 1985, Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1984 and 1985), pp.A1 and A89 respectively.

estimates of the revenues and expenditures of the Federation; statutory allocations of national revenue to states and local governments;[37] appointment and removal of superior court judges; general control over the appointment, promotion and discipline of the Armed Forces; and exercise of power of prerogative of mercy in respect of convictions under both federal and state laws.[38] As a legislature the authority of the SMC is unfettered and limitless for it has power to make laws on behalf of the Federal Military Government for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.[39] The conception of the military is that the SMC is the sole political authority in the country.

8:3:3 The Legislative Process Under Military Rule

The legislative mechanism of a civilian government exhibits marked differences when compared with that of the military. The former is more democratic and more elaborate than the latter.

Under the civilian Constitutions of 1963 and 1979, there existed legislatures at federal and regional/state levels and both were actively involved in the country's legislative process. The Centre had bicameral legislature (the House of Representatives and the Senate) in which the states were represented while the States had Houses of Assembly, each

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[37]. See the Financial Appropriation Decree 1984.

[38]. Schedule 2 of Decrees Nos 1 and 17 of 1984 and 1985 respectively.

[39]. The Constitution (Suspension and Modification) Decree No. 1 of 1984, s.2(1).

legislature deriving its powers from the Constitutions and neither was sub-ordinate to the other. Before a bill becomes law it has to go through prescribed procedures. It is published in official gazette so that the press and the public could comment, criticise, accept or reject it. It is usual for a bill to go through first, second and third readings during any of which stages it could be amended or even be withdrawn completely. The bill will not become law unless and until if the issue on being put to vote, enjoys the prescribed majority and has received the approval of the President and Governors with regard to federal and state laws respectively.[40]

The procedure is similar to the Westminster model. In Britain, all bills are open to criticism by the British press and the public and before they become law they are subjected to debate by the two Houses of Parliament, namely, the House of Lords and the House of Commons, after which they are sent for the Royal Assent. As held in the English case of Bowles v. Bank of England,[41] the procedure is so rigid that even a resolution of one House of Parliament cannot make a law. Similarly in the United States of America, a bill must be passed by the Congress (the House of Representatives and the Senate) before it becomes an enforceable law.[42]

In all the foregoing examples, the legislative process

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[40]. For a fuller account, see Chapter Six (6:2) and Eight (8:1:1 - Chart D) including Tables B and C below.

[41]. [1913] 1 Ch.57.

[42]. For details, see Chapter Six (ante, 6:2).

TABLE B: THE FEDERAL LEGISLATURE UNDER THE 1979 CONSTITUTION

Popular Sovereignty Principle

(The People Rule)

TABLE C

THE STATE LEGISLATURE UNDER THE 1979 CONSTITUTION

makes provision for the representation of all the constituent units through their duly elected candidates, thereby demonstrating the practice of democracy. Besides, the process symbolises the Rule of Law which emphasises that legislation should neither be the result of arbitrary exercise of power nor the manifestation of the whims and caprices of the government or the ruling class.[43]

By contrast, the process of promulgating a decree or an edict which gives expression to the legislative will of the military government in Nigeria lacks the elaborate democratic procedure of its civilian counterpart. Legislation for the entire country is undertaken by the Head of the Federal Military Government (HFMG) and members of his military oligarchy (the SMC). There is no opportunity for the type of debate one finds in Britain, America, and Nigeria (under civilian government). Being an authoritarian regime, the military admits of no opposition or criticism. More often than not, laws are arbitrarily made with retrospective effect. Draft decrees or edicts (the equivalent of bills) are not published to enable the government benefit from the reactions of the public and the press before they are passed into law. Consequently, only post-mortem comments and observations are possible.

Under the military dispensation, the power of the Federal Military Government to make law is exercised by means of decrees signed by the HFMG while the power of a state government to make laws is exercisable by the Military

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[43]. Ibid., (6:7).

Governor of the state by means of an edict signed by him. A decree or an edict may be made known to the public by means of a sound or television broadcast, or by publications in writing, or in any other manner. The power of signing a decree or an edict is never delegated. A decree or an edict becomes law by mere signature, no other special formality is required.[44]

The SMC has no rules of procedure and although the HFMG receives pieces of advice from his colleagues he is not bound to accept them before signing a decree. As the Chairman of the SMC as well as the Head of State, he tends to dominate the affairs of the Council. He could initiate a legislation at will or use his power of veto to stop it - a situation which always leads to enactment of obnoxious laws particularly those violative of fundamental human rights and of the Rule of Law. Striking examples are the State Security (Detention of Persons) Decree No. 2 of 1984 which empowers the military government to detain people up to six months without trial if they are found or suspected to be security risk, and the Public Officers (Protection Against False Accusation) Decree No.4, 1984 which strictly made false statement against public officers punishable even when made without actual malice or with honest belief.[45]

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[44]. See Decrees No. 1 of 1966, s.4; No. 8 of 1967, s.3; No. 32 of 1975, s.2; and No. 1 of 1984, s.3. Decree No.32 is called the Constitution (Basic Provisions) Decree No.32, 1975.

[45]. Abuse of human rights resulting from the application of Decree No.4 and the refusal of Major-General Muhammadu Buhari and his Deputy, Major-General Tunde Idiagbon, to abrogate it, partly led to the overthrow of their regime in 1985. President Ibrahim Babagida has since repealed it.

8:3:4 Validity of Decrees and Edicts

The necessity of ascertaining the validity of a law, especially in a federal State cannot be over-emphasised. The American Supreme Court held in McCulloch v. Maryland[46] and Marbury v. Madison[47] that judicial review of the constitutional validity of legislation is both invaluable and inevitable to the practice of federalism. This is based on the recognition that a federation is a limited government and since it connotes the existence of two levels of government each level should make laws only on items within its legislative competence. In the latter case Marshall, C.J. stressed that:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.[48]

This passage implies that only the judiciary in its role as an umpire can safeguard the federal system by protecting individual liberties as well as maintaining checks and balances between the national and regional governments. The American system of judicial review was the constitutional practice in Nigeria in the First and Second Republics.[49]

But under the military administration, no question as to the validity of a decree or an edict can be entertained in any

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46. 4 Wheat 31 [1819].

47. 1 Cranch US [1803].

48. Ibid., at p.137.

49. See Chapter Six (ante) for the details.

court of law in Nigeria. It is immaterial even if the decree is in breach of human rights or impinges on the sphere of the judiciary.[50] The only ground on which an edict may be declared invalid is when it is inconsistent with a decree.[51] These legislations are in pari materia with the National Redemption Council (Establishment) Proclamation, 1971 of Ghana's military that operates a unitary system of government. It is also similar to an Act of British Parliament which cannot be challenged by any court of law in the United Kingdom. According to Lord Campbell in the case of Edinburgh and Dalkeith Railway Co. v. Wauchope,

> The function of the court is to construe and apply the enactments of the Parliament. The court has no concern with the manner in which Parliament or its officers perform their functions.[52]

In the same vein, it was categorically stated in the English cases of Pickin v. British Railways Board,[53] R v. Jordan[54] and Bowles v. Bank of England[55] that the Parliament being

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[50]. Decrees No. 1 of 1966, s.6; No. 8 of 1967, No. 28 of 1970 (preamble); No. 32 of 1975, s.4; No. 1 of 1984, s.4; and No. 13 of 1984 (preamble). See also the celebrated case of Lakanmi and Anor v. Attorney-General for Western State [1971] 1U1LR 201; Ojaiobo v. Alamu [1987] 3 N.W.L.R. (Part 61) 377; and Iffie v. Attorney-General of Bendel State [1987] 4 N.W.L.R. (Part 67) 972.

[51]. Ademolekun v. University of Ibadan [1968] N.M.L.R. 253; Onyuike v. Eastern States Interim Assets and Liabilities Agency [1974] 1 All N.L.R. 151; and Ondo State Military Governor v. Adewumi [1988] 3 N.W.L.R. 280.

[52]. [1842] 1 Bell 252. See also Bribery Commissioner v. Ranasinghe [1965] A.C. 172.

[53]. [1974] AC 765.

[54]. Crim. L.R. 483.

[55]. [1913] 1 Ch. 57.

supreme, its Acts are not subject to judicial review.

Thus, like the Acts of British Parliament, military decrees are not subject to judicial review,[56] but the implication for the Nigerian military government is that its claim to federalism is not only untenable but hypocritical.[57]

8:3:5 Federal-State Legislative Relationship

In contrast to the First and Second Republics, under the military dispensation, the Federal and State Legislatures are not equal partners; rather the latter are subordinate to the former. Whereas the Federal Government has power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever,[58] the Military Governor (the sole state legislator) shall not have power to make laws with respect to any matter within the Exclusive Legislative List; and "except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter in the Concurrent Legislative Lists".[59] Furthermore, the question whether the requisite consent has been given or refused shall not be inquired into

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[56] But unlike the military dictatorship, there are checks and balances in the British Parliament.

[57] Surely, the Federal Military Government or a Military Governor of a State will be more careful in enacting Decrees and Edicts respectively if it is apparent to them that their validity might be tested in a court of law. This would avoid abuses which are inherent in the frailties of human nature. It would also create more public confidence in both the judiciary and the government.

[58]. See Decrees No. 1 of 1966, s.3(1); No. 32 of 1975, s.1(1); and No. 1 of 1984, s.2(1).

[59]. Ibid., ss.3(2)(a)(b), 1(2)(a)(b), and 2(2)(a)(b) respectively. See also Keepler Hausban Ltd. v. Irinoye [1989] 2 N.W.L.R. 458.

in any court of law.[60] Application for consent is made by submitting a draft copy of an edict to the Head of the Federal Military Government (HGMG) who then refers it to the Federal Ministry of Justice for vetting before giving clearance. If consent is refused the edict cannot become an enforceable law.[61]

The impression created by the generality of the foregoing provisions is that the states no longer have any independent allotted sphere of legislative competence save as delegated to them by the Federal Government who has unlimited power to make laws for the entire country on any subject. The FMG has even expressly stated that any legislative authority so delegated to the states can be varied or revoked at will.[62] Thus, it may be argued that the Military Governor (a supposedly autonomous one-man state legislature) who is subordinate to (but not co-ordinate with) the Supreme Military Council (SMC), the federal legislature has no legislative powers of his own.

In practice, this is not so. The Military Governor has full powers to make provisions for grants or loans from or the imposition of charges upon any of the public funds of the state. He also has unlimited powers to enact legislations for the imposition of charges upon the revenue and assets of the

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[60]. Ibid., ss.4(6), 1(6), and 2(6) respectively.

[61]. An ex-Governor informed the author in an interview at the Department of War Studies, King's College, London, in September 1989 that consent is not normally refused unless the subject-matter of the legislation is of crucial national importance.

[62]. Decrees No. 1 of 1966, s.3; No. 32 of 1975, s.1, and No. 1 of 1984, s.2.

state for any purpose, notwithstanding that it relates to any matter included in the Exclusive Legislative List.[63] More importantly, he does not require the consent of the Federal Government to make these provisions for any purpose whatsoever irrespective of the fact that it concerns a matter included in the Concurrent List relating to Federal legislative powers.[64] In addition, the Governor has unfettered authority to legislate on any matter not included in the Exclusive and Concurrent Lists.[65] Such matters which are termed residual, comprise religion, primary and secondary education (with the exception of setting the standards which falls within the exclusive legislative competence of the Federal Government), agriculture, fishery, local government matters such as chieftaincy, native laws and customs, and social relations generally including contracts and torts among the inhabitants of the state.[66] Besides, a state may legislate on any matter in the Concurrent List for the peace, order and good government of his state, provided he first obtains the consent of the FMG, and subject to the rule of inconsistency under s.4(5) of the 1979 Constitution and the doctrine of "covering

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[63] See the Constitution (Suspension and Modification) Decree No.1, 1984, s.2(5)(a).

[64] Ibid., s.2(5)(b). See also Salami v. Governor of Ogun State [1985] H.C.N.L.R. 816; and Attorney-General, Ogun State v. Aberuagba [1985] 1 N.W.L.R. (Part 3) 395.

[65] See Chapter Six (ante, 6:1:1).

[66] Ibid., see also Lawal Kagoma v. The Governor of Kaduna State [1981] 2 N.C.L.R. 530.

the field".[67]

But notwithstanding the existence of this rather limited state legislative freedom, in a true federation, it is undesirable to vest the ultimate source of authority in the central legislature because it would be possible for it to tip the balance of power in favour of the national government to the detriment of the state governments. The result is that the rulers of the federation would overawe the rulers of the constituent governments, thereby destroying the fundamental basis of federalism - self-autonomy.

Another visible weakness in the military legislation is the conspicuous absence of accredited state representative in the SMC, the country's highest law-making body. Since the overthrow of Gowon regime in 1975, military governors have been excluded from this all-important body. With the prohibition of politics and political parties by the military,[68] one would have expected the membership of the SMC to be on state basis in order to provide the much needed co-operation and coordination necessary for sustaining a viable federation. The justification for the non-inclusion of the governors is that they behaved irresponsibly during the Gowon era and because they took part in major policy formulation in the SMC, General Gowon found it impossible to discipline them. Secondly, that their inclusion would have made the SMC an

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[67] Decree No.1 of 1984, s.2(2)(3). See also Attorney-General of Ogun State v. Aberuagba [1985] 1 N.W.L.R. (Part 3) 395; and Nigerian Soft Drinks v. Attorney-General of Lagos State [1987] 2 N.W.L.R. (Part 57) 444.

[68]. Cf the Constitution (Suspension and Modification) Decrees No. 1 of 1966 and 1984 respectively.

unnecessarily unwieldy body.[69]

These arguments are rather naive or problematic: firstly, state representatives in the SMC need not be the Governors; secondly, since the over 300-member Federal Parliament of the First and Second Republics were not unwieldy Assemblies it is inconceivable to suggest that the SMC with an under 30-man membership performing the same legislative functions would be so. Lack of special provision for proportional state representation in the SMC is a serious indictment on the military government that purports to operate a democratic federal system.[70]

In sum, the legislative process under the military administration which not only divests State governments of their independent legislative power but also enables the Federal government to legislate on "any matter whatsoever" is certainly not in line with the federal principle.

8:4 Legislative Inroads and Federal Dominance

The very nature of military legislation has contributed to the Federal Government's legislative dominance over the States. This is demonstrated by the spate of Decrees promulgated since the inception of military rule which have penetrated (albeit, indirectly) into the areas that were hitherto constitutionally preserved for the states.

8:4:1 Instances of Legislative Incursions and Violation

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[69]. Ojo, Abiola Constitutional Law and Military Rule in Nigeria op. cit. pp. 42-43.

[70]. E.g. see the opening address of the Head of the Federal Military Government, General Murtala Muhammed to the members of the Ad Hoc Constitutional Drafting Committee on 18 July 1975 (supra.)

of the Federal Principle

The first military legislation that actually violated the federal principle is Decree No.1 of 1966 which restricted the legislative and executive powers of the states to residual matters only; in respect of the items on concurrent list prior approval must be obtained from the central government. This was followed by Decree No. 27 of 1967 which effectively transferred substantial number of items from the concurrent list to the exclusive list.[71] But before the advent of military rule, both regional and federal governments jointly and severally exercised jurisdiction over matters within the concurrent list and neither of them acting alone could alter or amend any of the Legislative Lists.

Also, by the Newspapers (Prohibition of Circulation) Decree No. 17 of 30 May 1967,[72] the Head of the Federal Military Government was empowered to proscribe the circulation in the Federation or in any state thereof, of any newspaper considered to be subversive or detrimental to the interests of the nation. The main reason for this piece of legislation was to prohibit a particular newspaper, the "Nigerian Outlook" (later named the "Biafran Sun"), published in Eastern Nigeria, from circulating to other parts of the country because the Eastern Region was then attempting to secede from the rest of

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[71]. Matters such as Higher Education, Labour, and Consular Affairs have been affected. For more details, see the accompanying text.

[72] Laws of the Federal Republic of Nigeria (Lagos: Government Printer, 1967), p.A111.

Nigeria.[73] The proscription of the paper throughout the country was to avoid dealing with a hostile enemy. But the relevant point here is that under the Republican Constitution of 1963,[74] prohibition of any newspaper within a region was the sole responsibility of the Regional (not Federal) Government.

In the same manner, the Federal Military Government by the Administrative Councils Decree No. 18 of 31 May 1967[75] created Interim Common Services Agencies for the defunct Northern and Eastern Regions with a view to sharing the assets and liabilities of these regions among the newly created states that replace them. The Head of State was directly responsible for the appointment of the members of these Councils. Although, Professor Aluko has argued that the Federal Government was setting up those interim administrations to fill in the vacuum left following the creation of states,[76] in the pre-military era such exercise was solely the responsibility of the subnational units.

Similarly, the Investigation of Assets (Public Officers and other Persons) Decrees Nos 37, 43 and 45 of 1968[77] and

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[73]. For a detailed account of the secessionist move which eventually culminated into a civil war, see Akpan, N.U. The Struggle for Secession (London: Frank Cass, 1972).

[74] Section 72.

[75] Laws of the Federal Republic of Nigeria, 1967, p.A113. These Agencies were dissolved by General Murtala Muhammed in 1975.

[76]. Olajide Aluko, "Federal-State Relations", Quarterly Journal of Administration 3,4 (1969), pp.289-90.

[77] Laws of the Federal Republic of Nigeria 1968, pp.A133, A161 and A165 respectively.

the Recovery of Public Property (Special Military Tribunals) Decree No. 3 of 1984[78] give the Federal Military Government the power to make inquiry into the assets of politicians and public officers at both federal and state levels who have contributed to the economic adversity of the country. Such expansion of federal authority is an encroachment on the powers of the States who have the constitutional responsibility to probe and punish state officers and politicians found guilty of corruption.[79]

The FMG has also taken over the direct administration of certain duties which were previously under the jurisdiction of the states. A striking example is the absorption of States' Marketing Boards. With the enactment of the Marketing Board Reforms Decrees of 1967-73, states have been prohibited from selling their commodities directly to overseas countries save through the Federal Ministry of Trade which has the sole authority on export goods.[80] The action of the Federal Government in introducing national uniformity has deprived the

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[78] Ibid., 1984, p.A29.

[79]. See ss.140, 144, 178 and 182 of the 1979 Constitution; and Adebayo Doherty v. The Prime Minister and Ors [1961] All NLR 604.

[80] See, for example, the South-Eastern State Interim Marketing Board Decree No.3 of 1968, and the Marketing Board (Northern States (Amendment) Decree No.17 of 1969, Laws of the Federation 1968 and 1969, pp.A5 and A109 respectively. In fact, it was alleged that the Nigerian Marketing Board Decree of 1968 was promulgated to veto the decision of the six Northern States' Governments which had authorised their agents, the Nigerian Produce Marketing Company to suspend overseas sales of their groundnuts, see West Africa (London), 27 April 1968, p.502. For the criticism against Federal Governments' abolition of the state marketing boards system, see also West Africa, 24 August 1968, p.998.

states of their otherwise constitutional powers.

The FMG took additional measures to cripple state autonomy. By the Central Bank of Nigeria Act (Amendment) Decree No. 28 of May 8, 1968,[81] it has confirmed its absolute control over the Marketing Boards throughout the country. The Decree makes the Central Bank the only bank that can grant loans and advances to state marketing boards. The Central Bank also determines how much each state needs for its operation at the beginning of each buying season. Furthermore, the Decree provides that no state marketing boards can fix prices for their produce except with the approval of the Central Bank of Nigeria.[82] The result is that with the marketing boards system being entirely controlled by the Central Bank it has become virtually impossible for state marketing boards to make grants and loans or fix producer prices for export commodities. The initiative has shifted to the central government.

Although the Federal Military Government initially claimed that these Decrees were necessary for protecting national economy and prosecuting the civil war,[83] their effects have been gradual erosion of the autonomy of the state governments and consequential loss in revenue. The marketing board reforms have adversely affected the states in three important respects: firstly, they have virtually made

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[81] Laws of the Federal Republic of Nigeria 1968, p.A99.

[82] Ibid., The Central Bank of Nigeria Act (Amendment) Decree No.50, 1968, p.A185.

[83]. See the 1973 Budget Speech by the Head of the Federal Military Government.

the state marketing boards financially dependent on the Federal Government; secondly, they have imposed federal supervision on the system of price fixing; and thirdly, most of the powers of the state marketing boards have been removed.[84] Only a military government can carry out such policy of centralisation without opposition from the regional governments.

In the area of education the central government has made tremendous gains at the expense of the state governments. In the 1972/73 financial year, the Supreme Military Council decided to transfer primary and secondary education from the Residual to the Concurrent List to enable the FMG to implement its Universal Primary Education (UPE) scheme scheduled to commence in 1975/76 session. In pursuance of that objective the FMG promulgated the School Year (Variation) Decree, No.29, 1972,[85] which enjoined all primary and secondary schools in the country to change their academic year from January-December to September-June; and in 1986 the military decided to revert to the old system.[86] The Decree has been justified by the military on the grounds that it allows the school year to vary with the seasons so that school pupils may help their parents on the farm, as well as providing the Joint Admissions

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[84]. See also the Export of Nigerian Produce (Special Provisions) (Amendment) Decree No.31 of 1971. For a critique of the Federal Government's measures, see Professor Olajide Aluko, op.cit., pp.290-91.

[85] Laws of the Federation 1972, p.A501.

[86] See the School Year (Variation) Decree No.20 of 1986. See also the Education (National Minimum Standards and Establishment of Institutions) Decree No.16 of 1985.

and Matriculation Board (JAMB) and the West African Examination Council (WAEC) enough time to mark their examinations. The Federal Government effected these changes as it pleased in defiance of objections from states.

Similarly, university education has been transferred from the Concurrent to Exclusive (Federal) List "in the best interests of an orderly and well-coordinated educational development in Nigeria."[87] In 1975, all the existing regional/State Universities were forcibly taken over by the FMG.[88] In addition, introduction of new faculties and courses in these Universities could be done only on the recommendation of a federal body, the Nigerian Universities Commission (NUC)[89] while establishment of private and new state universities was also prohibited by Muhammed/Obasano regime (1975-79) and it was not until the advent of civilian rule in the Second Republic (1979-83) that states were again allowed to set up their own universities.[90] Even then the ban has been reintroduced since the emergence of another military administration in 1984 under General Buhari, when the

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[87]. Text of the 1973/74 Budget Speech by the HFMG, p.19.

[88] See the University of Nigeria (Transitional Provisions) Decree No.44, 1969; Univesity of Benin (Transitional Provisions) Decree No.20, 1975; Ahmadu Bello University (Transitional Provisions) Decree No.22, 1975; and the University of Ife (Transitional Provisions) Decree No.23, 1975 in the Laws of the Federal Republic of Nigeria 1969 and 1975, pp.A631, A89, A97, and A99 respectively.

[89] Set up by the NUC Decree No.1 of 1974 to advise the Federal Government on all aspects of university education in Nigeria.

[90] Among them are the Anambra, Bendel, Cross River, Imo, Lagos, Ogun, Ondo and Rivers States Universities.

Prohibition (Private and State Universities) Decree No.21, 1984 was promulgated. Those universities established during the civilian era are however allowed to stay.

In a civilian government the actions of the military would not have been tolerated as they are manifestly illegal: firstly, the transfer of university education to Exclusive List even if accepted by both federal and state governments would have required constitutional amendments as laid down by ss.4 and 9 of the 1963 and 1979 Federal Constituitons; and secondly, the idea that the NUC should dictate course contents and number of faculties would ahve been considered as an infringement on states' freedom of expression including "freedom to hold opinions and to receive and impart ideas and information without interference."[91] Relying on the provision, the Nigerian Supreme Court has held in Archbishop Okagie and Others v. Attorney-General of Lagos State[92] and in Ukaegbu v. Attorney-General of Imo State[93] that neither the Federal Government nor a state government has absolute control of providing education to the exclusion of any other person or organisation. But under the present dispensation, although the actions of the Federal Military Government are manifestly derogative of both the fundamental human rights and the federal principle, the validity of its Decrees cannot be challenged by any Court of Law in Nigeria.[94]

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[91] 1963 Constitution, s.25; and 1979 Constitution, s.36.

[92] [1981] 2 N.C.L.R. 337.

[93] [1983] 2 S.C.N.L.R. 212.

[94] See the preceding discussion (8:3:4), footnote 50.

In particular, the involvement of the FMG in the running of primary and secondary schools under General Gowon in the 1970's was vehemently opposed by state governments who considered the action as an encroachment on their rights but the Federal Government as the financier of the scheme overruled their objections.[95] As was expected, the UPE Scheme failed woefully: first, due to the inability of the Federal Military Government (FMG) to continue with its funding; and secondly, as a result of poor management and control. The central government cannot pretend to know more about the educational problems of the states than the state governments. Instead of exercising 'remote control' by giving states directives, the state governments should have been directly involved while remaining accountable to the FMG for the money expended on the scheme.

Even though the FMG claimed that those radical measures were motivated by its desire to relieve the states of financial burdens by prohibiting proliferation of institutions of higher learning particularly universities, or standardize education in terms of uniformity throughout the country,[96] these arguments notwithstanding, it cannot be denied that a very important area of state power and authority has been

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[95]. For an insider's account of the criticisms of the FMG's usurpation of states' constitutional responsibilities, see the one-time Secretary to the Military Government and Head of Civil Service, Western State of Nigeria, Augustus Adebayo Principles and Practice of Administration in Nigeria op.cit., pp.177 et seq.

[96]. The FMG argues that its educational policy is aimed at preventing the setting up of mushroom Universities that can hardly support themselves financially, see the Head of State's 1975/76 Budget Speech.

taken over by the Federal Government. The question that arises then is, "what is left of federalism"? The purpose of federalisation is to strike a balance in the sharing of governmental powers between the national and subnational units, and this is achievable only if there is no monopolisation of authority by one level of government as experienced under the military administration. Therefore, it is an abuse of political terminology to call military rule federal.

The introduction of uniform income tax in 1975 by the military also epitomises another aspect of federal infringement on the functions of the states. Prior to the commencement of military rule in 1966, the defunct regions had independent power of taxation within their areas of jurisdiction. However, in 1974, the military administration introduced a uniform system of personal income taxation throughout the country with a view to providing similar reliefs and allowances to taxpayers wherever they may be, to facilitating mobility of high-level manpower, as well as encouraging social and economic integration.[97] It promulgated the Income Tax Management (Uniform Taxation Provisions) Decree no. 7 on February 24, 1975 with retroactive effect from April 1, 1974.[98] It has been reported that among the casualties of the Uniform Income Tax

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[97]. 1974/75 Budget Broadcast, p.6.

[98] Laws of the Federation 1975, p.A23.

system, Lagos State alone loses about £7 million annually.[99] Yet, because of the 'master-servant' relationship that exists between the Federal Military Government and the State Governments, the latter cannot raise an eye-brow. Such a situation would not have been tolerated under civilian administration.

Equally interesting in terms of the changed constitutional and political relationship is the replacement of state police force with the Federal Nigeria Police Force (NPF) to maintain uniform standard.[100] By the Police (Amendment) Decree No.14 of 1987, a Nigeria Police Council, charged with the policy and administration of the NPF has also been established.

By contrast, under the First Republic (1963-65), there existed state-wide Native Authority Police which in fact competed with the Federal Police.[101] Similarly, the Prisons Decree No.9 of 1972 has reorganised the Prisons Service and integrated the Federal, State and Local Government Prisons.

Again, in the area of concurrent list, the Central Government through legislative manipulation has swept the states 'under the carpet'. This is because in the event of conflict or inconsistency between a decree of the Federal

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[99]. See Professor J. Isawa Elaigwu, "Nigeria's Military Federalism", in Akinyemi, Bolaji A. et al(eds) Readings on Federalism op. cit., p. 173.

[100]. See the Constitutional (Suspension and modification)Decree No. 1 of 1966, schedule 1.

[101] See s.105(5)(b) of the 1963 Constitution. The Federal Police Force has been retained under the 1979 Constitution, s.194.

Government and an edict of a state Military Governor, the former shall prevail over the latter.[102] The federal centre, capitalising on this inherent legislative superiority has promulgated a number of Decrees which, in their practical effect, diminish state rights, power and authority. Hence the Trade Union Decree No. 31 of 1973[103] and the Trade Disputes Decree No.7 of 1976[104] on compulsory membership, recruitment, wages, health and discipline have been comprehensively and elaborately drafted that it is no longer possible for any state to make law on the same subjects without being in conflict or inconsistent with the federal law. In effect, through legislative manoeuvring, labour is now made an exclusive rather than a concurrent subject. The Nigerian Enterprises Promotion Decree No.4 of 1972 has also curtailed the right of states to seek foreign investment except with approval of the Federal Government.[105]

By virtue of States (Creation and Transitional Provisions) Decree No. 14 of 1967,[106] the Federal Government on May 27, 1967 created twelve states out of the former four Regions without the consent of the constituent regions. The country's structural configuration was further altered on February 3, 1976 with the creation of seven additional states,

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[102]. Decrees No. 1 of 1966, s.3(4)(b)(ii); No. 32 of 1975, s.1(4)(b)(ii), and No. 1 of 1984, s.2(4)(b)(ii).

[103] Laws of the Federal Republic of Nigeria 1973, p.A543.

[104] Ibid., 1976, p.A21. See also the Trade Unions (Miscellaneous Provisions) Decree No.17 of 1986.

[105]. Ibid. (1972), p.A11.

[106] Ibid. (1967), p.A103.

bringing the number to nineteen;[107] and continuing with the same momentum, the Babangida Administration added two more states on September 23, 1987 - all without giving the state governments prior notice.[108] Similarly, on February 3, 1976, the Supreme Military Council under the leadership of General Murtala Muhammed took a decision to change Nigeria's capital from Lagos to Abuja[109] without consulting the states.[110] The point being made here is that the Federal Government's unilateral actions have alienated the states. This is a negation of the federal principle which demands cooperation and consensus in all matters affecting the Federation as a corporate entity.

Another example of federal government's incursion into state affairs is the use of "set off" rights under sections 143 and 153 of the 1963 and 1979 Constitutions respectively which the military partly adopted. This section empowered the Federal Government to "set-off" part of the revenue due to a region that failed to meet its debt either to it or to an external creditor. Experience has shown that since the military assumed power in 1966, many states have failed to

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[107]. See the States (Creation and Transitional Provisions) Decree No. 12 of 1976.

[108]. See General Ibrahim Babangida's Address to the Nation on the Creation of New States, Wednesday, 23 Spetember 1987 (Lagos: Federal Ministry of Information, 1987). See also Newswatch, October 12, 1987, p.20.

[109]. See the Federal Capital Territory Decree No. 6 of 1976, Laws of the Federation 1976, p.A15.

[110]. See Professor Humphrey N. Nwosu Political Authority and the Nigerian Civil Service (Enugu: Fourth Dimension, 1977), p.70.

meet their financial obligations towards the centre with the result that there has developed a creditor-debtor relationship which has indirectly weakened the bargaining power of the states. In essence, "set-off" right is being exercised with the sole aim of enhancing federal power to the detriment of the states. Professor Aluko feels this is an "abuse of power".[111]

But it should be realised that although The Federal Military Government (FMG) as a matter of law is not required to (and does not) seek the consent of state governors before making any legislation, in practice, it does sometimes devise an informal means of consultation with the states. For instance, when a draft Decree is prepared by the Federal Ministry of Justice, it is submitted by the initiating Ministry to the Federal Executive Council (FEC) with a covering memorandum for the council's consideration and approval. If the Council approves the decree (with or without amendment), it will authorise its submission to the Head of the Federal Military Government (HFMG) for promulgation into law. If the decree deals with matters that are within the competence of state governments, it will be referred to the National Council of State (NCC) (composed mainly of governors) and thence to the Supreme Military Council by way of memorandum by the HFMG for their comments and approval. It is only after such approval that the decree drafted will be

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[111]. Olajide Aluko, "Federal-State Relations", (supra.), p.291.

signed into law by the HFMG.[112] The point here is that to the extent that a proposed decree affects the interests of the states, all the Military Governors will by virtue of their membership in the NCS be involved in its process of enactment.[113]

Besides, in certain cases, a Decree or the modification of an existing Decree is a product of reports and recommendations of a Panel or Committee that was set up by the FMG to make a study of a particular problem in the country. These reports and recommendations are normally based on the memoranda submitted nationwide to the Panel by the public. Typical examples are: the Nigerian Enterprises Promotion Decree No.4 of 1972 was promulgated following submissions made by the Nigerian business community together with the recommendations of the Federal-State Inter-Ministerial Committee on Trade and Industries; the State (Creation and Transitional Provisions) Decree No.12 of 1976 grew out of the recommendations of the Panel on the Creation of States headed by Justice Ayo Irikefe, a one-time Chief Justice of Nigeria; the Federal Capital Territory Decree No.6 of 1976 was the result of the Panel on Federal Capital led by Dr. (Justice) Akinola Aguda, formerly Chief Justice of Botswana and

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[112] This internal procedure for securing approval for some military legislations was revealed in an interview with a retired Federal Permanent Secretary in charge of administrative procedure for the formulation of policy and drafting of legislations, Cabinet Office Lagos. He chooses to remain anonymous. His information was confirmed as correct by the legal draftsmen in the Federal Ministry of Justice, Lagos.

[113] For the composition and functions of the SMC, NCS and the FEC, see Item 8:1:3 (ante), and Chapter Nine (infra, 9:1:2 and 9:1:3).

Director-General of Nigerian Institute of Advanced Legal Studies, Lagos; the Oaths (Amendment) Decree No.22 of 1976 was enacted following the recommendations of the Public Service Review Commission and the Government's White Paper thereon, while the River Basins Development Authorities Decree No.25 of 1976 was the result of the joint efforts of the Federal and State governments.[114] In essence, through the establishment of Panels and Committees, both the Federal and State Governments including a wider spectrum of Nigerian society have been able to make some input into the military's legislative process.[115]

Of course, it is still debatable whether in the existing situation a Council, such as the NCS or SMC (each with less than 30 members), in the absence of preliminary publication of draft Decrees, can bring to bear on the consideration of a piece of legisaltion the high degree of meticulous examination to which government legislations are subjected under a civilian democratic federal system. It may also be argued that Councils, Panels and Committees as often constituted are not sufficiently representative of the diverse elements in the country. Obviously, as indicated in Chapter 5, a military administration, no matter how benevolent, cannot pretend to be

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[114] The author witnessed the establishment and proceedings of these Panels. See also the "Explanatory Notes" to the Decrees.

[115] For more discussion on the advantages of Panels and Committees under the military, see E.O. Olowu, "The Legislative Process in a Military Regime: The Nigerian Experience", Quarterly Journal of Administration, 11, 1 (1970).

a popularly elected government.[116]

The military also encourages ad hominem legislation[117] which affects both the Central and State Governments. It is inherent in the Rule of Law that legislation should be conceived as a system of rules with a generality and uniformity of application for the regulation of the life and activities of the community as a whole.[118] Individualised legislation may not only be arbitrary and discriminatory, it could also be oppressive. In the words of Chief Justice Marshall of the United States Supreme Court, "it is the province of the Legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments".[119] He declares individualised statutes as "invalid and repugnant to the general principle of legislation" because they are "speculative legislative acts which take away the life, liberty, or property of particular named persons".[120] The Court of Appeal in England has also said that a statute directed against a named person alone is

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[116] See Chapter Five (ante, 5:1:8).

[117] That is, legislation directed against named individual(s). Examples in Nigeria include the Forfeiture of Assets (Validation) Decree No.45 of 1968, and the Recovery of Public Property (Special Military Tribunals) Decree No.3 of 1984. What is more, these Decrees were given retrospective effect. See, for example, Governor of Mid-Western State v. Mid-Western (Nig.) Co. Ltd. [1977] 10 S.C. 43.

[118] See Chapter Six (ante, 6:7).

[119] Fletcher v. Peck, 8 Cranch 87 [1810]. One of those "other departments" is invariably the Judiciary, see Marbury v. Madison, 1 Cranch 5 U.S. [1803], p.137.

[120] United States v. Lovett, 328 U.S. 303 [1945] at p.318.

a privilegium which "has never commended itself to British legislators".[121]

Our fundamental objection to ad hominem legislation by the military is that besides being discriminatory, it is also a derogation from the doctrine of separation of powers, an infringement on human rights, and a fortiori, a breach of the federal principle.[122]

But one profound question that requires an urgent answer is, "what has been the reactions of the states towards the foregoing invasions of their constitutional rights?"

A number of factors are responsible for state subordination. In the first place the existence of command obedience relationship between the centre and the states renders the latter wholly impotent. Since state military governors are appointees of the Federal Government, they must of necessity accept the latter's actions and instructions otherwise they are liable to dismissal. A good example is the case of the ex-Military Governor of Western State, Navy Captain Akin Aduwo, who under General Murtala Muhammed's regime in 1975 heard of his removal over the radio on the very day he was moving from a temporary accommodation to the

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[121] R. v. Earl of Crewe [1910] 2 K.B. 576.

[122] See, for example, Olowofoyeku v. Attorney-General of the Federation [1972] 2 U.I.L.R. 196. For more criticisms on the negative character of military legislation, see Chapter Five (ante, 5:2:7); and B.O. Nwabueze, "The Process and Challenges of Legislation in a Military Government", Nigerian Bar Journal, 18, 1 (1984).

Governor's Lodge having served as governor for one month.[123] His offence was failure to retire compulsorily many officials of the ousted regime in accordance with the FMG's directive. The aim of the Federal Military Government was to inject 'new blood' into the new administration with a view to minimising the incidence of corruption. The Governor of Gongola State, Colonel Yohana Madaki was also summarily dismissed (later converted to retirement) in 1986 in similar circumstances.[124] Secondly, virtually all the states are very poor and they are economically dependent on the centre, thereby making them more vulnerable to federal dominance as they cannot 'bite the finger that feeds them'.[125] Thirdly, the increase in the number of the states makes them smaller and weaker than their predecessors, the regions.

Finally, it should be added that notwithstanding the centralist policy of the military government, it has made some useful contributions in terms of legislations. The Federal Military Government has transferred some items from the Concurrent to the Exclusive List to take greater control of strategic areas of policy because it has greater financial ability to manage the country towards the achievement of even development and national integration. The civilian

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[123] It was the author's personal experience. Apparently embarrassed, the FMG claimed the Governor was being sent for a course but people hardly believed that statement.

[124] Being a lawyer, he has set up his Chambers at Kaduna, Kaduna State, Nigeria.

[125]. All the State Governments have been relying on the Federal Government for their budgets, see the discussion on fiscal federalism in Chapter 11.

governments were unable to carry out purposeful, nationally-oriented programmes of economic and social development partly because of the organisational structure of power distribution. The fact that too many subjects were incuded in the Concurrent Legislative List gave rise to duplication of resources, cut-throat competition, and uncoordinated mobilisation of manpower among the regions/states.[126] The situation was aggravated by the fact that between 1960-66 Nigeria had overbearing regional governments and a weak central government. Although the Federal Government was allocated enormous powers, it could not really assert its position as the 'senior partner' in the federal compact because the federal leaders including the President and the Prime Minister derived their political support from their respective regions. It was a case of dual loyalty in favour of the regions.[127] This undermined the federal set up and rendered ineffectual cohesive and comprehensive national planning.

For example, the inclusion of "industrial development" in

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[126] E.g. during the Second Republic, the Governors of Anambra, Bendel, Borno, Gongola, Imo, Lagos, Ogun, Ondo, Oyo and Plateau States refused to allocate land to the Federal Government for houses in their states for fear that State voters would shift their loyalty to the centre if federal presence was felt because these Governors and the government in power were not in the same party. Perhaps the situation would have been different if land was not on the Concurrent List, or if the government was a military one.

[127] The decision by the Federal government to set up Iron and Steel Industries could not materialise because there was deadlock among the regions on their locations. Now the FMG has established them in Bendel, Plateau, Katsina and Kwara States respectively. See the Nigerian Steel Development Authority Decree No.19 of 1971, Laws of the Federation 1971, p.A75. For a detailed account of the inter-regional competition, see Chapter Four (ante, 4:2:4).

the Concurrent List under the 1963 Constituiton encouraged proliferation of unviable competing industrial projects in the then existing four Regions[128] with attendant wastage of scarce resources. The attraction of foreign investment towards industrial projects in Nigeria illustrates the very unhealthy competition among the regions. Due to lack of overall policy, whilst richer regions were able to attract foreign investors, the poorer ones who were marginalised could not. The situation was so deplorable that the foreign investors had to urge the Federal Government to intervene and coordinate the activities of regional governments. In the words of the British investors, "it would be an advantage if the procedure for obtaining an approval for new industrial investment or expansion could be clarified ideally by the provision of a single point of reference with property".[129] It should be remembered that prior to 1966, all the regions had their different Consulates in London that negotiated foreign ventures on their behalf. The statement of British investors shows that in terms of national policy the Nigerian Federation was loosely held together under the civilian era. It could therefore be argued that the military shifted some items especially Trade and Commerce from the Concurrent to Exclusive list to make the centre stronger. The retention of these subjects under the Exclusive List in the 1979 Republican

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[128] Industries such as cement manufacturing were estblished in virtually all the regions on political grounds without considering their economic viability.

[129] See Confederation of British Industries Report (London: H.M.S.O., 1971).

Constitution is probably an affirmation of the military government's good intentions.[130] It should also be added that the creation of twelve states in 1967 and other exercises that followed was partly meant to reduce the power of the Regions and to reduce tensions among them.[131]

In the area of university education, the states also engaged themselves in unhealthy competition through proliferation of tertiary institutions in the face of meagre financial resources, especially in the later part of the 1970s and in the 1980s. Many of the states are too poor to support such projects effectively, although it may be argued that the poverty of the states is to a large extent due to the refusal of the Federal Military Government (FMG) to allocate more resources to the states.[132] Besides lack of finance, courses were being duplicated in many universities without taking into account the country's manpower requirement and priority. Consequently, the FMG had to take over the ownership and funding of universities with a view to streamlining the courses, reducing costs and maintaining uniform policies. These measures, it seems, were taken in good faith, bearing in mind that in a developing country like Nigeria higher education is considered as a co-determinant of national growth.

8:5 Summary

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[130] See Schedule 2, Part I, Item 59.

[131] See, for example, General Gowon's Broadcast to the Nation on 29 May 1967, Unity in Diversity (Lagos: Federal Ministry of Information, 1967).

[132] For details, see Chapter 11.

This chapter has attempted to demonstrate that the institution of legislature and the legislative mechanism under military rule in Nigeria differs significantly from those found in typical federations like the United States of America, Canada and Australia. In theory, while the states have inherited the legislative powers of the defunct civilian governments of the First and Second Republics, in practice the extent and scope of these powers have been drastically reduced by the military with the result that the states are now in a subordinate and much weaker position. The Federal Military Government leaves no one in doubt that it is the sole legislative authority in Nigeria. In spite of the illusion that the military have preserved the federal nature of the country's constitutions by not abolishing the tripartite legislative lists (Exclusive, Concurrent and Residual), the retention of this classification appears not only theoretical but also cynical in the light of the actual content of the military Decrees and the practice of government. The presence of the military as rulers obviously accounts for the relative ease with which legislative infringements are being committed by the Centre at the expense of the States. If it were in the civilian era when long procedural hurdles through regional and federal legislatures were required for constitutional amendments; it would have been very difficult, if not impossible, for the FMG to assume such overwhelming power without adverse reactions from the regions.

In the main, the legislative process under the military is characterised by such negative features as (i)

arbitrariness and swiftness in total disregard of the federal principle, Rule of Law, democracy, respect for human rights and public opinion; (ii) lack of adequate consultation and proper advice which are necessary for rational and effective decision-making, resulting in poor legislative output; and (iii) ex part facto legislation, culminating in lack of certainty or predictability.

It is, however, to the credit of the military that it has not been constrained or influenced in its legislative functions by any sectional interest as it has, strictly speaking, no constituency to represent or any other socio-political considerations that were regarded as too sensitive by the erstwhile party-politicians to legislate upon. The military created twelve states within their first two years in office - a task which took politicians more than a decade without providing solution. Some of the Decrees and Edicts promulgated, especially those against serious crimes and corruption are socially desirable as they are meant to protect the image of the country and her entire citizens.

Also, in contrast with the parliamentary and presidential legislatures which had over 300 legislators from different constituencies under the 1st and 2nd Republics, the membership of the SMC is less than 30. The net effect is that a lot of funds could be saved by the military administration because of its comparatively small size. Furthermore, lobbying, protracted debates, frequent adjournments, motions, resolutions, and filibustering that normally militate against prompt legislations under civilian regimes are not tolerated

by the military. The Supreme Military Council meets at short notice and its proceeding usually lasts for 2-3 days. Besides the fact that a decree or an edict can be given the force of law by means of a sound or television broadcast enables the Council to legislate expeditiously.

In addition, the transfer of certain items such as trade and commerce, and higher education from the Concurrent to Exclusive List by the military was motivated by their desire to give the country a sense of direction towards a nationally-oriented economic and social development.

On the whole, the Federal Military Government is an absolute, supreme legislature unlimited by the federal principle.[133] Not only is the legislative authority of the FMG absolute and unlimited as regards the range of subject-matters comprehended with it, its exercise is not required to follow any legally laid down procedure. The State Governments are merely its agents, with no substantial independent legislative power. It would be a non sequitur to suggest that the Nigeria military operates a federal system of government.

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[133] It was held in Din v. Attorney-General of the Federation [1986] 1 N.W.L.R. (Part 17) 471 and Ojokolobo v. Alamu [1987] 3 N.W.L.R. (Part 61) 377 that the Supreme Court of Nigeria can neither question the exercise of the Supreme Military Council to legislate nor alter the law or overrule decisions of courts which it considers not in the interest of the society, nor challenge the validity of a Decree or the competence of the Federal Military government to make it.

CHAPTER NINE

THE EXECUTIVE UNDER THE MILITARY

The importance of the executive arm of government needs no emphasis. Constitutionally, the word "executive" has two meanings. In the narrower sense, it connotes a head of state or a head of government such as the British monarch and Prime Minister, or the American Executive President, including members of their respective Cabinets.[1] In the wider context, "executive" is that branch of government charged with the planning, initiation and implementation of policies as well as maintenance of law and order. The "executive" plays an important role in inspiring, guiding, and leading a nation towards political, social and economic transformation.[2] Executive functions are incapable of comprehensive definition; they are merely the residue of the functions of government after legislative and judicial functions have been taken away.[3] This chapter adopts the broader concept of "executive".

9:1 The Nature and Structure of the Executive

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[1] See Sykes, J.B. (ed.), The Concise Oxford Dictionary of Current English, 7th edn. (Oxford: Clarendon Press, 1985), p.337; and Ojo, J.D., The Development of the Executive Under the Nigerian Constitutions (Ibadan: University Press Ltd., 1985), p.1.

[2] Selassie, Bereket, H., The Executive in African Governments (London: Heinemann, 1974), p.2.

[3] Halsbury's Laws of England, 33rd edn., Vol.7 (1954), p.192.

In the pre-military era, the executive authority of the Federal Government extended to the execution and maintenance of the Constitution of the Federation and to all matters within the legislative competence of the Federal Parliament, while the executive authority of the Regions similarly included the execution and maintenance of their Constitutions and all other matters within the legislative domain of the Regional Assemblies. The Federal Executive was headed by the President and Prime Minister while those of the Regions were led by Governors and Premiers.[4]

On the face value, the fact that the military rulers have maintained the same geopolitical entity of the country and have created states to inherit the powers of the defunct regions might suggest that they have adopted or substantially retained the pre-1966 republican federal model which was characterised by explicit division of executive powers between the national and regional governments. On the contrary, this apparent structural similarity in no way reflects the true position of executive under military rule. The nomenclature gives a false impression for "nowhere is the unitary character of the military administration more in evidence than in the definition of the relationship between the Federal and State Executives".[5] This is exemplified by the hierarchical but highly stratified chain of command linking the Supreme

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[4] See the discussion on the status of Nigerian federalism during civilian rule in Chapter Six (6:1:2) and Tables D & E below for further details.

[5] Professor D.I.O. Eweluka, "The Military System of Administration in Nigeria", African law Studies, 10 (June 1974), p.67.

TABLE D. THE FEDERAL EXECUTIVE UNDER THE SECOND REPUBLIC, 1979-83

TABLE E: THE STATE EXECUTIVE UNDER THE SECOND REPUBLIC, 1979-83

1. State Civil Service Commission
2. State Council of Chiefs
3. State Electoral Commission
4. State Judicial Service Commission

Commander who is also the Head of the Federal Military Government (HFMG) at the apex to the State Governors at the base.[6] The executive authority of the HFMG is superior to the combined powers of President and Prime Minister under the First and Second Republics. The HFMG has now become the embodiment of all the executive powers in the country. We shall now consider the various organs of the executive arm of the military government.

Strictly speaking, there is only one executive authority for Nigeria under the military for it is provided that the executive authority of the Federal Republic of Nigeria shall extend to the execution and maintenance of the Constitution of the Federation as modified by a decree, and to all matters whatsoever throughout Nigeria. Such executive authority shall be vested in the Head of the Federal Military Government (HFMG) and may be exercised by him either directly or through persons or authorities subordinate to him.[7] It is further provided that the HFMG may either conditionally or unconditionally delegate to the Military Governor of a state executive functions falling to be performed within that state in relation to any matter.[8] By implication, both the

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[6] See Chart G below.

[7] Decrees No.1 of 1966, s.7(1)(2); No.32 of 1975, s.5(2)(3); No.1 of 1984, s.6(1)(3)(5). Note that delegation of powers to subordinate authorities does not include the function of signing Decrees which is the HFMG's prerogative, see ss.11(1) and 12(1) of Decree No.32, 1975 and No.1, 1984 respectively.

[8] The Constitution (Suspension & Modification) Decree No.1 of 1984, s.6(1)(7). These provisions have remained the basic formula for delegating executive powers to states since the inception of military rule in 1966.

CHART G

Organizational Chart of Federal-State Relations

(29 July 1975 - 30 September 1979 and
31 December 1983 to Date)

Notes:

(1) ——▸ flow of command relations in which decisions are made from above
(2) ◂——▸ flow of deliberative relations indicating processes of effective mutual decision making
(3) HFMG - Head of the Federal Military Government
(4) SMC - Supreme Military Council
(5) C of SSHQ - Chief of Staff Supreme Headquarters
(6) NCS - National Council of State
(7) FEC - Federal Executive Council
(8) SEC - State Executive Council

Source: Adapted from Oyovbaire, Sam Egite, Federalism in Nigeria, op.cit., p.112.

executive authorities of the Federation and the States are now vested in one person, the Head of the Federal Military Government who is also the Chief Executive of the Central Government. The total effect of these provisions is that not only is the executive power possessed by the State Governments dependent on the will of the Federal Government, but also that a state government has no executive power even over matters that would have otherwise been within its legislative competence. Any executive authority delegated to states may at any time be varied or revoked by the HFMG who was its repository in the first place. Thus, under the military, a state governor, being a delegate, is subordinate to the HFMG in federal-state executive relations.

9:1:1. The Head of the Federal Military Government

At the apex of Nigeria's governmental hierarchy is the Head of the Federal Military Government (HFMG) who is also the Head of State as well as the Commander-in-Chief of the Armed Forces.[9] He has exclusive responsibility for the appointment of the Chief of Staff, Supreme Headquarters (his political Deputy); Minister of Defence and Chairman, Joint Chiefs of Staff; the Chiefs of Staff of the Nigerian Army, Navy and Air Force respectively; the Inspector General of Nigeria Police Force; and the Director-General of the Nigerian Security Organisation (NSO).[10] He is also responsible for the

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[9] See s.20 of Decrees No.32 of 1975 and No.1 of 1984 respectively. Under Decree No.1 of 1966, s.16, he was designated as the Supreme Commander.

[10] The Constitution (Suspension & Modification) (Amendment) Decree No.17 of 1985, s.3.

appointment and removal of the Secretary to the Federal Government and Head of the Civil Service of the Federation,[11] and the Economic Adviser to the Military Government.[12] In him also resides the power to determine the operational use of the Armed Forces of the Federation.[13] Furthermore, he is the Chairman of the Supreme Military Council (SMC), the National Council of State and the Federal Executive Council.[14] He appoints State Governors, judges of superior courts, ambassadors and other senior government officials.[15] In addition to this multitude of responsibilities, the HFMG is also the Chairman of the Army, the Navy and the Air Force Councils - the bodies responsible for the promotion and discipline of senior military officers, including state governors.[16] Thus, apart from being the Head of State as well as Head of Government, he is also the supreme commander of the Nigerian military. It therefore follows that state military governors are subject to political as well as military control of the HFMG. Besides, the Supreme Military Council for which he is the Chairman plays a dual role as the country's highest legislative and executive body.

The concentration of the executive powers of the

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[11] The Constitution (Suspension & Modification) Decree No.17 of 1974.

[12] Decree No.36 of May 20, 1966, s.4.

[13] See Decree No.17 of 1985, Schedule 3, p.A95.

[14] Decree No.1 of 1984, ss.4(a), 5(a) and 7(2)(a).

[15] See the Constitution (Suspension & Modification) Decrees No.1 of 1966, No.32 of 1975 and No.1 of 1984.

[16] Decrees No.1 of 1984 and No.17 of 1985.

Federation in the Head of the Federal Military Government was initially justified on the ground of exigency of the Nigerian Civil War 1967-70) which demanded draconian and emergency powers for the successful prosecution of the war, but the retention of such powers (to the detriment of the state executives) even two decades after the war is questionable. The powers gained or assumed for war purposes have not been relaxed and unfortunately voices of protest within government are feeble because of military dictatorship. At one stage, says Professor Ojo, it was even being assumed that the words or wishes of the Head of State were laws.[17]

But it must be pointed out that although the HMFG is the ultimate source of executive authority, s.5(1) of Decree No.32, 1975 and s.6(1) of Decree No.1, 1984 under which Muhammed/Obasanjo and Buhari regimes respectively ruled, and s.5 of Decree No.17, 1985 under which Babangida administration has been operating, expressly provide that such authority shall be exercised in consultation with the Supreme Military Council (SMC). In fact, the 1985 Decree provides that the SMC shall have the exclusive responsibility for the appointment of the Head of the Federal Military Government (HFMG), Military Governors, members of the National Council of State and of the Federal Executive Council. The significance of these provisions lies in the fact that they have introduced the concept of collective leadership although this cannot be equated with civilian democracy. Secondly, by the requirement

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[17] Ojo, Abiola, Constitutional Law and Military Rule in Nigeria, op.cit., pp.50-51.

of consultation there seem to have been eroded the discretionary and absolute executive power enjoyed by Generals Ironsi and Gowon under Decree No.1 of 1966. Thirdly, it could be speculated that since the Governors no longer owe their offices to HMFG personally, they are likely to enjoy greater autonomy. These arguments though theoretically logical are difficult to sustain in practice: firstly, the question whether there has been any consultation with the SMC shall not be enquired into by any court of law;[18] secondly, the fact that most of the members of the SMC are appointed and removed by the HFMG will necessarily compromise the role of the former as the 'watchdog' of the latter;[19] thirdly, as regards state governors, military ethos such as seniority, unity of command

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[18] The Constitution (Suspension and Modification) Decrees No.32 of 1975, s.5(2); No.1 of 1984, s.6(2); and No.17 of 1985, s.5.

[19] In 1988 General Babangida (the HFMG) sacked his Deputy, Navy Commodore Ebitu Ukiwe (Chief of General Staff and a member of the SMC) and replaced him with Rear Admiral Augustus Aikhomu without any explanation to the Nigerian public. Though it was later understood that the dismissal was a result of their internal differences, the Chief Press Secretary to President Babangida, Duro Onabule, said it was purely a military matter in spite of the fact that Decree No.17 of 1985 conferred no such power on the HFMG. The criticism of his lack of legal authority to dismiss any member of the SMC at will led to his subsequent promulgation of Decree No.4 of 1989. And in July and December 1989, he singlehandedly dropped many members of the SMC, NCS, and FEC in 'Cabinet' reshuffles. He can do and undo all the members of his 'Executive'. The SMC merely rubber-stamps the HFMG's wishes - see the African Concord, 22 January 1990, pp.21-23 for the interview granted by Lt-General Domkat Bali, former Minister of Defence and Chairman, Joint Chiefs of Staff, as well as member of the SMC in which he referred to the SMC as "a one-man show", calling President Babangida a dictator.

and discipline renders their independence unattainable.[20] In essence, there can hardly be any effective checks and balances for limiting the powers of the HFMG.

In sum, to the extent that the HFMG enjoys absolute monopoly of all the executive powers in Nigeria it will be argued that federalism is jettisoned.[21]

9:1:2 The National Council of State

This is the newest political organ established by the Muhammed/Obasanjo administration after the overthrow of the Gowon regime in 1975.[22] Its creation was necessitated by the exclusion of the State Military Governors from membership of the SMC consequent upon the change of government that occurred on July 29, 1975. Though relatively new, it is next to the SMC in the hierarchy of the military government.[23]

The National Council of State (NCS) is composed of the Head of the Federal Military Government (as the Chairman); the

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[20] A retired member of the SMC informed the author that the HFMG personally appoints the State Governors. According to him, the names of the nominees are brought to the SMC meeting only for ratification and that since such appointments are meant to be official secrets until announced the HFMG hardly gives his colleagues (except perhaps his Deputy) advance notice. This statement seems to be true because all the Governors I contacted said their appointment was a surprise to them - hearing it over the radio and from friends by telephone calls before they were formally and officially asked at short notice to report to the HFMG at the Dodan Barracks, Lagos, for swearing-in ceremony. According to the Governors interviewed, since it is a military posting, their consent was not required to be sought and as a lawful superior order it should be obeyed "willy-nilly'.

[21] For further details, see Chapter Eight (ante, 8:3:1).

[22] The National Council of State came into being by virtue of the Constitution (Basic Provisions) Decree No.32 of 1975, s.6. See also Decree No.1 of 1984, s.7.

[23] See Chart G (ante).

Chief of the General Staff; the Minister of Defence and Chairman, Joint Chiefs of Staff; the Chiefs of Army, Naval and Air Force Staff respectively; the Inspector-General of Police; all State Military Governors; and such other members as the Supreme Military Council may from time to time appoint.[24] The Attorney-General of the Federation attends the meeting of the NCS only in an advisory capacity.[25] Hence, it is interesting to observe that like the SMC, the membership of the NCS is purely military.

Essentially, the NCS is charged with the responsibility for policy guidelines on financial and economic matters, including social affairs in so far as they affect the states; the formulation and implementation of National Development Plans, including state programmes; constitutional matters, especially in relation to the states; and such other matters as the Supreme Military council may from time to time determine.[26] The NCS which meets at least twice a month provides an opportunity for discussion of purely state matters. It affords the Military Governors the advantage of acting as linkages between their states and the Federal Government thereby transmitting to the latter the peculiar problems, prospects and policies of the states. The NCS in effect serves as a consultative forum for the coordination and harmonisation of the activities of the Federal and State

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[24] Decrees No.32 of 1975, s.6(4); No.1 of 1984, s.7; No.17 of 1985, s.4(4).

[25] Decree No.1, 1984, s.7(4)(g).

[26] Ibid., s.7(6)(a).

Governments.

In terms of federal-state relations, the National Council of States is inferior and subordinate to the Supreme Military Council. In fact, it is expressly stated that the former shall perform such functions in relation to states only as the latter may from time to time determine.[27] It should however, be emphasised that for a true federalism to exist, the relationship between the national and regional governments must be based on coordination rather than subordination. The fact that all State Military Governors are direct appointees of the Head of State and could be dismissed at his pleasure means that the governors can hardly be expected to exercise much independence in the deliberations of the NCS. Moreover, the inclusion in the membership of the NCS of some senior officers who are leading members of the SMC, a higher political authority, responsible for the discipline of governors renders the role of the State Governors at NCS meetings merely as a 'rubber stamp'.[28]

Describing the relationship between the Head of the Federal Military Government and a State Governor, the first Nigerian military Head of State, General Aguiyi-Ironsi, who ruled between January-July 1966, said inter alia:

> "A Military Governor is assigned to a group of Provinces over which, and subject to the direction of the Head of the National Military Government, he shall exercise executive power. The Head of the National Military Government assumes the exercise of all legislative and executive powers throughout the Republic subject to such

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[27] Ibid., ss.9(b) and 10(c)(d).

[28] See Chapter Five (ante, 5.2.3) on military's penchant for discipline, and dogmatic obedience to superior officers.

> delegations to Military Governors as are considered necessary for purposes of efficient administration.[29]

To further underscore the purely military nature of the governor's assignments, they are always enjoined to implement federal government's policies 'willy nilly' irrespective of states' interests and peculiarities. They are also required to channel their complaints through the normal military chain of command - that is, to the Head of the Federal Military Government via the Chief of Staff, Supreme Headquarters.[30] Newly sworn in military governors are often told that they are in the states to serve as in any military posting and can be redeployed at any time.[31] Consequently, state governors have accepted their position as that of an agent meant to carry out the instructions of his principal. A striking example is the statement of the former Governor of Western Region of Nigeria, Colonel Adekunle Fajuyi. While explaining his role in the Region, he told his people:

> "I am not a Regional leader. I am here on an assignment given to me by the Supreme Commander's Government."[32]

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[29] The Republic of Nigeria: Broadcast to the Nation by His Excellency Major-General J.T.U. Aguiyi-Ironsi, Head of the National Government and Supreme Commander of the Armed Forces, 24th May, 1966 (Lagos: National Government Press, 1966), p.4. It is significant to note that this statement was made the same day that his famous Unification Decree No.34 of 1966 was promulgated.

[30] See Chart G (supra).

[31] For example, see the addresses of Generals Murtala Muhammed and Muhammadu Buhari to their newly appointed State-Governors reproduced in Oyediran, Oyeleye (ed.), Survey of Nigerian Affairs (Lagos: NIIA, 1975), pp.216-20; and Lindsay, Barret, Agbada to Khaki: Reporting a Change of Government in Nigeria (Enugu: Fourth Dimension, 1985), p.49 respectively.

[32] West Africa (London), 12 February 1966.

This, in effect, confirms that the State Chief Executive (the Governor) in Nigeria today has no independent executive authority. His position is akin to that of a provincial governor appointed directly by the President under Kenya's unitary government.[33] To deny this would be to affirm that "the deputy is greater than his principal; or that the servant is greater than his master".[34] Since the Governors are appointed by the Head of State who is also the Commander-in-Chief of the Armed Forces, they are subordinate officers, bound by service discipline to obey his commands and instructions.[35]

9:1:3 The Federal Executive Council

Besides the Supreme Military Council (SMC) and the National Council of State (NCS), there is a third tier arm of the executive in the hierarchy of the central political leadership structure called the Federal Executive Council (FEC).[36] The FEC is made up of military personnel and a number of civilians hand-picked by the Head of the Federal Military Government (HFMG). Its membership includes the HFMG as the Chairman, the Chief of Staff, Supreme Headquarters; the Attorney-General of the Federation and Minister of Justice;

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[33] See Bienen, Henry, Kenya: The Politics of Participation and Control (Princeton: Princeton University Press, 1974).

[34] Alexander Hamilton, cited in Nwabueze, B.O., Constitutional Law of the Nigerian Republic, op.cit., p.119.

[35] See Chapter Five (ante, 5.2.1).

[36] See Chart G (supra). The Babangida administration has redesignated FEC as the "National Council of Ministers", see the Constitution (Suspension and Modification) (Amendemnt) Decree No.17, 1985.

and other ministers which the HFMG in consultation with the SMC may from time to time appoint.[37]

The inclusion of civilians in the FEC is necessitated by the fact that their absence always creates a political vacuum which the soldiers find difficult to fill themselves due to lack of political skill. In fact, it is generally thought that the dismissal of the entire professional politicians after the January 15, 1966 revolution was largely responsible for the hasty and ill-advised decision that led Ironsi into adopting a unitary system in May 1966 with fatal consequences. Expert advice from experienced politicians might have averted the unfortunate situation that eventually took General Ironsi's life.[38] The second reason is the idea to give military regime some semblance of democracy with a view to bridging the communication gap between the national and subnational units - what Professor Oyovbaire refers to as "political lacuna".[39] It is therefore commendable that the composition of FEC, like that of NCS, is fairly representative of the various states that make up the country.

The membership of the Federal Executive Council which is based on proportional state representation seems to have compensated for the lack of special provision for states' presence in the Supreme Military Council. One obvious

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[37] Ss.7(5) and 4(5) of Decrees No.1 of 1984 and No.17 of 1985 respectively.

[38] See the Address by Lt.Colonel Yakubu Gowon, HFMG, to the newly appointed Federal Commissioners, Lagos, 12 June 1967.

[39] Oyovbaire, Sam Egite, Federalism in Nigeria, op.cit., p.139.

advantage is that besides generating popular attachment from the states to the centre, it instills some psychology of power-sharing between the Federal and State Governments. It also provides a useful institution for the articulation and aggregation of public demands.

It should however be borne in mind that FEC is a purely advisory body established to assist and advise the Head of State in the day-to-day performance of ministerial functions such as supervision and execution of government departments and policies respectively. But the Head of State is not bound to accept the Council's advice. Thus, unlike the civilian cabinet which it is meant to replace, FEC is not a policy-making but a policy interpreting body - a conduit through which government policies are passed to ministries and departments for implementation. It is vested only with the responsibility for executing the general policy of the Federal Government within such framework as may from time to time be determined by the Supreme Military Council.[40]

Once again, as in the SMC and NCS, the dominant character in the FEC is the Head of the Federal Military Government.

9:1:4 The State Executive Councils

At the beginning of military rule in 1966, the position of the regional (state) governments was slightly different from that of the central government in that the former had no executive councils. The state military governors arrogated to themselves both the role of the legislature and that of the

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[40] See Decrees No.32 of 1975, s.10; and No.1 of 1984, s.11 in the Laws of the Federal Republic of Nigeria, 1975 and 1984.

executive. According to Professor Ojo, "a state military governor was virtually a law unto himself".[41] This was so because the famous Decree No.1 of 1966 that first established military rule in Nigeria equated the Government of each state with its Military Governor by stipulating that any reference to the Government, Governor, Premier or Minister of each of the defunct Regions should be construed as reference to the Military Governor of that Region.[42] Hence, in absence of any provision for state executive councils, the management of the affairs of state ministries fell naturally on the Permanent Secretaries and their subordinates - an experiment in the institutionalisation of military bureaucracy. It was therefore not a mere coincidence that there emerged a crop of 'super-permanent secretaries' who wielded enormous power in policy formulation and execution.

State Executive Councils (SEC) became formally recognised and allotted roles in 1975 with the emergence of General Murtala Muhammed's administration.[43] A SEC consists of the Military Governor as chairman; one senior officer each from the Nigerian Army, Navy, Air Force, and the Nigeria Police Force in the state; and such other members known as Commissioners as the Governor, in his discretion, may from time to time appoint. One of the members must be a woman. It is now mandatory for a military governor to have an executive

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[41] Ojo, Abiola, Constitutional law and Military Rule in Nigeria, op.cit., p.44.

[42] The Constitution (Suspension & Modification) Decree No.1 of 1966, Schedules 2 and 4.

[43] See Chart G (supra).

council of this composition, and the membership shall reflect the various local governments that make up the state.[44] In all the states of the Federation, the membership is predominantly civilian.

The SEC advises the Governor on matters of state policy and on any other issue he might deem necessary to consult them.[45]

It should be noted that a State Executive Council (SEC) has no independent executive authority. It carries out such functions as are delegated by the Head of the Federal Military Government to the Military Governor of a state in respect of those executive duties falling to be performed within the state in relation to any matter. Any function so delegated may be conditionally or unconditionally varied or could be revoked.[46] Though the Military Governor is the Chief Executive of the state to which he is appointed, Decrees No.1 of 1984 and No.17 of 1985 expressly vest the executive authority of the Federal Military Government (which includes the state governments) in the Head of the Federal Military Government. The Governor exercises his executive authority in the state, in conformity with directives from the Federal Authorities, namely, the Chief of Staff, the Supreme Military Council and the Head of the Federal Military Government

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[44] Decrees No.32 of 1975, s.7 and No.1 of 1984, s.8.

[45] Decrees No.1 of 1966, s.9; No.8 of 1967, s.7; No.1 of 1984, s.6.

[46] Decree No.1, 1984, s.6(6)(8).

(HFMG).[47]

All executive functions which immediately before 31st December 1983 were vested in or exercisable by the Governor or any officer or authority of a state by virtue of s.5(2) of the Constituton of the Federal Republic of Nigeria 1979 are now to be treated as having been delegated to the Military Govenor of each State.[48] The effect of this provision is that the executive authority of a state vests in the HFMG who in turn delegates same to the Military Governor. The delegated authority extends to the execution and maintenance of the Constitution (as amended by Decrees), all matters within its legislative competence,[49] as well as exercising the power of prerogative of mercy in relation to offences created by state laws.[50]

The Military Governor shall exercise the executive authority delegated to him over a state, so as not to impede or prejudice the exercise of the executive authority of the Federal Republic or to endanger the continuance of the Federal Military Government. The Governor may exercise executive functions delegated to him either directly or through persons or authorities subordinate to him in the Public Service of the

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[47] See Chart G (ante).

[48] The Constitution (Suspension and Modification) Decree No.1 of 1984, s.6(7).

[49] See Chapter Eight (ante), footnotes 61-63.

[50] The Constitution (Suspension and Modification) (Amendment) Decree No.17 of 1985, Schedule 1, s.161. See also s.192 of the 1979 Constitutiion.

State.[51] The function of signing an edict by the Military Governor of a State cannot however be delegated.[52]

In sum, although State Executive Councils are created to occupy the position of the Regional Executive Councils (REC) of the pre-military era,[53] the former are not at par with the latter because under the military dispensation, states have no constitutionally recognised executive authority. The failure of the military government to fully preserve the executive autonomy of the State governments is repugnant to federalism.

9:1:5 The Civil Service

The term "civil service" normally refers to functionaries of state who are appointed to government jobs through non-elective process. Their recruitment is often based on merit, determined through competitive examinations and other techniques including nominations, patronage, academic qualifications, and professional expertise. As an arm of the executive, the Civil Service is probably the most central public institution employed in the actual execution of government policies. In Nigeria, it is the bureaucratic arm of the executive which implements the day to day routine policies of the Federal and State Governments. Any employee of the Federation or a state who on or after October 1, 1960 holds or has held any public office in a civil capacity is a

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[51] Decree No.1 of 1984, s.6(9).

[52] Ibid., s.4(2).

[53] Ibid, ss.12(4), 10(4) and 15(4) respectively.

civil servant.[54]

The role of civil service in a military regime is of particular significance, especially if it is realised that although policies are mostly formulated by the military administrators and their civilian ministers, the task of thinking out policy and details of its execution lies on the trained and experienced team of civil servants. The civil service could therefore be described as the backbone of governmental system without which the whole structure would inevitably collapse.

That the civil service plays an important role in military rulership is exemplified by the fact that successive military administrations in Nigeria have consistently relied on it in running their governments. Indeed, when the military took over the mantle of leadership of the country in 1966, it was only the civil service, the judiciary and the police that were left intact. The civil servants stepped into the power vacuum that was created by the retirement of the politicians from public offices. The military 'courted' and formed an alliance with the civilian bureaucracies because unlike the disbanded politicians, military administrators lack the political and administrative acumen to rule. The civil servants were the only viable alternative to elicit for support in offering policy leadership. Thus, the nine-year rule of General Yakubu Gowon (1966-75) has been described as the 'burgeoning' in the powers of the civil servants,

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[54] See the Constitution of the Federal Republic of Nigeria 1979, s.277.

particularly the most senior ones, the permanent secretaries. They were disparagingly referred to as 'super-permanent secretaries' for fear of bureaucratic authoritarianism.[55] There is no doubt that the narrower apparatus of policy input of military administrators, and the hierarchy-order orientation of military discipline which militate against exhaustive consideration of policy issues accounts for the indispensability of civil servants under military rule.

Prior to the emergence of the military on Nigeria's political arena, both the federal and regional constitutions[56] provided for a distinct and an autonomous civil service with a board of management (the Civil Service Commission) for the Federation and for each of the Regions. The two parallel and independent commissions derived their origins and power from their respective constitutions, each being responsible for staffing, salary structure, conditions of service, and discipline of its own civil servants. Since the federal and regional governments were then coordinate, and autonomous in their respective spheres of competence, it was considered necessary that each level of government should have its own civil service loyal to it and answerable to no other authority. The regional civil services regarded themselves as equal to the federal civil service and resented any leadership role from the latter. In fact, before 1966 the regional

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[55] See, for example, Pat Utomi, "Military Rule and the Dangers of Bureaucratic Authoritarianism in Nigeria", Spectrum (A Current Affairs Digest), Lagos, March-June 1984, p.42.

[56] See the Constitution of the Federation 1963, Chapter X, ss.146-153.

governments had separate consular offices in London independent of the Nigerian High Commission through which each regional civil service commission recruited its expatriate staff with little or no interference from the Federal Civil Service Commission.[57]

The constitutional creation of divided sovereignty which existed between the two levels of government, the historical fact that the regions attained self-government before independence was granted to the centre; the political pressure to indigenise the civil service which was manifested much earlier in the regions, together with higher pay and rapid advancement, gave the regional civil services more advantage in attracting qualified senior indigenous staff than the federal civil service. And with the departure of the British colonial administrators on the attainment of Independence in 1960, those senior civil servants who had gone to the regions refused not only to go to the centre for fear of losing their seniority, but resented any moves towards enhancing the leadership role of the federal civil service. The problem was further aggravated by the country's hostile political climate which encouraged cut-throat inter-regional competition. As the basis of political power the regions were more powerful than the federal centre. The sum total of all these developments was that "administrative federalism" (the existence of two separate civil services for two levels of government) was the practice between the federal and regional

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[57] E.g. the Northern Region had its office at Bayswater in West London.

governments in the period before the commencement of military rule.[58]

Of all the institutions of governments of the civilian era, the public service is among the least affected by the military takeover. Hence, even though we now have 22 separate civil services in place of 5 under the First Republic and 20 under the Second Republic, and though instead of being under a separate and independent executive superior, each is now subject to the ultimate authority of a common superior (the HFMG), in functions, structure and personnel, both the Federal and State civil services are each the same as its republican counterpart. There now exist one central and twenty-one state civil services, each with its own separate functions, organisation structure, including system of control and leadership based on the principles of division of labour. At each level of government, each service is divided and subdivided into ministries, departments and sections. A ministry is normally headed by a Permanent Secretary who ensures that all related or similar functions under his jurisdiction are considered together and subjected to the same planning and policy. The Permanent Secretary is responsible for the supervision of the day to day activities of his ministry, but he and the ministry are under a political head - a Minister at the federal level and a Commissioner at the state level - who links the Permanent Secretaries to policy makers.

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[58] For more information, see Peter T. Odumosu, "Leadership in the Public Service of Nigeria", Quarterly Journal of Administration, 2, 2 (1968), pp.63-70.

Besides, the organisation and structure of the civil service remains largely along the class-oriented lines of the British colonial model. Each public service has a technical as well as an administrative class. Whilst the technical group provides services and social amenities in furtherance of performance of civil duties, the administrative class sees to the internal needs of each ministry or department especially in respect of such matters as personnel, finance, planning and execution of policies.

Apart from being under the general control and direction of a Minister or a Commissioner, each pubic service is also controlled by an executive council, FEC or SEC.[59] In addition, each is under the special control of a Ministry of Establishment and a Public Service Commission. The Ministry of Establishment controls the internal organisational structure of the Public Service by controlling the grading and seniority of its members. The Public Service Commission, on the other hand, is responsible for the appointment, promotion, dismissal and general disciplinary control of the members of the public service under its charge, with the exception of Ambassadors, Permanent Secretaries, Directors of Audit, Judges and members of the Armed Forces.[60]

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[59] See Items 9:1:3 and 9:1:4 (ante). The author worked as administrative officer in the Ministry of Finance, Kwara State between 1974 and 1975 and is very conversant with the system.

[60] See ss.110, 123, 147-150 of the 1963 Constitution of the Federation, as modified by Decrees No.1 of 1966 and No.13 of 1968. See also the Third Schedule to the 1979 Constitution, Part I(B) and Part II(A) as amended by Decrees No.1 of 1984 and No.17 of 1985.

Although the military administration has not substantially disturbed the pre-existing set up in the public services, since 1966 the country has witnessed a systematic expansion of the power of the federal civil service at the expense of the states' civil service. This may be attributable to the fact that military rule by its very nature emphasises centralised command structure,[61] with the result that state governments are given directives by the Federal Government on the management of their civil services. In some cases, the number of State Ministries has even been fixed by the centre.[62] Besides, as indicated in the preceding chapters, the dramatic rise of oil revenue and the retention of its bulk by the centre has led to increasing dependence of the states on the Federal Government to finance their services, especially in the fields of agriculture and education. These changes in the relative status of the federal and state governments cannot but be reflected in the relative status of the federal and state civil service. Consequently, in Nigeria today, the military has given recognition to the primacy of the federal civil service so much so that some military regimes significantly took over the functions of the states' civil services.

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[61] See Chapter Five (ante, 5:2:3), and Charts F & G (supra).

[62] When General Muhammadu Buhari became the Head of State in 1984, he directed that no state should have more than nine ministries, the aim being to maximise the available resources. This directive which is still retained by his successor, General Ibrahaim Babangida, does not apply to the Federal Military Government, see Moment of Truth: Collected Speeches of Major-General Buhari (Lagos: Federal Ministry of Information, 1985).

It should be noted that this federal dominance was initiated by the first military Head of State, Late General Aguiyi-Ironsi, who in 1966 maintained that "except as a unified command, the military cannot afford to run five separate governments and separate civil services (one federal and four regional) as if it were a civilian regime".[63] He decided that in addition to services like the Posts and Telecommunications which were already under exclusive federal control, others like Education, Health, Industry and Agriculture should be centralised as one of the urgent means of consciously promoting the unity of the country.[64] And on 24th May 1966, he introduced a momentous constitutional change which was effected by the Constitution (Suspension and Modification) Decree No.34, 1966. As from that date, Nigeria ceased to be a Federation and became simply the Republic of Nigeria.[65] The Federal Military Government and the Federal Executive Council were redesignated as the National Military Government and the Executive Council respectively; the Federal Territory of Lagos became known as the Capital Territory; the Northern, Eastern, Western and Mid-Western Regions were renamed the Northern, the Eastern, the Western, and the Mid-Western Groups of Provinces respectively. Each Group of Provinces was kept under the general direction and control of a Military Governor appointed by the Head of the National

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[63] Major-General Ironsi's maiden press statement of 17 January 1966, published as Government Notice No.149, Nigeria Gazette, 53, 6 (1966), p.103.

[64] Ibid., p.104.

[65] s.1.

Government, while the Constitution of the Federation of 1963 became known as the Constitution of the Republic.[66]

In addition, all the Edicts made by the Regional Military Governors which were in force immediately before that date were henceforth given the force of a Decree in each Group of Provinces.[67] This, in essence, meant that the Military Governors had even lost the power of issuing Edicts.

It should be noted that the newly formed Group of Provinces corresponded exactly with the four previous Regions and the four Military Governors continued in office administering the same areas as before.[68] Even the Regional Constitutions, as suspended and modified by Decree No.1 of 1966 remained in force. The Military Governors however lost the power to incur expenditure on their own responsibility without the prior consent of the National Military Government.[69] Thus, in terms of the structural configuration of the country, it may be argued that there was no real change.

But more importantly, Decree No.34, 1966 merged the federal and regional civil services into a single "National Public Service" under a National Public Service Commission (NPSC), and the latter took control over the appointment, promotion, discipline and dismissal of senior civil servants

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[66] s.2(1).

[67] s.1(6).

[68] See Map V in Chapter Three (ante).

[69] Decree No.34 of 1966, s.2(3).

throughout the Republic.[70] The NPSC was required to give approval before appointment carrying an initial salary of £2,292 or more per annum could be made. All other offices with lesser salary remained the delegated responsibility of the appropriate Provincial Public Service Commission (PPSC) which delegation could be varied or revoked at any time by the NPSC with the approval of the Head of the National Military Government.[71]

The power to appoint and remove persons to hold or act in the office of permanent secretary or other officers of equivalent rank was however vested in the Head of the Federal Military Government. However, authority over police appointments lay with the Police Service Commission,[72] while appointments of Ambassadors, Directors of Audit, Attorneys-General of the Republic and Group of Provinces, including judicial personnel were under the control of the Supreme Council,[73] both being federal bodies.

It would seem therefore that by Decree No.34 of 1966, a unitary form of government was established for Nigeria. The Federation and the Regions were abolished, although the replacement of the latter by the new name of groups of provinces as well as the retention of the Regional Governors would appear to have retained the essence of the original

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[70] s.3(1).

[71] s.4(1)(2)(3)(4).

[72] s.6.

[73] s.5. See also s.2(1) of the Constitution (Suspension and Modification) Decree No.36, 1966 Laws of the Republic of Nigeria (Lagos: National Press, 1966), p.A163.

administrative arrangement. The Regional Military Governors were subordinated to the authority of the head of the National Government as a result of the unification of the federal and regional public services, as well as the taking away of legislative and executive functions from them except by delegation. The geographical areas hitherto delineated by the Regions and administered by the Military Governors nevertheless retained most of their distinctive characteristics, including the maintenance of separate treasuries, restricted public services, and the Revenue Allocation Formula established in s.143 of the 1960 and 1963 Federal Constitutions respectively.

In effect, although Decree No.34 cannot be described as wholly unitary the introduction of a unitary civil service by Ironsi was calamitous. His argument that "it was intended to meet the demands of the military government under a unified command" could not prevent the Northern revolt against his hasty and badly handled attempts to establish a unitary government. General Ironsi, who lost his life when overthrown in July 1966, has been described as "inept, lacking in political commonsense and not very intelligent"[74] because of his obsession for unitarism.

Unitary tendencies were also exhibited by the Muhammed/Obasanjo administration which in 1975 initiated mass retirement and dismissal of both federal and state public servants, including officials of statutory bodies, governors

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[74] Kirk-Greene, A.M.H., Crisis and Conflict in Nigeria, op.cit., p.184.

and commissioners allegedly on grounds of old age, corruption, redundancy, or ill-health. Besides, General Obasanjo claimed that the public service was characterised by lethargy, uncaring attitude, 'godfatherism', bossiness, egocentricism, gross erosion of morality, indolence, impropriety and loss of integrity.[75] Similarly, in 1984 the Buhari administration, which called itself the off-shoot of Muhammed/Obasanjo regime, by a decree, empowered federal and state authorities to retire, dismiss or remove public officers on the same grounds, adding that no court of law shall entertain any action in respect of the retirement and dismissal.[76]

Also in 1986, General Ibrahim Babangida removed from the Federal Public Service Commission the responsibility for the appointment, promotion, dismissal and general disciplinary control of the members of Customs, Immigration and Prison Services by establishing a separate and distinct joint board to administer the Customs, Immigration and Prison Laws.[77] Similarly, on January 1, 1988 President Babangida came out with a major restructuring of the civil service while delivering his budget speech. With effect from that date, all

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[75] See General Murtala Muhammed's maiden Address to the Nation, 30 July 1975; and the Public Offices (Removal of Certain Persons) Decrees No.10 of 1976 and No.18, 1977; and Obasanjo, O., "My Dodan Barracks Years", Newswatch, 19 February 1980, pp.40 et seq.

[76] The Civil Service Commission and Other Statutory Bodies (Removal of Certain Persons from Office) Decree No.16 of 1984, and the Public Officers (Special Provisions) Decree No.17 of 1984, Laws of the Federation of Nigeria 1984. See also Federal Civil Service Commission v. Garba [1986] 2 N.W.L.R. (Part 22) 395.

[77] See the Customs, Immigration and Prisons Services Board Decree No.14 of 1986.

Federal Ministers and State Commissioners (instead of Permanent Secretaries) shall be accounting officers of their respective Ministries, and shall have direct control of the finances allocated to them; secondly, all Permanent Secretaries in the Federal and State Civil Services shall no longer be permanent, they have to go with their appointing governments at the end of their tenure; and thirdly, Permanent Secretaries shall be known and called Directors-General.[78]

Since 1975 indiscriminate purges of both the federal and state civil services brought about by the Federal Military Government has introduced a sense of uncertainty and job insecurity among career civil servants. Even the post of Permanent Secretary has ceased to be permanent since nine of them were retired en masse in 1975. In the absence of judicial redress, the purges were not only arbitrary but contrary to the principle of natural justice.[79]

Furthermore, although these retirmements and dismissals were intended to enhance productivity, eradicate corruption and mismanagement, the Federal Government's directives for the retirement and dismissal of state employees for misconduct committed even within the states is a negation of the federal principle.[80]

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[78] Text of the 1988 Budget Speech.

[79] In the case of Attorney-General of Bendel State v. Eweka, FAC/B/9/79 of 9th November 1979, the Federal Court of Appeal held that Decrees No.10 of 1976 and No.18 of 1977 validating the general purge exercise of public officers in 1975 effectively ousted the jurisdiction of the court.

[80] For more discussions on federal incursion into state civil service, see Ademolekun, Ladipo (ed.), Public Administration in Nigeria (Ibadan: Heinemann, 1985); and P.C.

It should however be pointed out that apart from the nature of military rule, another major factor responsible for the dominance of the federal civil service over the states is the emergence of a generation of highly educated technocrats and econocrats who are deeply committed to federal superiority or what they regard as 'strong federation'. This new breed of Nigerians among whom are university intellectuals, have played a prominent role in the formulation of national policies. They prefer national politico-economic integration to sectionalism and political expediency. One of these intellectuals, Phillip Asiodu, a one-time federal Permanent Secretary, has warned against the danger of regionalism and the illusion of equating the responsibilities of regional civil servants with those of their federal counterparts, arguing that it would be necessary to establish the federal civil service as the 'elite service' with adequate recruitment, training and remuneration policies to make it indeed superior to the states' civil services in its highest echelons and more attractive to the best talents in the country.[81]

The supremacy of the federal service over those of the states has been reflected and maintained by the appropriate pay differentials between the federal and state permanent

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Asiodu, "The Civil Service: An Insider's View", in Oyediran, Oyeleye (ed.), Nigerian Government and Politics Under Military Rules, 1966-79 (London: Macmillan, 1979), pp.73 et seq.

[81] Asiodu, Phillip Chiedo, The Future of the Federal and State Civil Services (Benin City: Mid-West Newspaper Corporation, 1971).

secretaries under military rule.[82] Consequently, unlike in the civilian era, state civil services are now in a more subordinate position, looking up to the centre for guidance and leadership.

9:1:6 Advisory and Consultative Administrative Bodies

Besides the civil service, there exist under the military dispensation federal-state administrative relations which represent a trend not only towards increasing federal leadership but indicate a direction of a more fruitful and meaningful cooperation between federal and state officials through a number of intergovernmental administrative institutions some of which were established even before the advent of military rule in 1966.

At the head of each institution is a top federal official, with state representatives and few nominated individuals especially professionals as members. For example, the National Council on Establishments which was inaugurated in 1957[83] but retained by the military[84] has as its members the Permanent Secretaries of the Federal and State Ministries of Establishments and Training, with the Permanent Secretary

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[82] See the Government Views on the Report of the Public Service Review Commission (Lagos: FMI, 1974). On 25th September 1972, the Federal Military Government set up a Commission under the Chairmanship of Chief J.O. Udoji to carry out a review of the organisation, structure, management, salaries and wages of the Nigerian Public Service.

[83] See the Appendix to Nigeria (Constitution) Order-in-Council 1957. Joint federal-state institutions such as the National Economic Council and National Population Commission were also established under the Third Schedule to the 1979 Constitution.

[84] See, among others, Decrees No.1 of 1966, No.32 of 1975, No.1 of 1984, and No.17 of 1985.

of the Federal Ministry of Establishment as its chairman. Its principal functions are to provide a forum for consultation among all the governments of the Federation on service conditions such as salaries and gradings, uniform regulation, and collection and exchange of information on public service matters.

The Agricultural Research Council of Nigeria Decree No.25 of 1971 established a Council to advise the Nigerian Council for Science and Technology on national science policy and financial requirements for the implementation of such policy in respect of research and training in the agricultural sciences and the application of the results of such research and training to promote the national economy.[85]

The Nigerian Enterprises Promotion Board set up by the Nigerian Enterprises Promotion Decree No.4 of 1972 is charged with the responsibility for advancing the promotion of Nigerian enterprises. The decree also establishes the Enterprises Promotion Committee in each state of the Federation with certain powers to assist and advise the Board on the implementation of the Decree, and to ensure that the provisions of the Decree are complied with by aliens in every state. Basically, the Board ensures large-scale indigenisation of the business and entrepreneurial activity in the country.[86]

The Directorate of Food, Roads and Rural Infrastructure Decree No.4 of 1987 charges the Directorate with the functions

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[85] Laws of the Federal Republic of Nigeria, 1971, p.A111.

[86] Ibid., 1972, p.A11, ss. 1 and 2.

of mobilising the rural communities, development of rural areas in Nigeria, and the improvement of the quality of life of the rural dwellers. The Directorate is required to develop rural roads, basic infrastructures, increased food supply, industrial raw material output, and the stimulation of agricultural activity in the country.[87]

In the performance of its functions, the Directorate is enjoined to liaise with Federal Ministries and Agencies, State and Local Governments. The Directorate, which is a federal body, is empowered to establish a branch office in each of the states of the Federation.[88]

Even thought the establishment of the Directorate is commendable in that it represents a bold attempt by the FMG to pay more attention to the development of rural areas, we hasten to add that this administrative institution has once again demonstrated the propensity of the military government to assume more responsibility in matters that ought to be left with the state and local government. It is doubtful if a central government can ascertain the needs of the rural community better than the state governments. It is therefore not surprising that the record of the Directorate since its inception is said to be one of dismal failure.[89]

Some other similar intergovernmental institutions that call for mention are: the Nigerian Council for Medical

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[87] Section 5.

[88] Section 4.

[89] See "Plenty Money, Little Result", Nigeria Home News (London), January 5-11, 1990.

Research,[90] Mid-wives Board,[91] Nigerian Council for Scientific and Industrial Research,[92] Institute of Medical Laboratory Technology,[93] Nursing Council of Nigeria,[94] National Sports Commission,[95] Nigerian Educational Research Council,[96] Public Complaints Commission,[97] National Fertilizer Board,[98] Nigerian Students' Loan Board,[99] Nigerian Universities Commission (NUC),[100] Joint Admissions and Matriculation Board (JAMB),[101] National Teachers Institute (NTI),[102] National Science and Technology Development Agency

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[90] The Nigerian Medical Council Decree No.72, 1966, Laws of the Federation 1966, p.A293.

[91] The Mid-wives Decree No.79, 1966, Laws of the Federation 1966, p.A327.

[92] The Nigerian Council for Scientific and Industrial Research Decree No.83, 1966, op.cit., p.A351.

[93] The Institute of Medical Laboratory Technology Decree No.56 of 1968, p.A775.

[94] The Nursing Council of Nigeria Decree No.2, 1970, p.A49.

[95] The National Sports Commission Decree No.34, 1971, p.A149.

[96] See the Nigerian Educational Research Council Decree No.31, 1972, op.cit., p.A505.

[97] The Public Complaints Commission Decree No.31, 1975 (supra), p.A137.

[98] The National Fertilizer Board Decree No.8, 1977, op.cit., p.A65.

[99] The Nigerian Students' Loan Board Decree, 1972.

[100] See the Nigerian Universities Commission Decree No.1, 1974, Laws of the Federal Republic of Nigeria, 1974, p.A1.

[101] Decree No.2, 1978, op.cit., p.A33.

[102] Decree No.7, 1978, op.cit., p.A69.

(NSTDA),[103] National Board for Technical Education,[104] and the National Council for Arts and Culture.[105]

On the whole, the establishment of the above intergovernmental Councils by the military provided useful fora in which the Federation and the States could meet and discuss the many economic, political and social problems besetting the country. The establishment of such joint advisory and consultative bodies has resulted in the harmonisation of standards and implementation of policies on education, health, law and judicial administration, public sector salary structure, pensions and taxation. On all these issues, federal-state relations have become one of consultation and cooperation for joint action rather than of competition experienced during the civilian era. Joint services have helped to strengthen the quality of senior public servants in the states especially those newly created. Indeed, it has been argued that intergovernmental composition of a common service would encourage the development of a national point of view among public servants.[106] Joint administrative services may also foster and facilitate intergovernmental cooperation particularly where this is such an important element in national development planning. For instance, where state units are too small or too poor to

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[103] Decree No.5, 1977 (supra) p.A45.

[104] Decree No.9, 1977, op.cit., p.A65.

[105] Decree No.5, 1987.

[106] Watts, Ronald L., Administration in Federal Systems (London: Hutchinson, 1970), pp.25-43.

support an extenstive administrative organisation, the sharing of services is a good way of avoiding uneconomic duplication in administrative agencies.

Since the FMG controls the lion's share of the national revenue and is responsible, in the broad sense, for the overall proper functioning of the generality of all the governments of the Federation in the maintenance of peace, law and order, and general development, the need for joint programme of action between the national and subnational governments cannot be over-emphasised. It should be further realised that until the emergence of military administration, the federal public service could not provide effective leadership in national development programmes due to the co-existence of the forces of centrifugalism and centripetalism. The dualism of the administrative services under the civilian governments was very sharp particularly during the First Republic. In the process of 'Nigerianisation' each regional service recruited its own staff almost exclusively from its own region. The net effect was the encouragement of regional spirit and loyalty within the separate services to avoid intereference between federal and regional governments - a situation which undermined the forces making for Nigerian unity.[107] The ultimate aim of the military has been to esablish a strong central government and forge a viable political system that could integrate the various units of the

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[107] For a comprehensive account, see Chapters 3 and 4 (ante).

Federation.[108]

But from a purely constitutional point of view, and in the context of this thesis, common administrative services under a strong and overbearing central control as experienced under military rule weakens and even destroys regional/state autonomy or independence which is imperative in a federal polity like Nigeria. What is desirable is the need for the Federal Government to allocate more resources and functions to the states to discharge their legitimate responsibilities.

9:2 Summary

What emerges from the preceding discussion and analysis of the general relationship between the Federal and State "executives" is that right from the inception of its administration in 1966, the "ghost" of institutionalising a unitary government has been haunting the military. It has been oscillating between a unitary system of government in consonance with its traditional centralised structure of command and what one may constitutionally refer to as quasi-federalism in recognition of the diversity which exists in the country. But contrary to the self-proclamation of the military regimes that they have been operating a federal system of government, true federalism has never been practised. The spirit of military decrees and the "command-obedience" nature of the military administration are incompatible with the federal principle.

In the real sense, under the military, there is only one

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[108] See General Murtala Muhammed's 15th Independence Anniversary Broadcast, 1 October 1975.

executive authority - the Head of the Federal Military Government (HFMG). As General Danjuma rightly points out:

> "In a military regime, as in a military command, the authority to govern is vested only in one person - the HFMG; any Governor, Minister, Commissioner or Permanent Secretary appointed by him are mere lieutenants or advisers. As the boss, he can veto or ignore such advice and could even dispense with the services of the appointees."[109]

Federal-state executive relationship under the military is characterised by centralisation of authority, power and policies.[110] The State Governors being personal appointees of the Head of the Federal Military Government (HFMG) occupy a subordinate position comparable to that of an agent or a field representative. Their executive authority is subordinate to but not parallel to that of the HFMG who has been aptly described by Professor Eweluka as "the centre of gravity of the whole machinery of military government".[111] All exercise of executive power in Nigeia is ultimately subject to this overriding authority. In the end, it seems irresistible to agree with Nwabueze's conclusion that,

> "federalism and military rule where they cohabitate, they are generally strange bed-fellows; where they meet, the latter tends to influence the former in the direction of a unified administration".[112]

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[109] Lieutenant-General T.Y. Danjuma, ex-Chief of Staff, Nigerian Army, The Renaissance, (Lagos), 29 July 1973, p.13.

[110] E.g. see Chapter Five (ante, 5:1:4).

[111] D.I.O. Eweluka, "The Military System of Administration" (supra), p.108.

[112] Professor B.O. Nwabueze, "Constitutional Problems of Military Coups in Nigeria", op.cit., p.31.

CHAPTER TEN

THE JUDICIARY UNDER THE MILITARY

After the legislature and the executive, the judiciary is the third most important organ of government. It is the mighty fortress against tyrannous and oppressive laws. The judiciary ensures that both the rulers and the ruled are subject to the law, and that courts adjudicate upon the legality of the exercise of the legislative and executive powers. The importance of the judiciary in a free and democratic society cannot be over-emphasised.[1]

Federalism is potentially conflictual in that it usually emerges out of conflict and compromise between centrifugal and centripetal forces in a given polity. The conflict may be related to claims or disputes arising from such issues as division of powers, social responsibilities, boundary adjustments, or revenue allocation between the national and regional governments. There is therefore a need for an umpire such as the judiciary to resolve these questions, for according to Professor Sawer:

> "The distribution of competence between centre and regions should be interpreted and policed by a judicial authority which can make authoritative decisions as to the validity of governmental acts where these are alleged to be beyond the competence

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[1] For a more detailed and lucid discussion on the role of the judiciary, see, among others, Aguda, Akinola T., The Judiciary in the Government of Nigeria (Ibadan: New Horn Press, 1983); and Awogu, Olisa F., The Judiciary in the Second Republic of Nigeria 1979-1983 (Onitsha: Pacific College Press Ltd., 1984).

of the centre or a region.[2]

Sir K.C. Wheare also maintains that the last word in settling disputes about the meaning of the division of powers must rest neither with the general government nor with the regional government alone, but essentially with the judiciary.[3] It should, however, be added that the umpire need not be a court, it could be a tribunal provided its role is regarded as legitimate by both the general and regional governments.[4] The role of an independent umpire in the functioning as well as the structure of federalism in Nigeria becomes apparent when one considers the stark realities of the cultural diversity and hot political climate that exist in the country. Unfortunately, as we shall see in this chapter, under the military, independence of the judiciary is more honoured in breach than in observance. But, before delving into that issue it is necessary to first examine the structure of the Nigerian judiciary.

10:1 The Structure of the Nigerian Judiciary

Although the military by the famous Decree No.1 of 1966 and its successors suspended some major political institutions like the legislatures and the executives throughout the country, the judiciary is the least affected.

Before the advent of military rule, the Nigerian

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[2] Sawer, Geoffrey, Modern Federalism, op.cit., p.1.

[3] Wheare, Kenneth C., Federal Government, op.cit., p.58.

[4] See Wiltshire, Kenneth, Planning and Federalism: Australian and Canadian Experience (supra), p.76; and Paul A. Freund, "Umpiring the Federal System", in MacMahon, Arthur W. (ed.), Federalism: Mature and Emergent, op.cit., p.161.

judiciary had a federal peak and a predominantly regional base. The base was made up of inferior courts, namely, Customary/Native courts and Magistrates' courts. At the apex were the superior courts of record such as High Courts, one in each of the four Regions and in the Federal Capital Territory of Lagos established by the 1963 Federal Constitution. In addition, there existed in the Northern region a Sharia Court of Appeal to where appeals lay from Native Courts on matters pertaining to Moslem personal law, and also a Court of Resolution meant specifically to settle jurisdictional conflict between the High Court and the Sharia Court of Appeal. From the Regional High Courts and Sharia Court of Appeal, appeals lay to the Supreme Court of Nigeria. This structure has been substantially retained by the military.

The only new changes introduced following the creation of twelve states in 1967 include the transfer of the High Courts and Magistrates' Courts of the Federal Capital Territory of Lagos to the newly created Lagos State, replacement of the Federal and Regional Judicial Service Commissions with federal and state Advisory Judicial Committees; merger of the old Native and Customary Courts with the higher judiciary to eliminate political influence that hitherto existed in lower courts,[5] and the establishment of Court of Appeal[6] as well as

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[5] For details of these reforms, see among others, the Area/Customary Courts Edicts No.2, 1967 of Kwara, Kano and North-Central States respectively; No.1 of North-Western State, 1968; No.4 of North-Eastern State, 1968; No.38 of Benue-Plateau State, 1968; No.2 of Eastern Nigeria, 1966; No.8 of Western Nigeria, 1966; and No.29 of Mid-Western Nigeria, 1966. See also A.O. Obilade, "Reform of Customary Court Systems in Nigeria Under the Military Government", Journal of African Law, 13 (1969), p.28; and Abiola Ojo, "Recent Reforms

Federal Revenue Court[7] at the centre. The retiring age of superior court judges has also been extended from 62 to 65 years.[8] In addition, the exclusive original jurisdiction conferred on the Supreme Court under sections 114 and 112 of 1963 and 1979 Constitutions respectively to arbitrate in disputes between the Federation and a state or between the states inter se has been removed.[9] The court structure in Nigeria is hierarchically arranged,[10] while the basic law governing the judiciary is the 1979 Constitution as modified from time to time by military decrees.

At this juncture, it is pertinent to look at the establishment, composition, appointment and dismissal, jurisdiction and functions of the courts, particularly the superior ones with a view to highlighting the nature of federal-state judicial relationship as well as the existence or otherwise of the independence of the judiciary under military rule. The aim is to determine further the working of the federal system.

10:1:1 The Supreme Court

At the apex of the judicial hierarchy is the Supreme

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in the Native and Customary Courts Systems", Nigerian Lawyers' Quarterly, 4 (1970), p.69.

[6] Federal Court of Appeal Decree No.43, 1976.

[7] Federal Revenue Court Decree No.13, 1973.

[8] See the Judicial Officers (Extension of Period of Service) Decree No.35, 1984.

[9] See Decrees No.1 of 1966, No.32 of 1975 and No.1 of 1984.

[10] See Chart H below.

CHART H

NIGERIAN COURT STRUCTURE

Notes:

** Superior Courts

* Inferior Courts

→ Channel of Appeals

Court of Nigeria which was first established by virtue of s.111 of the Republican Constitution of 1963. It is the highest court of the land and from its determination, no appeal lies to any other body or person. Its decision binds all courts in Nigeria.[11]

The Supreme Court of Nigeria shall consist of the Chief Justice of the Federation and such number of Justices not exceeding fifteen, as may be prescribed by an act of a National Assembly or a decree. The appointment of the Chief Justice is made solely by the Supreme Military Council (SMC), while that of other Justices is done by the SMC on the advice of the Chief Justice, the Attorney-General of the Federation, and the President of the Court of Appeal sitting jointly. A person shall not be qualified to hold the office of the Chief Justice of Nigeria (CJN) or a Justice of the Supreme Court, unless he is qualified to practise as a legal practitioner in Nigeria and has been so qualified for a period of not less than 15 years.[12]

10:1:2 The Court of Appeal

The idea of establishing a Court of Appeal was conceived by the military in 1975.[13] It was formally set up in 1976. The Court of Appeal (CA) is next to the Supreme Court and hears appeals from the Federal and States' High Courts, the

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[11] The 1979 Constitution, s.215; see also Yusufu v. Egbe [1987] 2 N.W.L.R. (Part 56) 341.

[12] Ibid., ss.210 and 211.

[13] See Decree No.32 of 1975. It was originally called Federal Court of Appeal until 1984 when it was redesignated simply as Court of Appeal to give it a national outlook since it is the only one of its kind in the country.

Sharia Court of Appeal and Customary Court of Appeal of the states. The decision of the CA binds High Courts and any other subordinate court.

It is composed of a President and such number of Justices not exceeding 15, of which not less than 3 each shall be learned in Islamic personal law and customary law respectively. The appointment of a person to the office of a Justice of the CA is made by the Supreme Military Council (SMC) on the advice of the Advisory Judicial Committee (AJC). Such a person shall not be eligible unless he has practised as a legal practitioner in Nigeria for at least 12 years.[14]

10:1:3 The Federal High Court

This court, formerly known as the Federal Revenue Court, came into being by virtue of Decree No.13 of 1973. It has, however, been redesignated as the Federal High Court by s.228(1) of the 1979 Constitution. The Federal High Court (FHC) holds session in various states of the Federation as determined from time to time by its Chief Judge. It is the only federal court which is of coordinate status with the States' High Courts. It deals primarily with matters relating to the revenue of the Government of the Federation, incorporated companies, and banking. Although Decree No.13 of 1973 and the 1979 Constitution do not define the word "revenue", the Courts have held that it includes all public monies which the State collects and receives from whatever

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[14] The Constitution of the Federal Republic of Nigeria 1979, ss.217-219.

source and in whatever manner.[15]

The FHC consists of a Chief Judge and such number of Judges as may be prescribed by an act of a National Assembly or a decree. The Judges of the FHC are appointed by the Supreme Military Council (SMC) on the advice of the Advisory Judicial Committee (AJC). A person cannot become a member of this court unless he is a qualified legal practitioner for at least 10 years.[16]

10:1:4 State High Court

There is established in each state of the Federation a High Court of Justice. At subnational level, it is the highest court of record with unlimited jurisdiction in both civil and criminal matters.[17]

The composition of a State High Court includes the Chief Judge of the State and such number of judges as may be prescribed by a law of a House of Assembly of the State or by a decree. The appointment of a person to the office of a Chief Judge and Judges of the High Court of a state shall be made by the Supreme Military Council (SMC) on the advice of the Advisory Committee (AJC). No person is eligible for judgeship of a State High Court unless he has qualified as a

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[15] See Alhaji Zanna Mandara v. Attorney-General of the Federation [1984] 4 S.C. 8; and Ansaldo (Nigeria) Ltd. v. National Provident Fund Management Board [1988] 1 Q.L.R.N. 168.

[16] The 1979 Constitution, ss.228-230.

[17] Ibid., s.236. It should be noted that the High Court has been in existence since the introduction of federalism in 1954.

legal practitioner for a period of not less than 10 years.[18]

10:1:5 Sharia Court of Appeal of a State

This court was set up for the first time by the Sharia Court of Appeal Law of 1960. It has been re-established by the 1979 Constitution.[19] At present, the Sharia Court of Appeal (SCA) is found only in the predominantly Muslim states of Northern Nigeria. It was originally created to allay the fears of Muslims that the reorganisation of the legal and judicial systems on the English model in 1934 would not endanger Moslem law.

The SCA of a state is made up of a Grand Kadi (as President) and such number of Kadis (Judges) as may be prescribed by a House of Assembly of the State or by a decree. The SMC on the advice of the AJC is responsible for the appointment of the Grand Kadi and Kadis. No person shall be qualified as a Kadi unless he has attended and has obtained a recognised qualification in Islamic personal law from an institution approved by the AJC and has held that qualification for a period of not less than 10 years; or he has a considerable experience in the practice of Islamic personal law; or he is a distinguished scholar in that field. The SCA deals mainly with questions of Islamic personal law regarding marriage and dissolution of such marriage, will, succession, and custody of children.[20]

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[18] The Nigerian Constitution 1979, ss.134 and 135. Note that both the SMC and AJC are federal bodies and this implies centralisation which is antithetical to federalism.

[19] Ibid., s.240.

[20] Ibid., ss.241-243.

10:1:6 Customary Court of Appeal

This is a creation of the 1979 Constitution. It deals primarily with appeals from Area/Customary Courts.

The Customary Court of Appeal (CCA) is composed of a President and other Judges appointed by the Supreme Military Council (SMC) on the recommendation of the Advisory Judicial Committee (AJC). In addition to any other qualification that may be prescribed by the Federal Military Government (FMG), nobody is eligible for the membership of the CCA of a state unless, in the opinion of the AJC, he has considerable knowledge and experience in the practice of Customary Law.[21]

10:1:7 The Magistrates' and Area/Customary Courts

These are inferior and subordinate to the aforementioned courts. Magistrates' Courts are presided over by qualified lawyers, while Area/Customary Courts (except in a few southern states) are generally manned by lay judges.[22] Both magistrate and customary court judges are appointed by State Public Service Commissions on the advice of State Advisory Judicial Committees. They are considered as civil servants.

It should be noted that under the military the rules and procedures of all the courts are subject to the provisions of decrees.[23] Note also that the power to adjudicate disputes between the national and regional governments exercisable by the Supreme Courts of the Federations of U.S.A., Australia,

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[21] Ibid., ss.245 and 246.

[22] In Northern Nigeria, Customary Court judges attend judicial basic courses.

[23] See the Constitution (Suspension and Modification) Decree No.1, 1984.

Canada, India, Switzerland, a la Nigeria under the First and Second Republics, has been removed by the military government.[24]

But before discussing the implications which the Nigerian Court structure under military rule has for federalism, it is necessary to examine briefly the composition and function of the Advisory Judicial Committee (AJC).

10:2 The Advisory Judicial Committee

The AJC is a federal organ which was first set up by Decree No.1 of 1966.[25] It is composed of the Chief Justice of Nigeria as Chairman; the Attorney-General of the Federation and Minister of Justice; the President of the Court of Appeal, the Chief Judge of the Federal High Court, the Chief Judges of States' High Courts, and the Chief Judge of the High Court of the Federal Capital Territory, Abuja; one Grand Kadi and one President appointed annually in rotation by the SMC from the states having Sharia Courts of Appeal and Customary Courts of Appeal respectively.[26] The AJC is entrusted with the responsibility of advising the Supreme Military Council (SMC) on the appointment of judges of superior courts and other matters pertaining to the judiciary that may be referred to it by the SMC.[27]

It should be noted that the establishment of the AJC by

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[24] See, for example, the Schedule to Decree No.1 of 1984.

[25] The Constitution (Suspension and Modification) Decree No.1 of 1966, s.11.

[26] See Decrees No.1 of 1966, s.11; No.32 of 1975, s.13; and No. 1 of 1984, s.14(1).

[27] Section 14(3) of Decree No.1, 1984.

the military has the advantage of insulating from the local politics of each state the final determination of issues connected with the appointment, discipline and removal of Superior Court judges.

10:3 The State Judicial Service Committee

This body is responsible for the appointment, discipline and dismissal of all judges of inferior courts including registrars and deputy registrars in states' judiciary.[28]

10:4 The Impact of Military Rule on the Judiciary

Military rule has made some significant impact on the Nigerian judiciary. Prior to the commencement of military administration, the judiciary was the country's final arbiter. It reviewed legislative and executive actions and pronounced upon their constitutional validity. Both the federal and state courts dispensed justice independently without fear or favour.

However, the emergence of the military government changed the position of the judiciary radically. It has been centralised and the powers of the courts have been curtailed considerably. They are barred from questioning the validity of all forms of military decrees and edicts.[29] The courts are also not competent to hear and determine any dispute between the Federal Military Government and a state. Such matters are handled by the Supreme Military Council.[30] In

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[28] Ibid., 1984.

[29] Decrees No.1 of 1966, s.6; No.32 of 1975, s.4; and No.1 of 1984, ss.3 and 5.

[30] See the Schedules to Decrees No.1 of 1966 and No.1 of 1984.

effect, the judiciary has not been truly independent.

10:5 The Independence of the Judiciary Under the Military

Before discussing the demise of the independence of the judiciary under the military administration in Nigeria, it is necessary to first ascertain its meaning.

In general parlance, independence of the judiciary relates to the manner of appointment of judicial officers, their removal, quantum and source of their remuneration, the freedom and immunity they enjoy in the performance of their duties, their qualifications and moral character, their comportment in society and the structural relationship of the judiciary with the other arms of government.[31] It implies that judges in the exercise of their judicial functions shall not be subject to the control of the executive or the legislature, the aim being to ensure that they dispense justice impartially. The principle of judicial independence and impartiality, says Professor Nwabueze, is among Nigeria's valuable heritage from Britain.[32] And according to the Nigerian Constitution of 1979, "the independence, impartiality and integrity of Courts of Law, and easy accessibility thereto shall be secured and maintained".[33] Article II, paragraph 2:04 of the Montreal Declaration also states that the judiciary must be independent of the Executive and the

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[31] For a comprehensive discussion, see Ojo, Abiola, Constitutional Law and Military Rule in Nigeria, op.cit., p.165.

[32] Nwabueze, B.O., Constitutional law of the Nigerian Republic, op.cit., p.144.

[33] Section 17(1)(e).

Legislature in the dispensation of justice.[34]

It should, however, be understood from the onset that there has never been perfect independence of the judiciary in Nigeria. A striking example is the fact that in both civil and military regimes, the judiciary has not had autonomous budget. Secondly, it has little or no control over the appointment and supervision of its supporting staff such as those in charge of library, vehicle and police security. In all these services, the judiciary relies on the executive arm of government. Thirdly, the executive exerts undue influence in the appointment of judges.

There are two kinds of judicial independence - the internal independence of individual judges from interference or undue influence from colleagues and seniors, and the institutional independence of the judiciary as a body from the other organs of government.[35]

10:5:1 Individual Independence

This means that a judge should adjudicate according to the dictate of his conscience without any undue influence from his colleagues. It enjoins each judge to be independent and free from directives, influences, inducements or pressures of

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[34] The Montreal Declaration is the Universal Declaration on the Independence of Justice unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on June 10th, 1983. For a copy of this Declaration, see Shetreet, S. and Deschenes, J. (eds.), Judicial Independence: The Contemporary Debate (Amsterdam: Nijhoff Publishers, 1985), Chapter 39 (Appendix), pp.447-54.

[35] For a critical analysis of these two types of judicial independence, see Shimon Shetreet, "Judicial Independence: New Conceptual and Contemporary Challenges", in Shetreet, S. and Deschenes, J. (eds.) (supra), pp.598-637.

his fellow judges in the performance of his judicial functions. This is in consonance with Article II, Paragraph 2.03 of the Montreal Declaration which provides, inter alia, that:

> "In the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely."

As far as this is concerned there is no precedent under both civil and military rule in Nigeria where a judge has been unduly influenced by his colleagues or superiors in his official duties. There has been no reported case of interference too.

10:5:2 Institutional Independence

This refers to freedom from interference from both the legislature and executive. It relates to security of tenure (appointment and removal), remuneration, freedom from governmental pressure, and immunity.

10:5:3 Independence of the Judiciary Under the Civilian and Military Era Compared

The independence and dignity of the Nigerian judiciary were substantially assured under the civilian governments (1960-66 and 1979-83).

Under the 1960 Independence Constitution, there was established each, for the Federation (including the Federal Territory of Lagos)[36] and the Regions,[37] a Judicial Service

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[36] The Constituiton of the Federation 1960, s.120(1).

[37] The 1960 Constitutions of Northern Region, s.53(1); Eastern and Western Regions, s.52(1) respectively.

Commission, which had the responsibility for the appointment, promotion and discipline of the Justices of the Supreme Court,[38] and the justices of the High Court of Lagos;[39] and the judges of the regional High Courts[40] respectively. But the Chief Justices of the Federation[41] and of the Federal Territory of Lagos[42] and those of the Regions[43] were appointed by the Governor-General of the Federation and the Governors of the Regions acting in accordance with the advice of the Prime Minister of the Federation and the Premiers of the Regions respectively. The Commission was also responsible for the appointment, transfer, dismissal and general discipline of other judicial officers such as Chief Magistrates and Chief Registrars whose salaries were charged upon the Consolidated Revenue Fund of the Federation[44] or of the Regions.[45]

The composition of the Judicial Service Commission of the Federation was made up of the Chief Justice of Nigeria, who was the chairman, the Chief Justices of the Federal Territory

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[38] The Federal Constitution, s.105(2).

[39] Ibid., s.116(2).

[40] The Constitutions of Northern Region, s.50(2); Eastern and Western Regions, s.49(2).

[41] Section 105(2) of the Federal Constitution.

[42] Ibid., s.116(1).

[43] Northern Region, s.50(1); Eastern and Western Regions, s.49(1).

[44] Section 121 of the Federal Constitution.

[45] Sections 54, and 53 of the Northern, Eastern and Western Regional Constitutions.

of Lagos and those of the Regions, the chairman of the Public Service Commission of the Federation, and one other member nominated by the Governor-General, acting in accordance with the advice of the Prime Minister.[46] The regional Chief Justices were barred from taking part in the activities of the Commission in relation to the judges and other judicial officers of Lagos Territory, while the member appointed on the Prime Minister's advice was precluded from participating in the business of the Commission pertaining to federal justices.[47] In the Eastern and Western Regions, each Commission consisted of the Chief Justice, who was the chairman, a judge of the high court of the region, and one other member appointed by the Governor acting in accordance with the advice of the Premier. In the Northern Region, the Grand Kadi (the President of the Sharia Court of Appeal which dealt with Islamic Law) was in addition, a member.[48]

The establishment of the Judicial Service Commission was designed to ensure and secure absolute independence of the judiciary and insulate it from political influence. This was buttressed by the fact that a decision to remove a judge from office could be based only upon the findings of an independent and impartial tribunal of enquiry. Because of the existence of elaborate arrangement for the security and tenure of judges, coupled with the fact that many of the judicial

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[46] The Constitution of the Federation 1960, s.120(2).

[47] Ibid., s.120(3).

[48] The 1960 Constitutions of Eastern Region, s.52(2)(3); Western Region, s.52(2)(3); and the Northern Region, s.53(2)(c).

personnel were expatriates who were not involved in local politics, the Nigerian judiciary under the 1960 Independence Constitution enjoyed a remarkable degree of independence.[49]

But with the emergence of the Second Republic in 1963, the Judicial Service Commission was abolished and replaced by a practice obtaining in Britain whereby a judge is appointed only on the advice of the executive. Under the British government, the Lord Chancellor, the Law Lords, the Lords Justices of Appeal, the Master of the Rolls, and the President of the Family Division are appointed by the Queen upon the advice of the Prime Minister. The ordinary High Court judges and Circuit judges are appointed by the Queen upon the advice of the Lord Chancellor who is a member of the Cabinet.[50] The ordinary (puisne) judges of the High Court, the Lords Justices of the Court of Appeal, Master of the Rolls, and the Law Lords of the House of Lords hold office during good behaviour subject to removal by the Crown on an address of both Houses of Parliament (the House of Lords and the House of Commons). The same rule applies to the Lord Chief Justice, the President of the Family Division, and the Vice-Chancellor who is the head of the Chancery Division of the High Court. Circuit

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[49] See, for example, Doherty v. Balewa [1961] All N.L.R. 604 where the Supreme Court declared the action of the Federal Government ultra vires, null and void. There were, however, few reported cases of governmental interference in judicial process; see Adegbenro v. Attorney-General of the Federation [1962] W.N.L.R. 150; Awolowo v. Federal Minister of Internal Affairs [1962] L.L.R. 177; and Williams v. Majekodunmi [1962] 1 All N.L.R. 413.

[50] For a detailed account of judicial appointment in Britain, see Shetreet, Shimon, Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary (Amsterdam: North Holland Publishing Co., 1976).

judges and Recorders however may be removed from office by the Lord Chancellor on ground of incapacity or misbehaviour.[51] High Court judges must retire at seventy-five years of age, Circuit judges at seventy-two, with possible extension to seventy-five, Justices of the Peace and Stipendiaries at seventy.[52]

It should be appreciated that the method of appointment and removal of judges in Britain is largely a matter of practice and convention rather than of written law. Anyone who is not conversant with the British administration of justice might argue from a superficial analysis that political influence or governmental pressures could be exerted on the English judiciary, at least from the point of view of separation of powers. This is because the Lord Chancellor is identified politically with the party in power. However, in practice, this is far from the truth. The Lord Chancellor is more often than not a 'politician' of outstanding character with a manifest integrity. Constitutional conventions and traditions have ensured recognition of the dual nature of his office and there is public confidence that he would not allow political considerations to outweigh his value judgment.

But how did the judicial practice inherited from Britain

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[51] The Supreme Court of Judicature (Consolidation) Act 1925, s.12(1); and the Appellate Jurisdiction Act 1876, s.6. See also Griffith, J.A.G., The Politics of the Judiciary, 3rd edn. (London: Fontana Press, 1985).

[52] Note that it was not until 1959 that a retirement age of seventy-five years was introduced for judges of the Superior Courts in England; see the Judicial Pensions Act 1959, Chapter 9, s.2. Mr. Justice S.G. Howard, retiring in 1971, was the first judge to retire on reaching the age set by the Act.

in 1963 operate in Nigeria? In terms of appointment, the 1963 Federal constitution provided that the Chief Justice of Nigeria and the Justices of the Supreme Court were to be appointed by the President on the advice of the Prime Minister, four of them being on the recommendation of the four Regional Premiers.[53] The process of appointment therefore ensured federal-regional participation, although it was left wholly in the hands of politicians with the abolition of the Judicial Service Commission - a departure from the 1960 Independence Constitution. In removing the Chief Justice or any of the Justices of the Supreme Court, the Constitution again stipulated that the address for the removal presented to the President must be supported by not less than two-thirds majority of all the members of the two Houses of Parliament, namely the House of Representatives and the Senate.[54] The latter was composed mainly of regional nominees.[55] Thus, as in appointments, the Regions were also involved in the removal process. At regional level, High Court Judges (including the Kadis of the Sharia Court of Appeal of Northern Nigeria) were appointed by the Governor of each Region on the advice of the regional Premier.[56] The procedure for the removal of regional judges followed mutatis mutandis that of the

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[53] Section 112(1).

[54] Section 112(2)(a)(b).

[55] Section 42.

[56] The 1963 Constitutions of Northern Nigeria, s.51; Eastern and Western Nigeria, s.49.

Federation.[57]

It should be pointed out that the abolition of the Judicial Service Commission (JSC) was rather unfortunate because, in the then newly emergent Nigerian Republic, the judiciary should not have been subjected to too much political control if it were to be impartial and independent. Nigeria ought not to have adopted the British model of judicial appointment and removal, for in Britain, the battle for the independence of the judiciary has been fought and won since the glorious revolution of 1688.[58] The decision to abolish the JSC was condemned, rightly in our view, by the Nigerian Bar Association as "deplorable and unjustified". The Association called on both the Federal and Regional Governments to restore it as soon as possible.[59] The danger of allowing politicians, particularly in a developing country like Nigeria, to have direct hands in the appointment of a judge is best summarised in the criticism of Professor Mayers. According to him:

> "Even where the history of his designation is entirely honourable, the judge who owes his appointment or nomination to the favour of particular groups or individuals within the party enters upon his office under a load of political debt; and however high-minded he may be, he will find almost impossible to resist completely the importunities of his creditors for payment through judicial favours - sometimes light, sometimes not so light."[60]

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[57] Ibid., ss.51(2) and 49(2) respectively.

[58] For a comprehensive account, see Lord Denning, The Road to Justice (London: Stevens, 1955), p.10 et seq.

[59] See the Nigerian Bar Journal (1964), p.45.

[60] Lewis Mayers, The American Legal System (New York: Doubleday, 1955), p.374.

Although it is not being suggested that the situation in the judiciary under the 1963 Constitution was as bad as that highlighted by Mayers, it can hardly be denied that under the First Republic (1963-66) only very few judges of high integrity and great courage took a firm and impartial stand in political cases where the President or Premier (both being party members) who recommended their appointment was involved. This view is confirmed by an article which appeared in one of the Nigerian newspapers immediately after the military takeover in 1966. It reads thus:

> "The Judicial Service Commission should be revived. The appearance of a military government is a mark of dishonour to the courts established by the Constitution. If the judges were vigilant enough they would have curbed the events which eventually led to military rule."[61]

It might be worthwhile to cite instances of the failure of the judiciary to contain political conflicts or prevent governmental interference in the administration of justice. In the case of Attorney-General for Eastern Region v. Attorney-General for the Federation,[62] relating to the accuracy of the census conducted in 1963, the Supreme Court said it had no jurisdiction in spite of the fact that allegations of corruption and dishonesty in the inflation of figures by some sections of the country were rampant. The plaintiff/regional attorney argued that revenue allocations made from the "Distributable Pool Account" under s.141 of the 1963 Constitution if altered on the basis of the 1963 census figures would be detrimental to the Eastern Nigeria

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[61] Daily Times (Lagos) 26 January 1966, p.6.

[62] [1964] 1 All N.L.R. 224.

Government. But Brett S.C.J., on delivering the judgment of the Supreme Court said:

> "... while the court has jurisdiction, in certain circumstances, to declare that something which Parliament has done is unconstitutional, it has no jurisdiction to dictate to Parliament what material it is to take into consideration in exercising its power to amend the constitution or what sources or information it is to rely on."[63]

The Court then concluded that it had no jurisdiction to entertain the claim and that no remedy was available by process of law where the establishment of Constituencies by the Parliament was based on incorrect figures. The legality of the Prime Minister's claim that his acceptance of the results was final and conclusive was not even questioned.

With due respect, the Supreme Court's verdict was rather untenable in that although Nigeria was then operating a parliamentary system of government, it was the Constitution and not the Parliament that was supreme. And unlike in Britain, any wrong committed by Parliament was subject to judicial review. The inability of the Supreme Court to resolve the issue and the political instability that arose therefrom was one of the factors that brought about the January 15, 1966 military revolution.[64] The case of Adegbenro v. Akintola[65] is another classic example of political and governmental interference in the judicial process of the First Republic. This case concerned the right of the Governor of the Western Region of Nigeria to remove a

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[63] Ibid., p.230.

[64] For details, see Chapter Seven (ante, 7:2:6).

[65] [1963] 3 W.L.R. 63.

Premier from office on the ground that it appeared to him that the Premier no longer commanded the support of a majority of the House of Assembly, although there had been no adverse vote in the House. An action was instituted by the respondent, the Premier of Western Nigeria, seeking a declaration that the Governor had no right to remove him from office in the absence of a prior resolution of the House of Assembly reached on the floor of the House to the effect that the Premier no longer commanded the support of the House. When the case came before the Chief Justice of the Western Region it was agreed by counsel for all the parties that the matter be referred to the Federal Supreme Court pursuant to s.108 of the 1963 Federal Constitution. The Supreme Court held that the governor could not validly exercise power to remove the Premier from office under s.33(10) of the Constitution of Western Nigeria except in consequence of proceedings on the floor of the House in the form of a vote of no-confidence that the Premier no longer commanded the support of a majority of the members of the House of Assembly. The appellant thereupon appealed to the Privy Council in London which reversed the decision of the Supreme Court. Thus, after the opinion of the Judicial Committee of the Privy Council, it was clear that Akintola was not the legal Premier of the Western Region and that any cabinet formed by him was equally illegal. But instead of accepting the verdict of the Privy Council, the Federal Government, exercising its power under s.5(4) of the Constitution ratified a law purportedly passed by the 'Akintola government' amending the Constitution of the Western

Region to the effect that the Governor should no longer have the discretionary power to remove the Premier. In effect, the Privy Council's decision which reversed the decision of the Supreme Court was in turn nullified by retrospective legislation,[66] and thenceforth, the Privy Council ceased to be a final Court of Appeal for Nigeria.[67] It can be seen that the action of the Federal Government was nothing short of determination by a government in power to bend the Constitution to suit its political ends, having regard to the fact that Akintola's party, the Nigerian National Democratic Party (NNDP) was in alliance with the Northern Peoples Congress (NPC), the party in power, with a considerable majority in the Federal Parliament.

It is our contention that a fearless, courageous, impartial and an independent judiciary at the time would have probably reduced the incidence of federal-state, intra-party and inter-party frictions of the First Republic and ultimately averted the impending holocaust of the January 1966 coup d'etat. If the country's highest tribunal like the Supreme Court could be politically manipulated, then it was inconceivable to talk of the existence of a complete independence of the judiciary.

As regards tenure of office of judges of superior courts, the 1963 Constitution stipulated that a person holding or appointed to act in the office of the Chief Justice of Nigeria

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[66] See the Western Nigeria Constitution (Amendment) Law, 1963.

[67] See the Constitution of the Federation, 1963, s.120.

or a Justice of the Supreme Court should vacate that office when he attained such age as might be prescribed by Parliament.[68] The Constitution also provided for the removal of the Chief Justice of Nigeria and other Justices of the Supreme Court on addresses presented to the President from both Houses of Parliament that any of them be so removed for inability to discharge the functions of his office whether arising from infirmity of mind or body or for misbehaviour. The addresses must be supported by at least two-thirds majority of their members.[69] Hence, as in appointment, the tenure and removal of judges under the 1963 Constitution were left wholly in the hands of politicians with the same attendant undesirable consequences earlier highlighted. What is more, the term "inability or misbehaviour" was not defined by the Constitution. Could the Parliament that was dominated by the Federal Government and its allies be entrusted with deciding impartially the issue of "inability and misbehaviour"? This term, it is submitted, left too much room for abuse in that an alleged misbehaviour might be no more than political prejudice. As pointed out in the preceding discussions, in Britain from where this practice of removal was inherited, the security of tenure enjoyed by judges is a product of unparallelled deep-rooted traditions and constitutional conventions. It would be very difficult, if not impossible, to expect Nigerian politicans to be as

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[68] The Constitution of the Federation 1963, s.113(1).

[69] Ibid., s.113(2)(a)(b). The Regional Constitutions contained similar provisions.

restrained and impartial as their British counterparts, particularly in the face of judicial decisions considered inimical to legislative and executive actions. Thus, notwithstanding the provision that judges' salaries both at the federal and regional levels should be paid from the Consolidated Revenue Funds,[70] the position of the judiciary in terms of independence under the First Republic left much to be desired. The transfer of the power to remove a judge from office from an independent tribunal under the Independence Constitution 1960 to Parliament under the Republican Constitution of 1963 was rather unfortunate.

It should be noted, however, that the extent of political influence especially in the higher judiciary varied from region to region. In the Northern Region where the judiciary was manned principally by white expatriates with no political affiliation, it achieved a measure of independence. The former Chief Justice of Northern Nigeria, Sir Hugh Hurley, in a farewell speech after his retirement in December 1968 remarked that "it was a credit to Nigeria that during my twenty-two years of judicial service, no person ever appraoched me, either directly or indirectly for favour or disfavour".[71] However, in the Eastern, Western and Mid-Western Regions where virtually all judicial positions were occupied by indigenous judges and where cut-throat political competition, crisis and upheavals were rampant, the judiciary was accused of political patronage and fraternity with the

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[70] Ibid., s.133(4).

[71] The New Nigerian, 16 December 1968, p.1.

parties in power.[72] Some judges who were known to have consistently favoured claims put forward by or on behalf of certain governments and their supporters were retired by the military.[73]

The inferior courts, especially the native or customary courts, could not conceal their judicial partiality. They belonged indeed to political executive rather than the judicial arm of government. Appointments to their benches were controlled by the ruling politicians and as political appointees, the judges' loyalty lay with the ruling party. In the Northern Region, for instance, native court judges behaved more or less as the Northern Peoples Congress (NPC) party agents, bullyng and victimising party opponents. Similar experiences were shared in other Regions. This led to the reform of customary courts systems in Nigeria immediately after the military take-over.[74]

Finally, notwithstanding its shortcomings, the judiciary under the 1963 Constitution exhibited some flashes of activism. A typical example is the case of Akwule v. The Queen[75] where the Supreme Court resisted the attempt by the Federal government to usurp the legislative powers of a regional government.

Under the Second Republic (1979-83), all federal judges

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[72] See, for example, Mackintosh, J.P., Nigerian Government and Politics (London: Allen & Unwin, 1966), p.522.

[73] E.g. Justice Morgan of the defunct Western Region was retired immediately after the coup d'etat of January 1966.

[74] See footnote 5 (ante) of this Chapter.

[75] [1963] All N.L.R. 193.

were appointed by the President on the advice of the Federal Judicial Service Commission (FJSC), subject to the approval of a simple majority of the Senate.[76] Similarly, at state level, judges were appointed by State governors on the advice of the State Judicial Service Commission (SJSC) subject to the approval of the State Assemblies.[77] The membership of the FJSC included the Chief Justice of Nigeria (who was the Chairman), the President of the Court of Appeal; the Attorney-General of the Federation, two legal practitioners recommended by the Nigerian Bar Association, and two other persons, not being legal practitioners, who in the opinion of the President were of unquestionable integrity.[78] The SJSC comprised the Chief Judge of the High Court of the State as the Chairman, the Attorney-General of the State, the Grand Kadi of the Sharia Court of Appeal, the President of the Customary Court of Appeal, one legal practitioner, and another person, not being a legal practitioner, who in the opinion of the Governor was of unquestionable character.[79]

A judicial officer could retire when he attained the age of 60 years and should cease to hold office on the attainment of 65 years. He could however be removed from office before the retirement age on grounds of inability to discharge the

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[76] See the Constitution of the Federal Republic of Nigeria 1979, ss.211, 218 and 228. It is to be noted that the 1979 Constitution, which has been partly suspended by the military, is still operative.

[77] Ibid., ss.235, 241, and 246.

[78] Ibid., Third Schedule (Part I-D).

[79] Ibid., Third Schedule (Part II-D).

functions of his office (whether arising from infirmity of mind or of body) or for misconduct or contravention of the code of conduct. In the case of the Chief Justice of Nigeria, the removal could be effected by the President acting on an address supported by two-thirds majority of the Senate;[80] and in respect of the Chief Judge of the High Court of a State, Grand Kadi of a Sharia Court of Appeal (in the case of Northern States), and the President of the Customary Court of Appeal, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State.[81] In any case other than those aforementioned, the removal could be made by the President or, as the case may be, the Governor acting on the recommendation of the Federal Judicial Service Commission (FJSC) or the State Judicial Service Commission (SJSC). The salaries of the judges of all superior courts were paid from the Consolidated Revenue Funds of the Federation and the States.[82]

Thus, apart from the revival of Judicial Service Commission similar to that of 1960 (though with variation in composition), the method of judicial appointment, tenure of office of judges and the mechanisms for their removal under the 1979 Constitution was basically the same as that under the 1963 Constitution. The presence of the executive and politicians although comparatively on a smaller scale was conspicuous. This, as earlier argued, resulted in the

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[80] Ibid., s.256(1)(a)(i).

[81] Ibid., s.256(1)(a)(ii).

[82] Ibid., s.78(4).

undermining of judicial independence. Although the provisions in relation to appointment in the 1979 Constiution appear to be fairly adequate, it may be worthwhile reconsidering the membership of the Federal and State Judicial Service Commissions. It is our contention that as regards the FJSC, subsection 7(e) of the Third Schedule to the Constitution, which empowers the President to appoint two persons, not being legal practitioners, be amended to allow the Chief Justice of Nigeria to appoint them, with a view to making that body more independent and free from governmental influence, bearing in mind that already one of its members, the Attorney-General, is a political appointee. Similarly, with respect to the SJSC, subsection 8(e) of the Third Schedule to the Constitution should be amended such that the legal practitioners appointed by the Governor ought to be from a list of candidates nominated by the state branch of the Nigerian Bar Association. Apart from depriving the Governor of the opportunity of appointing his loyalist (who might not necessarily be a good lawyer), such an amendment would make the procedure for membership of Judicial Service Commission at federal and state levels uniform.

Another aspect of the 1979 Constitution that touches on the independence of the judiciary is the method of removal of judges. As indicated above, removal by the President or Governor "on an address supported by two-thirds majority" applies only to the Chief Justice of Nigeria, Chief Judges and Grand Kadis of States. Other judges, including Justices of the Supreme Court and the Court of Appeal, could be removed

without such "address" but merely on the advice of the Judicial Service Commission. In absence of any explanation offered by the Constitution, this distinction is not only unnecessary, but would also undermine the security of tenure of the judges concerned. Our view is that all the judges of Superior Courts should be subjected to the same mode of removal (that is "on an address") as and when necessary. It is also our suggestion that s.256(1) of the 1979 Constitution on the removal of judges be amended in line with the 1960 Constitution to make provision for an investigation of the alleged ground for the removal by an independent panel, the majority of whom should be judges or former judges. The judge being investigated should be given a right to be heard before the National or a State Assembly votes on his removal. This practice is common to some constitutions in Commonwealth Africa.[83]

It must be admitted that the Nigerian judiciary enjoyed much greater independence under the 1979 Constitution than under the 1960 and 1963 Constitutions. This could be seen in the light of decided cases. The Chief Justice of Nigeria, Mr. Justice Atanda Fatayi-Williams, exhibiting judicial fortitude in the case of Dr. O.G. Sofekun v. Chief N.O.A. Akinyemi and Others[84] remarked that "the jurisdiction and activities of the Court cannot be usurped by either the executive or the legislative branch of the Federal or State Government under

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[83] See, for example, ss.91(3)(4) and 113(2)(3) of the Gambian and Zambian Constitutions respectively.

[84] [1980] 5-7 S.C. 1.

any disguise whatsoever".[85] Similarly, Oputa, C.A. (the then Chief Judge of Imo State), while nullifying the actions of the State House of Assembly, declared that the 1979 Presidential Constitution entrenched the doctrine of separation of powers and for the legislative arm of government to interpret the laws it made would amount to "a naked usurpation of the powers of the judiciary".[86] The Supreme Court also held that any attempt by government to force a person (especially a journalist) to disclose the source of information given to him in confidence[87] or prevent any person or group of persons from establishing a school for dissemination of knowledge or to statutorily abolish existing private schools is an interference with freedom of expression and a violation of s.36(1) of the 1979 Constitution.[88]

Similarly, in Alhaji Shugaba Darman v. The Federal Minister of Internal Affairs and Others[89] where the applicant was deported to the Republic of Chad on the allegations that he was not a national of Nigeria, Mr. Justice Adefila of Borno State High Court, Maiduguri, held that the Federal Government's deportation order was null and void as the

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[85] Ibid., at p.4.

[86] Ekeocha v. The Civil Service Commission, Imo State [1981] 1 N.C.L.R. 154 at p.159.

[87] Tony Momoh v. Senate of National Assembly [1981] 1 N.C.L.R. 105.

[88] Archbishop Okogie v. Attorney-General of Lagos State [1981] 2 N.C.L.R. 337; Adewole v. Alhaji Jakande (Lagos Stae Governor) and Others [1981] 1 N.C.L.R. 262; and Ukaegbu v. Attorney-General of Imo State [1983] S.C.N.L.R. 212.

[89] [1981] 1 N.C.L.R. 25.

applicant was proved to be a Nigerian and could not have been deported by virtue of s.38 of the Constitution. Declaring that the action of the Government was politically motivated, the Judge awarded exemplary damages of three hundred and fifty thousand naira (N350,000) in favour of Darman and ordered that his passport which had been seized be released to him.[90] Where the Government of Bendel State challenged the constitutionality of the Allocation of Revenue (Federation Account etc.) Act No.1 of 1981 on the ground tyhat it was not passed by the National Assembly (the Federal Legislature) in the manner and form prescribed by sections 55 and 58 of the 1979 Constitution, the Supreme Court declared the Act invalid.[91] Consequently, the Federal Government had to make another law, the Allocation of Revenue (Federation Account etc.) Act No.2, 1981 which was duly passed. Both the press and the general public hailed the Supreme Court decision as vindication of the independence of the judiciary.[92]

This does not however suggest that the judiciary was completely freed from political influence. Between 1979-83, a number of politically biased decisions were given by some judges in election petitions, particularly those relating to the offices of the President and State Governors. It was

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[90] See also the case of Salihu Gwanto v. The State and Others [1982] 3 N.C.L.R. 312.

[91] Attorney-General of Bendel State v. Attorney-General of the Federation [1981] 10 S.C. 1.

[92] This was the personal experience of the author; see also Ralph Obioha v. President of Nigeria [1981] 2 N.C.L.R. 701 and Attorney-General of Ogun State v. Attorney-General of the Federation [1982] 1-2 S.C. 13.

therefore not surprising that majority of decisions given by some state high court judges in favour of the incumbent State Governors were quashed on appeal by either the Court of Appeal or the Supreme Court.[93] Overt and covert acts were made by various governments and their functionaries to intimidate and harass the judiciary. Although there is no hard evidence in terms of decided cases, The Punch newspaper of September 28, 1982 reported the outcry of the Chief Judge of the Rivers State, the Honourable Mr. Justice Graham-Douglas that "acts of suppression and intimidation had been perpetrated by the other arms of government through denial of certain rights". Similarly, both the Daily Sketch and the New Nigerian newspapers of November 17, 1982 reported that the Benue State House of Assembly (BSHA) did summon the Chief Judge of the State to appear before it to answer questions in connection with appointments of some state judges to the Federal Court of Appeal. But the amazing thing is that under the Constitution the Chief Judge of a state had no hand in making such appointments, it was the duty of the Federal Judicial Service commission.[94] The BSHA (the State Legislature) was only determined to humiliate and intimidate the Chief Judge.

Also, on 14 October 1982, the then Chief Judge of Kano State, Honourable Mr. Justice Musdapher, issued an Order

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[93] See, for example, John Jatau Kadiya v. Solomon Lar and Others [1983] 11 S.C. 124; Jim Nwobodo v. Christian Onoh and Others [1984] 1 S.C. 1; and Akin Omoboriowo and Another v. Michael Ajasin [1984] 1 S.C. 264. See also the detailed account of the celebrated case of Awolowo v. Shagari [1979] 6-9 S.C. 51 in the accompanying text.

[94] The 1979 Constitution, s.218.

restraining the State Governor from making certain appointments. The Governor ignored that Order.[95] The same act of contempt was committed with impunity by the Lagos State Governor when he refused to carry out the Order of Mr. Justice Ajose-Adeogun of the Lagos High Court.[96] Even the Senators in the National Assembly participated in these despicable acts of contempt for and intimidation of the judiciary. The New Nigerian editorial of 22 October 1982 condemned the deliberate flouting of the Order of Mr. Justice Fred Anyaegbunam in the Federal High Court, saying that by rejecting the Court Order "the Senators have destroyed all the existing records in infantile temper tantrums". In the same vein, the then Chief Justice of the Federation, Mr. Justice Fatayi-Williams publicly condemned eminent Nigerians, particularly government officials in 1983, for trying to dictate to him as to who should sit on the Election Petition Tribunals. He told the officials that, "No amount of pressure from any quarter will make me change the panel which will continue to hear the appeals so directed by me."[97] The problem of the Chief Justice looks pale when compared with those of his subordinate colleagues in the country.

The significance of the foregoing examples is that even the democratically elected presidential government of the Second Republic (1979-83) did interfere (albeit mildly) with

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[95] See the New Nigerian, 19 October 1982.

[96] Ibid., 22 October 1982.

[97] Cited in Nwabueze, Benjamin O., Nigeria's Presidential Constitution 1979-83: The Second Experiment in Constitutional Democracy (London: Longman, 1985), pp.443-44.

judicial independence. It should however be remembered that since the adoption of a federal system of government in 1954, the Nigerian judiciary enjoyed much greater independence between 1979 and 1983.

In sum, under the civilian era (1960-66 and 1979-83), independence of the judiciary was substantially sustained. The regional/state judiciary was autonomous. The federal centre had no hands in the appointment and removal of the personnel of the States' Courts. In addition, the Federal and State Governments each had a separate and distinct Judicial Service Commission, and neither could interfere in the functions of the other. Such dualism is one of the essential ingredients of federalism.

By contrast, under military rule, the position of the judiciary has changed significantly. As could be seen from the preceding discussions,[98] all the judges of the superior courts, namely, the Supreme Court, Court of Appeal, Federal High Court, State High Courts, Kadis and Judges of the Sharia and Customary Courts of Appeal respectively are appointed by one central body, the Supreme Military Council (SMC) on the recommendation of the Advisory Judicial Committee (AJC), another federal agency. The pre-existing Federal and State Judicial Service Commissions have been abolished.

The role assigned to the SMC and AJC (the two federal bodies) in the appointment of both the federal and state judicial officers is tantamount to centralisation of the

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[98] Items 10:1:1, 10:1:2, 10:1:3, 10:1:4, 10:1:5, and 10:1:6.

Nigerian judiciary. Secondly, the appointment of a State Judge by the central authority constitutes an infringement on the states' autonomy - the hallmark of federalism.

The advantage of centralisation, however, is that it has the virtue of promoting uniformity of standards as well as insulating the judiciary from local or state pressure often experienced in civilian regimes.

10:5:4 Security of Tenure of Judges

As pointed out earlier, under the First and Second Republics, a federal Judge could be removed by the President on grounds of inability to perform his functions or for misconduct upon an address of both Houses of Parliament (House of Representatives and the Senate) supported by two-thirds majority of their members; and in a region, by the Governor upon an address supported by two-thirds majority of the members of the Regional Assembly. This procedure is based on the British and American constitutional practice.[99]

In contradistinction, security of tenure of judges in Nigeria under the military administration is very precarious because as an authoritarian regime, the military has no regard for the independence of the judiciary. There have been several instances of unceremonious dismissal of judges; many judges have been removed by the military arbitrarily and indiscriminately, sometimes without explanation. In fact, in 1972 the Head of the Federal Military Government (HFMG) was given the sole power to appoint and dismiss the Chief Justice

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[99] For details, Item 10:5:3 above.

of the Federation.[100] The shift of power from the AJC to the HFMG appeared inexplicable. The AJC, which has at least a member from each state of the Federation, would have been more competent and representative to appoint and dismiss judges, including the Chief Justice of Nigeria.

Soon after the third military coup of July 29, 1975, the new Head of State, General Murtala Muhammed decided to rid the nation of those he considered as 'dead wood' - persons charged with redundancy or declining productivity, corruption, inefficiency, poor health, abuse of office or old age.[101] The new administration retired Chief Justice Elias from the judiciary on vague and obscure ground of ill-health.[102] This official reason was hardly convincing for barely three months thereafter the same retired Chief Justice was elected a Judge to the International Court of Justice at The Hague. In fact, Justice Elias has been the President of this Court for more than a decade. Apart from the Chief Justice, Supreme Court Judges, High Court Judges, Registrars and other judicial officers were equally retired with immediate effect. At the 1982 All Nigeria Judges Conference held in Ilorin, Kwara State, Mr. Justice Kayode Eso (a Justice of the Supreme Court) summed up the unceremonious dismissals of judges by the military government in 1975. According to him:

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[100] See the Constitution (Suspension and Modification) Decree 1972, s.1(a). Under Decree No.34 of 1966, the Attorney-General of the Federation was given power to institute, take over or discontinue prosecutions in respect of offences under any law in force in <u>any part</u> of Nigeria.

[101] <u>Daily Times</u> (Lagos), 18 August 1975, p.1

[102] <u>New Nigerian</u> (Kaduna), 21 August 1975, p.16.

> "In 1975, there was a great purge which affected the judiciary in the worst way possible. The Chief Justice of the country, Justices of the Supreme Court and Western State Court of Appeal, and High Court Judges were removed by the ruling Military Government without reason."[103]

Justice Eso, who claimed that the purge was effected "without consultation with the Advisory Judicial Committee" described the 1975 episode as "a very sad part in the history of the judiciary in this country", and warned that "it is a grave thing to place the judiciary in a state of anxiety".[104]

In an attempt to justify the action of the military government, General Olusegun Obasanjo, a former Head of State and Head of the Federal Military Government, as well as one of the architects of the 1975 purge revealed in January 1990 (15 years after the exercise) in his book[105] that Justice (Dr.) T.O. Elias was relieved of his appointment as the Chief Justice of the Federation because of improper behaviour considered offensive to public morality. According to General Obasanjo, in another statement to the press, Dr. Elias's management competence and integrity to administer the judiciary was called to question especially as a result of the apparent muddle, confusion and ineptitude displayed by the judiciary previously. Obasanjo mentioned specifically the empanelling of a Supreme Court body by Elias to hear the appeal in respect of a case brought by Elias's senior brother.

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[103] The Honourable Justice Kayode Eso, "Nature of Judicial Office: Independence of the Judiciary", in All Nigeria Judges Conference Papers, 1982 (London: Sweet & Maxwell, 1983), p.133. The emphasis is mine.

[104] Ibid., p.134.

[105] Obasanjo, Olusegun (General) Not My Will (Ibadan: University Press Ltd., 1990).

He maintains that Dr. Elias in his capacity as the Chief Justice of Nigeria chaired the Panel which eventually decided in favour of his brother, adding that:

> "If it was right legally, we considered it improper and offensive to public morality. We considered his capacity to administer the judiciary thereby impaired. He would not be able to move along with the new order and new dispensation, he had to be relieved of his assignment."[106]

General Obasanjo adds that it was in consideration of Justice Elias's distinguished status as jurist, if not as an administrator and a good manager of judicial establishment and to indicate that the intentions of the government were based purely on the facts as it saw them that the military recommended him (Elias) for appointment into the International Court of Justice at The Hague. "Not only did we recommend him, we also fought to get him elected against other African candidates who were nominated ahead of him."[107]

Obasanjo also defends the decision of the Supreme Military Council in removing Justices M.A. Odesanya and Rotimi George of Lagos High Court on the ground that there were allegations against the two judges of influencing the judgment of each other in favour of a friend, relation or associate with bribe or gratification to the tune of two thousand naira (N2,000) passing hands, with both Judges enjoying Dr. Elias's protection. Obasanjo points out that the victim cried out which turned the incident into a pubic issue, and with

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[106] General Olusegun Obasanjo, "We Removed Elias", Nigeria Home News (London) 1, 17 (February 1-7 1999), p.1. See also his interview with Newswatch Magazine (Lagos), 19 February 1990, p.41.

[107] Ibid., pp.1 and 41 respectively.

support, agreement and lack of controverting evidence from the then Attorney-General of the Federation, Mr. Justice Dan Ibekwe (himself a Justice of the Supreme Court), the two judges had to be relieved of their offices.[108]

General Obasanjo goes further to explain the reasons for the dismissal of the other High Court Judges, namely, Justices Lambo and Coker. Both of them were alleged to be involved in property speculation especially land which the military regarded as grossly unbecoming of the offices they held, impairing the effective performance of their duties. He concludes that at the time the military came to power in 1975, the judiciary had lost credibility and confidence in it had greatly eroded. "We had to bring sanity to the judiciary.[109]

Dr. Taslim Olawole Elias has reacted to Obasanjo's accusations with fury, describing them as patently malicious and untrue and as a source of bitterness and damnation of the whole of his career as a judge and as a man. Dr. Elias insists that he resigned from his position as the Chief Justice of Nigeria on the 25th of August 1975 because he thought that was the only honourable thing to do, since General Obasanjo was adamant that he must either sign the paper dismissing the two Judges (M.A. Odesanya and Rotimi George) at once or leave the post of Chief Justice if he refused. According to Elias, Justices Odesanya and George were forced to resign their appointment as judges of the High Court of Lagos State on the flimsy and inexcusable allegation

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[108] Ibid.

[109] Newswatch (supra), p.41.

that one of them must have received a bribe of about two thousand naira (N2,000) to persuade the other in maintaining their stand that an accused person was clearly found to be wrong in law. Justice Elias further maintains that the Advisory Judicial Committee (AJC) over which he presided spent well over three months to investigate the matter but found that the allegations were baseless. Consequently, according to him, the AJC advised the military government to exonerate the Judges in question, but the military ignored the advice and instead asked him (Elias) to effect their dismissal or leave his post as the Chief Justice of Nigeria. He says he had no alternative but to resign.[110]

Dr. Elias has also denied all the allegations of impropriety made against him and has challenged General Olusegun Obasanjo to produce hard evidence of his judicial misconduct, maintaining that he never sat over any case involving his elder brother or any other known relative. He asks Obasanjo to come up with the name of the case and the subject-matter. It has been reported that the Lagos State High Court at the instance of Dr. Elias on 15 February 1990 granted an application stopping further circulation of Obasanjo's book for alleged libellous publication, together with a claim of eighty-five thousand naira (N85,000) in damages.[111] The defendants objected to the injunction on the ground that it was wrongly obtained. Surprisingly, on March

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[110] Interview with the Nigeria Home News of January 5-11, 1990, p.24 and February 1-7, 1990, p.1.

[111] West Africa (London) 26 February-4 March 1990, p.343. The case is still unreported.

12, 1990 when Elias's counsel, Professor A.B. Kasunmu, a Senior Advocate of Nigeria (SAN), was expected to reply to the objection, Mr. Akin Adeniji (his junior) who stood in for him declined to make a submission, but merely asked the court to strike out the case because his client (Elias) wanted it withdrawn.[112] Although no reason has been given for the latest development, it is not unlikely that the matter would be settled out of court, possibly in the 'national interest' considering the personalities involved and the public offices they previously held.

The foregoing allegations and counter-allegations between the former Head of the Federal Military Government and the former Chief Justice of the Federation aptly illustrate the type of relationship that exists between the judiciary and the executive/legislative arms of government under military rule. While we do not intend to hold brief for any of them, it is clear from the above that the military arbitrarily sacked many judges mainly on mere grounds of rumours, suspicions and/or allegations which in law cannot sustain conviction or a disciplinary action such as dismissal. The 1975 purge exercise portrayed the military government as playing the role of both the prosecutor and judge without giving the accused judges the opportunity to defend themselves. As General Obasanjo himself admits, "in view of the numerical magnitude of the people involved in the shake-up, one could not rule out

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[112] Nigeria Home News, Vol.1, No.23, March 22-28, 1990, pp.1 and 24.

instances of miscarriage of justice".[113]

The military regime of General Muhammadu Buhari which came to power on December 31, 1984 continued with the arbitrary removal of judges, especially those whose judgments were not favourable to his government. His restoration of the power of appointment and dismissal of the Chief Justice to the SMC on the advice of the AJC,[114] instead of the Head of State alone, made little or no difference.

The anxiety of the judiciary was even more ominous in 1985/86 when more than 30 judges (including the Chief Judges of Anambra, Bendel and Borno States) accused of corrupt practices were sacked by the military government.[115] It is obvious that not all those dismissed could have been found guilty if the Rule of Law were to take its course. No thorough investigation was conducted, neither were the accused given fair hearing. Allegation of corruption is a blanket description used by the military to justify removal of uncompromising judges. Compulsory retirement and dismissal of judges have continued unabated.

No doubt there are some 'black sheep' among Nigerian judges. But such judges should face trial or be investigated by the Advisory Judicial Committee or any other independent

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[113] Ibid., Vol.1, No.17, February 1-7, 1990, p.42.

[114] The Constitution (Suspension and Modification) Decree No.1 of 1984, Schedule 2.

[115] Some of the judges interviewed said they were removed "with immediate effect" without explanation. For more information, see, Daily Times, June 28, 1985, p.32; The Guardian (Lagos), March 22, 1985; and Newswatch, January 6, 1986, p.29.

body before they are disciplined, retired or removed.

Arbitrary and summary dismissal of judges by the military constitutes a breach of the Montreal Declaration which provides, inter alia, that: (a) the proceedings for judicial removal or discipline when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary; (b) all disciplinary action shall be based upon established standards of judicial conduct; (c) the proceedings for discipline of judges shall ensure fairness to the judge and opportunity of a full hearing; and (d) a judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.[116] Judges are men of honour and as such should be treated with some measure of respect. Hence, unless a judge was involved in some offence of moral turpitude or manifest illegality, he should not be retired or removed on the pages of newspapers or on the screen of television.

In sum, the summary removal of judges, coupled with the absence of any formal procedure for testing allegations of misconduct or incompetence made against them by the military, renders such mode of removal highly objectionable. Besides, the fact that judges are not given the opportunity to defend themselves of any such allegation runs counter to the principle of natural justice. It should be pointed out that although the Advisory Judicial Committee (AJC) was set up to advise the Federal Military Government on the appointment and

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[116] Article II, paragraphs 2:33, 2:34 and 2:35.

removal of judges, the Government is not bound to accept its advice or recommendation.[117] Thus, if the AJC was established to detach the judiciary from the control of the legislative and executive arms of government, and consequently from political influence, that purpose can hardly be achieved under the present arrangement since it acts only in an advisory capacity.

10:5:5 Adequate Remuneration

According to Article II, paragraphs 2:21(b) and 2:2(c) of the Montreal Declaration, the salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office and be regularly adjusted to account fully for price increases; and judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure. This provision is necessary for two main reasons: firstly, a judge who is subjected to financial anxieties through inadequate or insecure remuneration might 'dance to the tune' of the executive which is usually vested with financial authority, thereby compromising his independence; and secondly, secure and adequate pay is needed in order to attract lawyers of the highest calibre to the judiciary.

It is a common knowledge in Nigeria that judges are not adequately remunerated, most of them receiving the same salaries as civil servants, especially the permanent secretaries. In 1981, for instance, the Justices of the

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[117] E.g. the recommendation of the AJC headed by Dr. (Justice) T.O. Elias that the Military Government should not dismiss Justices Odesanya and George (supra) was ignored.

Supreme Court with a basic annual salary of N17,500 (local currency) in real terms earned less than circuit judges in England (£22,000); American district judges ($44,600) and Chief Justice ($65,000) respectively.[118] And since 1988 Nigerian judges have become worse off.[119]

The pensions of Nigerian Judges are, however, reasonable and may compare favourably with those of their English and American counterparts. For instance, a judge who retires after 15 years of meritorious service is entitled to a pension for life equivalent to his last annual salary.[120] But in spite of such generous scheme, a Nigerian judge can hardly be satisfied because the law seems to make him rely on his pension solely. According to the 1979 Constitution, "Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria".[121] Whilst this provision, which affects only the judges of superior courts, is not bad in itself, it is contended that in adopting the judicial practice in the U.K. and U.S.A., the Nigerian Government ought to have paid its judges comparable

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[118] See Griffith, A.J.G., The Politics of the Judiciary, 3rd edn. (London: Fontana, 1985).

[119] It may be argued that poor conditions of service, especially salaries partly account for the corrupt tendencies among some Nigerian judges, see Tables F and G below.

[120] See the 1979 Constitution, s.255.

[121] Ibid., ss.256(2) and 277(1).

(As at 1st January, 1988)

No.	STATUS	NIGERIA	ENGLAND
1.	*Chief Justice of Nigeria, as Head of the Judiciary of Nigeria, Equivalent of Lord Chancellor of England as Head of Judiciary in England and Wales.*	N39,660 per annum Note: 5.9% (which is less than 6%) of the Salary of his counterpart in England	£83,000 per annum OR N664,000 per annum
2.	*Justices of Supreme Court of Nigeria Being the Highest Court in Nigeria Equivalent of Law Lords of the House of Lords being the Highest Court in England.*	N35,100 per annum per Justice Note: 5.8% (which is less than 6%) of the Salary of his counterpart in England.	£74,750 per annum per Law Lord. OR N598,000 per annum. per Law Lord.
3.	*President of the Court of Appeal of Nigeria equivalent of Master of The Rolls of Court of Appeal in England*	N35,100 per Annum Note: 5.8% (which is less than 6%) of the salary of his English Counterpart.	£74,750 per annum OR N598,000 per annum
4.	*Justices of the Court of Appeal in Nigeria equivalent of Lords Justices of Appeal in England*	N33,000 per annum per Justice Note: 5.7% (which is less than 6%) of the salary of his counterpart (English Lord Justice) in England.	£71,750 per annum per Lord Justice OR N574,000 per annum per Lord Justice
5.	*Chief Judge of each State High Court or of the Federal High Court (Near equivalent of Lord Chief Justice of England)*	N33,000 per annum Note 5.1% (which is less than 6%) of the salary of his near counterpart as English Chief Justice in England.	£81,000 per annum OR N648,000 per annum
6.	*Judges of the High Courts of the States or of the Federal High Court in Nigeria (Equivalent of High Court Queens Bench of England)*	N31,200 per annum per judge Note: 5.4% (which is less than 6%) of the salary of his counterpart in England.	£71,750 per annum per judge OR N574,000 per annum per judge

SPECIAL NOTE:

It is significant to Note:

(a) That an inner London Chief Metropolitan Magistrate earns £43,500 per annum OR N348,000 per annum

(b) that a magistrate in England earns £33,500 per annum OR N268,000 per annum

Sources: (1) 1988 Whitakers Almanac, 120th edn., London, pp.448-60.
(2) Fawehinmi, Gani, Bench and Bar in Nigeria (Lagos: Nign. Law Publications Ltd., 1988), pp.18-19

Salary of the Chief Justice of Nigeria
in Relation to the salary of a
Chief Magistrate and a Magistrate in England:

Salary of Chief Justice of Nigeria is 11.4% (which is less than 12%) of the Salary of a Chief Magistrate in London and 14.8% (which is less than 15%) of the salary of a magistrate.

Salary of a Justice of Supreme Court
in Relation to a
Chief Magistrate and a Magistrate in England:

Salary of a Justice of Supreme Court of Nigeria is 10.1% of a Chief Magistrate's Salary and 13.1% of the Salary of a Magistrate in England.

Salary of President of Court of Appeal
in comparison with Salary of
Chief Magistrate and a Magistrate in England:

Salary of the President of Court of Appeal in Nigeria is 10.1% of a Chief Magistrate's Salary and 13.1% of the Salary of a Magistrate in England.

Salary of a Justice of Court of Appeal
in comparison with that of a
Chief Magistrate and a Magistrate in England:

Salary of Justice of Court of Appeal in Nigeria is 9.5% (which is less than 10%) of a Chief Magistrate's Salary and 12.3% of the salary of a magistrate in England.

Salary of a Chief Judge of each state
in comparison with that of a
Chief Magistrate and a Magistrate in England:

Salary of a Chief Judge of a High Court of each state in Nigeria is 9.5% (which is less than 10%) of a Chief Magistrate's Salary and 12.3% of the Salary of a Magistrate in England.

Salary of a Judge of a High Court in Nigeria
in comparison with that of a
Chief Magistrate or a Magistrate in England:

Salary of a Judge of a High Court of each State in Nigeria is 8.9% (which is less than 9%) of a Chief Magistrate's salary and 11.6% of the salary of a magistrate in England.

Source: Adapted from Fawehinmi, Gani, Bench and Bar in Nigeria (Lagos: Nign. Law Publications Ltd., 1988), pp.18-19

* TABLE G: COMPARATIVE ANALYSIS OF THE SALARIES STRUCTURE OF SUPERIOR COURT JUDGES IN NIGERIA AND THOSE OF INFERIOR COURT JUDGES IN ENGLAND

salaries.[122] Our argument is that the law forbidding ex-judges from practising has removed any compensatory effect of the pension provisions. To prevent a judge relieved of his post perhaps unjustly from practising his only hcosen profession is to deny him to right to earn a living. This is too harsh a punishment, capable of enslaving a retired judge.

Besides, although the salaries of judges have continued to be charged upon the Consolidated Revenue Funds of the Federation and States respectively,[123] today this has little or no significance because the same (SMC) which exercises unlimited power of appointment and dismissal of judges, also controls these Funds. Furthermore, the judiciary has no control over its budgets, it relies wholly on the executive for money to meet all its financial obligations. In all these circumstances, the Nigerian judiciary can hardly be said to be independent. It needs to be added that as far as remuneration or perquisite is concerned, the condition of judges in Nigeria under both civil and military rule leaves much to be desired.

10:5:6 Freedom from Governmental Pressure

It is an established principle of law that in the interest of justice, judges in the performance of their functions should act in accordance with the dictate of their conscience, deciding matters impartially without fear or favour, affection or ill-will. But in order to do so judges

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[122] For similar provisions in the U.K. and the U.S.A., see Shetreet, S., Judges on Trial (supra), pp.32-33.

[123] The Constitution of the Federal Republic of Nigeria 1979, s.78. This conforms with Article II, Paragraph 2:29 of the Montreal Declaration.

must be free from restrictions, influences, inducements, pressures, interferences, threats or coercion either directly or indirectly from any quarter or for any reason.[124]

The Nigerian experience shows that judges suffer from undue pressure from government functionaries, both under civilian and military governments. In 1979, for example, at the inauguration of the Second Republic in October, the Supreme Court in the case of Awolowo v. Shagari and Others,[125] had to decide whether the new President, Alhaji Shagari had been validly elected. The issue arose from the interpretation of the Electoral Decree No.73 of 1977. Section 34A(1)(C) of the Decree provided that "a candidate for election to the office of President shall be deemed to have been duly elected to such office where there being more than two candidates if: (i) he has the highest number of votes cast at the election; and (ii) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the states in the Federation". At the Presidential Election held on 11th August 1979, five candidates, namely, Alhaji Shehu Shagari, Chief Obafemi Awolowo, Dr. Nnamdi Azikiwe, Alhaji Waziri Ibrahim, and Alhaji Aminu Kano contested. On the 16th August, the Returning Officer of the Federal Electoral Commission (FEDECO) announced that Alhaji Shagari had been elected as President after the election results in all the States had been declared.

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[124] Article II, paragraph 2:02 of the Montreal Declaration.

[125] [1979] 6-9 S.C. 51.

Chief Awolowo, who was declared to be in second position, petitioned the Election Tribunal contending that Alhaji Shagari had not been validly elected in accordance with s.34A(1)(C)(ii) on the ground that Shagari received at least a quarter (25%) of the votes cast only in twelve states and 19.94% in the thirteenth state (Kano). If Shagari had polled 25% of the votes cast in Kano State, his victory would have been unassailable. Nevertheless, the Election Tribunal upheld the view of the Returning Officer.

On appeal to the Supreme Court, Chief Awolowo attacked the decision of the Tribunal that s.34A(1) of the Electoral Decree, 1977 was satisfied by a candidate who received a quarter of the votes cast in twelve states and a quarter of two-thirds in the thirteenth state, arguing that "a state cannot be fractionalised". The respondent's case was that s.34A(1) had been complied with or, in the alternative, that any non-compliance did not materially affect the result and could therefore be condoned under s.111 which stipulated that "an election shall not be invalidated by reason of non-compliance with the Decree if it appears to the Tribunal that the election was conducted substantially with the provisions of the Decree and that non-compliance did not affect the result of the election". The Supreme Court, by a majority of six judges (one dissenting) dismissed the appeal and held that s.34A(1) had been complied with.

The decision of the Supreme Court might be justified on political grounds. Firstly, to ensure peace and stability; secondly, to effect a smooth transition from military to civil

rule after 13 years of military dictatorship; and thirdly, to avert the inconvenience that would have arisen from the invalidation of the election due to time factor in the handover. It may also be argued that the Supreme Court adopted a purposive approach because the requirement of "at least two-thirds..." was to have a wider territorial spread in the election of a President with a view to making him more acceptable nationally - an objective which Shagari reasonably achieved. The Court as the guardian of the society has an important role to play. The case of Awolowo v. Shagari involved both legal, political and social issues.

With due respect, the reasoning of their Lordships is hardly convincing. The majority view failed to give due consideration to the words "each of" or "in each of at least two-thirds of the states in the Federation". In our opinion, Chief Awolowo was right to argue that a state cannot be fractionalised. In making the necessary calculations to determine the proportion of votes cast, each state should have been treated as a single entity. Secondly, the phrase "two-thirds of ..." should have been construed as having the same meaning as that provided by the 1979 Constitution, to wit: "An Act for the creation of new States or alteration of the Constitution shall not be passed unless the proposal is ... approved by resolution of the Houses of Assembly of not less than two-thirds of all the States."[126] It was on the basis of such provision under the 1963 Constitution[127] that the

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[126] Sections 8 and 9.

[127] Section 4.

Mid-Western Region was carved out of the defunct Western Region on a resolution passed by the two-thirds majority of the then Northern and Eastern regional Legislatures in favour of the creation. Thirdly, the Supreme Court should not have invoked s.111 of the Electoral Decree because non-compliance with s.34A(1) did actually affect the result of the election.

It is significant to note that the judgment was delivered on September 26, 1979, but two days later (i.e. September 28) the Federal Military Government, which had earlier taken an irrevocable decision to return the country to civil rule on October 1, 1979 (4 days after the judgment) rushed through an amendment to sections 126 and 164 of the 1979 Constitution (the corresponding provisions of s.34A(1) of the Electoral Decree No.73 of 1977) to the effect that if the circumstances of Awolowo v. Shagari should reoccur, the candidate with the majority of votes cast throughout the country (instead of the hitherto "at least two-thirds of the votes in each of the States in the Federation") shall be duly elected as President.[128] This subsequent amendment by the military is an evidence of subterranean governmental influence on the Supreme Court decision which has been rightly described as "a harbinger of the judicial attitude to constitutional interpretation".[129]

It is our submission that the supreme Court did compromise its ndependence for political expediency. Chief

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[128] The Constitution of the Federal Republic of Nigeria (Amendment) Decree No.104, ss.677.

[129] The Hon. Justice A.G. Karibi-Whyte, All Nigeria Judges Conference Papers (supra), p.211.

Obafemi Awolowo was right in saying that "the judiciary was subverted; it danced gleefully and unashamedly to the tune of the military".[130]

Also in 1986, a High Court Judge, Mr. Justice Gregory Okoro-Idogu, who was a chairman of a military tribunal in 1985 was reported to have apologised later to one of his convicts that he received order from "high government officials" to send him to jail because the convicted was critical of the military government. The revelation, which came out soon after the overthrow of General Buhari's administration on August 27, 1985 led to the release of the convict from prison in 1986 by the succeeding military government of General Ibrahim Babaginda.[131] Thus, the military demands of compliant judges have rendered the judiciary impotent - a puppet in the hands of military leadership, with the attendant consequence of its independence being compromised.

10:5:7 Ouster of Judicial Review

Most governments accept the principle of judicial review, and in fact the possibility of such review is the most reliable sanction for the preservation of a federal structure. Judicial review, says A.V. Dicey, is the inner essence of federalism - "an essence which turns federalism into legalism

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[130] Obafemi Awolowo, "Judiciary Was Manipulated by the Federal Government", in Daily Sketch, 13 December 1979, p.2. For a comprehensive analysis and criticism of the case, see Professor James S. Read, "Justice in the Mathematics: Reporting the Case of Awolowo v. Shagari and Others" in "The New Constitution of Nigeria, 1979: The Washington Model?", Journal of African Law, 23, 2 (1979).

[131] See West Africa, 28 April 1986, p.901. See also "Judiciary on Trial" in Newswatch, 26 May 1986, pp.15-22.

or the rule of lawyers".[132] And to Chief Justice Marshall of the U.S. Supreme Court, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule."[133] The combined effect of these statements is that the power of judicial review, which is an integral part of federalism, lies with the court. It is very vital for the independence of the judiciary.

Under the First and Second Republics, the Nigerian judiciary occupied a unique and important position by virtue of its powers to review legislative and executive actions.[134]

However, the military government has on several occasions promulgated Decrees ostensibly designed to deprive the courts of their traditional role as adjudicators and interpreters of law. Examples of such ouster Decrees include the Constitution (Suspension and Modification) Decree No.1 of 1984, s.5 which provides, inter alia:

> "No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of Nigeria."[135]

The provision of this Decree is further strengthened by the

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[132] Cited in McWhinney, Edward, Comparative Federalism (Toronto: University of Toronto Press, 1962), pp.5-6.

[133] Marbury v. Madison, 1 Cranch.137 (1803).

[134] See the Nigerian Constitution 1979, s.6 and Chapter Six (ante, 6:6) for full details.

[135] This Decree is identical with its predecessors, namely, Decrees No.1 of 1966 and No.32 of 1975. For a detailed analysis of this Decree, see Chapter Eight (ante, 8:3:4). See also the Benue State Environmental Sanitation Edict No.16 of 1984 and the decision of the Court of Appeal in Bendel State v. Eweka [1979] D.A.C. 23.

Federal Military Government (Supremacy and Enforcement of Powers) Decree No.13 of 1984 which states that:

> "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any proceedings are instituted before, on or after the commencement of this Decree, the proceedings shall abate, be discharged and made void."[136]

This Decree has retroactive effect and the main objective is to oust the jurisdiction of the courts from reviewing the administrative actions of the military, the validity of its laws, as well as nullifying any decision already given by courts. In the case of Lakanmi and Another v. Attorney-General (Western State) and Another,[137] where the Supreme Court of Nigeria declared the military government's action as ultra vires, the military promptly reacted by passing a Decree[138] nullifying the decision of the Supreme Court. The decision in Chief B. Olowofoyeku v. Attorney-General for Western State[139] was also met with a similar reaction.

The above Decrees undoubtedly violate Article II of the Montreal Declaration which provides that:

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[136] This is a replica of Decree No.28 of 1970. But under the Second Republic, a similar legislation was declared null and void, see Paul Unongo v. Aper Aku [1983] 9 S.C. 126.

[137] [1971] 2 U.I.L.R. 201. For a comprehensive discussion, see Chapter Seven (ante, 7:3:2).

[138] The Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970. See also the State Security (Detention of Persons) Decree No.2 of 1984; and the Exchange Control (Anti-Sabotage) Decree No.7 of 1984 among several others.

[139] [1972] 2 U.I.L.R. 196. See also Adejumo v. Colonel Mobolaji Johnson [1972] 1 All N.L.R. 159; and Azege v. Local Government Task Force[1985] H.C.N.L.R. 1066.

> "The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates proper execution of a court decision. No legislation or executive decree shall attempt retroactively to reverse specific court decisions, nor to change the composition of the court to affect its decision-making".[140]

The fact that the actions and laws of the military government are not subject to judicial review destroys the position of the judiciary as the final arbiter, as well as seriously undermining its independence.[141]

10:5:8 Transfer of Jurisdiction to Special Tribunals

According to Mr. Justice Stephen:

> "The traditional courts and their judiciary may be left outwardly untouched but their jurisdiction steadily diminished by the assignment to special tribunals of all those areas in which an authoritarian government wishes to intervene. The Special Tribunals, creatures of the regime, will then administer those sensitive areas according to the wishes of government, while the courts, retaining apparent independence will, in the innocuous areas left to them, have no occasion to exercise it. Yet such a government may display a facade of judicial independence."[142]

This statement epitomises the Nigerian experience under military rule. Since its inception in 1966, the military

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[140] Paragraphs 2:07(d) and 2:08 respectively.

[141] See De Smith, S.A., Judicial Review of Administrative Action, 2nd edn.; and the famous case of Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147. For a lucid account of the negative effect of ouster of judicial review, see Johnston, R.E., The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States (New York: Doubleday, 1969).

[142] The Rt. Hon. Sir Ninian M. Stephen of the High Court of Australia, "Judicial Independence: A Fragile Bastion", Melbourne University Law Review, 13 (1982), p.334 at pp.337-38. "Military trial is frequently but an empty form, conducted by men who know no law and who frequently, in the name of discipline, are not disposed to do justice to the accused" - Nichols, Louis B., "The Justice of Military Justice", William and Mary Law Review, 42, 12 (1971).

administration has shown preference for the use of special tribunals rather than the conventional courts. The country has witnessed a variety of situations in which matters that would otherwise require purely judicial decisions have been transferred to military tribunals, which not only undertake convictions but also impose various forms of penalties including death.

Among such tribunals are those set up under the Robbery and Firearms (Special Provisions) Decrees of 1977 and 1984 for trying armed robbers or persons suspected of carrying dangerous weapons with or without intent to rob or kill; the Counterfeit Currency (Special Provisions) Decrees of 1974, 1975 and 1984 for the trial of any person who unlawfully imports or exports, buys, sells or deals in counterfeit currency; the Petroleum Production and Distribution (Anti-Sabotage) Decree, 1984 for the offence of sabotage involving petroleum products, especially aiding, inciting, procuring and counselling any person calculated to disrupt or interfere with the production and distribution of petrol in any part of the country; the Exchange Control (Anti-Sabotage) Decrees No.57 of 1977 and No.7 and 1984, which make it an offence to make payment to or for the credit of a person resident outside Nigeria; the Public Officers (Protection Against False Accusation) Decree No.4 of 1984, which made it an offence for any person to publish in any form, whether written or otherwise, any message, rumour, report or statement which is false in any material particular, or which brings, or is calculated to bring the Federal Military Government or the

Government of a State or a Public Officer to ridicule or disrepute;[143] the Special Tribunal (Miscellaneous Offences) Decree No.20 of 1984 for the trial of offences, ranging from arson on public property, tampering with oil pipelines, electricity, telephone cables and postal matters, and dealing in drugs, to unlawful exportation of foodstuff, destruction of highways and cheating at examination.

Finally, the most controversial of all, is the Recovery of Public Property (Special Military Tribunals) Decree No.3 of 1984 which provides for the investigation of assets of any public officer who has been involved in corrupt practices; or has by virtue of his office contributed to the economic adversity of the nation; or has in any other way been in breach of the code of conduct.

It has been speculated that the main reasons for the establishment of these tribunals are: firstly, the need to find permanent solutions to the country's endemic official corruption and abuse of office without delay; secondly, to avoid the technicalities in the rules of criminal procedure; and thirdly, the loss of confidence by the military in the judiciary.[144] But whatever may be the justification for their establishment, to the extent that they perform judicial roles which fall within the purview and competence of the ordinary courts of law, the existence of the military

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[143] The present military administration of General Ibrahim Babaginda has since repealed this obnoxious Decree.

[144] See Omotola, J.A. and Adeogun, A.A. (eds.), Law and Development (Lagos: Lagos University Press, 1987), pp.213 and 318.

tribunals amounts to usurpation of the functions of the judiciary, as well as an infringement on its independence.

No one objects to the setting up of tribunals if there is no likelihood of miscarriage of justice and if their independence and impartiality are not compromised. In fact, the 1979 Constitution expressly provides that:

> "In the determination of his civil rights and obligations, 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 and constituted in such manner as to secure its independence and impartiality."[145]

Therefore, in order to secure such fair hearing, a tribunal must be guaranteed independence and its procedure must also give the person on trial adequate opportunity to state his case, and make representation of his choice. He should, in addition, be given the right to appeal against the decision of the tribunal. These conditions are fundamental to the administration of criminal justice.[146]

However, under the military dispensation they are all lacking. For example, under the Recovery of Public Property (Special Military Tribunal) Decree No.3 of 1984, out of the five members of the Tribunal, all but one are military officers not below the rank of a Lieutenant Colonel. The Chairman is a senior officer of a rank of Major-General or its equivalent. The only non-military member is a serving or retired judge of a High Court whose role is restricted to

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[145] Section 33. Emphasis is mine.

[146] See Justice C. Oputa in L.D.P.C. v. Fawehinmi [1985] 2 N.W.L.R. 300 at p.384.

assisting the tribunal in the determination of questions of law. This arrangement undoubtedly puts the military officers at a vantage position in the ultimate determination of the fate of the accused person, particularly if he is a civilian. Secondly, the detention of the accused and pre-trial investigations are conducted solely by the Federal Military Government (PMG). Thirdly, the FMG who appoints the members of the Tribunal lays down its rules and procedures, determines the venue and time of sitting. Fourthly, the promotion and career advancements of the military officers who are members of the Tribunal are determined by the FMG. Fifthly, the Decree replaces presumption of innocence with one of guilt, the burden of proof being shifted to the accused instead of the prosecution. Sixthly, the FMG, through the instrumentality of the Supreme Military Council is the confirming authority in respect of the verdicts given by the Tribunal. Finally, there is no right of appeal.[147]

Besides, the proceedings of military tribunals are always held in camera. To ensure independence and impartiality, the proceeding of a court or any tribunal relating to the civil rights and obligations of any person, including the announcement of the decisions of the court or tribunal, should be held in public. There is no doubt that openness of proceedings is an important element in the maintenance of the

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[147] Decree No.3 of 1984. Bakare v. Apena [1986] 4 N.W.L.R. (Part 33) 25 is a classical example. A military court is an inferior tribunal and therefore subject to control by the High Court through the order of certiorari and habeas corpus, see Lord Loughborough in Grant v. Gould, 12 E.R. 434 at p.450.

independence and impartiality of the judiciary. It affords the litigants, lawyers and the general public the opportunity of following the proceedings as well as being satisfied that justice is not only done but clearly seen to be done.

But in a circumstance where the FMG is the prosecutor, the judge and the jury at the same time, with unappealable judgments of heavy and almost indeterminable sentences,[148] one can hardly describe such a tribunal as independent and impartial. Professor Ghai has this type of situation in mind when he says that:

> "The autonomy of law is undermined when prosecutions are seen to be a matter entirely for the discretion of the government. The protection the law is supposed to provide to the individual becomes illusory when the government refuses to accept the law's mandate. And when the confidence in the independence and impartiality of the judiciary is impaired, a basic source of the legitimacy of the legal system disappears. The law then is seen merely as an opportunistic instrument of control and domination by the ruling group."[149]

This statement is perfectly true for in Nigeria military tribunals have been used by the military oligarchy as instruments of repression and victimisation rather than protection of civil liberties. Military tribunals are not a good substitute for conventional courts except perhaps in cases affecting only military personnel.

The idea of setting up military tribunals with <u>omnibus</u> powers to try civilians constitutes a breach of the Montreal

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[148] Some politicians of the Second Republic have been sentenced to a term of more than one hundred years imprisonment.

[149] Ghai, Yash et al. (eds.), <u>The Political Economy of Law: A Third World Reader</u> (Delhi: OUP, 1987), p.254.

Declaration which provides, inter alia, that:

> "The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court.[150]

So far, in Nigeria, the military's objective idea of cleansing the ills of the society through the agency of tribunals has remained elusive. There now appears to be more instances of official corruption under military rule than under the discredited civilian governments.[151] What is more, the extreme brevity of the proceedings of military tribunals and their traditional harshness in sentencing make them the ideal instrument for fast exemplary punishment of abrasive activities.[152]

The mere fact that the military finds it necessary to transfer some functions which are purely judicial from the ordinary courts to Special Tribunals, discounts the competence of and the confidence in the courts and to that extent vitiates their independence.

10:5:9 Judicial Immunity

For the sustenance of independence of the judiciary, Article II, paragraph 2:24 of the Montreal Declaration

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[150] Article II, Paragraph 2:06(e).

[151] Whilst the over-thrown civilian governments have been probed by the military, successive military regimes in similar circumstances have never given account of their stewardship while in office, simply because the military has the monopoly of the coercive apparatus of the state. The result is that in Nigeria there are now more millionaires among military rulers than among the erstwhile politicians due to acquisition of unchecked ill-gotten wealth.

[152] See Jose J. Joharia, "Judicial Independence in an Authoritarian Regime", in Ghai, Yash et al. (eds.), The Political Economy of Law (supra), p.185.

provides that:

> "Judges shall enjoy immunity from suit or harassment, for acts and omissions in their official capacity."

This rule, as in England, was established in order to secure the independence of judges, and prevent their being harrassed by vexatious actions for a judicial act done in good faith.[153] Nigeria adopts the English practice and her judges under both civil and military rule enjoy the utmost freedom of speech in the discharge of their judicial functions. They are absolved from liability or prosecution in respect of anything said or done in the course of their official duties.[154]

10:5:10 The Public Image of the Judiciary

Since the advent of military rule in 1966, the judiciary has been struggling to maintain its independence as the third arm of government but more often than not, it has been on the defensive as a result of humiliation by the executive. The most prominent aspect of this humiliation is the consistent failure of successive military governments to obey orders of courts not favourable or convenient to them or which in any way show weakness or irresponsibility in their administration. This has led to loss of public confidence in the judiciary as the last hope of the common man. Examples of the military's

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[153] Fray v. Blackburn [1863] 22 E.R. 217; Anderson v. Blackburn [1895] 1 Q.B. 670; and Sirros v. Moore [1974] 3 All E.R. 776.

[154] See, among others, s.31 of the Criminal Code, Laws of the Federation of Nigeria and Lagos, 1958, Cap.42; s.46 of the Penal Code, Laws of Northern Nigeria 1960, Cap.89; and the Magistrates Courts Ordinance, Laws of Nigeria 1948, Cap.122. See also Initiri v. Ojomo [1954] 21 N.L.R. 19; and Awosanya v. Board of Customs [1975] 1 All N.L.R. 106.

disobedience and intransigence abound.

In 1984, the order of Mr. Justice Yahaya Jinadu of the Lagos High Court that one Mr. John Kenneth Oyegun, a federal Permanent Secretary in the Ministry of Internal Affairs, should appear before him on a charge of contempt was ignored. Oyegun had terminated the appointment of one Saidu Garba, a federal fire officer who thereupon instituted an action for wrongful dismissal. Justice Jinadu gave judgment in favour of the fire officer and ordered that he be reinstated but Oyegun defied the order. The court summoned him five times but he refused to show up. Justice Jinadu then issued a bench warrant for the arrest of J.K. Oyegun but on the instruction of the Federal Military Government, this was treated with utter contempt and was never served.[155] The military regime of General Muhammadu Buhari which was determined to purge the civil service (albeit arbitrarily and illegally) saw the Court's order as a direct affront to its executive authorities and did everything it could to frustrate the judge. The Government directed the then Chief Justice of the Federation, Mr. George Sodeinde Sowemimo to ask Justice Jinadu to apologise to Chike Ofodile, the Federal Attorney-General, over the Oyegun case. It then went further to bar all courts in Nigeria from entertaining similar actions in future and abated all pending proceedings.[156] Justice Yahaya Jinadu refused

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[155] See Federal Civil Service Commission v. Garba [1986] 2 N.W.L.R. (Part 56) 395.

[156] See the Civil Service Commissions and Other Statutory Bodies (Removal of Certain Persons from Office) Decree No.16, 1984.

to tender any apology and instead resigned in frustration saying that he could not be a party to humiliation and disgrace.

Also in Governor of Lagos State v. Ojukwu,[157] the Court of Appeal ruled against the Lagos State Government and granted on an ex-parte application an interim injunction to stop ejectment of Chief Odumegwu Ojukwu from his residence at No.29 Queen's Drive, Ikoyi, Lagos pending the determination of a substantive motion. But the Government refused to carry out the said order and instead forcibly ejected Ojukwu from the property in dispute. Thereafter, the Government proceeded on appeal to the Supreme Court against the order of the Court of Appeal seeking by a motion an order of the Supreme Court to stay the execution of the decision of the Court of Appeal.

The Supreme Court in dismissing the application of the Military Government of Lagos State said, inter alia:

> "(i) It is a very serious matter for anyone to flout a positive order of a Court and proceed to taunt the Court further by seeking a remedy in a higher Court while still in contempt of the lower Court;
> (ii) It is a more serious contempt when the act of flouting the Court is by the Executive; and
> (iii) Executive lawlessness tantamounts to a deliberate violation of the Constitution, and it is much more serious and profound if such lawlessness takes place in a military administration."[158]

The verdict of the Supreme Court reiterates the established principle of law that once the Court is seised of a matter, no party including government has a right to take the law into his own hands. It also reaffirms the essence of the rule of

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[157] [1986] 1 N.W.L.R. (Part 18) 621.

[158] Ibid., pp.622-23.

law that it shall never operate under the rule of force for which the military is characterised.[159]

The humiliation of the judiciary by the military has continued unabated. In the case of Chief Gani Fawehinmi v. Colonel Halilu Akilu and Lt. Colonel A.K. Togun,[160] the plaintiff (a human rights lawyer) in an attempt to get the defendants (Federal Government security agents) prosecuted in connection with the murder of one Dele Giwa (a critic of the Military Government who was killed by a letter bomb), prepared his information and took it to the Director of Public Prosecution (DPP), Lagos State, to either prosecute the accused officers, namely, Col. Akilu (Director of Military Intelligence) and Lt.-Col. Togun (Deputy Director, State Security Service) or allow him (Fawehinmi) to prosecute them. The DPP using delay tactics to pervert the course of justice declined to take immediate action saying that he was waiting for police investigation - an investigation which was not forthcoming. The plaintiff sought and was granted by the Lagos High Court to apply for a writ of mandamus to be issued to compel the Attorney-General of Lagos State to exercise his power under s.342 of the Criminal Procedure Law to file an information containing charges of murder of and conspiracy to murder Dele Giwa.

Chief Gani Fawehinmi decided to prosecute in his private capacity and on December 18, 1987 appealed to the Surpeme

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[159] See Chapter Six (ante, 6:7) for a detailed discussion on the Rule of Law.

[160] [1987] 4 N.W.L.R. 797.

Court where all the seven Justices who heard the appeal held unanimously that every Nigerian had a right to prosecute anyone for a crime committed within the nation. With this ruling, Fawehinmi went back to the High Court which gave him leave to institute private prosecution. But in a surprise move, the two security officers filed a motion asking the Court to stop proceedings in the matter because according to them, the Lagos State Government had just passed an amendment to the original law that allowed private prosecution. The amendment which was passed ostensibly to circumvent the ruling of the Supreme Court with a view to thwarting Fawehinmi's efforts provides, inter alia:

> "Subject as hereinafter provided, no information charging any person with an indictable offence shall be preferred unless the information is preferred pursuant to an order ... to prosecute the person charged for perjury."[161]

As was not unexpected, when Fawehinmi went back to the Supreme Court in yet another appeal against the above legislation, the Court said that its 'hands were tied' by the new Edict, holding that the right of a private prosecutor to initiate prosecution in all other cases apart from perjury has been withdrawn.[162] Hence as in other cases earlier considered, the military government has again encroached on the independence of the judiciary. Its action is inconsistent with Article II, Paragraph 2:07 of the Montreal Declaration

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[161] Criminal Procedure (Amendment) Edict No.7, 1987 of Lagos State.

[162] Colonel Akilu and Another v. Fawehinmi [1989] 3 S.C.N.J. 1. Note that the security agents continued to keep Chief Gani Fawehinmi's international passport for 17 months despite the ruling of the Court for its immediate release to him.

which stipulates that "No power shall be exercised so as to interfere with the judicial process".

In Arowoye and Others v. Inspector-General of Police,[163] Oshodi, J. of the Lagos High Court ordered, on an application for habeas corpus, the immediate release of the applicants who had been unlawfully detained by the Chief of Staff, Supreme Headquarters. The government refused to release the detainees but rather flew them by helicopter to unknown destination. The detainees were eventually released six months thereafter. This is yet another example of military interference with judicial process.

Also in July 1989, members of the Nigerian Bar Association went on a one-week boycott of courts in protest over the arrogant disregard for rule of law and contempt of the judiciary by the Military Governor of Gongola State, Wing Commander Isa Mohammed (who incidentally happens to be a lawyer), when he flagrantly ignored the rulings of the State High Court and the Court of Appeal that the two men who were declared victorious in local government elections be sworn in as chairmen.[164]

The apparent helplessness of the judiciary under the military dispensation has led some Nigerians, particularly members of the armed forces, to take the law into their own hands by resorting to lynching as well as employing 'jungle'

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[163] Suit No.1D/14M/84 delivered on April 6, 1984.

[164] The author obtained this information from the Chairman of the Nigerian Bar Association, Mr. Alao Aka-Bashorum in an interview held in December 1989; see also Newswatch, 11 September 1989, p.10.

justice. In January 1990, a Lagos High Court was told how a Customs Officer was forcibly ejected from his residence to make way for one Brigadier Rabiu Aliyu, a Garrison Commander. To effect the ejection, Brigadier Aliyu sent 20 fully-armed soldiers to guard the house even after the occupant had vacated the place. The military officer (Aliyu) admitted sending his troops. In his judgment, Justice Dolapo Akinsanya, said that "it was wrong to send armed soldiers to civilian residential areas when we are not at war".[165] Although the officer was verbally reprimanded in the Court, no further action was taken either by the judge or military authority against him. The army officer still retains the residence that he seized from the Customs Officer.[166]

The utter disregard and contempt which the military has for judicial decisions violates Article II, Paragraph 2:47 of the Montreal Declaration which states that:

> "The State shall ensure the due and proper execution of orders and judgments of the Courts."

The attitude of the military government in Nigeria towards the judiciary is a classical reminder of Alexander Hamilton's assertion that:

> "The judiciary has neither influence over sword nor purse, nor direction of the strength or wealth of the society. It has neither force nor will but only judgment, and is ultimately dependent upon the executive arm even for the efficacy of its judgments."[167]

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[165] Suit No.1D/8M/90 (unreported).

[166] The military was criticised for non-observance of the rule of law, see "How Governments Handcuff the Courts", Newswatch, 29 January 1990, p.12.

[167] Hamilton, A., Madison, J. and Kay, J. (eds.), The Federalist (1961) Chapter 8, p.489.

Under the military rule, judicial independence has become a mirage as successive military regimes have adopted various devices to circumvent the rule of law and undermine judicial process. Most military leaders and their subordinates have no respect for laws and the Constitution. Dr. (Justice) Aguda, an eminent Nigerian jurist, who is particularly appalled by the utter disregard of court orders by the military, has opined that the ruled must have visible incontrovertible evidence that there was discipline among the rulers before they could imbibe the culture of discipline. He warns that no nation founded upon indiscipline and injustice could survive permanently and that a time would come when it could collapse under the yoke of injustice.[168]

Ironically, in the face of overwhelming evidence which points to the fact that the military has eroded the independence of the judiciary, some sneior members of the bench have insisted that their position is unassailable. According to Honourable Justice A.O. Obaseki of the Supreme Court of Nigeria, "there is absolutely no interference in the operation or decision-making process of the judiciary".[169] And in his own response to the criticism of the judiciary, the Chief Justice of Nigeria, Mr. Justice Mohammed Bello, maintains that those who blame the judges for applying the law

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[168] See Akinola Aguda, "In the Danger of Fiend and the Ghoul", a Lecture delivered at the January 1990 Business Luncheon of the Island Club of Lagos, Nigeria.

[169] Andrew O. Obaseki, "The Relevance of Law As an Effective Instrument of Social Engineering in Contemporary Nigeria", a Paper presented at the University of Lagos in 1985.

and not questioning the rationale or wisdom for such laws are ignorant of the functions of the judiciary. The judges, he says, are sworn to apply the law as it is, not to change it. He argues that there is a distinction between a civilian administration and a military rule, pointing out that in the former, Courts' jurisdictions are never ousted by Parliament, but under the latter, military decrees can and do oust the jurisdictions of the Court. Justice Bello further declares that any judge who feels the law-maker (the Supreme Military Council) has no right to make a decree to oust his jurisdiction should resign. He admits that some decrees are bad laws noting that "we pass judgments we know do not comply with our conscience. But do not blame the judge, blame the law-maker or even the Executive".[170] The excuse offered by the Chief Justice is nothing but timidity and naivety. His admission and confession are indicative of the threat posed to the independence of the judiciary by the military.

It should be borne in mind that the independence of the judiciary is, to a large extent, dependent on the type of persons who are called upon to perform the onerous task of judicial administration. As Professor Schwartz aptly puts it:

> "The quality of justice depends more upon the quality of men who administer the law than the content of the law. Unless those appointed to the bench are competent and upright and free to judge without fear or favour, a judicial system, however sound its structure may be on paper, is bound to function poorly in practice."[171]

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[170] See the text of Chief Justice Bello's interview with Newswatch (Lagos) 29 January 1990, p.15.

[171] Bernard Schwartz, American Constitutional Law (New York: Greenwood, 1969), p.130.

Judicial independence requires courage, maturity, confidence, personal integrity, and ability to resist pressures and remain impartial in the dispensation of justice. Unfortunately, many Nigerian judges lack these qualities and the problem has been compounded by the military dictatorship. To use the words of an American scholar, the majority of Nigerian judges are "insulting, abrupt, rude, sarcastic, patronising, intimidating, vindictive, insisting on not merely respect but almost abject servility. Indeed, the lower the Court, the worse the behaviour."[172] It is absolutely important that those who run the judiciary should be men of the highest integrity and learning.

A judiciary cannot be truly independent unless the judges are mentally and psychologically independent, bold and courageous, able and willing to defend their independence. The attempt of a judge in a case to show favour to a government or save it from the embarrassment resulting from the loss of a law suit is a clear indication that the judge lacks independence. The decision of the Mid-Western State High Court in D.O. Ereku v. Military Governor, Mid-Western State of Nigeria and Others[173] vividly illustrates this phenomenon under military rule. Under s.31(2) of the 1963 Constitution, the Government of Mid-West could acquire

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[172] Herman Schwartz, "Judges as Tyrants", Criminal Law Bulletin 7 (1971), pp.129-30. Some Nigerian judges abuse their judicial immunity by harassing lawyers and their clients in court, see Boyo v. Atake [1970] M.W.S.N.L.R. 197; and Fawehinmi v. Akilu and Another [1987] 4 N.W.L.R. 797 and [1989] 3 S.C.N.J. 1 respectively.

[173] [1974] 10 S.C. 59.

people's property compulsorily without paying adequate compensation therefor if the property was acquired for a public purpose as defined by the Public Lands Acquisition Law. The Military Government of Mid-Western State, purporting to be acting under the said law, acquired the plaintiff's land compulsorily and leased it to a foreign company for industrial purposes. The plaintiff challenged the validity of the acquisition on the ground that it was not for a public purpose. While the case was pending the Military Governor of the State enacted a law known as the Public Lands Acquisition Law (Amendment) Edict, 1972 by which the then existing Public Lands Acquisition Law was amended so as to extend its definition of "public purpose" with a view to enabling the Government to obtain control over land required by any company or industrialist for industrial purposes.

The learned trial judge held that "the acquisition was valid, not because it was for a public purpose, but because to declare it invalid might embarrass the Government of the State and, possibly expose it to a series of hostile actions by other landowners in similar circumstances."[174] On appeal, the Supreme Court reversed the decision on two grounds: firstly, that the acquisition of the land for the exclusive use of a privately owned company was not for a public purpose; and secondly, that the purported amendment was unconstitutional and invalid. The trial judge in the State High Court was not courageous enough to question the validity

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[174] Ibid., p.62. Emphasis is mine.

and constitutionality of the Military Government's actions thereby destroying public confidence in the judiciary.

In Commodities Sales Ltd. v. Cocoa Merchants Ltd.,[175] counsel completed their addresses on October 5, 1978. The judge delivered his judgment on January 30, 1981, despite repeated applications by the counsel for the judgment to be delivered earlier, and in spite of the fact that s.258(1) of the 1979 Constitution provided that every Court in Nigeria shall deliver its judgment not later than 3 months after the conclusion of evidence and final addresses. The defendant against whom the judgment was eventually given appealed on the ground that the judgment was unconstitutional, being out of time. The appeal was upheld, and the case was remitted to the High Court for retrial de novo.[176] Such a display of incompetence and/or dereliction of duty by the trial judge could neither project a better public image of the judiciary nor the integrity of the judge.

Another High Court Judge in Bendel State, Mr. Justice Ikomi, was removed in 1986 in the light of the mysterious circumstances surrounding the death of his police guard. The 'mystery' was that the police constable was murdered at night while on duty at the official residence of the judge, and some parts of his body were removed allegedly for ritual purposes. The Judge was charged with the murder of the constable.[177]

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[175] Suit No. LD/1396/75, Lagos High Court (unreported).

[176] Suit No. CA/L/47/84.

[177] Ikomi v. Attorney-General of Bendel State [1986] 1 N.W.L.R. 183.

Although he was acquitted for lack of sufficient evidence after protracted trial, the image and integrity of the state judiciary was 'dented'. The matter which was considered as a public scandal by the media was an embarrassment not only to the judge and the State Government but also the entire judiciary in the country.[178]

Similarly, in 1972 it was reported that a High Court Judge in the South-Eastern State, Mr. Justice Peter Effiong Bassey, was removed by the Supreme Military Council on the recommendation of the Advisory Judicial Committee for professional misconduct.[179] And in 1986, a High Court judge was alleged to have altered the records of his judgment.[180] All these infamous acts put the judiciary into disrepute with consequential loss of public confidence.

The apparent despicable and disgraceful role of a Federal High Court Judge, Mr. Justice Gregory Okoro-Idogu, who had convicted and imprisoned a Nigerian musician, Fella Anikulapo-Kuti, for currency offences but later paid the prisoner a visit in a hopspital in 1986 and allegedly apologised for having convicted him because of pressures from high government officials, led to the immediate removal of the Judge by the President, General Ibrahim Babangida. Justice Okoro-Idogu's alleged confession,[181] which cast aspersion on his personal

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[178] See the Daily Times (Lagos), 27 November 1985, p.1.

[179] The Nigerian Observer, 7 March 1972.

[180] See the Daily Times, Nigerian Observer and The Guardian of 29 April 1986.

[181] See "Judiciary on Trial", Newswatch, 26 May 1986, pp.15-22; and West Africa (London), 28 April 1986, p.901.

integrity was a betrayal of the independence of the judiciary.

Apart from lack of competence and integrity, certain actions and pronouncements of some judges open them to accusations of bias in favour of government. In the case of Gani Fawehinmi v. Colonel Halilu Akilu and Lt. Colonel A.K. Togun (supra), the plaintiff (a lawyer) in an affidavit sworn to on November 2, 1989 prayed that the case be transferred from Justice Ligali Ayorinde (the acting Chief Judge of Lagos State) to another judge, because according to him "since Ayorinde, J. became the acting Chief Judge of Lagos State, most of the cases filed by my Chambers against either the Federal Government or Lagos State Government have been wholly assigned to Ayorinde himself and all his Lordship's decisions had been in favour of the government". Justice Ayorinde took the view that Fawehinmi's averment contained innuendo which referred to him as a government judge. He convicted and jailed Fawehinmi summarily for 12 months without option of fine for contempt of court, notwithstanding the fact that s.133(9) of the Criminal Code provided that "any person whose action is tantamount to a contempt may be liable to imprisonemnt for three months". The Judge said he was exercising his power under the law which gave him discretion to extend the length of prison term. Fawehinmi was refused bail pending his appeal. In a unanimous judgment, the Court of Appeal, setting aside the ruling of Justice Ayorinde, held that the offence of contempt which earned Fawehinmi 12 months jail sentence is one which should not have attracted more than 3 months. It also added that he was entitled to bail.

In the counter-libel suit filed by the accused against Fawehinmi,[182] claiming N10 million damages, Justice Ligali Ayorinde awarded the two security officers (Akilu and Togun) N6 million, directing that "Fawehinmi must pay the amount even if it means selling his property to raise money".

Ayorinde's anger and exemplary punishments in the above two cases arose from his perception of Fawehinmi as a 'trouble shooter' who always takes delight in criticising the military government as well as challenging its authority. According to Justice Ayorinde, "the President (the Head of the Federal Military Government) has absolute executive and legislative powers. Since Decrees have ousted the jurisdiction of the courts, who is to query him? The President is above query. He is 'Kabiyesi' (almighty King)."[183]

There have also been allegations that Justice Ayorinde in his capacity as the Chief Judge of Lagos State always assigns to himself to exclusion of other judges cases brought against the Federal and State Governments, especially those relating to enforcement of fundamental human rights. What is more, even though such cases are supported by affidavits of urgency for accelerated hearing and issuance of writs of habeas corpus, they are never heard on time and this often results in

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[182] Colonel Akilu and Another v. Fawehinmi [1989] 3 S.C.N.J. 1.

[183] Justice Ayiorinde's response to criticism of prejudice and high-handedness in the trial of Fawehinmi's case is contained in the text of his interview with African Concord (Lagos), 24 January 1990.

the deprivtion of the personal liberty of the detainees.[184] The unwillingness of Justice Ayorinde to assign government cases to other judges in the State and his propensity to give judgment in favour of governments at all costs has led litigants and their lawyers taking or transferring their cases to federal courts in protest.[185] Public identification of a judge's apparent bent in favour of the government's interest or that of its officials whenever those interests are in conflict with those of private citizens, coupled with a deliberate delay in the dispensation of justice[186] can hardly enhance the independence of the judiciary or its image.

In January 1990 the same controversial Justice Ligali Ayorinde took all the judges in the Lagos State judiciary on a condolence visit to the State Military Governor, Colonel Raji Razaki who had lost his wife. The courts were said to have been shut for two days because of the visit.[187]

Although Mr. Justice Ayorinde has denied being a 'government judge', the Nigerian Bar Association and the general public have called for his resignation or removal because he is said to have handed over the Lagos Judiciary to

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[184] Striking examples include Okudoh v. Commissioner of Police, Suit No.M/32/84 and Dr. Tai Solarin v. Inspector-General of Police, Suit No.ID/15M/84 (unreported).

[185] E.g. a student unionist at the University of Lagos abandoned the suit he earlier filed in Ayorinde's Court and went to Federal High Court where he later won his case, see Aborisade v. Attorney-General of Lagos State, Suit No.ID/19M/89 (unreported).

[186] Justice delayed, is justice denied.

[187] African Concord, 4, 40 (24 January 1990), p.22.

the Executive by his words and deeds.[188]

The actions and utterances of Justice Ayorinde and other judges aformentioned fall short of the requirement of Article II, Paragraph 2:10 of the Montreal Declaration which states that:

> "Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and the independence of the judiciary."

It is sad to observe that the long period of military dictatorship has inculcated in the minds of some Nigerian judges an unwarranted timidity - the fear of and subservience to the Executive. A government, whether military or civilian cannot influence the decision of the Courts if the judges themselves do not succumb to any form of intimidation or compromise their independence through patronisation.

Intense lobby for judicial appointments tends to increase the leverage of the Executive over the judiciary. The executive, 'holding the power of the purse' and the prerogative to appoint, promote and discipline judges,[189] sometimes capitalise on this to exert influence on the judiciary. In Lagos State, for example, many people believe that by failing to appoint Mr. Justice Idowu Agoro (the most senior and uncompromising judge on the bench) as the Chief Judge, following the retirement of the incumbent (Justice Candido Ademola-Johnson), the State Military Government was interested in appointing its 'own candidate'. Whilst Ademola-Johnson was on vacation preparatory to his retirement, the

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[188] Ibid., pp.22, 26, 35 and 36.

[189] See Items 10:1:1-10:1:6 and 10:5:4 above.

Government in August 1988 went down the ladder to appoint Justice Akintude Desalu, the fifth on the seniority list, as the acting Chief Judge instead of Justice Agoro. Public criticism and protests from the Nigerian Bar Association, Lagos Branch, and the media, led the Government to drop Justice Desalu.[190] But the Government went ahead notwithstanding further protests, to appoint Justice Ligali Ayorinde, the second on seniority list, as the acting (and later substantive) Chief Judge of the State without stating the criteria it used. It would appear that Justice Ayorinde, the controversial 'pro-government' judge has been 'rewarded'. Criticising this type of judicial appointment, Mr. Akinola Aguda, a former Chief Judge of Western State, has warned the judiciary and the nation that:

> "We are now approaching the danger line when some of those unworthy appointees would find themselves in the two highest Courts (the Court of Appeal and the Supreme Court) which may lead to these Courts losing their credibility".[191]

Candidates for judicial office should be individuals of integrity and ability, well-trained in the law, and their promotion should be based on an objective assessment of their integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law rather than on the basis of governmental

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[190] Interview with the Secretary, Nigerian Bar Associaiton, Lagos Branch, December 1989. See also "The Judiciary Is Impotent", Newswatch, 29 January 1990.

[191] "In the Danger of the Fiend and the Ghoul" (supra).

patronage.[192]

In addition to its dented public image, there is a general belief among Nigerians that the judiciary is corrupt. Even some of the senior members of the bench have acknowledged and admitted the existence of corruption. Thus, a one-time Chief Justice of Nigeria, George Sodeinde Sowemimo was reported to have said in 1985 that he had no regrets about the purge of "some undesirable ... and ... corrupt judges from the nation's judiciary".[193] And in his own words, a former Chief Judge of Imo State (and later a Justice of the Supreme Court), Mr. Justice C.A. Oputa laments:

> "What is it that in present day Nigerian society tarnishes, desecrates and disfigures the solemn and beautiful image of justice and the judiciary? The answer is not far to seek. It is the cancer of bribery and corruption ... Some of these allegations are absolutely unfounded, but one is faced with the stark and naked reality that some judicial officers are corrupt."[194]

Similarly, Justice (Dr.) Aguda has asserted that there is a growing awareness of the public of the increasing corruptibility of a sizeable number of judicial officers not only through financial or other material gain or hope for such gains, but also for undeserved or even deserved preferment.[195]

The significance of the above statements of some eminent

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[192] See Article II, Paragraphs 2:11 and 2:16 of the Montreal Declaration.

[193] Daily Times, 28 June 1985, p.32; Daily Sketch, 28 June 1985, p.9. Note that judicial corruption exists under both civilian and military rule.

[194] Oputa, C.A., The Law and the Twin Pillars of Justice (Owerri: Government Printer, 1981), p.9.

[195] See footnote 168 above.

Nigerian judicial officers is to demonstrate that although no superior court judge in Nigeria has ever been prosecuted for corruption, it is a common knowledge that such vice exists.[196] There have, however, been few reported convictions of Customary Court judges.[197] The unprofessional conduct of judicial officers has undermined the independence of the judiciary.

It must not be supposed however that judicial corruption is peculiar to Nigeria alone, it is a common phenomenon in most developing countries, and to a lesser extent even in advanced countries.[198] But to project a better public image, we suggest that Nigerian judges should exhibit a greater sense of maturity, confidence, personal integrity, will, together with ability to resist favouritism, nepotism and corruption.

On a positive note, it should be added that in spite of the formal dependence of the judiciary on the executive and legislature of the military government, the courts have exhibited considerable courage, independence and impartiality in certain respects, especially in the protection of civil liberties where their jurisdiction has not been ousted. Thus,

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[196] E.g. see General Obasanjo's explanation for the removal of the former Chief Justice of Nigeria, Dr. T.O. Elias, in Item 10:5:4 (ante).

[197] R. v. Duruibe [1938] 4 W.A.C.A. 124 and R. v. Olukolu [1939] 5 W.A.C.A. 118 are typical exmaples.

[198] E.g. there was a case of Lord Bacon, a Lord Chancellor, who was convicted, fined and imprisoned for corruption in Britain, see Campbell, J., The Lives of the Lord Chancellors, 4th edn., Vol.III (London: Murray, 1857), pp.102-116. For convictions in America, see among others, McFarland v. State, 109 N.W.2d 397 (1961); State v. Corruzzi, 460A. 2d. 120 (1983); and United States v. Claiborne, 727 F. 2d. 482 (1984).

in Lakanmi and Another v. Attorney-General of Western State,[199] the Supreme Court held that the Forfeiture of Assets (Validation) Decree No.45 of 1968 under which the assets of the applicants had been forfeited was null and void as ultra vires the 1963 Constitution. Delivering the judgment, Chief Justice Adetokunbo Ademola said, inter alia:

> "If the Federal Military Government, however well-meaning, fell into error of passing legislation which specifically in effect passed judgment and inflicted punishments or eroded the jurisdiction of the Courts, in a manner that the dignity and freedom of the individual, once assured are taken away, the Courts must intervene."[200]

The decision of the Supreme Court purporting to limit the legislative competence of the Federal Military Government was an epitome of a singular display of judicial courage and ultra judicial activism considering the ease with which judges of the Court would have been dismissed by the Supreme Military Council. It was daring though misguided.[201]

Similarly, in Jackson v. Gowon and Others,[202] Sowemimo, J. relying on Doherty v. Balewa[203] held that notwithstanding the clear provisions of Decree No.1, 1966 ousting Court's jurisdiction, the power of the Courts to review military legislation remained unimpaired. Although the Judge came to that conclusion under the wrong impression that the 1963 Constitution in its modified form was still supreme, his

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[199] [1971] 1 U.I.L.R. 201.

[200] Ibid., at p.209.

[201] See Chapter Seven (ante, 7:3:2).

[202] Suit No.ZD.92/67 (unreported).

[203] [1961] All N.L.R. 604.

remarks were courageous. And where a Decree gave power to the Chief of Staff, Supreme Headquarters or the Inspector-General of Police to detain where they were satisfied that "any person is or has recently been concerned in acts prejudicial to public order ...",[204] such a detention has, in some cases, been held illegal on habeas corpus proceedings.[205] The Courts have consistently maintained that for such detention to be valid it must be made in accordance with the enabling Decree - that is, the detention order must be signed by either the Chief of Staff or the Inspector-General of Police personally.[206]

In Prince Ademiluyi v. Brigadier R.A. Adebayo, [207] the High Court held that the Western State Public Officers and Other Persons (Forfeiture of Assets) Edict No.51 of 1968 was in conflict with the provisions of both Decree No.1, 1966 and the 1963 Constitution, and therefore null and void. The Supreme Court of Nigeria has further declared as unconstitutional the compulsory acquisition of a parcel of land at Warri by the Government of the defunct Mid-Western State through the Public Lands Acquisition Law (Amendment)

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[204] Armed Forces and Police (Special Powers) Decree No.24, 1967; and State Security (Detention of Persons) Decree No.2, 1984.

[205] See, among others, Agbaje v. Commissioner of Police [1969] 1 N.M.L.R. 137; and Adeoye v. Commissioner of Police [1971] 1 N.M.L.R. 172.

[206] Ex parte Okafor Nwaji, Suit No.B/11M/69 (unreported); Ex parte Augustine Ifeanyichukwu Mordi, Suit No. M/135/68; Arowoye v. Inspector-General of Police, Suit No.1D/14M/84; Okudoh v. C.O.P., Suit No. M/32/84; and Dr. Tai Solarin v. I.G.P., Suit No. 1D/15M/84 (unreported).

[207] [1968] 2 All N.L.R. 272.

Edict of 1972.[208] And in Chukwu v. Commissioner of Police,[209] the Court said that no matter how strong the words of a statute are in purporting to oust the jurisdiction of the Courts, the judges cannot accept a retreat from their responsibility. The Court also held in Re Mohammed Olayori and Others[210] that it is ridiculous detaining a person as being concerned in "acts prejudicial to public order or in the preparation of such acts" by merely failing to pay a deposit or an instalment on a sum arbitrarily imposed on him by the military for allegedly having received money for services not rendered or goods not supplied to the Nigerian Army.

The High Court of the new Federal Capital Territory Abuja, while granting an application for the writ of habeas corpus in Thomas Twange v. Commissioner of Police,[211] held that police officers have no power to detain any person for an indefinite period since the Constitution (Suspension and Modification) Decree No.1 of 1984 which preserves s.32(1) of the 1979 Constitution has ensured the existence of a right to personal liberty. Where a State Military Governor forcibly ejected a citizen from his residence in defiance of the Order of the lower Court and at the same time went on appeal to a higher Court to invalidate the lower Court's decision, the

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[208] D.O. Ereku v. Military Governor, Mid-Western State of Nigeria [1974] 10 S.C. 59.

[209] [1974] 4 U.I.L.R. 516.

[210] [1969] 2 All N.L.R. 298. See also Okonnne v. C.O.P. [1986] 4 N.W.L.R. (Part 36) 473.

[211] [1985] H.C.N.L.R. 1083. See further, Alhassan v. Attorney-General of Kwara State [1985] H.N.L.R. 1083; and Olanipekun v. Governor of Oyo State [1985] N.N.L.R. 562.

Supreme Court held that "to use force to effect an act and while under the marshall of that force, seek the Court's equity, is an attempt to infuse timidity into Court and operate a sabotage of the cherished rule of law; it must never be."[212] The Supreme Court added that "even under a military government, the law is no respecter of persons, principalities, or powers; the State or Government must be bound by law".[213]

Judicial courage was also displayed in the case of Amakiri v. Iwowari,[214] which was decided during the Gowon regime. Here, the plaintiff, a correspondent of a newspaper was invited to the Government House in Port Harcourt, Rivers State, and ordered to be flogged, shaved with broken bottles, and detained in a guard-room on the orders of the defendant, the Aide-de-Camp to the Military Governor of the State. The plaintiff's alleged offence was that he caused a publication in the Nigerian Observer about non-payment of salaries to teachers in the state on the birthday of the Governor. The publication was considered as an affront and act of disrespect to the Governor. The plaintiff sought a declaration that his detention was illegal. He also claimed damages for false imprisonment, assault and battery. The Chief Judge of Rivers State, Justice Allagoa, gave judgment in favour of the plaintiff and held that he was entitled to damages. In

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[212] Per Justice Kayode Eso in Governor of Lagos State v. Ojukwu [1986] 1 N.W.L.R. 621 at p.626.

[213] Justice C.A. Oputa, at p.628.

[214] [1986] 1 N.L.T.R. 145.

condemning the barbaric acts of the military, the Judge sounded a note of warning:

> "The Courts are the watchdogs ... and the sanctuary of the oppressed and will spare no pains in tracking down the arbitrary use of power where such cases are brought before the Court."[215]

The courage, fortitude, and flashes of judicial activism shown by some judges in the protection of human rights under military dispensation, particularly where their jurisdiction has not been ousted expressly, is to a large extent a demonstration of their impartiality and independence. It should be remembered that the philosophy of military governance per se is antithetical to democracy and the rule of law.[216] Consequently, it is paradoxical to talk about complete independence of the judiciary under the military. Military rule has significantly affected both the individual and institutional independence of the country's judiciary.[217]

10:5:11 Summary

The conclusion that emerges from the discussion of the judiciary under the military vis-a-vis the practice of federalism in Nigeria is that the centralisation of courts system, appointment and removal of judges; the existence of governmental pressures and undue influences, financial anxiety, ouster of judicial review, and the military's

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[215] Ibid., p.154. For other similar judicial pronouncements, see Chief V.O. Onabanjo v. The Special Military Tribunal, Lagos Zone, Suit No.M/106/84 delivered on 28 May 1984 (unreported); and Adewumi v. Military Governor, Ondo State [1986] 1 N.L.T.R. 179.

[216] For details, see Chapters 5 and 6 (ante).

[217] Even under a democratic civilian government, complete independence is not attainable, but it has greater potential.

preference for tribunals to ordinary courts have by their combination effectively eroded the independence of the judiciary, as well as undermining the federal principle. The time-honoured constitutional precedent of using courts as final arbiters has been thrown into oblivion by the military's draconian Decrees. In as much as the military government is conferred with unlimited power, the independence of the judiciary and the civil liberties of the citizens cannot be guaranteed. It is our submission that a government that neither respects the independence of the judiciary nor its verdicts, and operates without checks and balances cannot claim to be federal.

CHAPTER ELEVEN

FISCAL FEDERALISM UNDER THE MILITARY ADMINISTRATION

This chapter will examine the extent to which military rule has affected Nigeria's fiscal federalism since 1966. It addresses itself to three main issues: (i) the quantum of revenue resources available in the Federation; (ii) the criteria used in sharing statutory and non-statutory revenues among the federal, state and local governments; and (iii) the changes introduced in the revenue allocation scheme by the military and their effects on the subnational units.

The importance of finance in a federation cannot be over-emphasised. First, legislative or executive autonomy for the States is likely to prove illusory if the state governments are dependent upon the discretion of central government for financial assistance. Thus, a centralised financial system may threaten to undermine the state political and administrative autonomy which the federal structure was intended to protect. Second, the control of revenue and expenditure is a vital instrument for the effective and efficient public control of the economy, particularly in the area of allocation of taxing and other financial powers. Third, one of the factors that usually accentuates tensions among States within a federation is the existence of differentials in the range and quality of publicly provided amenities available in the different constituent states. Consequently, there has always been pressure for a

redistribution of financial resources among them to ensure that no one single state or group of states enjoy a significantly much lower standard of living than those of other states.

Thus, the division of political authority between the national and regional governments within a federation is only a means to an end, but not an end in itself. Such division must be accompanied by fiscal autonomy with reasonable degree of financial self-sufficiency. A number of learned scholars have stressed this point. According to Alexander Hamilton, John Jay and James Madison, the founders of American federalism, "it is necessary that the state governments should be able to command the means of supply of their wants whilst the national government should possess the like faculty in respect to the wants of the union".[1] Professor Wheare also maintains that the federal principle requires the general and regional governments not only to be coordinate but also that each must have under its independent control financial resources sufficient to perform its exclusive functions.[2]

These views further underscore the importance of fiscal and financial autonomy in the practice of federalism, especially in the conduct of public administration. A government that is wholly or partially dependent is not equal in autonomy, power, prestige, and sovereignty. Therefore, for a federal system to be functional, the national and regional governments must each have sufficient, specified and

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[1] The Federalist, No.XXXI (Everyman edn.), p.149.

[2] K.C. Wheare, Federal Government, op.cit., p.93.

identifiable sources of revenue. But this is not possible in a country like Nigeria where there exists gross fiscal imbalance between the Federal and State Governments.

Fiscal imbalance occurs in a federation when one level of government receives from the nationally collected revenues less than is necessary to discharge its constitutional responsibilities whilst the other is given more than its requirements.[3] This should not, however, be interpreted as suggesting that fiscal and financial equality between the two is practically attainable. It is not - even in older federations like the United States of America and the Australian Commonwealth, due to differences in territorial jurisdiction and constitutional responsibilities. But the uniqueness of these federations is the maintenance of a balance between the revenue sources and expenditure responsibilities of the national and regional governments, and a constitutionally guaranteed fiscal autonomy for both levels of government.[4]

The Nigerian experience under the military is the converse - whereas the heaviest financial burdens are borne by the states and local governments, the federal government controls the lion's share of the most lucrative sources of

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[3] For a fuller account, see N.J. Thomson, "Apportioning Revenue Sharing Grants Between States: The Australian Commonwealth", Economic Analysis and Policy 16, 2 (1986), pp.172 et seq.

[4] See Des More, Developments in Commonwealth-State Financial Relations (Canberra: Australian National University, 1986); Mathews, L.R. (ed.), Fiscal Federalism: Retrospect and Prospect (Canberra: ANU, 1972); and Break, George, Intergovernmental Fiscal Relations in the United States (Washington, D.C.: Brookings Institute, 1967).

revenue, especially petroleum oil which accounts for more than 70 per cent of the Gross National Product (GNP).[5] Because the centre controls the bulk of the national revenues it has been able to intrude into the states' sphere of competence under the guise of giving them financial aids and loans as well as maintaining uniform fiscal policies. The essence of fiscal federalism is to correct such imbalance. But what really is fiscal federalism?

11:1 Meaning of Fiscal Federalism

Fiscal federalism is a process of adjustment whereby the revenue of each unit of government is brought into line with its expenditure. It involves the need to match fiscal jurisdiction with assigned responsibilities. In the context of Nigerian experience it is a tripartite allocation of nationally derived revenues among the Federal, State and Local Governments. The need for fiscal adjustment in a federation is brought about by four main factors: (i) the problem of resolving the imbalance of resources and needs between the national and regional governments; (ii) the problem of harmonising income with needs in different regions; (iii) the need to insure that economic equilibrium is achieved for the federation as a whole; and (iv) the need to 'level up' so that poorer regions are raised and the level of services provided in different regions is relatively equalised.[6]

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[5] See, among others, West Africa (London), 8 December 1980, p.2476.

[6] See Adedeji, Adebayo, Nigerian Federal Finance (London: Hutchinson, 1969), pp.220 et seq; and "Federalism and Fiscal Equity", American Economic Review, XL (1980).

There are two kinds of fiscal federalism - vertical and horizontal. The former occurs when there is vertical fiscal interaction between levels of government (e.g. national and regional), whereas the latter takes place when there is a horizontal fiscal interaction between political units at the same level (e.g. regional governments inter se). When a situation exists in the form of an imbalance of revenue and expenditures "vertical" between levels of government, it is referred to as the problem of non-correspondence or vertical fiscal imbalance; and when fiscal imbalance occurs horizontally between units of government at the same level, it is known as the problem of equalization or horizontal fiscal imbalance.[7] Nigeria witnesses both types of fiscal imbalance. But before considering them, it is necessary to briefly examine the importance of fiscal federalism.

11:2 The Importance of Fiscal Federalism

The importance of fiscal federalism lies in the fact that it provides an essential foundation for the successful operation of a federal system of government. Besides maintaining a healthy balance in power relations between a federation and its constituent units through a process of national integration, it serves as an instrument for achieving equitable distribution of the available resources and funds

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[7] Horizontal fiscal equalisation involves the provision of grants to various states in a federation in accordance with their judged needs. For a lucid and comprehensive discussion on different kinds of fiscal federalism, see Bernard P. Herber, "Revenue Sharing and Fiscal Equalization in Canada and the United States" in Mathews, L.R. (ed.), Fiscal Federalism: Retrospect and Prospect (supra); and Herber, Bernard P., Modern Public Finance (Homewood, Illinois: Irwin, 1975), pp.422-23.

among them. Fiscal federalism ensures that the efforts of all the federated units are geared towards the development of an integrated economy within a single polity. Furthermore, as an instrument of national policy, it is capable of alleviating some of the basic problems of economic integration.

In addition, fiscal federalism is very crucial to economic planning strategies and investments within a federation. Apart from determining the degree of participation of the various tiers of government in economic planning and management compatible with the national economic aspiration, it also has a strong bearing on the development strategy of the country as a whole.[8]

11:3 Federal-State Fiscal Relations in Nigeria Before the Advent of Military Rule

The issue of fiscal federalism arose for the first time in Nigeria in 1946 when the then three Regions were granted fiscal autonomy under the Richards Constitution. This was followed in the same year by the establishment of the first Revenue Allocation Commission headed by Sir Sydney Phillipson to formulate a revenue sharing scheme for the country in line with the political changes introduced by the Constitution.[9]

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[8] See Heller, Walter H., New Dimensions of Political Economy (Cambridge, Mass; Harvard University Press, 1967), p.129; and Keziah Awosika, "Fiscal Federalism and Development Strategy in Nigeria", in Ndekwu, E.C. (ed.), Proceedings of the 1979/80 Staff Seminar, Nigerian Institute for Social and Economic Research, Ibadan.

[9] See the Report of Sir Sydney Phillipson's Commission titled Administrative and Financial Procedure under the New Constitution: Financial Relations Between Government of Nigeria and Native Administration, 1946 (Lagos: Government Printer, 1946). For details of the constitutional changes, see Chapter Three (ante, 3:2:8).

Ever since then every constitutional review has been accompanied by a revenue allocation commission and not less than seven of such commissions have been established. These include the Hicks-Phillipson Commission (1951),[10] Sir Louis Chick Commission (1953),[11] Raisman's Commission (1958),[12] J.K. Binn's Commission (1964),[13] Dina Interim Revenue Review Committee (1968),[14] Aboyade's Technical Committee (1978),[15] and Okigbo's Commission (1979).[16] The Binns Commission was the fifth and last fiscal exercise before the military came to power.

The existence of these commissions before the emergence of military administration suggests that the military who did not initiate fiscal federalism cannot be solely blamed for its defects. But, what is peculiar about the military is that the problem of fiscal imbalance has been aggravated to the extent that the State Governments are now virtually incapable of performing their constitutional functions, and where they are

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[10] See Hicks-Phillipson Commission's Report on Revenue Allocation (Lagos: Government Printer, 1951).

[11] See The Report of the Fiscal Commission on the Fiscal Effects of the Proposed New Constitutional Amendments (Lagos: Government Printer, 1953).

[12] The Report of Sir Jeremy Raisman's Fiscal Commission (London: HMSO, 1958).

[13] J.K. Binns Fiscal Review Commission Report, 1964 (Lagos: Federal Government Printer, 1965).

[14] See Dina's Revenue Review Committee Report 1969 (Lagos: Federal Ministry of Information, 1969).

[15] Report of the Technical Committee on Revenue Allocation (Lagos: FMI, 1978).

[16] Presidential Commission Report on Revenue Allocation (Lagos: FMI, 1980).

able to do so, only at the price of financial dependence upon the Federal Government.[17]

11:3:1 Fiscal Autonomy and Financial Self-Sufficiency

The Constitution of the Federal Republic of Nigeria, 1963,[18] gave the Regional Governments a reasonable degree of fiscal and financial autonomy. It guaranteed them independent sources of revenue, including jurisdiction over a wide range of taxes. Sections 136-145 of the Constitution empowered the regional governments to share with the federal government certain centrally collected taxes in a way that reflected the capability of each governmental level to discharge the activities over which it had a policy-determining voice. The following is the summary of the sources and distributional basis of revenue under the 1963 Constitution as amended by the Allocation of Revenue (Constitutional Amendment) Act, No.18 of 1965.[19]

(a) Revenue Collected and Retained by the Federal Government.

All excise and import duties on beer, wine and liquor, and 65% on other goods except motor spirit, diesel, oil and tobacco; all company taxes, personal income tax within the Federal Territory of Lagos, and 15 per cent of mining rents and royalties;[20]

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[17] Details will be furnished in the subsequent discussions.

[18] Laws of the Federal Republic of Nigeria, 1963 (Lagos: FMI, 1963), pp.A153-A156.

[19] Ibid., 1965, p.A323.

[20] Sections 69(5) and 76; and items 10 and 38 of the Exclusive Legislative List.

(b) Revenue Collected by the Federal Government but Credited to the Regional Governments according to Derivation or Consumption: All export duties according to Region of origin of products, import duties on motor spirit, diesel oil, tobacco as well as excise duties on all of them proportionate to the level of consumption in each region, and 50 per cent of mining rents and royalties according to region of deposit of the mineral concerned;[21]

(c) Revenue Collected by the Federal Government, but Allocated to Distributable Pool Account (DPA) and shared among the Four Regions on the Basis of North (42%), East (30%), West (20%), and Mid-West (8%): 35 per cent of all import duties except those on beer, wine, liquor, motor spirits, diesel oil, tobacco, and 35 per cent of mining rents and royalties;[22] and

(d) Revenue Collected and Retained by the Regions: Personal income tax, taxes on partnerships, clubs, trusts and other unincorporated associations, licences and service fees, rents and earnings from government departments and properties, interests on loans and surplus funds invested, produce tax other than those on tobacco, motor fuel, hides and skins, fees of courts and offices.[23]

From this summary a number of facts emerge: firstly, there

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[21] SS.137(1), 138(1), 139(1), and 140(1)(a)(b).

[22] SS.136(1), 140(2) and 141. The Distributable Pool Account (DPA) is a joint account in which all the funds accruing to the regional or states from the federally collected revenues are kept before allocation.

[23] S.139(1) and Part II of the Concurrent List.

was constitutionally protected fiscal autonomy; secondly, revenue sharing among the Regions was based mainly on a combination of two principles, namely derivation,[24] and population;[25] thirdly, there was great emphasis on the principle of derivation which was weighted heavily in favour of the Regions;[26] and fourthly, the Federal Government was more or less a revenue collecting agent for the Regions.[27]

On the whole, although the pre-military fiscal system has been described as being characterised by "regional obscurantism, lacking development-oriented national policy",[28] its imperfection notwithstanding, Nigeria witnessed a reasonable balance in revenue sharing between the Federal and Regional Governments on one hand, and among the Regions on the other, commensurate with their respective constitutional responsibilities (see Chart I, below).

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[24] The principle of derivation implies that a region is statutorily entitled to all revenues that are capable of being identified as having originated from, and being attributable to, such a region.

[25] The Allocation of Revenue (Constitutional Amendment) Act 1965 made the allocation in (c) above (42%, 30%, and 8% of the DPA) to the Regions on the basis of their relative 1963 population viz: North (29.78 million), East (12.39 million), West (10.28 million), and Mid-West (2.54 million); see the 1963 Census figures in the Digest of Statistics, Volume 15 (Lagos: Federal Office of Statistics, 1966). The total population was 55.70 million.

[26] See Paragraphs (b) and (d) above.

[27] See Paragraphs (b) and (c) above.

[28] Adedeji, Adebayo, Nigerian Federal Finance, op.cit., p.254.

CHART I

Regional Governments' Recurrent Revenue
1955-1966 (N million)

Years	1 Net.Fed.Govt revenue	2 Total Reg. Govts revenue	3 Amount from Fed.source in Reg.revenue	4 % of 3 in 2
1955/56	68.20	66.10	46.14	70
1956/57	83.04	80.48	52.36	65
1957/58	81.84	81.42	54.52	67
1958/59	90.44	88.48	58.18	66
1959/60	100.48	101.19	70.48	69
1960/61	140.18	110.06	78.92	72
1961/62	131.52	130.28	88.08	68
1962/63	133.72	137.88	93.92	68
1963/64	151.14	141.32	95.78	68
1964/65	171.66	178.52	126.92	71
1965/66	188.60	189.76	132.54	70*

Source: Oyovbaire, Sam Egite (supra), p.77.

Again, as a result of the fiscal autonomy enjoyed by the subnational units, coupled with their expanded sources of taxes, the regions were financially sound. Thus, between 1954 when federalism was formally adopted and 1960 when the country was granted her Independence, while the federal government revenue rose by 74.4 per cent, the combined regional revenue showed an increase of 181.5 per cent. The breakdown for the Regions was 74.4 per cent, 124.4 per cent and 247.2 per cent for the North, East and West respectively.[29] Similarly, during the First Republic (1963-66), whereas the federal revenue rose by only 32.5 per cent, those of the regions put together rose by 72 per cent with a breakdown of 84.7 per cent

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[29] See the Recurrent and Capital Estimates of the Federal Republic of Nigeria, 1954-60 (Lagos: FMI, 1960).

(North), 81.3 per cent (East), and 53.5 per cent (West).[30] In effect, the essential features of fiscal federalism inherited by the military were regional fiscal autonomy and financial self-sufficiency. We shall now look at the situation under military rule.

11:4 The Nature and Structure of Fiscal Federalism Under the Military

The Nigerian experience of fiscal federalism under the military will be considered under three headings:

(a) revenue sharing under the first military administration;

(b) revenue sharing under the Second Republic; and

(c) revenue sharing under the second military administration.

11:4:1 Revenue Sharing Under the First Military Administration, 1966-79

The introduction of military rule in January 1966, which was subsequently accompanied by the creation of twelve states in May 1967, the emergence of civil war (1967-70), and the discovery of petroleum oil in the 1970s, brought about a reverse process in Nigeria's federal-state fiscal relations. The military government embarked on a number of measures which whittled down the financial powers of the states, so that by the end of the first military administration in 1979 the states were left with less than 25 per cent of the national revenue[31] as opposed to 70 per cent in 1966,[32] the Federal

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[30] Ibid., 1963-66.

[31] Of the estimated total federally collected revenue of N8.8 billion for the 1979/80 fiscal year, the last budget to be presented by the first military regime, only N2.2 billion

Military Government alone retaining more than 75 per cent.[33]

This financial dominance was achieved in three principal ways, each of which reflected a vertical fiscal imbalance between the Federation and the constituent states. The first was the system of revenue allocation whereby the Federal Government made general grants to the states from the Distributable Pool Account in substitution for the income taxes the states used to collect for themselves. Secondly, the extensive use of specific purpose payments, whereby the Federal Military Government by Decrees used its unlimited financial powers and superior resources to take over some services which were hitherto provided by the states. Thirdly, the centre used its de jure power and control over internal and external loans to determine the level, terms and conditions of virtually all public sector borrowing. In addition, it also influenced the distribution of tax-sharing grants, specific purpose payments and loans funds among the state and local government authorities, thereby playing a decisive role in determining the extent of horizontal fiscal imbalance within these tiers of government.[34]

11:4:2 The Binns Revenue Allocation Commission, 1964-66

(25%) was allocated to the states, see the Recurrent and Capital Estimates of the Federal Republic of Nigeria, 1979-80 (Lagos: FMI, 1979), p.XXVI.

[32] See Chart I (ante).

[33] It should be remembered that the first military administration covered three regimes - Generals Agiuyi-Ironsi (January-July 1966), Gowon (August 1966-July 1975), and Muhammed/Obasanjo (July 1975-September 1979).

[34] For details, see the accompanying text.

The Report of the Binns Commission on revenue allocation set up by the overthrown civilian government of the First Republic formed the basis of the first revenue allocation formula undertaken by the military under the leadership of Major-General J.T.U. Aguiyi-Ironsi. It shared the Distributable Pool Account (DPA) on the basis of 42 per cent for the North, 30 per cent for the East, 20 per cent for the West, and 8 per cent for the Mid-West.[35] But while the military's allocation for the North was shared among the six constituent states on the basis of equality (7% each), that of the South (comprising East, West and Mid-West) was distributed among the six component units on the criterion of their relative population as shown below:

(a) to North-Western State	seven one hundredths;	
(b) to North-Central State	seven one hundredths;	
(c) to Kano State	seven one hundredths;	Northern
(d) to North-Eastern State	seven one hundredths;	States
(e) to Benue-Plateau State	seven one hundredths;	
(f) to Central-West State	seven one hundredths;	
(g) to Lagos State	two one hundredths;	
(h) to Western State	eighteen one hundredths;	
(i) to Mid-Western State	two twenty-fifths	Southern
(j) to Central-Eastern State	seven fortieths;	States
(k) to South-Eastern State	three fortieths;	
(l) to Rivers State	one twentieth.	

Source: The Constitution (Financial Provisions) Decree No.15 1967, Laws of the Federal Republic of Nigeria, 1967 (Lagos: FMI 1967), p.A107.

It should be noted that the Binns Commission's Report which was inherited by the military marked the end of an era

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[35] See the Allocation of Revenue (Commencement) Decree No.67, 1966. This Decree was based on the formula laid down by the Allocation of Revenue (Constitutional Amendment) Act No.18, 1965, see footnote 25 above.

of revenue allocation based on accepted findings of democratically appointed Commissions since the introduction of federalism. Subsequent revenue allocation formulae were based not only on ad hoc arrangements but also influenced by the subordinate-superordinate relationship between the federal and state governments. And, since 1967 the states have become increasingly weak financially while the centre has been waxing stronger, recording surpluses in its annual budgets.

State Military Governors being the appointees of the Head of the Federal Military Government imbued with the military tradition of hierarchy and discipline, lack the will to challenge the Federal Government.[36]

11:4:3 The Dina Interim Revenue Allocation Review Committee, 1968

In 1968, the military government headed by Lt.-Colonel (later General) Yakubu Gowon set up its own Commission, the Dina Committee, to work out a new revenue allocation formula. This was the first fiscal review commission appointed by the military. According to the Republican Constitution of 1963, a fiscal review commission could be appointed only at a five-year interval and since the Report of the Binns Commission took effect from 1965, the earliest time for the inauguration of another one would have been 1969, but the prevailing hot political climate in the country, especially the civil war, and the creation of new states, necessitated a readjustment of the existing revenue allocation system within a shorter period. Hence the appointment of a revenue committee in July

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[36] For details, see Chapters 8 and 9 (ante).

1968 under the chairmanship of Dina.

In the context of the country's twelve-state structure the Committee was requested by its terms of reference to look into and suggest any change in the existing revenue allocation scheme as a whole and recommend new revenue resources for the Federal and State Governments. The Committee in its attempt to satisfy the Federal Military Government, which was determined to foster national unity through removal of revenue allocations from the ambit of politics, recommended, among other things, that: (a) federal government should assume full responsibility for the financing of higher education which hitherto was on the Concurrent Legislative List; (b) there should be uniform income tax legislation for the whole country; (c) mining rents in respect of in-shore operations should be distributed on the basis of 15 per cent federal, 10 per cent state of derivation, 70 per cent joint account (the DPA) - meaning that oil producing states were to be allocated 40 per cent less than what used to accrue to them; (d) off-shore rents and royalties be distributed on the basis of 60 per cent federal, 30 per cent joint account and 10 per cent special account; (e) the financial policies of the marketing boards be harmonised; (f) a permanent national planning and fiscal commission be established.[37]

The Committee's report, which was submitted in January 1969 was rejected in April of the same year by All-Nigeria Conference of Finance Commissioners on the ground that the

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[37] See the Dina Revenue Allocation Review Report, 1969 (Lagos: FMI, 1969), pp.1-5.

Committee exceeded its powers and in many respects ignored its terms of reference". The Dina Committee advocated a strong central government with more resources and power at the expense of the states. Like the structure of military organisation, the centralised nature of the Committee's recommendations failed to take into account the federal character of Nigeria.

But in spite of the outright rejection of the Report by the states and its subsequent disapproval openly by the Federal Military Government, the Supreme Military Council went ahead, albeit indirectly, to implement it by incorporating almost all its recommendations into a series of Decrees; and with the exigencies of the civil war there was least resistance from the states and the generality of Nigerians. It is therefore necessary to examine some of these Decrees in order to know their impact on federal-state fiscal relations.

11:4:4 Transfer of Tax Jurisdiction

It is in the area of tax jurisdiction and revenue sources that the problems of fiscal federalism were largely manifested. Many of the expanding traditional taxes on which the states relied under the First Republic were either transferred to the centre or abolished altogether.[38]

With the cessation of the Nigerian civil war in 1970 the military government fundamentally altered the structure of the

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[38] Even where there is no transfer or abolition, the power of the State Governments to impose tax is subject to the rule of inconsistency with Federal legislation under s.4(5) of the 1979 Constitution and the doctrine of "covering the field"; see Attorney-General of Ogun State v. Aberuagba [1985] 1 N.W.L.R. (Part 3) 395.

existing revenue allocation scheme. It promulgated Decree No.13 of 1970[39] with retrospective effect from 1st April 1969 and shifted the bulk of the national revenue from the states to the centre. The Decree introduced five major changes: firstly, excise duties on tobacco which were previously wholly shared by the states on the basis of relative consumption were made to be shared equally between them and the federal government.[40] Thus, the revenue accruing from the Distributable Pool account (DPA) in respect of these sources was significantly reduced by 50%; secondly, the 100 per cent export duties that used to go to states of derivation was reduced to 60 per cent while 40 per cent was retained by the federal government;[41] thirdly, the former practice of sharing mining royalties and rents on the basis of 50% to the states of origin, 15% to the federal government and 35% to the DPA was changed to 45%, 5% and 50% respectively;[42] fourthly, instead of 100 per cent of import duties on petroleum products and motor spirit accruing wholly to the states, they were transferred altogether to the DPA to be administered by the federal government.[43] and fifthly, the Decree provided that the amount standing to the credit of the DPA shall be

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[39] The Constitution (Distributable Pool) Account Decree No.13, 1970, Laws of the Federal Republic of Nigeria (Lagos: FMI, 1970), p.A49. This Decree repealed the Allocation of Revenue (Constitutional Amendment) Act No.18, 1965.

[40] Sections 1 and 2.

[41] S.3(2).

[42] S.4(a)(b).

[43] S.4(c).

distributed to the States on a compromise formula of 50% equality and 50% population.[44] All these changes, it was claimed, were motivated by the desire of the military government to de-emphasise the principle of derivation that had so far granted the states fiscal autonomy so as to enable it to influence the general economic growth of Nigeria,[45] but in doing so the states were starved of finance. Thus, for the first time in the country's fiscal history the states lost a major source of their revenue to the centre, meaning that they had to depend more and more on the generosity of the Federal Military Government.

In 1971, more radical changes were introduced by the Federal Military Government in an attempt to assert fiscal and financial dominance over the states. The Supreme Military Council realised in that year that petroleum was becoming the mainstay of Nigeria's economy and did all it could to divest the states of any authority over this sector by promulgating the Off-shore Oil Revenue Decree No.9 of 1971,[46] which repealed s.140(6) of the 1963 Constitution that vested the ownership of the continental shelf in the region adjoining it. The Decree transferred the ownership of and title to the territorial waters and the continental shelf; including all

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[44] S.5(1)(a)(b).

[45] See the 1971/72 Budget Speech by His Excellency, General Yakubu Gowon (Lagos: FMI, 1971), p.XX.

[46] Laws of the Federal Republic of Nigeria, 1971, p.A37. This Decree which came into force on 1st April 1971 vested all offshore oil revenues and the ownership of the teritorial waters and the continental shelf in the Federal Military Government.

royalties, rents and other revenues derived from or relating to the exploration or prospecting of petroleum products as a whole to the Federal Government.[47] Consequently, all the revenues accruing from the petroleum taxes and licences went to the Federal Government to the detriment of the states. The declared aim was to weaken further the effect of the principle of derivation,[48] but this effectively reduced the finances of the state governments in whose territories oil was produced. But instead of sharing the proceeds realised among all the constituent states to bring about equitable distribution of resources, the federal government retained all the revenues.

Also in June 1971, the efforts of the coastal states of Southern Nigeria to increase their finances through fishery were equally thwarted by the Federal Government. It promulgated the Sea Fisheries Decree No.30, 1971,[49] which repealed all the existing state laws on fisheries and vested the control of sea fisheries and ownership of revenues accruing therefrom in the Federal Military Government with a view to ensuring unified fiscal policy.[50] This, of course, adversely affected the financial fortunes of the states concerned.

11:4:5 Abolition of Sources of state Revenue

In April 1973, Export Duty and Produce Sales Tax that

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[47] S.1(1)(2)(a)(b).

[48] See General Yakubu Gowon's 1977/73 Budget Speech, p.xix.

[49] Laws of the Federal Republic of Nigeria, 1971, p.A131.

[50] See ss.1-10.

each State could impose on scheduled commodities were restricted to a maximum of 10 per cent,[51] and in the following year both taxes were completely abolished by the Federal Military Government as part of the on-going reforms within the Marketing Board system.[52] Once again, the primary aim was to place less emphasis on derivation and to maintain uniform taxes.[53] The net effect is that the states have been deprived of their independent source of revenue. It should be pointed out that the regionalisation of Marketing Boards between 1954 and 1973 boosted the fiscal autonomy of the State Governments. Governor Oluwole Rotimi of Western State noted that the reform in the Marketing system called for sacrifice because according to him, "under the new arrangements, the amount claimable as subsidies from the Federal Government in lieu of export duty and sales tax will be lower than what would have been collected if the duties had not been abolished."[54]

Besides the transfer and abolition of states' sources of revenue, the Federal Military Government further promulgated two Decrees (Nos.6 and 7) in April 1975 which marked the zenith of its centralisation policy. These Decrees endorsed

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[51] See the Produce Sales Tax Decree, 1973.

[52] Marketing Board (Reform)(Amendment) Decree, 1974.

[53] See the 1974/75 Budget Broadcast by General Yakubu Gowon (Lagos: FMI, 1974), p.xxii. With the abolition of State Marketing Boards, centralised Commodity Boards were set up for each of the country's major cash crops like cocoa, cotton, groundnut and palm produce.

[54] West Africa (London), 11 June 1973, p.763. The Federal Government also abolished pools betting, casino and gaming taxes.

not only the financial supremacy of the central government, but also confirmed that the 'rejected' Dina Report had been implemented in toto.

The effect of Decree No.6, the Constitution (Financial Provisions etc.) Decree of 1975,[55] was as follows:

(i) The 45% mining rents and royalties paid to the states on the basis of derivation by virtue of Decree No.13 of 1970 were reduced to 20% while the balance (80%) was credited to the DPA;[56]

(ii) The Federal Government retained 65% of import duties on all goods, and the remaining 35% together with the duties on motor spirits, diesel oil, tobacco, wine, portable spirit and beer were paid into the DPA;[57]

(iii) Fifty per cent of the excise duties was paid into the DPA while the balance (50%) was retained by the Federal Government;[58]

(iv) That all proceeds from import duties be paid into DPA;[59] and

(v) The DPA was distributed on the basis of 50% population

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[55] Laws of the Federal Republic of Nigeria, 1975 (Lagos: FMI, 1975), p.A2. This Decree which took effect from 1st April repealed all the pre-existing revenue allocation Laws, namely, the Allocation of Revenue (Constitutional Amendment) Act No.18, 1965; Allocation of Revenue (Commencement) Decree No.67, 1966; Constitution (Distributable Pool Account) Decree No.13, 1970; and the Off-Shore (Oil Revenues) Decree No.9, 1971.

[56] Section 5.

[57] SS. 1 and 2.

[58] Decree No.6, 1975, s.3.

[59] Ibid., s.4.

and 50% on equality of states.[60]

Decree No.7 of 1975 introduced uniform personal income tax throughout the Federation. Under it, the taxing powers of the states were further curtailed. Before 1974, each state government had its own personal income tax system with different rates and reliefs while the Federal government administered its own in respect of the members of the Armed Forces and public officers in foreign service. But with the promulgation of the Income Tax Management (Uniform Taxation Provisions) Decree No.7 of 1975,[61] retrospectively from April 1974, tax rates and allowances were made uniform throughout the country. This Decree amended the Income Tax Management Act, 1961; the Capital Gains Tax Decree No.44, 1967; and the Armed Forces and Other Persons (Special Provisions) Decree No.51 of 1972 to provide uniformity in the taxation of the income of individuals in all parts of Nigeria. Uniform Income Rates were also prescribed but State Governments were empowered to retain any existing capitation, community development, education, poll or other general tax or levy. The objective of this reform, according to the FMG, was to facilitate the mobility of high-level manpower and productive forces in the Federation.[62] But it was essentially an attempt to exercise federal control over the national economy.

Although the states did retain the authority to

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[60] Ibid., s.6.

[61] Laws of the Federal Republic of Nigeria, 1975, p.A23.

[62] Ibid., "Explanatory Note" to Decree No.7, 1975, p.A29.

administer and keep the proceeds of the tax, ambitious state governments have been prohibited from varying the rates.[63]

With the acquisition of the foregoing major sources of revenue, the Federal Military Government decided to take over many of the states' responsibilities. The most noticeable is in the field of education. Between 1974 and 1976 it introduced and financed Universal Primary Education (UPE), took over all existing state universities, and barred the states from establishing new ones.[64]

It may be argued that the usurpation of states' functions by the centre is a financial relief to the states, but the political implications are many; firstly, it shows that the states are not financially independent; and secondly, the states have no determining voice in the execution of their supposedly constitutional functions.[65] The entire idea of federal incursion into the states' sphere of competence is a breach of the federal principle. Instead of retaining the bulk of the national revenue, the FMG ought to have given the states a reasonable amount of money in the form of statutory allocations to meet their legitimate obligations.

11:4:6 Attitudes of the State Governments

The questions that arise then are: What was the attitude

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[63] We are not unmindful of the advantages of a unified personal income system in a federal set up, especially in terms of national unity, but our interest here is on the impact of the uniform tax provision on state financial autonomy.

[64] See Chapter Eight (ante, 8:4) for details.

[65] See Chapters 8, 9 and 10 (ante) generally for fuller discussions on the legislative, executive, and judicial incursions by the Federal Government.

of the states towards the foregoing fiscal centralism? What is the essence of federalism which the military professes if the national government could impose its will on the regional governments in matters that are entirely within the competence of the latter? Would this type of situation have been tolerated under a democratic civilian regime? The answers are in the negative for under the federal principle, each state should be allowed some measure of autonomy to control its own economic resources provided national interest is not thereby jeopardised. Federalism presupposes union but not uniformity which the military always attempts to achieve.

The 'command-obedience' federal-state relationship under the military accounted for the inability of the State Military Governors to oppose the fiscal measures introduced by the FMG.[66] As Professor Ojo rightly observes:

> "Under the military, decisions of the FMG are implemented unquestionably in the states by the governors, even when those decisions meant loss of revenue to the states. Governors are essentially instruments of the Federal Government".[67]

It was therefore not surprising that in 1975 when the revenue allocation formula of the new military regime of General Murtala Muhammed drastically reduced the shares of two oil producing states (Rivers and Mid-Western) in the Distributable Pool Account (DPA), the Military Governor of the Mid-Western State said that,

"the new allocation formula was agreed upon in the

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[66] See the characteristics of military rule enumerated in Chapter Five (ante, 5:2:2).

[67] Olatunde Ojo, "Federal-State Relations", Quarterly Journal of Administration, 10, 2 (1976), p.114.

overall interest of the country; the interest of the nation should take precedence over that of the states."[68]

It may be unrealistic to expect a continuation of this overwhelming federal dominance beyond the period of military rule.[69]

But whilst the administration of the FMG tended to silence the State Military Governors, there were criticisms and voices of dissent against the pattern of fiscal authority of the centre. The increased federal government involvement in some previously assigned regional functions, and the increasing dependence of the state governments on revenue collected by, and distributed through the federal government, attracted a lot of criticisms and condemnation from intellectual scholars and politicians who argued that the States ought to have been given more constitutional functions and unconditional statutory allocation of funds from the total of national revenue.[70] It was partly this growing demand that motivated the FMG to appoint a Technical Committee on Revenue Allocation (TCRA) in 1977.

11:4:7 The Aboyade Technical Committee on Revenue Allocation, 1977

The Mohammed/Obasanjo military regime which assumed power

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[68] New Nigerian (Kaduna), 15 March 1975, p.8.

[69] The rejection of such dominance by the States during the Second Republic led to the abandonment of the then pre-existing military formula for revenue allocation, see Item 11:5 below.

[70] See, for example, Adedotun Phillips, "Revenue Allocation in Nigeria", Journal of Economic and Social Studies, 17, 2 (1975).

on July 29, 1975 set up a fiscal review commission, known the Aboyade Technical Committee on Revenue Allocation, in June 1977 to examine, among other things, the existing revenue allocation scheme and recommend an appropriate formula for the sharing of revenue among the Federal, State and Local Governments, taking into consideration the need to ensure that each government of the Federation has adequate revenue to enable it to discharge its responsibilities and having regard to the factors of population, equality of status among the States, derivation, geographical peculiarities, even development, the national interest and any other relevant factor. In addition, the Committee was required to make whatever recommendations it considered necessary for effective collection and distribution of federal and state revenues.[71] The whole exercise was part of the military government's preparations for a return to civil rule in 1979.

The Committee made some radical and novel proposals in respect of federal/state/local government financial relations. It recommended that all federally collected revenues (except those from the personal income tax of the members of the Armed Forces of the Federation, the Nigerian Police, the Ministry of External Affairs and the residents of the Federal Capital Territory) be consolidated into one account, and shared on the basis of 57%, 30% and 10% to the Federal, State and Local Governments respectively, while 3% went into Special Grants

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[71] See the Committee's "Terms of Reference" outlined in Government Views on the Report of the Technical Committee on Revenue Allocation (Lagos: FMI, 1978), p.3. This is the Federal Government's White Paper.

Account administered by the Federal Government as a Contingency Fund for promotion of special national needs.[72] The Committee broke new ground by recommending for the first time in the history of revenue allocation in Nigeria that local government council as the third tier government be allotted 10% from the federally derived revenue, and 10% of the total revenue receipts of each state government. It abandoned the main old principles of revenue sharing notably "derivation" and "population", arguing that they were politically controversial and arbitrary, lacking statistically concise definition, as well as not encouraging the development of a cohesive fiscal system. It was in favour of federal fiscal superiority and decided to reduce considerably the states' independent sources of revenue, maintaining that the psychology and operational philosophy of military organisation support centralisation of fiscal and financial power.[73]

But despite the innovations brought about by the Aboyade Technical Committee, its findings and recommendations were open to criticism. In the first place, they were too technical, having been made by university professors and bureaucrats who failed to take into account the political realities of the country; secondly, they were based on inadequate and incorrect statistical data; thirdly, there was lack of consensus about the indices that the Committee used; fourthly, its Report weighted too heavily in favour of its

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[72] Ibid., p.6, paragraph g(i)(ii).

[73] Ibid., p.5, paragraph e(i-viii). Note that the principle of derivation carried the greatest weight throughout the period 1954-65.

'mentor' (the Federal Government) to the detriment of the states; and fifthly, there was gross financial imbalance between the centre and the states.[74]

In spite of these obvious anomalies, the Federal Military Government (FMG) accepted the Committee's recommendations, albeit with few modifictions, namely, Federal Government (60%), States Joint Account (30%), and Local Governments (10%),[75] because they tallied with its unified and centralised policies. It implemented the formula suggested by the Committee during the 1978/79 fiscal year by directing that the Federal and the State Ministries of Finance and the Federal Ministry of Economic Development should determine statistically the new concepts introduced by the Aboyade committee for the purposes of revenue alloction. It further directed the Federal Ministry of Finance to allocate any incremental revenue for the 1979-80 fiscal year on the basis of the new formula.[76] The government also noted that the new revenue allocation arrangement should be used during the formulation of the 1980-85 Development Plan if the arrangement was approved in principle by the newly established Constituent Assembly that was reviewing the country's Draft Constitution in preparation for return to civil rule in October 1979.[77]

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[74] See Oyediran, Oyeleye, Nigerian Government and Politics Under Military Rule, 1966-79 (London: Macmillan, 1979), pp.206-11; and Muhammadu, Turi, The Nigerian Constitution, 1979: Framework for Democracy (Enugu: Fourth Dimension Ltd., 1982), pp.45-46.

[75] Government's White Paper (supra), p.6.

[76] Ibid., p.7.

[77] Ibid., p.8.

The Head of the Federal Ministry Government, General Olusegun Obasanjo commended the effort of the Committee and declared that the attraction of the new system was the fact that it avoided the use of the old controversial criteria and substituted for them objective economic, financial and social formulae which could not be manipulated easily to the advantage of any particular state.[78]

The imposition of the Report on the States could again be attributed to the hierarchical nature of the military and its unity of command which make the decision of the Head of the Federal Military Government automatically binding on the State Governors.[79] However, when the Aboyade Report and Government's White Paper on it were sent to the Constituent Assembly (a body of would-be politicians, not members of the military) the Report, like the Dina's, was rejected for its "political insensitivity, cumbersome technicality, and intellectual arrogance".[80] Accordingly, the problem of revenue sharing was then shelved for the succeeding civilian administration. This was the position of Nigerian fiscal federalism when the first military regime handed over power to a democratic civilian government of the Second Republic on October 1, 1979.

11:5 Revenue Sharing Under the Second Republic, 1979-83

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[78] 1978/79 Budget Speech, Recurrent Estimates of the Government of the Federal Republic of Nigeria, 1978-79 (Lagos: FMI, 1978), p.xxii.

[79] See Chapter Five (ante 5:2:1).

[80] See the Proceedings of the Constituent Assembly, Volumes I-III, 1977-78 (Lagos: FMI, 1978), Volume III.

The administration of the second Republic under the leadership of an executive President, Alhaji Shehu Shagari, lasted only for a period of 4 years and 3 months (October 1, 1979 - December 31, 1983).

With the coming into being of the Presidential Constitution in October 1979, there was continued a growing dissatisfaction over the recommendations and implementation of the Aboyade Technical Revenue Committee Report. As indicated in the preceding discussion, the Report did not find favour with the members of the Constituent Assembly because they ignored the political realities and the federal nature of the country by investing the federal government with the lion's share of the national revenue. Thus, one of the first steps taken by President Shagari was to appoint a Presidential Commission on Revenue Allocation, headed by Dr. Pius Okigbo, a renowned Nigerian economist.

11:5:1 The Okigbo Presidential Commission on Revenue Allocation, 1979

In the light of the deliberations of the Constituent Assembly and the need to ensure that each tier of government in the Federation had adequate revenue to enable it to discharge is functions as laid down in the 1979 Constitution,[81] the Okigbo Commission was inaugurated on 23rd November 1979 to devise a new scheme for revenue allocation between the federal, state and local governments, having regard to such factors as national interest, derivation,

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[81] Sections 149-54 provided generally for revenue sharing among the Federal, State, and Local Governments.

population, even development, equitable distribution, and the equality of States. The Commission was also requested to make whatever suggestions it deemed necessary for effective collection and distribution of Federal and State revenues. Its other term of reference was to offer broad guidelines on the distribution of revenue among local governments within states.[82] In order to draw up a revenue sharing formula that would reflect the changes in the power relations between the various tiers of government, the Commission toured the country and had consultations with the representatives of the federal, state and local governments as well as accepting memoranda from interested organisations and individuals. The Commission submitted its Report to President Shagari on 30th June 1980. It recommended that the Federation Account be shared among the three levels of government as follows: (i) Federal Government (53%), State Governments (30%), Local Government Councils (10%), and Special Fund (7%).[83] The Government noted this recommendation but added that in view of its enormous commitments the Federation acccount be shared thus: Federal Government (55%), State Governments (30%), Local Governments (8%), and Special Fund (7%).[84] With few modifications to the Government's proposal, the National Assembly passed the

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[82] See the Commission's "Terms of Reference" contained in Views of the Government on the Report of the Revenue Allocation Presidential Commission, 1980 (Lagos: FMI, 1980), p.5.

[83] Paragraphs 302-4 of the Report of the Revenue Allocation Presidential Commission 1980 (Lagos: Federal Government Press, 1980).

[84] Views of the Government on the Report of the Presidential Commission (supra), p.13.

Allocation of Revenue (Federation Account, etc.) Act No.1 of 1981 which was later amended in 1982.

11:5:2 The Allocation of Revenue (Federation Account etc.) Act No.2, 1982

The Act provided, among other things, that the amount standing to the credit of the Federation Account as specified in Section 149(1) of the 1979 Constitution should be distributed among the various tiers of government in the order of Federal (55%), State (35%) and Local (10%). The states' allocation of 35% was to be shared on the basis of ecology (2%), derivation from minerals (2%), mineral producing areas (1.5%) and 30.5% shared equally. The share for ecology and mineral producing areas was to assist in restoring and ameliorating the ecological disaster which generally results from mineral exploration in oil producing areas of the country. The states' share of 30.5% (excluding the amount for ecology, derivation and mineral pollution) was to be divided on the basis of: population (40%), equality (40%), internal revenue effort (5%), and primary school enrolment (14.50%). The sharing of the 10% from the Federation Account among the local governments was to follow the states' formula mutatis mutandis.[85]

11:5:3 The Advantages of the Presidential Revenue Allocation Formula

From the above statistics it can be seen that there was improvement over the military's scheme of revenue allocation

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[85] The Allocation of Revenue (Federation Account, etc.) Act No.2, 1982, ss.5-10, Laws of the Federal Republic of Nigeria (Lagos: FMI, 1982).

during the Second Republic. The Revenue Allocation Act of 1982 employed three principles, namely, deficiency transfer, equalisation and categorical grants, which were beneficial to the States.

In the first place, there was an increase in the state governments' DPA from 30% of the military era[86] to 35%.

Secondly, the 40% of the DPA to be shared on the basis of population recognised the differences in the sizes and population of the respective states. By using population as index of need the Act ensured that each state received a share proportionate to its population and responsibilities, thereby making up for any deficiency that would have resulted from a uniform share from the DPA. The formula represented both deficiency and equalisation transfer which, in effect, remedied the defects of the military's fiscal scheme.[87]

Thirdly, the other 40 per cent from the Distributable Pool Account shared on the basis of equality took cognisance of the fact that all the states of the Federation have minimum responsibilities to provide to their citizens.

Fourthly, the allocation for ecology and mineral producing areas was to aid or ameliorate ecological disaster that would occur in any state as well as assisting mineral-producing states because of the adverse effects of mineral

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[86] See the Aboyade Technical Committee's Revenue Allocation formula in Paragraph 11:4:7 above.

[87] As President Shagari himself pointed out, "the new formula should be seen as trimming the Federal Government resources to the bare bones in the interest of fiscal federalism", 1982 Budget Speech, Approved Estimates for the Federal and State Governments, 1982 (Lagos: FMI, 1983), p.xi.

exploration such as pollution or any other hazards.

Fifthly, for the first time in the fiscal history of Nigeria, local governments were given a statutory allocation of 10%.

It should, however, be noted that notwithstanding these advantages, revenue allocation under the Second Republic could hardly be said to be perfect. The military precedent of federal dominance remained influential. Thus, whereas the Federal Government had a share of 55%, the State and Local Governments were given only 35% and 10% respectively. The states continued to look unto the centre for financial assistance.

11:6 Revenue Sharing Under the Second Military Administration, 1984—90

The Buhari military regime that ousted the civilian government of President Shehu Shagari in December 1983 promulgated a new Decree, known as the Allocation of Revenue Decree No.36 in 1984 which introduced some minor changes to the pre-existing revenue sharing scheme.

The Decree provided for the distribution of the Federation Account on the basis of: Federal Government (55%), State Governments (32.5%), Local Governments (10%), ecological problems (1%), Fund for the development of mineral producing areas (1.5%).[88]

The Decree further provided that the 55% allocated to the

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[88] S.2 of the Allocation of Revenue (Federation Account, etc.) (Amendment) Decree No.36, 1984, Laws of the Federation of Nigeria, 1984, p.A575. This Decree was enacted on 31 December 1984 but was deemed to have come into force from 22 January 1982.

Federal Government should be for its exclusive use[89] while the 32.5% allocated to the states should be shared equally among them.[90] It stipulated that "a sum equivalent to 2 per cent of the revenue derived from minerals extracted from mineral producing areas of Nigeria shall be paid directly to the mineral producing states in direct proportion to the value of minerals extracted from each state."[91]

The new amendment introduced two main changes: first, there was a slight adjustment in favour of the states as their actual receipts of the Federation Account increased marginally by 2% (from 30.5 to 32.5 per cent);[92] secondly, an amount equivalent to the value of 1 per cent of the Federation Account was reserved for the amelioration of ecological problems in any part of Nigeria;[93] thirdly, compared with the first military regime, there was greater emphasis on derivation as the mineral producing areas were to receive 1.5 per cent of the Federation Account for their development.[94] It should be remembered that the principle of derivation was previously de-emphasised by both Dina and Aboyade Military Committees on revenue allocation.

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[89] Ibid., s.3(2)(1)

[90] Ibid., s.3(2)(2)(a).

[91] Ibid., s.3(2)(2)(b).

[92] Ibid., s.3(3)(1). This excluded the amount for ecology, derivation and mineral pollution embedded in the Allocation of Revenue Act No.2 of 1982; see Item 11:5:2 above.

[93] Ibid., s.303(2.

[94] Ibid., s.3(4).

On the whole the main difference between the revenue sharing formulae under Shagari and Buhari was that whereas the Revenue Allocation Act of 1982 provided that 1.5% of the total federation Account be allocated to oil producing areas, the new amendment of 1984 stipulates that the 1.5% should come from revenue derived from mineral production and not the total Federation Account.

The revenue allocation formula provided by Decree No.36 of 1984 was inherited in 1985 by the present military regime of General Ibrahim Babaginda and it is still in force. Like its predecessors, the most noticeable feature of this Decree is centralisation and federal dominance in fiscal and financial matters.

11:7 Factors Responsible for Federal Fiscal Dominance Under Military Rule

The display of financial and fiscal supremacy by the centre over the states is attributable to a number of factors, namely, the nature of military rule, the creation of more states, the exigency of the civil war, and the emergence of the oil boom.

11:7:1 The Nature of Military Rule

The hierarchical authority structure of military organisation has been brought to bear on the fiscal life of the country. Since State Military Governors are subordinate to the Head of the Federal Military Government, it is perceived that states should be subordinate to the federal centre. Thus, the frequent changes both in terms of allocation formula and the composition of the DPA effected by

the federal government particularly between 1970-75 was unilateral and the net effect was fiscal centralism - a situation that would not have been tolerated under a democratic civilian rule.[95] The ability of the FMG to change the revenue allocation system more frequently, and unilaterally in favour of itself is determined by the nature of military rule, with its greater command structure, and cohesiveness.[96]

11:7:2 The Creation of More States

The fragmentation of the former four Regions into smaller states of twelve in 1967, nineteen in 1976 and twenty-one in 1987 respectively, has weakened the powers of the states. They have neither the political will nor the financial resources which their predecessors (the Regions) used in challenging the federal might during the pre-military era. Many of the newly created States did not have independent sources of revenue, resulting in wide disparity in social and economic responsibilities among the constituent units of the Federation. To reduce such disparities, the Federal Military Government (FMG) thought it desirable for the purposes of national unity to transfer most of the resources to the centre

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[95] E.g. during the Second Republic, the Allocation of Revenue (Federation Account, etc.) Act No.1, 1981 was declared unconstitutional, null and void because the State Governments protested that it was not passed in accordance with the procedure prescribed by s.55 of the 1979 Constitution, see Attorney-General of Bendel State v. Attorney-General of the Federation [1981] 10 S.C. 1. See also Ralph Obioha v. President of Nigeria [1981] 2 N.C.L.R. 701; and Attorney-General of Ogun State v. Attorney-General of the Federation [1982] 1-2 S.C. 13.

[96] See Chapter Five (ante, 5:2:2) and Chapter Eight (ante, Charts E & F).

with a view to distributing them equitably among the States. Furthermore, since many States were not able to finance their socio-economic programmes, the FMG also decided to take over some functions that were previously the concern of the State Governments.[97] The result has been the increased financial strength of the Federal Government vis-a-vis the State governments. The more states are created, the weaker their financial and political strength in relation to the central government. This view is confirmed by a Nigerian newspaper which argues that:

> "It is a piece of constitutional fiction to pretend that states are successors to regions, for the more the states are, the more powers are aggregated to the centre. This may not accord to individual or group wishes, but it is inexorable".[98]

Thus, notwithstanding the good intentions of the Federal Military Government, its policy of centralisation of powers and the random seizure of functions that are constitutionally within the competence of the States are not in consonance with the federal principle. Besides, the Federal bureaucracy could be remote and insensitive to the needs of the States. What is necessary and desirable is that more resources should be transferred to the State Governments through fiscal adjustments to enable them to discharge their responsibilities

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[97] Such functions include primary and higher education, agriculture, road network, broadcasting and ownership of newspapers, see Chapter Eight (ante, 8:4:1) for a detailed account.

[98] New Nigerian (Kaduna), 21 May 1974, p.1. But it should be borne in mind that creation of states, to a large extent, has redressed the pre-existing imbalance in the size and population of the component states of the Federation. Now it seems unlikely that any of the States could contemplate secession as the former Eastern Nigeria did in 1967.

instead of depending on Federal 'hand-outs'.

11:7:3 The Impact of the Civil War, 1967-70

The original decision taken by the military in 1967 to mobilise all the available resources in the country and vest them in the Federal Government with a view to prosecuting successful war against the secessionist Eastern Region[99] later had boomerang effects on the states. The initial aim was to maintain the Nigerian Federation as an indivisible political entity but after winning the war in 1970, the Federal Government refused to relinquish most of its war-time financial privileges. The aftermath of the war witnessed a monopoly by the central government of all the major sources of revenue in the country, especially, petroleum and other minerals, mining rents and royalties as well as corporate taxes.[100] The states have been deprived of sufficient taxing powers to make them financially independent. They are now left with low revenue-yielding sources such as sales and purchase taxes, gift tax, football pools and other betting taxes, land registration, entertainment taxes etc. Thus, while the states are incurring annual budget deficits, the federal centre has been recording huge surpluses.

11:7:4 The Emergence of the Oil Boom

The problem of fiscal imbalance between the national and subnational units has been compounded by the remarkable structural shift in the economy of the country from

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[99] See our discussion on "Challenges to Nigerian Federalism", in Chapter Eight (ante, 8:1:2) for a fuller account.

[100] See Items 11:4:4 and 11:4:5 above.

agriculture to mining. The discovery of petroleum oil in Nigeria in the 1970s which is being controlled by the Federal Government, accentuates the weaknesses and consequent dependence of the states on the centre.[101] In the words of Professor Phillips:

> "The display of financial arrogance by the centre towards the states is attributable to the former's monopoly of oil, the most lucrative source of revenue ... to the detriment of the latter."[102]

The retention of most of the proceeds realised from the oil boom by the centre has embarrassingly converted the states into 'a beggar level of government' in the Nigerian Federation, whereas it has moved the Federal Government from a position of relative poverty under the First Republic to that of pre-eminence during military rule, the experience of the State Governments has been the converse.

In sum, the structure of Nigeria's fiscal federalism has profoundly changed since the commencement of military rule - changes brought about by a combination of military politics, state creation, civil war, the lessons of social dynamics, and above all, the buoyant government revenue from oil production. It would be difficult if not impossible for the states to regain their pre-military autonomous and affluent financial status.

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[101] Note that mining has been under the exclusive Federal Legislative List, see pages A168 and 106 of the 1963 and 1979 Constitutions respectively. Although the shift from agriculture to mining would have happened even without the military presence, the retention of the lion's share of the oil revenue by the centre would not have gone unchallenged by the States if it were a democratic civilian regime.

[102] Adedotun Phillips, "Revenue Allocation in Nigeria", op.cit., p.2.

11:8 Effects of Changes in Fiscal Federalism on the National and Subnational Governments

The impact of military rule on Nigeria's fiscal federalism may be better appreciated if the effects of the changes introduced by the military are shown empirically. This will be done from four perspectives, namely, its effect on:

(i) revenue sharing between the federal and State governments;

(ii) revenue sharing among the states from the Distributable Pool Account.

(ii) federal-state planned capital investment relationships; and

(iv) grants-in-aid and loans.

11:8:1 Revenue Sharing Between federal and State Governments

Our analysis of the federal-state fiscal relations in the preceding discussions shows that before the inception of military rule the regions were relatively financially autonomous and self-sufficient. But since the advent of military governance in 1966 this trend has been reversed as a result of certain measures undertaken by the military government.[103]

The effect of the financial dominance of the centre becomes much clearer if expressed in statistical terms by looking at the federal and state revenues as percentages of the overall national revenue and finding out their respective

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[103] Compare Chart I above with Charts J, K, L, M, N, O and P below.

periodical averages as illustrated in Charts J-P below.

Chart J shows the climax of states' dependency on the centre. It is obvious from it that the Federal Government had a disproportionate share of the total national revenue during the tenure of the first military administration (1966-79). In statistical terms, whereas the federal government's share of the overall national revenue had an average percentage of 90.41, that of all the states combined stood at 9.59% - only about one-tenth. This was the inevitable consequence of the various Decrees promulgated between 1970-75 notably, the Constitution (Distributable Pool Account) Decree No.13, 1970; the Offshore Oil Revenue Decree No.9, 1971; the Sea Fisheries Decree No.30, 1971; and the Income Tax Management (Uniform Taxation Provisions) Decree No.7 of 1975. States also sustained heavy losses as a result of the abolition of export duties through the scrapping of the states' marketing boards. Besides, the soaring of revenues accruing from petroleum profit tax gave the central government a greater financial advantage over the states.[104]

The trend in federal financial supremacy continued from the first military administration to the second through a brief period of civil rule in the second Republic. Charts K and L amply demonstrate the existence of fiscal imbalance between the national and subnational governments between 1976-85. On the revenue side, Chart K reveals that for the 4-year

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[104] Details of this federal dominance have been furnished in the preceding discussions, see Items 11:4:4 and 11:4:5.

CHART J

ESTIMATED FEDERAL AND STATE GOVERNMENTS' REVENUES
1966-76

Year Ending March 31	National Total Amount (Nmillion)	Federal Government Amount (Nmillion)	Federal Government % of National Total	All State Governments Amount (Nmillion)	All State Governments % of Nat. Total
1966	380.00	321.80	84.68	58.20	15.32
1967	382.40	339.20	88.70	43.20	11.30
1968	322.00	300.20	93.23	21.80	6.77
1969	349.97	291.91	83.41	58.06	16.59
1970	506.00	435.80	86.13	70.20	13.87
1971	851.96	758.00	88.97	93.96	11.03
1972	1,415.18	1,305.60	92.26	109.58	7.74
1973	1,519.20	1,389.91	91.49	129.29	8.51
1974	2,327.10	2,171,37	93.31	155.73	6.69
1975	5,373.04	5,177.06	96.35	195.98	3.65
1976	6,103.94	5,856.22	95.94	247.69	4.06
TOTAL	19,530.76	18,347.07	994.47	1,183.69	105.53
AVERAGE	1,775.52	1,667.91	90.41*	107,60	9.59*

Note: From 1967-76 Nigeria was a Federation of 12 states.

Source: Computed from: (i) Federal Government Digest of Statistics and Estimates of State Governments, 1966-76; (ii) Olatunde Ojo, "Federal-State Relations", op.cit., p.119; and (iii) Barido Yereba Deeyor-Ikaba, "Fiscal Federalism and the Growth of National Government's Influence in Nigeria", Arizona State University, U.S.A., 1981.

CHART K

ESTIMATED REVENUES OF FEDERAL AND STATE GOVERNMENTS, 1976 TO 1980

Revenue	1976-77 Nb	1976-77 %	1977-78 Nb	1977-78 %	1978-79 Nb	1978-79 %	1979-80 Nb	1979-80 %	Four Years 1976-80 Nb	Four Years 1976-80 %
Total Federation Account	5,756.3	93.3	7,652.6	94.3	6,815.2	92.9	8,805.3	93.4	29,029.4	93.5*
of which items on exclusive list -										
(a) Customs and excise duties	548.8	8.9	1,008.7	12.4	1,584.4	21.6	1,240.6	13.2	4,382.5	14.1
(b) Mines and mineral revenues	1,438.6	24.9	1,772.8	21.8	1,255.7	17.1	1,780.4	18.9	6,347.5	20.4
(c) Taxes on incomes, profits & capital gains	3,465.5	56.2	4,568.0	56.2	3,646.5	49.7	5,326.0	56.5	17,006.0	54.8
Total items on exclusive list	5,552.9	90.0	7,349.5	90.6	6,486.6	88.5	8,347.0	88.5	27,736.0	89.3
Internal revenue of state governments	412.5	6.7	462.9	5.7	517.5	7.1	627.2	6.6	2,020.1	6.5*
Total all revenues	6,168.8	100.0	8,115.5	100.0	7,332.7	100.0	9,432.5	100.0	31,049.5	100.0

Source: Federal Republic of Nigeria, Report of the Presidential Commission on Revenue Allocation (1980), Vol.1 Table 5-2, p.55, cited in Ashwe, Chiichii, A Critique of Nigeria's Existing Revenue Sharing Scheme (Canberra: Australian National University, 1986), p.8.

CHART L

ALLOCATIONS OF NATIONAL REVENUES
1981-85

	Item	1981	1982+	1983+	1984	1985
1.	Federally Collected Revenue	11,8143.8	8,924.2	8,555.1	11,331.7	11,241.3
2.	Appropriation to State and Local Governments	2,365.5	3,451.5	3,407.6	4,587.8	4,467.5
3.	Retained Federal Government Revenue	9,447.4	5,472.7	5,147.5	6,743.9	6,773.8
4.	Percentage of 2 in 1	20.02	38.68	39.83	40.49	39.74
5.	Percentage of 3 in 1	79.98*	61.32*	60.17*	59.51*	60.26*

Source: Text of the 1986 Budget Speech of the President of the Federal Republic of Nigeria, Commander-in-Chief of the Armed Forces, General Ibrahaim Badamasi Babaginda, p.62

period (1976/77-1979/80), 93.5% of the total national revenues went to the Federal Government while all the State Governments' revenues accounted for 6.5%. Out of the 93.5%, about 90% came from taxes on petroleum profit, corporate taxes, capital gains, customs and excise duties, minerals and mineral resources, whilst the balance of 3.5% came from invisible trade. As shown in Chart L, this dominance continued up to and beyond 1985/86 fiscal years.

The result was that the majority of the states were unable to generate funds internally to maintain their existing services or increase the quality of such services and/or create room for reasonable expansion. Consequently, they had to rely more and more on statutory allocations from the Federal Government as can be seen from Chart M hereunder.

Chart M, which specifically covers the period 1968-80 illustrates the states' financial dependency on the centre during the 1966-86 fiscal years. It shows that state governments derived more than two-thirds of their revenue from statutory allocations by the federal government for financing their capital and recurrent expenditures. This shows the weakness of the internal revenue situation of the States in meeting the level of expenditures called for by the responsibilities allotted to them. The growth rate of their revenues could not keep up with the growth of expenditures necessary for maintaining their services.

CHART M

COMPOSITION OF STATE GOVERNMENTS' REVENUES

1968/69-1979/80

Year	Total Amount (Nmillion)	Federal Source Amount (Nmillion)	Federal Source %	Internal Source Amount (Nmillion)	Internal Source %
1968/69	144.5	86.5	60	58.0	40
1969/70	232.2	164.1	70	68.1	30
1970/71	393.0	302.0	77	90.0	23
1971/72	454.1	334.2	73	119.8	27
1972/73	545.8	312.4	67	142.3	33
1973/74	525.8	331.4	63	194.4	37
1974/75	839.6	589.9	72	249.7	28
1976/77	3,080.0	2,670.0	87	410.0	13
1977/78	3,740.0	3,180.0	88	460.0	12
1978/79	3,390.0	2,870.0	85	520.0	15
1979/80	5,220.0	4,590.0	88	630.0	12

Note: 1975/76 is omitted for lack of complete data

Source: Oyovbaire, Sam Egite, Federalism in Nigeria (supra), p.181.

It is a fundamental principle of fiscal federalism that the share of revenue among different levels of government should reflect the relative size of their fiscal responsibilities. But the paradox of the military's 'fiscal federalism' is that whereas the state governments accounted for only 6.5% of the total national revenues and were responsible for 36.9% of the total government expenditure in the Federation between 1976 and 1980, the Federal Government which was allocated 93.5%, was responsible for only 59.8% of the total national expenditures over the same period (see Chart K (ante) and Chart N (below)).

The financial implication here is that the amount of

CHART N

NET EXPENDITURES ON CONSTITUTIONAL FUNCTIONS
BY LEVEL OF GOVERNMENT 1976 to 1980

Level of Government	1976-77 Nm	1976-77 %	1977-78 Nm	1977-78 %	1978-79 Nm	1978-79 %	1979-80 Nm	1979-80 %	Four years 1976-80 Nm	Four years 1976-80 %
Federal government expenditure	5,792	55.9	9,167	62.6	7,136	63.1	7,630	56.9	29,725	59.8*
of which										
Recurrent expenditure	1,789	17.3	2,332	15.9	2,204	19.5	2,247	16.7	8,572	17.2
Capital expenditure	4,003	38.6	6,835	46.7	4,932	43.6	5,383	40.2	21,153	42.6
State government expenditure	4,367	42.1	4,980	34.0	3,729	33.0	5,275	39.4	18,351	36.9*
of which										
Recurrent expenditure	1,656	16.0	1,960	13.4	1,694	15.0	2,725	20.4	8,035	16.2
Capital expenditure	2,711	26.1	3,020	20.6	2,035	18.0	2,550	19.0	10,316	20.7
Local government expenditure	209	2.0	501	3.4	439	3.9	495	3.7	1,644	3.3
Total (federal, state and local government) expenditure	10,368	100.0	14,648	100.0	11.304	100.0	13.400	100.0	49,720	100.0

Source: Federal Republic of Nigeria, Report of the Presidential Commission on Revenue Allocation (1980) Vol.1, Table 8-2, p.82, cited in Ashwe, Chiichii, op.cit., p.9.

revenues that accrued from the centre to the States under the existing scheme for statutory allocations was not sufficient for the latter to meet their shortfalls of revenues over expenditures.

11:8:2 Revenue Sharing Among the States

One of the noticeable features of the revenue allocations scheme in the period prior to military intervention in 1966 is that great emphasis was given to the principle of "derivation" whereby each state's share of the Distributable Pool Account (DPA) was proportionate to its contribution to the federally collected revenue.[105] The principle of derivation had the dual advantage of enhancing regional fiscal autonomy as well as promoting production of export crops since the revenue fortune of each region depended largely on its ability to generate more revenue internally. The result was that horizontal revenue equalisation among the regions was relatively achieved.[106]

But in spite of the incentives created by the principle of derivation, it had the disadvantage of exposing the regions to unhealthy competition. There were also potential financial hazards as revenues of the Regions depended very much on the supply and demand conditions for their primary products in the world market.

The advent of military rule witnessed a gradual shift in emphasis from the principle of derivation to the principles of "need" and "even development" with the use of arbitrary

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[105] See Item 11:3 (ante).

[106] See Item 11:3:1 (ante).

formulae and imprecise definitions.[107] The criterion of "need" required that each state should receive federal funds in accordance with its needs, using population as an index. Thus, in the 1970s the DPA was distributed among the states on the basis of 50% population and 50% on equality of states.[108]

But the greatest criticism against these two principles employed by the military government is that they are unamenable to quantitative measures and prone to abuse due to arbitrary application of weights. Secondly, since 1963 there has been no reliable census figure in Nigeria for determining the population of each state.[109] The fact that the total amount of funds accruing to the states from the DPA in form of statutory grants is very small renders any attempt at equalisation nugatory.

In the 1970s, the financial situation of the states became so critical that some Military Governors resorted to appeal openly to the Federal Military Government (FMG), noting that "state governments should not be treated as mere beneficiaries of the federal bounties but as entities entitled

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[107] E.g. while population was made the basis of the sharing of the DPA in respect of the six Southern States, the allocation of 7 per cent to each of the six Northern States with different numerical strength during the 1966/67 fiscal year was inexplicable, see Item 11:4:2 (ante).

[108] See, for example, the Constitution (Distributable Pool Account) Decree No.13, 1970; and the Constitution (Financial Provisions etc.) Decree No.6, 1975 earlier discussed in Items 11:4:4 and 11:4:5 above.

[109] The 1973 census figures were cancelled for inaccuracy arising from manipulation of the results for political purposes.

to receive their legitimate shares".[110] Similarly, the Lagos State Governor, Colonel Mobolaji Johnson, while addressing a conference of All-Nigeria Finance Commissioners urged the participants to appeal to the Federal Government to give more funds to State Governments, adding that "states should not be made to suffer from a feeling of financial cramp in the discharge of their normal activities and in the achievement of their legitimate aspirations".[111] Also in 1988, the Military Governor, Kaduna State of Nigeria, argued in his address to the conference of Federal Account Allocation that "the existing formula is outdated; there is a need to critically examine ways of ensuring increased revenues for States".[112] So far, all the States of the Federation have had a bone to pick with the FMG as each wants a larger share of the 'national cake'.

On the whole, horizontal fiscal balance which is an essential principle of fiscal federalism has not been achieved by the military (see Chart 0 below).

11:8:3 Federal-State Planned Capital Investment Relationships

Fiscal federalism is very vital to the economic development of a federation. It determines the strength and

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[110] Colonel Abba Kyari, North-Central State Government: New Nigeria Interviews His Excellency, Colonel Abba Kyari (Kaduna: Ministry of Information, 1970), p.7.

[111] Daily Times, 23 May 1974, p.13.

[112] This Week Magazine, 6 June 1988, p.34. See also Lawrence A. Rupley, "Revenue Allocation Once Again", West Africa, 1 July 1974, p.790 for an interesting discussion on the states' financial predicament.

CHART O

ESTIMATES OF FEDERAL STATUTORY ALLOCATIONS TO STATES, 1976/77-1979/80

State	Population 1963 (millions)	1976/77 Amount (Nmillion)	1976/77 % share in Total Federal Receipts	1977/78 Amount (Nmillion)	1977/78 % share in Total Federal Receipts	1979/80 Amount (Nmillion)	1979/80 % share in Total Federal Receipts	*Av.% share in Total Fed. Receipts for 1976/7,1977/8, 1979/80
Kano	5,774,840	94.20	6.92	125.10	7.00	150.11	6.70	6.87
Oyo	5,208,840	87.50	6.43	117.00	6.53	137.00	6.10	6.35
Sokoto	4,538,787	80.80	5.93	107.40	5.99	128.60	5.80	5.90
Kaduna	4,098,306	76.10	5.59	101.10	5.65	124.53	5.60	5.61
Imo	3,672,654	81.00	5.95	112.40	6.26	127.91	5.70	5.97
Anambra	3,596,618	63.70	4.68	93.50	5.20	111.45	5.00	4.96
Cross River	3,478,131	70.90	5.21	94.40	5.26	114.50	5.10	5.17
Borno	2,997,498	64.00	4.70	84.60	4.71	114.07	5.10	4.83
Ondo	2,729,690	61.30	4.50	81.40	4.54	104.71	4.70	4.58
Gongola	2,605,263	64.20	4.71	80.20	4.47	108.41	4.90	4.69
Bendel	2,460,962	121.10	8.89	159.30	11.69	173.72	7.80	9.46
Bauchi	2,431,296	55.60	4.08	77.10	4.30	110.01	4.90	4.42
Benue	2,427,017	64.70	4.75	77.00	4.30	97.76	4.40	4.48
Plateau	2,369,089	54.50	4.00	71.90	4.01	100.91	4.50	4.17
Kwara	2,309,388	56.80	4.17	66.80	3.73	94.81	4.20	4.03
Rivers	2,026,657	123.60	9.08	160.20	8.90	170.88	7.90	8.62
Ogun	1,550,966	48.60	3.57	62.40	3.48	86.44	3.90	3.65
Lagos	1,443,568	47.50	3.49	62.90	3.50	89.80	4.00	3.66
Niger	1,194,508	45.60	3.35	59.30	3.30	83.33	3.70	3.45
Total	56,670,055	1,361.70	100.00	1,793,00	100.00	2,228.95	100.0	

Sources: Computed from Ndekwu, E.C. (ed.), op.cit., p.200;and Panter-Brick, Keith S., Soldiers and Oil: The Political Transformation of Nigeria (supra), p.217

Notes:
1. The average percentages of states' share in the total federal receipts between 1976/7-1979/80 were very small
2. Figures are rounded to the nearest whole number ±1
3. Other years are omitted for lack of correct data

capability of the governments in: (a) managing the economy; (b) maintaining stability and rates at which public services are developed in the constituent states; and, (c) helping to ascertain the degree of variation in their economic growth. In effect, fiscal federalism not only determines the degree of state government participation in economic planning and management compatible with national economic integration, but also has a bearing on the development strategy of the federation. But the level of states' involvement is dependent on their financial position.

As earlier indicated, the emergence of military administration in 1966, the subsequent fragmentation of the regions into smaller states, the civil war, and the monopolisation of oil revenue by the central government has brought new dimensions into federal-state relationship. In particular, the war-time encroachment on state functions and resources has enabled the federal government to arrogate to itself a preponderance of the national revenue and this trend has led to increased centralisation of economic planning and management with a corresponding decline in state governments' participation. It is therefore a historical irony that the very survival and integrity of the federal system over which the Nigerian civil war was fought has led to its displacement by a virtually unitary government under the military administration.

In fact, the Second National Development Plan (1970-74) and the Third National Development Plan (1975-80) were all federal plans, both in conception and in execution. What is

unique about these plans was the set of general and socio-economic policies to which both the federal and state governments were committed. This included the firm establishment of Nigeria as (i) a strong, united and self-reliant nation; (ii) a great and dynamic economy; (iii) a just and egalitarian society; (iv) a land of bright and full opportunities for all citizens; and (v) a free and democratic society.[113] As a result, no state government has been able to vary or alter any of these policies without the consideration and express approval of the Federal Government. In the Third National Development Plan, it was obligatory that all state approved Recurrent and Capital Estimates be submitted to the Supreme Military Council through the Federal Government Central Planning Office for consideration and final approval. The FMG claims that such procedures are necessary to ensure stricter control of capital projects and uniformity in their implementation.[114] But such uniformity and centralisation policy offend the federal principle of state independence in budgetary matters, planning and investment portfolios. What is more, as Professor Aluko rightly argues, there is no evidence that such centralised planning has been accompanied by any sharp rise in the rate of capital formation and the attainment of a more equitable spatial and sectoral allocation of investment; rather there is evidence that

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[113] See the Report of the Second National Development Plan, 1970-74 (Lagos:FMI, 1974).

[114] See "Plan Implementation and Control", in the Report of the Third National Development Plan 1975-80, Vol.1 (Lagos: Federal Ministry of Information, 1980), pp.397-404.

increasing economic inefficiency has arisen pari-passu with such centralisation.[115] The extravagant nature of military spending on defence, even in peacetime, has a direct adverse effect on state governments' participation in capital investments since their yearly revenue allocations from the centre have continued to diminish. Chart P below shows the decreasing role of state governments in planned national capital investment since the inception of military rule in Nigeria.

As can be seen from Chart P, the states' share in total planned investment in the country dropped sharply from 70% (1951-55) and 43% (1955-62) to 31% and 22% in 1970-4 and 1975-80 development plan periods respectively.

Thus, by 1980 the states had recorded a shortfall of 48% in the national investment portfolios. The states reacted to their loss by way of incursion into local government finances in the guise of reforms.[116]

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[115] See Professor Sam A. Aluko, "Lessons for Three Decades of Development Planning and Strategies in Nigeria", National Workshop on Planning, Ibadan, 1980.

[116] The adopted Constitution for the Third Republic in 1992 has taken care of such financial invasion by making Local Governments an autonomous third tier level of government that receives statutory allocation directly from the Federal Government instead of through the State Governments, see sections 3(2) and 160 of the 1989 Constitution.

CHART P
FEDERAL-STATE PLANNED CAPITAL INVESTMENT RELATIONSHIPS: 1951-1980

Plan Periods	Total Net National Investment (Nmillion)	Federal Investment and Percentage of total (Nmillion)	%	State Investments and Percentage of total (Nmillion)	%
1.1946-51	46	46	100	nil	nil
2.1951-55	69	21.0	30	48	70*
3.1955-62	572	335	57	247	43*
4.1962-68	1,644	1,035	63	609	37*
5.1970-74	2,050	1,410	69	640	31*
6.1975-80	43,300	34,000	78	13,300	22*

Notes: 1951-55 formed part of the 1946-55 Colonial Development and Welfare Plans.

The period 1968-70 was civil war period.
1970-74 plan was eventually extended to 1975.

Federal Republic of Nigeria - First Development Plan 1962-68.
Federal Republic of Nigeria - Second National Development Plan 1970-74.
Federal Republic of Nigeria - Third National Development Plan 1975-1980.

Source: Adapted from Keziah Awosika, "Fiscal Federalism and Development Strategy in Nigeria (supra), p.201; and Recurrent and Capital Estimates of the Government of the Federal Republic of Nigeria, 1946-80.

Since the majority of Nigerians live in rural areas, the state and local governments should have been given more fiscal autonomy and resources for capital investment because they are better placed to deal with local problems. The 'bogey' of uniformity, national interest and efficient centralised planning advocated by the military should not be used to

stifle the much needed contributions that would have been made by the states in terms of rural investment in particular and development in general. A return to a more equitable distribution of resources and responsibilities among the Federal, State and Local Governments in Nigeria will be desirable and compatible both with the federal principle, and the declared military policy of even development and egalitarian society.

11:8:4 Federal Grants-in-Aid and Loans to State Governments

A federal government has many ways of coping with demands for services at state and local government levels. The major instrument is grants-in-aid, a formal device for carrying out the partnership concept inherent in the federal system. Grants-in-aid or conditional grants as they are popularly called in Canada[117] are non-statutory and in recent years have assumed an important dimension in federal spending and a major influence on the structure of fiscal federalism. The need for allocation of federal discretionary grants to state governments derives from the requirements of impartiality, non-discrimination, and equity as conditions of federal stability.[118] Grants are a device for achieving a national

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[117] See Smiley, D.V., Conditional Grants and Canadian Federalism (Toronto: Canadian Tax Foundation, 1983); Bakvis, Herman and Chandler, William (eds.), Federalism and the Role of the State (Toronto: University of Toronto Press, 1987); and Waller, Harold et al. (eds.), Canadian Federalism: From Crisis to Constitution (Lanham, MD: University Press of America, 1988).

[118] See Rafiu Akindele, "Federal Grants-in-Aid to State governments", in Akinyemi, Bolaji A et al. (eds.), Readings on Federalism, op.cit., p.184; and King, Anthony (ed.), The American Political System (Washington, D.C.: American Enterprise Institute, 1978), p.341.

minimum standard in the provision of essential services. The federal government as the guardian of national interest, owes its citizens the duty to provide certain services or amenities especially in response to proven cases of disaster and emergency.

In the context of Nigerian political experience, grants-in-aid are payments made by the Federal Government to States that are in need of aid. In particular, such payments are made to aid states that are deficient in some essential services or beset with ecological disaster like famine, fire blaze, drought, flood or erosion, mineral pollution etc.[119] Besides emergency situations, the existence of programme benefits that spill over from one governmental level to another, fiscal imbalance, and the desire to alleviate the unmet demands or needs of the poorer states are also among the basic rationales for the use of grants-in-aid.[120]

Grants-in-aid have become a common feature of Nigeria's fiscal federalism under both civilian and military rule. The 1963 Republican Constitution, for example, provided that:

> "The Federation may make grants to a region to supplement the revenue of that region in such sums and subject to such terms as may be prescribed by the Parliament."[121]

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[119] E.g. during the 1982 fiscal year, 2 per cent of the national revenue was set aside for amelioration of ecological disaster, see Item 11:5:2 above.

[120] This is known as "equalisation" - the mechanism by which the central government gives the poorer states transfer payments to enable them to provide social services or perform their constitutional functions comparable to those in the wealthier states.

[121] Section 73. See identical provision in the 1979 Constitution, s.151.

The military government has been implementing these provisions by making grants to states as and when necessary.

But the peculiarity of the military regime lies in the fact that the use of the revenue allocation formulae previously discussed, which put so much funds at the disposal of the FMG, are fraught with political abuses on a scale which has no comparable precedent in the country's history of civilian administration. Whenever grants are made to states in aid of specific programmes or projects, they are accompanied with some explicit conditions, instructions or standards to which the latter must adhere. Although it could be argued that "attaching conditions" is the very essence of "conditional grants", the military has made political capital out of it to the extent that the recipient states cannot use their grants in the order of their priorities. A few examples will suffice.

The Federal Military Government has been able to exert its influence and assert its fiscal supremacy over the states through grants and loans in the fields of education and agriculture. Immediately after the creation of 12 States in May 1967, the Federal Government took over the financing of university scholarships previously awarded by the defunct Northern and Eastern regional governments, including payment of expatriates' salaries who were working in these two Regions. In the later part of 1968 it made a grant of about N2.2 million to the Northern States for the promotion of primary and secondary education. The Federal Ministry of Education set up machinery for ensuring that the grants were

used for the purpose for which they were meant.[122]

Also in 1969, a grant of N10 million was made to all the states of the Federation for the promotion of agricultural development. This grant was given with 'strings' attached. The Federal Ministry of Agriculture was instructed to monitor its use by ensuring that each state spent the grant on agriculture in accordance with the directive of the federal centre. It has been claimed that the decision by the military to centralise agriculture and education was one of the urgent means of consciously promoting the unity of the country.[123]

Besides education and agriculture, the Federal Military Government made another grant of N24 million to all the states during the 1973-74 financial year for rural and urban water; N15 million in the middle of 1974 for the rehabilitation of refugees and victims of the 1967-70 civil war; N10 million in 1973 to the drought affected states in Northern Nigeria; and a further N1.5 million to Western State as a revolving loan to local government councils for commercial projects.[124] All these grants were designed to relieve the states of their financial burden.

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[122] See the Approved Recurrent and Capital Estimates for 1967/68 Fiscal Year (Lagos: FMI, 1968); and West Africa, 9 November 1968.

[123] Professor Taslim O. Elias, "Nigeria Under Military Rule", in Nigeria: The Development of Its Laws and Constitution, op.cit., p.467; and Professor Olajide Aluko, "Federal-State Relations" (supra), p.291.

[124] See the Approved Estimates for 1973/74, together with the text of the Budget Broadcast by His Excellency, Major-General Yakubu Gowon, Head of the Federal Military Government, Commander-in-Chief of the Armed Forces of Nigeria, Lagos, 1973.

The net effect of these grants was that, with conditions attached to them, the beneficiary states had no discretion in the application of the funds supplied despite the existence of any other pressing commitments for fear of the grants being withdrawn or withheld. The Federal Government did not, of course, hesitate to make political capital of their penury by dictating its terms and compelling the states to compromise their autonomy which is a necessary adjunct to the practice of federalism. It would have been otherwise under civil rule where the party in power is always conscious of its electoral mandate and apprehensive of the consequences of political recrimination. The nature of military rule does not condone opposition or confrontation from state governments.

Furthermore, federal government's control over the states in respect of obtaining loans, particularly external ones, is an infraction on states' rights. The whole question of borrowing touches the root of federalism, no government with restrictive borrowing power can be considered autonomous within its sphere of competence. The imposition of limitations on the ability of the states to borrow in time of financial need endangers their autonomy and weakens the very functions of federalism.

It should, however, be appreciated that the use of grants and loans as an instrument of federal dominance is not unique to military rule. It applies to civil rule as well. It has become a recurrent phenomenon in both mature and emergent federations. As the national government is normally richer than the subnational governments, its ability to make grants

and loans to states enhances its power and standing in the federal-state relationship. Such power has been much used in the United States where the Federal Government grants subventions to states for a variety of purposes including old-age assistance, unemployment benefits, material and child welfare. It has become such a prominent feature of American federalism that about 15 per cent of all funds expended by state governments is estimated to come from this source. In fact, in the U.S.A., the growth of the federal grants-in-aid has helped to alter the balance of power within the Federation significantly in favour of the Federal Government. In the words of Professor Schwartz:

> "Federal aid has extended only at the price of ever-increasing control by Washington over state legislation. It cannot be denied that all federal grants for administrative drive stakes of important federal control into state administration. The old adage that he who pays the piper calls the tune contains an element of truth in relation to grant-in-aid services..."[125]

Similarly, in the Australian Commonwealth this practice has assumed a new dimension so much so that its prominence has now given birth to a new political concept, known as cooperative federalism.[126]

Thus, federal 'bounties' to states implicitly culminates aggrandizement of federal power in the American and Australian Federations.[127]

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[125] Schwartz, Bernard, American Constitutional Law, op.cit., p.178.

[126] See Jaensch, Dean (ed.), The Politics of New Federalism (supra), pp.1-34.

[127] But the degree of federal dominance is not as overwhelming as in Nigeria under the military dispensation.

In both U.S.A. and Australia, the predominant historical approach towards grants-in-aid was the "categorical grant formula whereby money was supplied to state governments in fairly narrowly defined policy areas with some limitations on how the funds could be spent.[128] However, in recent years this system has come under severe attack and there have been developed two broad approaches: general revenue sharing and block grants on a wide functional scope which allow recipient states significant discretion as to particular programme expenditure within broad areas.[129] In addition, there now exist in Australia two independent permanent bodies, namely, the Commonwealth Grants Commission and the Australian Loan Council which administer grants and loans respectively and make same to state governments in accordance with laid down rules and regulations.

The Commonwealth Parliament passed the Commonwealth Grants Commission Act 1933 empowering the Governor-General (now the Prime Minister) to appoint three persons to inquire into and report upon applications made by any State to the Commonwealth for grant by parliament of financial assistance in pursuance of s.96 of the Australian Federal Constitution, 1901. The principal aim of the Commission was to provide financial assistance to poorer States to function at a

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[128] See King, Anthony (ed.), The American Political System, op.cit., p.341.

[129] Reagan, Michael D., The New Federalism (New York: OUP, 1971).

standard not appreciably below that of other States.[130] The Loan Council, established by the Loans Act 1927, consists of the Prime Minister and State Premiers, and is empowered to control the amount, terms, and conditions of virtually all long-term public sector borrowing in Australia. Its primary purpose was to provide the machinery for coordinating the borrowing and the debt policies of all Australian governments so as to enable public loans to be raised more efficiently and economically.[131] Such independent bodies are desirable in Nigeria. We are not unaware of their limitations in Australia - neither have they removed the problems of revenue allocation from political to an exclusively technical field, nor provided a panacea against federal-state friction in revenue sharing. The Loan Council in particular is said to have failed to achieve its objectives because of the complete Commonwealth domination and control.[132]

But notwithstanding these shortcomings, it is our contention that the establishment of an independent permanent revenue allocation commission composed of Federal and State representatives in Nigeria would help minimise the current

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[130] See the Commonwealth Grants Commission Act 1933, ss.1-5; see also "The Establishment and Operations of the Commonwealth Grants Commission 1933-83", by the Hon. Mr. Justice R. Else-Mitchell, Chairman, Commonwealth Grants Commission, Address delivered to the Federal Finances Symposium, 12th Conference of Economists, Economic Society of Australia in Hobart, 1 September 1983.

[131] The Loan Council Act 1927, ss.1-3.

[132] Russell Mathews, "The Australian Loan Council: Coordination of Public Debt Policies in a Federation", Centre for Research on Federal Financial Relations, Australian National University, Canberra, 1984, p.13.

spate of federal dominance in revenue sharing and grants-in-aid. Such a measure would represent a milestone in the development of Nigerian fiscal federalism in that it marks a transition from the present constitutionally entrenched philosophy of coordinate federalism with emphasis on clear division of powers, to one of cooperative federalism based on policy coordination and the acceptance of joint decision-making responsibility. Secondly, such a permanent body has the advantages that would arise if all applications for grants or loans from states were dealt with according to the same principle by the same body, instead of the ad hoc Committees established by the previous civilian and military regimes. Thirdly, "an independent advisory body would reduce the opportunities for pork-barrelling".[133] Fourthly, establishment of an independent Commission tallies with federal principle, for according to Professor Wheare:

> "If grants are to be a permanent feature of federal finance, it is essential that their amount should not depend upon the will of the granting government, for if they do so depend, the federal principle is thereby modified."[134]

The overall effect of grants-in-aid and loans to state governments in Nigeria under the military has been to strengthen the position of the central government by escalating the extent of financial dependence of state governments upon the federal authority through the application of arbitrary and ad hoc criteria. The grants have no constitutional or legal basis. They are allocated purely on

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[133] The Hon. Mr. Justice R. Else-Mitchell (supra), p.3.

[134] K.C. Wheare, Federal Government, op.cit., pp.188-9.

a 'grace-and-favour' basis, and operated entirely at the discretion of the FMG. The states have no control over the amount and time of their release. More often than not grants are not received at the crucial time for which the money is required. Consequently very often no rational planning or budgeting forecast could be made on the basis of grants. The states grumble and complain but this has not made any impact on the centre.

11:9 Summary

This chapter has attempted to examine the changes introduced by the military into the pre-existing federal fiscal system. The FMG through its policy of centralisation has streamlined and curtailed the taxing powers of the state governments. It has abolished export duties and sales tax on agricultural produce; restructured and centralised the marketing board system; standardised personal income tax; introduced uniform fuel prices; transferred many tax jurisdictions from the states to the centre; retained the bulk of the national revenues; and made inadequate grants to the states on its own terms. The net effect of these measures (justifiable though they may be for purposes of national or macro-economic control) is the increasing dependence of the state governments on revenues from the federal government to well over 70 per cent, with the result that the states have compromised their autonomy and independence - a derogation from the federal principle.

There is a need for allocation of more revenue sources to state governments if they are to perform their constitutional

functions efficiently. It is desirable for the federal and state governments to have identifiable and independent sources that could as much as possible provide a base for their revenue needs if fiscal federalism is to be a reality in Nigeria. In particular, the state governments deserve more allocation from the oil revenue over which the federal government has been enjoying monopoly. While the need for the federal centre to have adequate resources at its disposal is recognised in the light of its internal and international commitments, the existing fiscal imbalance in the country emasculates the state and local governments.

It is suggested that in order to reduce such fiscal and financial disparity between the national and subnational units, an independent permanent fiscal review commission ought to be established in Nigeria with a view to keeping the federal fiscal system and the financial relations between the centre and the States under constant review in the light of changing socio-economic and political circumstances.[135] It must be realised that there is and can be no final solution to the problem of allocation of financial resources in a federal system. There can only be adjustments and re-allocations in the light of changing conditions. What a federal government needs is a machinery such as a review commission to make these adjustments in a manner that the financial independence of the national and regional governments is preserved as far as possible.

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[135] It must be emphasised that revenue allocation though primarily an economic issue, has a high political content and any attempt to remove politics is bound to fail. Revenue sharing is inextricably linked to the political system.

CHAPTER TWELVE

CONCLUSION

This study has examined the nature and structure of military government vis-a-vis the practice of federalism in Nigeria. It analysed the contradictions between the two and argued that although the military has retained the structure of Nigerian federalism, its texture has undergone substantial modifications so much so that the federal principle has been subverted.

Under the military dispensation, the distinction between federalism and unitarism has become blurred because the basis of federal-state relationship depends more on the unity of military command than on any constitutional provisions. The relationship is that of the superordinate-subordinate in favour of the federal centre to the extent that state governments are now virtually emasculated, and there hardly exists any guarantee of substantial spheres of activities in which they could exercise independent action. The policy-determining voice of the state governments has been eroded in all aspects - legislative, executive, judicial, fiscal, financial and even administrative. The powers of the Federal Military Government are illimitable and its actions unquestionable. There has been a gradual monopolisation and/or usurpation of political powers by the centre. The breaking up of the defunct four regions into smaller units (21 states), and the transformation of certain previously largely, state government areas of responsibility such as higher education, agriculture, land and even local government into national, has conferred upon

the federal government an unprecedented power over them. In addition, the restructuring of federal finance and development planning, as well as the functioning of sub-national governments has become extremely difficult relative to their developmental commitment and expenditure due to lack of adequate funds.[1]

This incursion of the central government into states' spheres of competence is a negation of the federal principle. Thus, although the official designation of the military administration is the Federal Military Government (FMG), the government has not exhibited the basic elements of a federal structure. The provisions of the various Decrees and Edicts under which Nigeria has been governed so far are, in the main, declaratory of the unitary machinery of the military government.

It was observed in Chapter 8 that the FMG acquired unusual legislative authority as it is expressly empowered to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever while the State Governments in the exercise of their legislative functions, are strictly speaking, made the agents of the FMG in the sense that they could exercise their legislative powers only with prior consent of the FMG and where the law passed by the Governor of a State is inconsistent with that of the FMG, the latter shall prevail and the former to the extent of its inconsistency be void.[2]

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[1] The States have been substantially deprived of the authority and autonomy which their predecessors (the Regions) enjoyed in the pre-military era. For details, see Chapters 6, 8, 9, 10 and 11.

[2] See Chapter Eight (ante, 8:4:2).

Hence, notwithstanding the fact that the military has tried to preserve the federal idea by the retention of the division of Legislative Lists into "Exclusive" and "Concurrent", the cardinal principle of federalism that in a federation, the national and regional governments should each enjoy some legislative independence and autonomy within their respective spheres of competence has been completely destroyed by the FMG arrogating to itself supreme legislative power. Such centralisation of powers of legislation is anathema to federalism. In fact, the phrase, "peace, order and good government" for which the FMG has been empowered to legislate, has been construed to mean, in constitutional language, the widest law-making power ever granted to a sovereign.[3] This has given the military government a totalitarian character. The unitary legislative demands of military rule cannot be reconciled with federal practice.

Chapter 9 has made clear that military administration gravitates around one central figure, the Head of the Federal Military Government (HFMG). The executive authority of the country has been vested in him, which he then delegates to the State Military Governors. The latter are divested of executive powers that were exercisable by civilian governors under the First and Second Republics. The HFMG could either conditionally or unconditionally delegate to the Military Governor of a State executive functions falling to be performed within that State in relation to any matter, and such delegation could be varied

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[3] See Ibralebbe v. The Queen [1964] A.C. 900 at p.923 and Liyanage v. The Queen [1967] A.C. 259 at p.272.

or revoked at any time. The State Governors are appointed and deployed to states by the HFMG on purely military postings. They are liable to be removed without notice.[4] These, in essence, have reduced the state executives (Military Governors) to the status of mere agents of the Central Government. It should, however, be appreciated that even though the unitary character of the military administration has reduced the State Governments to the status of a local government, its unified structure has brought about greater amity and cooperation among the constituent units of the Federation as a result of the elimination of the sources of inter-group animosity and hostility. This cooperation is facilitated by the fact that, at least in theory, the military as a national institution has no political base or constituency to represent and protect. But whatever form a federal system takes, one important and fundamental consideration, in our view, is that state governments should possess a reasonable degree of independence in their actions. Federalism requires not merely the demonstration of some degree of independent political action on the part of state authorities; in political terms, the central government is significantly dependent upon the states and vice versa. This combination of independence and interdependence is the hallmark of a federation.

In addition, under Nigeria's military oligarchy, the Federal Government via Decrees has taken over powers and functions in areas previously belonging to the Regions or

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[4] In fact, many State Military Governors have heard of their appointment, redeployment and/or dismissal through news media.

States, ostensibly in the interest of national unity and uniformity of standard. Hence, it was argued in Chapter 9 that notwithstanding the rhetoric of 'military federalism', the reality is that the States' sovereignty has been impeded by the unitarist drift of the FMG. The country is federal only in name and in formal structure, but hardly in any meaningful sense of the term.

In Chapter 10, we contended that the military has eroded the independence of the judiciary in Nigeria. The provisions that the question as to the validity of a Decree or of an Edict shall not be entertained by any Court of Law has subverted the traditional judicial functions of reviewing and nullifying legislation. Besides, the judiciary has been centralised. The mode of appointments and removals of judicial officers, particularly those of superior courts, has made their security of tenure a precarious one. The appointments of state and federal judges are vested exclusively in the central government. There also exists governmental interference with judicial process and violation of the rule of law and human rights. Independent-minded judges have been intimidated, compulsorily retired or removed by the military for giving adverse judgments against the government. The executive is often disrespectful of the judiciary and governors and other military leaders frequently ignore court orders. The judiciary overwhelmed by military dictatorship has become unnecessarily timid and the country has witnessed a leviathan government developed from strength to strength. Legislation has been characterised by retroactivity and exemplary penalties. The functions of the judiciary have

been usurped as cases are being transferred from conventional courts to military tribunals whose decisions are unappealable.[5] Indeed, the fact that the Nigerian post-independence political history has been dominated by military dictatorship has inevitably led to the centralisation of the country's judiciary with its attendant negative effect on federalism. It must be admitted however that this policy of centralisation has considerably removed the judiciary from the local politics that hitherto existed.

Besides centralisation and non-observance of the rule of law, it was also pointed out in Chapter 10 that, although the High Court in Nigeria still relies on such traditional prerogative writs as certiorari, prohibition, mandamus, quo warranto or habeas corpus, the scope of their application, particularly habeas corpus, with respect to the military government and its functionaries, has been greatly reduced through ouster of judicial review. Consequently, individual liberty including press freedom that was hitherto constitutionally guaranteed by civilian governments, has little or no meaning under military rule. Judicial power has now remarkably been submerged in the absolute legislative supremacy of the Federal Military Government.[6]

It suffices to say that the judiciary under the military administration has been 'sick', and as one of the

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[5] See Chapter Ten (ante, 10:5:8). It would appear that the military has lost confidence in the Nigerian judicial system.

[6] Ibid., especially Items 10:5:4, 10:5:6, 10:5:7, and 10:5:10 (ante).

Nigerian newspapers aptly points out:

> "The tragedy of a sick judiciary does not end with the shattered expectations of citizens. A morbid bench from the onset finds itself incapacitated in the discharge of its sacred duty as the legal watchdog of the nation. It cannot uphold the rule of law; neither can it administer justice without fear or favour nor prevent the citizen's rights from being imperilled by over-bearing government functionaries."[7]

Thus, an overbearing government such as the Nigerian military cannot bestow on the country an independent judiciary.

In sum, the unified mechanism and manner of appointment and removal of judges; and the military's despicable penchant for retrospective and retroactive legislations, non-observance of the rule of law, ouster of judicial review, transfer of matters which require purely judicial decisions to tribunals, and the absolute control of the executive over judicial budgets can certainly not be said to be in the aid of the independence of the judiciary and a fortiori in the practice of federalism.

The successful operation of federalism requires a particular kind of political environment - one which is conducive to popular government and has the strong traditions of political cooperation and self-restraint that are needed to maintain a system like federalism which minimises the use of coercion. Such environment does not exist under military rule. It was indicated in Chapter 5 that the military has undermined democracy, an integral part of federalism, due to absence of such institutions as parliament, political parties and press freedom. The nature of military administration and discipline does not

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[7] Daily Times editorial, 25 March 1985.

provide room for argument and opposition as lawful superior orders must be obeyed at all cost. The military has no time for lobbying, debate, negotiation, compromise, or political horse-trading that usually characterise party politics of a federal society like Nigeria. As a revolutionary organisation which assumed political power through violent means, the military is always prepared to resort to the use of force. It is not bound by any constitutional limitations. These, of course, raise doubts about the military's suitability as a guarantor of a democratic and accountable federal system in Nigeria.

It was also noted in Chapters 8-10 that the military has departed from the federal principle not only in the unitary nature of its institutions (the legislature, the executive and the judiciary), but also in some other aspects. In the first place, due to its hierarchical structure and concentration of authority, it has not adhered to the doctrine of separation of powers which is an embodiment of a federal system of government.[8] Both the legislative and executive powers of Nigeria are expressly vested in one person, the Head of the Federal Military Government (HFMG), who is also responsible for the appointment and dismissal of the members of the judiciary.[9]

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[8] Concentration of powers in one person or group of persons is likely to produce tyranny.

[9] Although judicial power has been left with the courts, and no personnel of the judiciary serves on either the Supreme Military Council or the Federal Executive Council, there are provisions of military Decrees which permit of intrusion into the basic functions of the judiciary by other arms of government, see Chapter Ten (ante, 10:5:4 and 10:5:6).

He could also nullify courts' decisions by Decrees.[10] It was also pointed out that besides the HFMG, his immediate Lieutenants, notably the Chief of General Staff, the Chiefs of Staff of the Army, Navy and Air Force respectively are members of the three principal organs of the military government, viz: the Supreme Military Council, the National Council of State, and the Federal Executive Council. Each of these organs is headed by the HFMG who is also the Head of State. What is more, he has absolute power to appoint and dismiss any public officer both at Federal and State levels who in his opinion cannot perform or who is guilty of misconduct.[11]

Thus, the power of detention without trial conferred on the Chief of Staff, Supreme Headquarters in respect of any person concerned in acts prejudicial to state security or who has contributed to the economic adversity of the nation[12] violates not only the human rights provisions guaranteed under Chapters III and IV of the 1963 and 1979 Constitutions respectively, but also constitutes an infringement on the powers of the judiciary.

Chapter 11 has also shown that the period of military rule is an era of fiscal centralism. The Federal Military Government (FMG) has whittled down the financial powers of the States by introducing a number of fiscal measures aimed

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[10] Such Decrees are judicial legislations, see generally Chapter 7, and in particular Decree No.28, 1970 and the case of Lakanmi v. Attorney-General of Western Nigeria [1971] 1 U.I.L.R. 201.

[11] See Chapter Nine (ante, 9:1:5) and Chapter Ten (ante, 10:5:4 & 10:5:6).

[12] The State Security (Detention of Persons) Decree No.2 of 1984.

at centralisation in conformity with its well known unity of command. It reduces the taxing powers of the State Governments and capitalises on the disparity between fiscal needs and revenue sources of the states as a principal means of assuming powers to which it did not originally have claim. This situation is aggravated by the fact that the majority of the states are newly created and have no sound fiscal policy and financial base of their own to assert their rights, nor could they resist federal dominance in view of their needy condition. The military formula for revenue sharing is an inadequate scheme for redressing Nigeria's problems of vertical and horizontal fiscal imbalance.[13] The result is that both the State and Local Governments have come to rely more and more on transfers from the Federal Government in order to discharge their legitimate responsibilities, thereby compromising their autonomy. This of course is a negation of fiscal federalism.

While there is a need to maintain a centre that is strong enough to foster unity among the component units of the Federation and give the country a sense of national direction, a situation in which too much political power and financial resources are left in the hands of the centre cannot provide a workable federalism.

On the whole, the modus operandi of military rule in Nigeria has revealed that the national government is an instrument of total domination. It is therefore misleading

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[13] This does not however suggest that the criteria used by the civilian governments in revenue allocation were perfect but that the military has compounded the existing problem.

to describe the existing relationship between the central and state governments as truly federal. What we have in Nigeria today is a quasi-federal system - a unitary government with some federal features. It cannot be otherwise. Nigeria cannot operate a strong, viable and authentic federalism unless the country returns to a stable democratic civilian federal government. Federalism and Military Rule are incompatible.

ABBREVIATIONS

Law Reports of Nigeria

All N.L.R.	All Nigeria Law Reports
C.C.H.C.J.	Certified Copies of the High Court Judgments (Lagos State)
D.A.C.	Digest of Appeal Cases
E.C.S.N.L.R.	East Central State of Nigeria Law Reports
E.N.L.R.	Eastern Nigeria Law Reports
E.R.L.R.	Eastern Region Law Reports
F.C.A.	Federal Court of Appeal Reports
F.N.L.R.	Federation of Nigeria Law Reports
F.R.C.R.	Federal Revenue Court Reports
H.C.N.L.R.	High Court of Nigeria Law Reports
I.M.S.L.R.	Imo State Law Reports
L.L.R.	Lagos Law Reports
M.W.S.N.L.R.	Mid-Western State of Nigeria Law Reports
N.C.L.R.	Nigerian Constitutional Law Reports
N.C.A.R.	Nigerian Court of Appeal Reports
N.C.R.	Nigerian Criminal Reports
Nig.Comm.L.R.	Nigerian Commercial Law Reports
N.L.R.	Nigerian Law Reports
N.L.T.R.	Nigerian Law Times Reports
N.M.L.R.	Nigerian Monthly Law Reports
N.N.L.R.	Northern Nigeria Law Reports
N.R.N.L.R.	Northern Region of Nigeria Law Reports

N.W.L.R.	Nigerian Weekly Law Reports
O.Y.S.H.C.	Oyo State High Court Law Reports
P.L.R.	Plateau Law Reports
Q.L.R.N.	Quarterly Law Reports of Nigeria
R.S.L.R.	Rivers State Law Reports
S.C.N.J.	Supreme Court of Nigeria Judgments
S.C.	Supreme Court Reports
S.C.N.L.R.	Supreme Court of Nigeria Law Reports
U.I.L.R.	University of Ife Law Reports
W.N.L.R.	Western Nigeria Law Reports
W.R.N.L.R.	Western Region of Nigeria Law Reports
W.S.C.A.	Western State Court of Appeal Reports

<u>English Law Reports</u>

All E.R.	All England Reports
A.C.	Appeal Cases
Bell	Bel (S.C.)
Ch.	Chancery
Ch.D.	Chancery Division
C.P.	Common Pleas
Crim.L.R.	Criminal Law Reports
Ex.D.	Exchequer Division
H.L.	House of Lords
K.B.	King's Bench
P.C.	Privy Council
P.D.	Probate Division
Q.B.	Queen's Bench
T.L.R.	Times Law Reports

W.L.R.	Weekly Law Reports

Australian Law Reports

C.L.R.	Commonwealth Law Reports
N.S.W.L.R.	New South Wales Law Reports
N.S.W.W.N.	New South Wales Weekly Notes
Q.L.R.	Queensland Law Reports
S.A.S.A.	South Australian State Reports

Canadian Law Reports

B.C.	British Columbia Law Reports
C.B.R.	Canadian Bankruptcy Reports
C.L.T.	Canadian Law Times
Can.Sup.Ct.	Canada Supreme Court Reports
N.F.R.	Newfoundland Law Reports
N.S.L.R.	Nova Scotia Law Reports
O.A.R.	Ontario Appeal Reports
O.L.R.	Ontario Law Reports
Q.L.R.	Quebec Law Reports

Law Reports of U.S.A.

Ala.	Alabama Reports
A.L.R.	American Law Reports
F.(2d)	Federal Reporter (Second Series)
F.Supp.	Federal Supplement
Md.	Maryland Reports
Me.	Maine Reports
Mo.	Missouri Reports
N.E. (2d)	North Eastern Reporter (Second Series)
N.Y.S. (2d)	New York Supplement (Second Series)

N.W. (2d)	North Western Reporter (Second Series)
S.E. (2d)	South Eastern Reporter (Second Series)
S.W. (2d)	South Western Reporter (Second Series)
S.C.L.	South Carolina Law Reports
Tenn.	Tennessee Reports
U.S.	United States (Supreme Court) Reports

Other Law Reports

A.I.R.	All India Reports
C.L.R.	Cyprus Law Reports
D.L.R.	Dominion Law Reports
E.A.C.A.	East Africa Court of Appeal Reports
E.A.L.R.	East Africa Law Reports
G.L.R.	Ghana law Reports
I.R.	Irish Reports
K.L.R.	Kenya Law Reports
L.L.R.	Liberian Law Reports
N.Z.L.R.	New Zealand Law Reports
N.I.	Northern Ireland Reports
P.L.D.	All Pakistan Legal Decisions
S.L.R.	Sudan Law Reports
S.A.L.R.	South African Law Reports
W.A.C.A.	West African Court of Appeal Reports
Z.L.R.	Zambia Law Reports

Law Journals

A.L.J.	Australian Law Journal
Cal.L.R.	California Law Review

C.L.J.	Cambridge Law Journal
Can.B.R.	Canadian Bar Review
Harv.L.R.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
J.A.L.	Journal of African Law
J.I.L.I.	Journal of the Indian Law Institute
J.P.P.L.	Journal of Private and Property Law
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
M.U.L.R.	Melbourne University Law Review
N.C.L.Rev.	Nigerian Current Law Review
N.B.J.	Nigerian Bar Journal
N.J.C.L.	Nigerian Journal of Contemporary Law
N.L.J.	Nigerian Law Journal
N.L.Q.	Nigerian Lawyers' Quarterly
O.L.R.	Oregon Law Review
W.O.L.R.	Western Ontario Law Review

<u>Other Terms</u>

A.G.	Action Group
A.N.U.P.	Australian National University Press
C.D.C.	Constitution Drafting Committee
C. of S. S.H.Q.	Chief of Staff, Supreme Headquarters
C.P.O.	Central Planning Office
C.U.P.	Cambridge University Press
D.P.A.	Distributable Pool Account
F.E.C.	Federal Executive Council
F.M.G.	Federal Military Government
F.M.I.	Federal Ministry of Informartion

G.D.P.	Gross Domestic Product
G.N.P.P.	Great Nigeria People's Party
H.F.M.G.	Head of the Federal Military Government
J.P.B.	Joint Planning Board
N.C.N.C.	National Council of Nigerian Citizens
N.C.S.	National Council of State
N.E.C.	National Economic Council
N.I.L.S.	Nigerian Institute of Advanced Legal Studies
N.I.I.A.	Nigerian Institute of International Affairs
N.I.P.S.S.	Nigerian Institute for Policy and Strategic Studies
N.I.S.E.R.	Nigerian Institute for Social and Economic Research
O.U.P.	Oxford University Press
S.E.C.	State Executive Council

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1954	Nigeria (Constitution) Order-in-Council, 1954
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1961	Emergency Act, 1961
1963	The Republican Constitution, 1963
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1965	Revenue Allocation (Constitutional Amendment) Act, 1965
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1967	Armed Forces and Police (Special Powers) Decree No.27, 1967
1967	Constitution (Miscellaneous Provisions) Decree No.24, 1967
1967	Investigation of Assets Edict (Western State) No.7, 1967
1968	Trade Disputes (Emergency Provisions) Decree No.21, 1968
1968	Investigation of Assets (Public Officers and Other Persons) Decree No.37, 1968
1968	Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree No.43, 1968
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1969	Income Tax (Miscellaneous Provisions) Decree No.7, 1969
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1970	The Constitution (Distributable Pool Account) Decree No.13, 1970
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1972	Finance (Miscellaneous Taxation Provisions) Decree No.47, 1972
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1973	National Youth Service Corps Decree, 1973
1974	Nigerian Universities Commission Decree No.1, 1974
1974	The Labour Decree No.21, 1974
1975	The Constitution (Finance Provisions etc.) Decree No.6, 1975
1975	Income Tax Management (Uniform Taxation Provisions) Decree No.7, 1975
1975	Ahmadu Bello University (Transitional Provisions) Decree No.22, 2975
1975	University of Ife (Transitional Provisions) Decree No.23, 1975
1975	University of Benin (Transitional Proviions) Decree No.20, 1975
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1975	Constitution (Basic Provisions) Decree No.32, 1975
1975	Corrupt Practices Decree No.38, 1975
1976	Federal Capital Territory (Abuja) Decree No.6, 1976
1976	State (Creation and Transitional Provisions) Decree No.12, 1976
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