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THE LIVING TREE: A Study of Constitutional Developments in Canada and Nigeria with Particular Reference to the Development of Executive Powers Under the Parliamentary System in Canada and the Different Systems that have Operated in Nigeria.

By

Grace E. Ntieyong Akpan

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfillment of the requirements for the L.L.M.
degree in Law.



G.E.-E. Ntieyong Akpan, Ottawa, Canada, 1988

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Abstract of Thesis.

The thesis proposes that whatever the nature of a constitution, the exercise and development of executive powers depends on the attitude of the people towards the constitution. The constitution continues to grow, but the direction of that growth is determined by the operation of the constitution. This contention is examined in the light of constitutional developments in Canada and Nigeria.

The first chapter discusses the nature and contents of the Canadian constitution, and contrasts this with the Nature and content of the Nigerian parliamentary constitution. Next it discusses the next step in the Nigerian constitutional development which involved the introduction of an entirely new constitution. The nature and content of this new constitution is then examined. Finally the chapter takes a look at the constitution according to the military and examines the effect of coups d'etat on constitutional development.

The second chapter discusses the operation of the different constitutions, and the exercise and development of executive powers under those constitutions. It examines the secret behind constitutional sanctity in any context, and the reasons behind the success and failure of different constitutions.

The third chapter contends that whatever ever the nature of the constitution, or the pattern which the development of executive powers assume, an increase in the powers of the executive is the historical trend in constitutional

development.

The different ways in which these powers have increased is examined. For Canada this entails a discussion of the increasing role of the executive in legislation. For Nigeria, the possible trend of increase, had the parliamentary constitution been allowed to stand, is examined. The definite increase that would have been witnessed under the provisions of the 1979 constitution is also looked at. Finally, the de facto increase brought about by the military take-over is discussed.

The fourth chapter summarises the arguments in the other chapters and takes a look at possible future trends.

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Abbreviations Used

A.C.....	Appeal Cases (England)
All N.L.R.....	All Nigeria Law Reports (Nigeria)
D.L.R.....	Dominion Law Reports (Canada)
FCA.....	Federal Court of Appeal (Nigeria)
S.C.....	Supreme Court (Nigeria)
S.C.R.....	Supreme Court Reports (Canada)
U.I.L.R.....	University of Ife Law Reports (Nigeria)
W.L.R.....	Weekly Law Reports (England)

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CHAPTER ONE

NATURE OF THE CONSTITUTIONS

Introduction

A comparative study of the exercise and development of executive powers under Nigerian and Canadian constitutions might appear incongruous at first glance considering the very different constitutional histories of the two countries. In particular, executive provisions and practices have been given very different interpretations in the two countries. However a comparison of the development of executive powers in the two countries gives a fascinating insight into the working of constitutions in different contexts.

The similarities and differences in the operation of the constitution will be examined to determine the reasons for the development pattern of executive powers in the two countries. To choose Canada and Nigeria for such a study is like selecting subjects from opposite sides of a spectrum, but the choice provides interesting contrasts and enigmatic similarities.

One interesting similarity is that, executive powers in both countries have the same origin in the British cabinet system but have developed along very different lines. Another similarity is that existing conditions in both countries were such that both not only chose to embrace a federal solution, but also superimposed federalism on a parliamentary system.

The BNA Act versus The Parliamentary Constitutions of Nigeria

The basic constitutional document of Canada the Constitution Act of 1867, is not a comprehensive document but a mere framework. The Act was in no way intended to be "a definitive statement of Canada's constitutional functioning,"¹ but rather a formal statement in British statutory form, intended to meet the immediate political need of assembling some of the colonies in North America into one country.²

By making the BNA Act a skeletal document with only the framework of government spelt out, the drafters of that act imported en bloc into Canadian constitutional law the entire body of constitutional conventions which had developed and been tried and proven in the United Kingdom. The bulk of these conventions deal with the exercise of executive powers.

As was stated in one case, "this constitution depends then on the statutes and common law rules which declare the law and have the force of law, and upon customs, usages and conventions developed in political science, which while not having the force of the law in the sense that there is a legal enforcement process or sanction available for their breach,

¹ Cheffins and Tucker, The Constitutional Process in Canada (2nd ed., 1975) p.133

² Ibid

form a vital part of the constitution without which it would be incomplete and unable to serve its purpose."³ The Nigerian constitution on the other hand was intended to be a comprehensive document, and as will be seen, the drafters went to great lengths to ensure that the people had a lot more than a mere framework to work with.

Furthermore the Constitution Act has served as the basis of Canadian constitutional history for over a hundred years. As the basic constitutional document, it has weathered all sorts of constitutional storm, and, through one hundred years of constitutional litigation, accumulated the wealth of constitutional jurisprudence which helps to drive Canada's constitutional evolution. The Nigerian constitution on the other hand seems destined to a stunted growth. No Nigerian constitution has lasted long enough to allow the courts to look into its finer details and build up constitutional jurisprudence.

Whereas the same Canadian constitution has guided the Canadians through a gradual evolution to full independence, the Nigerians have since 1922 gone through at least six constitutions, or a rate of at least one constitution per decade spread over the period before and after independence.

The first real constitution for Nigeria was drawn up in 1922 in the colonialist spirit and was imposed upon the country

³ Re Resolution to Amend Constitution of Canada [1981] 1 S.C.R. 753 at 852-3

without consultation with Nigerians. It laid down clear definitions with respect to the powers and functions of the Executive Council. It also provided that the Governor must "in all cases consult with the Executive Council" whether "in the making of Ordinance" or in the exercise of his other powers.⁴ In spite of these provisions there was not a proper cabinet, and as the Council was made up mainly of British officials, the constitution did not really involve Nigerians in the government of their country.

From 1922, the British colonialists began to face the problem of how to assimilate educated Nigerians into the system. As the number of educated Nigerians increased, political movements were formed by them with the objectives of developing a united nation out of the conglomeration of peoples who inhabited Nigeria and educating the public to a high moral and intellectual level so that a national consciousness could be developed. By the end of the second world war, the national movement was fueled by criticisms of imperialism from the United States and the British Labour Party. There was also resentment from the general public over the control that the British exercised over the Nigerian economy. Pressure was brought to bear on the colonial masters and they were faced with the dilemma of reconciling imperial control with the grant of more powers to the Nigerian nationalists.

⁴ Royal Instructions (Colony) 1922 Art.4

One of the avenues through which the nationalists sought to attain greater powers was through constitutional revision. In 1951⁵, a new constitution was drafted in consultation with some Nigerians. This provided for a Council of Ministers consisting of twelve Nigerians drawn from the respective legislatures of the different regions in the country, and six British officials.⁶ The constitution did not last however as the nationalists protested that it provided a system that was too closely knit and allowed the central government to interfere too much in the affairs of the regions.⁷

In 1954, in response to agitation from the new breed of Nigerian nationalists, another constitution was drafted for Nigeria and it is believed by some Nigerian constitutional lawyers⁸ that under this constitution, a proper cabinet on the British model was established for Nigeria. In the words of T.O. Elias, "The Council of Ministers had become a Cabinet at last. The British constitutional convention of the collective

⁵ There was another constitution in 1946 called the Richards Constitution which was also drafted without proper consultation with Nigerians. As expected there was very little change in the status of the Queen's representative's power to act as the effective executive.

⁶ The six British officials were the regional governors, the Chief Secretary, the Attorney-General and the Financial Secretary.

⁷ For a full account of the struggle for independence see generally Odumosu O.I. The Nigerian Constitution History and Development Op cit.

⁸ Elias T.O., The British Commonwealth: The Development of its Laws and Constitutions- Nigeria (Vol. 14) p.95

responsibility of ministers could now be applied to Nigeria".⁹

This belief was probably grounded on the fact that under the 1954 constitution, ministers were appointed by the Governor-General, "on the recommendation of the leader of the party which secured an overall majority in the House of Representatives" or in the event that no party had an overall majority, on the recommendation of the leaders in the House of the parties that gained the majority of seats in each region during the federal elections. It can be seen that unlike Britain and Canada, even at this relatively early stage in Nigeria's constitutional history, an attempt was made to prescribe within the parameters of a rigid, written body of rules, accepted but unwritten constitutional conventions.

A critical look at the provisions of the 1954 constitution raises doubts as to whether in fact a true cabinet in accordance with British constitutional conventions had been achieved in Nigeria in 1954. Ministerial responsibility presupposes the existence of an elected parliament from which ministers are appointed by a head of state on the recommendation of a head of government.⁹ Under a true cabinet system, the "head of state", the Queen in Britain, or her representative in Canada, is only a titular or "dignified" head of the government, while the cabinet or Prime Minister is the "efficient" head. The head of state under that system acts on the advice of the Cabinet and does not attend,

⁹ Ibid p.58

participate in, let alone preside over its proceedings.

Under the 1954 constitution the Queen in the person of the Governor-General remained the active head of the Council of Ministers. The situation was what would obtain in Canada if a literal interpretation were given to the Constitution Act and the Letters Patent appointing the Governor-General. Even with the appointment of a Prime Minister for Nigeria in 1957, the Governor-General remained the president of the Council of Ministers until the independence constitution was passed in 1960.¹⁰

Nigerian nationalists seem to have been more occupied with achieving responsible government within the British context than with whether such a system was really suitable for the peculiar circumstances in Nigeria. Unlike the Canadians who seem to have weighed the merits and decided in favour of the British parliamentary system against the American presidential system, history books indicate that the Nigerian nationalists believed that the adoption of the British parliamentary system was a prerequisite for independence. It is arguable that the framers of the Nigerian Constitution must have paid some attention to the needs of the country as they did not merely adopt the unitary system operating so successfully in Britain, but rather set up a federal system for the country.

¹⁰. With the attainment of independence, the Governor General became technically the apolitical head of government, which was a difficult role as he was also the leader of one of the main political parties in the country.

In order to explain the woeful failure of the cabinet system of government in Nigeria, certain writers blame the fact that British constitutional conventions were written into the constitution of Nigeria.¹¹ This contention would be tenable if it is accepted that "each (constitutional) convention takes a legal power which would be intolerable if it were actually exercised as written, and makes it tolerable"¹². It would then mean that writing down these conventions would break a sacred rule and deprive the constitution of the flexibility necessary for such a document.

The Nigerian case of Adegbenro v. Akintola¹³ appears to support this view. In that case, the court had to interpret sub-section 33(10) of the Western Nigeria Constitution of 1960 which provided that

(10) "Subject to the provisions of subsections (8) and (9) of this section Ministers of the Government of the region shall hold office during the Governor's pleasure-
Provided that-

(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly..."

(Emphasis mine)

The Governor of the region had removed the Premier from office on the strength of a letter signed by sixty-six of the one hundred and twenty-four members of the House. The Premier

¹¹ Aihie and Oluyede, Constitutional Cases in Nigeria p.22

¹² Hogg Peter W., Op. cit. p.20

¹³ [1963] 3 W.L.R. 63

brought an action seeking a declaration that the Governor had no right to remove him without first testing his popularity on the floor of the House. The case turned on the interpretation to be given to the words "unless it appears to him" and the extent of the discretion given to the Governor by those words.

The case was referred to the Supreme Court for its opinion on the following questions-

"(1) Can the Governor validly exercise the power to remove the Premier from office under subsection 33(10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly?

(2) Can the Governor validly exercise power to remove the Premier from office under sub-section 33(10)...on the basis of any materials or information extraneous to the proceedings of the House of Assembly?

The Supreme Court of Nigeria probably in an attempt to give a liberal interpretation to the sub-section, and avoid the chaos that a strict interpretation might bring about, held that the constitutional conventions of Britain should be adhered to. The court held that as the sub-section was an attempt to write down the conventions of the English constitution, cabinet or responsible government had taken the English form and so the whole body of constitutional conventions in England should be read into the Western Nigeria Constitution. The Governor could not therefore validly remove the Premier without first having a vote in the House of

Assembly as was the custom in England.

The Privy Council reversed the judgement of the Supreme Court of Nigeria and held that the Western Nigeria Constitution must be interpreted according to the wording of its own limitations and not to include limitations which that wording did not import. Viscount Radcliffe stated that although the Constitution does embody much of the constitutional practice and principles of the United Kingdom, it must be remembered that the British constitution works by a body of understandings that no writer can formulate, whereas the constitution of Western Nigeria is now contained in a written instrument that has sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument stands in its own right. It may well be useful on occasion to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced, or to study decisions on the constitutions of Australia or the United States where federal issues are involved, but it is the wording of the constitution itself that is to be interpreted and applied in the end. This wording can not be overridden by the extraneous principles of other constitutions that are not explicitly incorporated in the formulae that have been chosen as the framework of the constitution. On a strict interpretation of the words of the constitution, the removal from the office of the Premier was a discretionary power which the Governor had validly exercised.

A debate as to whether the Privy Council was right to apply a strict interpretation to a constitutional document is a mere academic exercise in view of the subsequent historical events in Nigeria.¹⁴ It is however submitted that the Council should not have applied ordinary rules of statutory interpretation, which to them meant strict interpretation of a constitutional document. The court should have taken into account the "formidable arguments" brought before it, in favour of a more liberal interpretation. They should have treated the Constitution as a living, growing document.

Although beyond doubt the beauty of having a constitution that is made of a bulk of unwritten constitutional rules is that it allows for flexibility, it is doubtful whether there would have been any significant difference in Canadian constitutional history if the unwritten conventions governing the exercise of executive powers had been written into the Constitution.¹⁵ It is admitted that executive powers would have been considerably restricted but those restrictions would certainly not have caused the

¹⁴ The Western Nigeria Legislature purported to amend the Constitution after the Privy Council decision. It was spelt out that the popularity of the Premier had to be tested on the floor of the House. It is doubtful if this amendment would have passed the test in the courts. The question was never tested due to the subsequent military coup in 1966.

¹⁵ Cheffins and Tucker The Constitutional Process in Canada p.11. As a matter of fact some of the unwritten practices in the United Kingdom were written into the Canadian Constitution. An example of this are the provisions governing money bills.

confusion seen in the case discussed above.¹⁶

Even though the constitutional histories of Canada and Nigeria appear so divergent, a look at the initial constitutional dilemmas of both countries will disclose some similarities. Both were former British territories with the British system of law as the basis for their own laws. Both were faced with the problem of catering to the needs of diverse and very different interests, and both elected a federal system as the best solution to these dilemmas. As a result of this choice, both had to opt for a written or partially written constitution, as opposed to the British unwritten constitution that both were using as a model.

Beyond these examples, the similarities in the mode of tackling the problem cease to exist. As the Constitution Act of 1867 did not mark any break from the colonial past, and independence was neither desired nor even contemplated for the future,¹⁷ the founding fathers were content to adopt a constitution "similar in principle to that of the United Kingdom", with all its attendant advantages. On the other hand subsequent independence from the United Kingdom was the main basis on which the first Nigerian constitution was drafted. This desire crystallised in the Nigerian Independence Act of

¹⁶. Spelling out the conventions governing amendments for example would have meant that the federal government would not have been able to threaten to unilaterally patriate the Constitution unless the provisions of the Constitution had given it such powers.

¹⁷. Hogg Op cit p.2

1960 which provided that "no Act of the United Kingdom passed on or after the appointed date shall extend to Nigeria or any part thereof as part of the law thereof". The Constitution also provided fully for constitutional amendment procedures.

Thus, in spite of the fact that the Nigerian constitution, which married a parliamentary system of government with a federal system, can be regarded as an emulation of the Canadian example the resultant document in the Nigerian case was very different from the Constitution Act of 1867. The Canadians did not bother to spell out constitutional conventions which were not relevant or absolutely essential for the working of a federal system.

Section 9 of the Constitution Act 1867 which deals with executive powers, provides only that the executive government and authority of and over Canada should continue to be vested in the Queen. In the Nigerian constitution the executive provisions not only set up the office of the Prime Minister but recognised the cabinet, which though the most powerful arm of Canadian government is not recognised by any law and until recently was completely ignored by the courts.¹⁸

In attempting to explain why constitutional conventions were written into the Nigerian constitution, and not simply adopted in principle, Odumosu in his book on the Nigerian Constitution

¹⁸. AG of Quebec v. Blaikie No. 2 [1981] 1 S.C.R.312. The Supreme Court here declared that the executive was a constitutional body which was part of the legislature, and that legislative powers exercised by the executive must be viewed as an extension of the legislative power of the legislature.

stated that

"in) the United kingdom the doctrine of collective responsibility rests on convention though it seems to have acquired the force of law. As no such convention exists in Nigeria it is not unreasonable to write the doctrine into the constitution;"¹⁹

Although this might appear to be a valid enough argument, an even better argument might be that the average Nigerian has a basic distrust for people in office. Constitutional practices were thus regarded as much too important to depend on some vague unwritten rules no matter how well tried they had been in the United Kingdom.

Another significant difference between the Nigerian and Canadian constitutions can be found in the attitude towards civil rights. The Constitution Act 1867 did not make any provision for fundamental human rights, the "pragmatic" Canadian politicians feeling that "the rights of British citizens were, for them sufficient"²⁰. The Nigerian Constitution in keeping with the tradition established in pre-independence constitutions, made provision for a comprehensive part on fundamental rights, a fact that can also be attributed in part to a desire to curb the excesses of an executive not entirely trusted.

There are other basic distinctions between the two constitutions. While the Constitution Act, 1867 provides only

¹⁹ Odumosu O.I. the Nigerian Constitution p.184

²⁰ Cheffins and Tucker Op cit p.8

in general terms for the establishment of the office of Governor General, both the Nigerian Constitutions of 1960 and 1963 provided in great detail for the office of the Governor-General and President respectively.²¹

Under the Nigerian parliamentary constitution there was no need to look at extraneous sources in order to discover how executive powers were to be exercised. In fact if the Constitution Act, is to be criticised mainly for the "gaps" found in it, the Nigerian constitution of 1963 could be held up as a good example of a comprehensive constitutional document that provided all the answers. It is therefore interesting to observe that the Canadian Constitution has served its people and stood the test of time much better than its Nigerian counterpart.

The reasons why the constitutional documents in the two countries were so different in spite of their generic similarities are not far to seek. The relative success on the one hand and woeful failure on the other hand of the different constitutions can also be explained. According to Dawson,

²¹. The office of the President under the 1963 Constitution was the equivalent of the Governor General's office in Canada as the President was the formal head of state and was expected to perform the same functions as the Governor-General performs in Canada. In the 1963 Constitution the provisions establishing the office of the president were embodied in sections 34 -40. Of those sections, section 35 had eleven subsections while section 36 had eight. Those sections provided not only the mode of choosing the President, (electoral college), but also for eligibility for election, tenure of office, removal from office and oaths of office. .

while the government of Canada came into existence on July 1, 1867,-----a very significant part of the new government was contributed by the practices of the component provinces which, in turn, were associated with the political experience of other areas on the continent.²²

In contrast to this, Nigerians were completely new to the constitutional and political practices introduced by the British, and had no previous experience upon which to draw. The different parts of the country had operated traditional systems that had little in common with each other. In the west and north and in some parts of the east could be found centralised systems under which the King or Chief in Council ruled over his people. The systems had their own checks and balances to prevent tyranny and oppression. In the east could be found other systems. For instance, among the Ibos, there was no centralised political authority in the person of kings or chiefs, but rather spiritual functionaries that were more tribal saints than rulers. Justice was dispensed by a council of elders who were qualified by age to be members of the council.²³

With these variations, the parliamentary system of government that was adopted at independence was not similar to anything with which the people were familiar. This lack of

²² Dawson Macgregor R. The Government of Canada p.4

²³ Elias T.O. The Nature of African Customary Law Manchester University Press 1957 Pp 14, 21, and 109.

inherited familiarity with the rules might have contributed to the abject failure of the system in Nigeria.

The problems were properly outlined by the Chief Justice of Nigeria in Adengbero v. Akintola,²⁴ when he said, "The English tradition, which is emulated in Nigeria, goes very far; but circumstances in Nigeria are so different...that it is difficult to accept in one generation what England has learnt through the centuries by bitter experience both in and out of Parliament."

Apart from the lack of inherited familiarity with the rules, the choices made by the two countries can also be attributed to the objectives that each country had at the time its constitution was drafted. As has been pointed out, in Canada the founding fathers were not concerned with immediate independence from Britain and were content with the symbiotic relationship which they enjoyed with the mother country. The Canadians were able to establish a degree of autonomy under British rule and this made complete independence from Britain a secondary issue. In contrast to this the Nigerian founding fathers were not prepared to accept anything less than complete independence feeling that such a compromise would perpetuate imperial control.

Another factor which influenced the content of the constitution in the two countries is that in Canada the different provinces voluntarily came together to join the

²⁴. Op cit.

confederation, and so were prepared to make some concessions in order to make the union work. In Nigeria the various people that now make up the country were thrown together against their will merely for administrative convenience. As a consequence the different ethnic groups were very wary of each other and of the wisdom of the union. This may account for a lot of the unnecessary details spelt into the constitution.

Justice Marshall in McCulloch v. Maryland²⁵ stated that

"A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.----Its nature, therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

The Constitution Act of 1867 seems to fit this bill. The Nigerian parliamentary constitution on the other hand did exactly what Judge Marshall said a constitution should not do. Although this constitution had only 167 sections as against the 147 sections of the Constitution Act, 1867 most of the sections in the Nigerian constitution were made up of enough subsections to make the document about twice the length of the Canadian Act.

If the constitution is really "a mirror reflecting the national soul"²⁶ then the 1960/63 constitution of Nigeria

²⁵. 17 U.S. (4 Wheaton) 316 (1819).

²⁶. Cheffins and Tucker Op cit p.4.

reflected a soul unsure of its direction hoping to provide in detailed provisions the panacea for national ills, and a stop gap against abuse of power by the executive.

The Constitution Act, 1867 on the other hand reflects the "evolutionary and pragmatic approach to politics so characteristic of the Anglo Canadian tradition".²⁷ The Canadians' decision to adopt a constitution "similar in principle to that of the United Kingdom" and the attendant adoption of the bulk of constitutional conventions has contributed to the flexibility and relative ease of growth of the Canadian constitution.

Although there has been a lot of criticism of the Canadian system of government, it must be admitted that most of the criticism has been constructive and has in most cases led to some adjustments in the Constitution to suit the needs of the people more adequately. One of the main criticisms of the Canadian constitution has been that the powers of the executive have increased inordinately. Some constitutional lawyers even fear the development of a cabinet autocracy in which the legislature merely acts as a rubber stamp for the actions of the executive.²⁸

While this may appear to be so in practice, it must be admitted that the Canadian system has allowed certain adjustments to be made. The judiciary has helped in these

²⁷. Cheffins and Tucker p.8

²⁸ Wheare K.C. Legislatures Op. cit. p.114.

adjustments and has, while recognising the immense powers of the executive, acted as a check on some of the excesses that could result from those powers. This matter will be dealt with in greater detail in chapter two of this paper.

The 1979 Constitution of Nigeria

After thirteen years of military rule, an attempt was made in 1978/79 to tailor a suitable system for Nigeria in a new constitution patterned more on the presidential model. For quite some time prior to the first military take-over, there had been talk of revision of the Constitution, but the revision foreseen was pressed "as a political issue because of the possibility it offered to alter the geographical power configuration²⁹ in the country and not because of any serious deficiencies (in the Constitution)".³⁰ The system itself was not criticised, only that the subunits in the country were much stronger than the central government and this led to an imbalance in the system. This imbalance could have been easily corrected by constitutional amendment and there was really no need to abolish the whole system.

It might thus be difficult to justify the drastic change from the parliamentary cabinet to the presidential executive which was undertaken in 1979. In fact within the constitution

²⁹ The country at this point was divided into regions which were disparate in size, one, the northern region being bigger than all the other provinces put together.

³⁰ Gboyega Alex E, The Making of the Nigerian Constitution, Oyediran Oyeleye, (ed.) Nigerian Politics under Military Rule 1966-79 p. 236

drafting committee there were some conservative members who advocated that the parliamentary system be retained in spite of the clear instructions of the military government that the committee set up a presidential system of government.

It would seem that having had some experience with the parliamentary system, by not taking advantage of the experience gained in that system, the Nigerian constitutional law is retrogressing. A constitution establishes a structure and framework based on certain values.³¹ A comparison between the constitution drafting experiences of Nigeria in 1960/63 and 1979 would show that national values and emphasis had changed. A look at Canadian constitutional practices between 1867 and the present would also show a change in national values and emphasis. However, while the Canadian experience has been that of gradual evolution, the Nigerians in 1979 felt the need to make a drastic change and make a fresh start. The desire to make a fresh start probably arose from the belief that the constitution and the system of government were responsible for the failure of democratic processes in the country.

The federal military government set up a Constitution Drafting Committee in 1975 to draw up a suitable constitution for the country. In a speech given by the Head of State at the inauguration of the committee, one of the guidelines given to

³¹ Scott F.R., Our Changing Constitution; in Lederman W.R. (ed,) The Courts and the Canadian Constitution, p.21

the committee was that it should ~~devise~~ a constitution that will discourage institutionalised opposition to the government in power and instead, develop consensus politics and government based on a community of all interests rather than the interest of sections of the country.³² In effect the Head of State in this statement accepted that while the parliamentary system of government was suitable in certain societies, the system of government organised on the government and opposition basis merely aggravated the ethnic tensions in the country.³³

This was an interesting directive when it is considered that "institutionalised opposition" is one of the bulwarks of Canadian constitutional practice. Without a recognised constitutional opposition, the Canadian executive would probably not function as efficiently. In fact Wheare has described "Her Majesty's opposition" as the greatest contribution of the 19th century to the art of government. He justified this statement on the ground that it meant that parties could now disagree because they had a basis of agreement upon the constitution.³⁴

Whether the "Opposition" is in fact the greatest

³² Awogu Olisa, The judiciary in the Government of Nigeria p.4

³³ This was especially so since the political parties under the parliamentary constitution had organised themselves on ethnic lines.

³⁴ Wheare, K.C, Legislatures (1968) p.80

contribution to the art of government was a disputable fact in Nigeria. The basis of agreement upon the Nigerian parliamentary constitution was not strong enough to allow disagreement on issues. Strong regional and ethnic loyalties were placed above the Constitution and thus shook the foundations of constitutional agreement. The directive of the Head of State apparently indicated that he felt that the existence of "an institutionalised opposition" had at least contributed to the failure of democratic government in Nigeria.

Whatever the merits of this belief, armed with the guidelines and advice of the Head of State, the committee set about drafting a constitution based more on the pluralist tradition that has served the Americans well for so many years. The Constitution provided for an executive president elected independently of the legislature for a fixed term of office, and not dependent on the confidence of the legislature for tenure of office.

Unfortunately it would appear from the provisions of the Constitution, that instead of "reflecting the national soul"³⁵ and identifying the values of the country in order to use them as a basis for the constitution, the drafters attempted to use the constitution, not only to create values for the country but also to create a national soul. An example of this is the inclusion in the Constitution of a chapter dealing with

³⁵ Cheffins and Tucker Op.Cit. p.4

fundamental objectives and national goals.³⁶

A lot of things have been said about the Nigerian Constitution of 1979. It has been said that the Constitution reflects more the sad experiences of the past than the hopes of the future.³⁷ The instructions of the head of the state while briefing the constitutional drafting committee, on the problems to which it should direct its mind, seems to support this view. Apart from asking the committee to avoid an institutionalised opposition, which in effect was a total condemnation of the parliamentary system for the country, the head of state also said that the Committee should set up "an executive presidential system of government in which the President and the Vice President are elected with clearly defined powers and are accountable to the people."

The drafting committee on its own part appear to have agreed with the Head of State. In its report it stated that a ceremonial head of state and a collegiate executive dependent on a parliamentary majority for its continuation in office is an inappropriate arrangement for Nigerian purposes.³⁸ The report further stated that

"The separation of the Head of State from Head of Government involves a division between real authority and formal authority...In the context of Africa the division is not only meaningless, it is difficult to maintain in practice. No

³⁶ Chapter 2 of the Constitution of the Federal Republic of Nigeria 1979

³⁷ Gboyega Alex E. Op.Cit.p.258

³⁸ Report of the Constitution Drafting Committee ,

African Head of State has been known to be content with the position of a mere figurehead. The experience of Nigeria, Uganda, Lesotho and Swaziland testifies to this.... The lesson of African experience with the system is that if non-political Heads of State are not already in existence, mere constitutional provisions will not bring them into being...The clashes and conflicts inherent in the system produce instability in the government and society and also endanger national unity. The system of separation clearly fails to provide a clear focal point of loyalty, which is indispensable to national integration.³⁹

Lijphart believes the parliamentary system of government to be unsuitable for pluralist societies, but for somewhat different reasons. He suggests that an attempt should be made to work out compromises among the different groups and set up what can be described as a grand coalition government.⁴⁰ According to him, the primary characteristic of consociational democracy (which he recommends for plural societies) is that the political leaders of all the significant segments of the plural society cooperate in a grand coalition to govern the country.⁴¹

The benefits that Lijphart catalogue under consociational democracy are probably the same benefits that the Nigerian Head of State hoped to gain when he proposed that the Constitution Drafting Committee should develop "consensus politics and government based on a community of all interests". The drafters of the Nigerian Presidential

³⁹ Ibid.

⁴⁰ Lijphart Arend, *Democracy in Plural Societies* Yale (1977).

⁴¹ Ibid p.25

Constitution however felt that a strong, effective and unifying chief executive would solve the problems of the country. They were however restrained by the fear of unwittingly creating a "constitutional Frankenstein's monster".⁴² The effect of all these considerations is fully reflected in the provisions for the executive president and his Ministers(or cabinet).

Under the Nigerian Presidential Constitution of 1979, Cabinet ministers were no longer members of the Legislature commanding the support of a majority of the House. The provisions for the executive presidency appear to have vested tremendous power in the President. As with the provisions for the powers of the Governor General in the Canadian Constitution Act, a literal reading of those provisions without further reference to any other source would endow the chief executive with inordinate powers.

However, while the actual scope of executive powers in Canada is determined by convention, the Nigerian Presidential Constitution purported to prescribe within its parameters all the possible checks on the powers to be exercised by the chief executive. The result was that this constitution was even bulkier and more unwieldy than the previous one.

One of the curious results that arise from trying to curb the enormous powers of the executive was that the Constitution set up a system of government that savoured very strongly of

⁴² Gboyega Alex E. Op.Cit. p.258

cabinet government in the parliamentary sense. Under the American system there is nothing that compels the President to consult his ministers before deciding policies of government. Some form of a Cabinet or Executive Council was set up and recognised under the Nigerian Constitution of 1979.

Section 136 of that Constitution provided that-

"(1) There shall be such offices of Ministers of the Government as shall be set up by the President."

- (2) The President shall hold regular meetings with the Vice President and all the ministers of the Government of the Federation for the purposes of
- (a) determining the general direction of domestic and foreign policies of the government of the Federation;
 - (b) co-ordinating the activities of the President, the Vice President and the Ministers of the Government of the Federation in the discharge of their executive responsibility; and
 - (c) advising the President generally in the exercise of his executive functions other than those functions with respect to which he is required by this constitution to seek the advice or act on the recommendation of any other person or body."

Although the President as the head of the government was to bear full responsibility for the outcome of the collective and individual actions of the ministers; there was a "veiled implication that the president must operate a modified form of the Cabinet system of government of the parliamentary type to which Nigerians had been used."⁴³ As a consequence of this veiled implication, the courts in Nigeria have held that the action of the executive taken without consultation with the

⁴³ Akpan, Ntieyong Udo, Public Administration in Nigeria, Ikeja Nigeria Longmans 1982 p.182.

executive council was unconstitutional and void.⁴⁴

In Lawal Kagomo v. The Government of Kaduna State & others⁴⁵, the court held that the determination of general policy and the coordination of government activities was the collective responsibility of the President, Vice President and the ministers, and the President could not therefore override the executive council on such matters. According to Justice Ademola, "this is cabinet government as superimposed on presidentialism.... constitutional provisions under consideration are intended to incorporate in the constitution a cabinet system of government in a modified form with a view to making it much more difficult for the government to assume the rule of a dictator".⁴⁶

Other provisions of the Constitution to which executive powers were subject, included those found in Chapter II of the Constitution. This chapter was entitled "Fundamental Objectives and Directive Principles of State Policy", and purported to set out standards that the government should comply with in the discharge of its duties.

Section 13 of that chapter declared that it shall be the duty of and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive

⁴⁴ Lawal Kagomo v. Governor of Kaduna State, FCA/K/99/80 of 16th January 1981

⁴⁵ Ibid.

⁴⁶ Ibid.

or judicial powers to conform to, and observe, and apply the provisions of that chapter of the constitution. The rest of the chapter then proceeded to enumerate ideals and standards by which government acts should be measured and also the goals to which the government should aspire.

Section 14(3) provided one of the major guidelines for the appointment of key members of the government as follows-

"14(3) The composition of the Government of the federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, also to command national loyalty thereby assuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that government or in any of its agencies."

The idea of a chapter of the Constitution setting fundamental objectives and ideals was introduced into Nigeria by the 1979 constitution⁴⁷ in a bid to find yet another way to ensure that the executive and other arms of the government did their jobs. It is interesting to note that "the Canadian politicians who brought ~~about~~ Canada's birth were not impressed by lofty statements of principles or goals"⁴⁸ in the Constitution.

Sections 16 and 27 of the Canadian Charter of Rights and Freedoms, and section 2 of the proposed Meech Lake Accord have some similarities with chapter II of the Nigerian Presidential

⁴⁷ Panter-Brick K. Op.Cit. ; Nwabueze, Presidential Constitution of Nigeria, OP cit

⁴⁸ Cheffins and Tucker Op. Cit. p.8

Constitution of 1979. Each constitution recognises that the countries for which they provide are made up of people with different interests and they make concessions to those interests.

However, while the Canadian courts are enjoined to have regard to section 27 of the Charter when interpreting the Charter and section 2 of the Meech Lake Accord in interpreting the Constitution, the Nigerian provisions were made non justiciable by section 6 of the Constitution. That section provided in paragraph 6(6)(c) that

"judicial powers shall not extend.... to any issue or question whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directives of State Policy set out in chapter II of this Constitution."

The exercise of the power of the executive was also subject to the provisions of chapter IV of the Constitution which set out the fundamental human rights of the citizens of the country. This chapter also existed in some form under the parliamentary system and had the same implication for the powers of the executive as the Canadian Charter of Rights and the American Bill of Rights. As is the case in those countries the chapter generated many interesting cases under both the Presidential and Parliamentary Constitutions.

Another curb to the exercise of the powers of the executive can be found in section 132 of the Constitution which provided that the President may be removed in accordance with the provisions laid down in the Constitution if he is guilty of

"gross misconduct". The procedure for removal was rather complicated involving an investigation by a committee and a subsequent adoption of the committee's findings by a resolution of each House of the National Assembly, supported by the votes of two thirds of all the members of each House. The detailed and rigid procedure was however negated by subsection 11 which defined "gross misconduct" as "a grave violation or breach of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct."

An abuse of the process might be difficult to imagine in view of the rigidity of the removal procedure. The Nigerian electoral processes were however such that once the National Assembly decided that the President's actions amounted to gross misconduct, it was highly probable that the President would be eventually removed from office.⁴⁹

In Canada the Prime Minister ceases to be Prime minister if he is dismissed by the Governor-General on losing the support of the majority of the House of Commons. The United States Constitution on which the 1979 constitution of Nigeria is modeled, states that "The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery,

⁴⁹. Similar provisions were brought into play to remove a state governor. Admittedly the state legislature consisted of one house, but effective control of both federal houses by one party would have meant that the second federal house would not provide the necessary deterrent to the abuse of process.

or other high crimes and misdemeanors".⁵⁰ Whereas impeachment has been rare in the two hundred years of American constitutional history, the Nigerian provisions were so liberal that one of the states was able to use similar provisions to impeach its governor within the four years of the Constitution's operation. Even in Canada because of the party system and intended party discipline, the loss of the confidence of the House is a more stringent test than the provisions of the 1979 constitution.

With all the details included to curb the powers of the executive, and the myriad others not relevant to this paper, the 1979 Constitution of Nigeria is even more comprehensive than the 1963 constitution. It can be said that the 1979 Constitution partook even more of the "prolixity of a legal code"⁵¹ than did the 1963 constitution.

In view of all this, it is not surprising that a constitutional observer anticipating the 1979 Constitution commented that the drafting of a constitution for Nigeria, after a decade in which so much has changed is bound to be something of an act of faith.⁵² His words were almost prophetic as the Constitution was only in force for four years before the military felt it necessary to step in once more.

⁵⁰ . Art.II sec.4 of the Constitution of the United States

⁵¹ Marshall in McCulloch and Maryland Op.Cit

⁵² Panter- Brick K., The Constitution Drafting Committee, in Panter-Brick k. Soldiers and Oil p. 346.

It is interesting to note that one of the reasons that a presidential system was chosen for Nigeria to replace a parliamentary one was to provide a strong and effective executive. The nature of an executive presidency however negatives this goal. The ultimate aim of the separation of powers, is of course, to avoid one arm of the government becoming too powerful and thereby holding the entire body politic to ransom.⁵³ In Youngstown Sheet & Tube Co. Ltd. v. Sawyer⁵⁴, Justice Brandeis said that the main function of the separation of powers was not "to promote efficiency, but to preclude the exercise of arbitrary power, to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy."

Granted that the last thing the military government or the drafting committee for that matter would want is a civilian autocracy. However, if the main reason that the parliamentary executive was found unsuitable for Nigeria was that it provided a "weak executive", then an executive presidency, whose main virtue is that it provides a weak executive is hardly the answer.

The Constitution According to the Military.

Although it may seem like a contradiction in terms to discuss a military government in the same breath with

⁵³ Awogu Olisa Op cit p.4

⁵⁴ (1952) 343 U.S 579 at 635

democratic constitutions, the military has played such a significant role in Nigerian constitutional history that a discussion of executive powers under the constitution would be incomplete without a discussion of the form and status of the constitution under the various military regimes in Nigeria.

The first military regime took over power in 1966 when the Parliamentary Constitution of 1963 was in force. The reason given by the military for the takeover was that the government had "ceased to function". However as pointed out by Aihie and Oloyede no reason had been given why the government should cease to function, and the only reasonable deduction is that the governmental machinery had broken down as a result of the military coup.⁵⁵ Granted that there were some disturbances in the country, but it was not provided anywhere that the military should be the judge as to whether this meant that the government did not function any more.

One of the first things the military regime did was to suspend the provisions of the Constitution dealing with the democratic institutions of government. Naturally the provisions which dealt with executive powers were among the first to go.

By Decree No. 1 of 1966, the military government declared that the Constitution of 1963 had ceased to function save for the provisions that were listed in the schedule. In effect,

⁵⁵ Aihie and Oloyede, Nigerian Constitutional cases and Material.p.231

certain provisions of the constitution were suspended by this decree and some others modified. The decree declared that the federal military government had the power to make laws for the whole country or any part of it on any matter.

The power of the Federal Military Government to make laws was to be exercised by means of Decrees signed by the Head of the Federal Military Government. The regional government exercised its powers to make laws by means of edicts signed by the military governor. The decree further provided that the executive authority of the Federal Republic of Nigeria shall be vested in the head of the Federal Military Government and shall be exercised by him in consultation with the Supreme Military Council. The question whether there had been any consultation with the Supreme Military Council was not to be enquired into in any court of law.

The most significant provision of the decree was to be found in section 5 which stated that "no question as to the validity of this or any other decree or of an edict shall be entertained by any court of law," a provision that completely offended against the notions of the rule of law by placing the executive above the law particularly since up until then the Nigerian courts were regarded as the custodians of that rule in Nigeria.

The military government set up its own government institutions, of which the most important was the Supreme Military Council mentioned above. The other two main

institutions at the federal level were the National Council of States and the Federal Executive Council.

The Supreme Military Council⁵⁶ consisted of the Head of the Federal Military Government as president of the Council, the defence minister, the military chiefs of staff, commanding officers of the major divisions of the army, the Attorney General of the Federation, the Inspector General of Police, the Director general of the National Securities Organization, six designated members who were to be senior officers of the armed forces and such other members as the Council may from time to time appoint.

The functions of the Supreme Military Council included among other things, the determination from time to time of national policy on major issues affecting the Federal Republic of Nigeria, constitutional matters including amendments of the Constitution, and all security matters including the authority to declare war, or proclaim a state of emergency or martial law.

The National Council of States consisted of the Head of the Military Government as president, the defence minister, military chiefs of staff, the Attorney General of the Federation, the Inspector General of Police, the Military Governors of the States and such other members as the Supreme Military Council may from time to time appoint. Whatever

⁵⁶. The Supreme Military Council has since been replaced by the Armed Forces Ruling Council, but the functions of the body are still basically the same.

functions were performed by the National Council of States were subject to the control of the Supreme Military Council.

The Federal Executive Council consisted of the Head of the Military Government as President, the Chief of Staff of The Supreme Headquarters, the Attorney general of the Federation and such other members to be known as ministers as the Supreme Military Council may from time to time appoint. The Federal Executive Council was charged with the responsibility of determining and executing the general policy of the Federal Military Government within such framework as may from time to time be determined by the Supreme Military Council.

As has been seen, most of the institutions were dominated by the executive with the Head of State acting as the chairman. Thus by a stroke of the pen, the military merged both the executive and legislative arms of government.

The impact of the military take-over and the new importance of the executive was not fully appreciated until the courts attempted to exercise their time honored role of interpreting the actions of the executive and legislature, the two arms of government which had been merged. In the case of Lakanmi v. Attorney-General of Western Nigeria⁵⁷, the court held that a decree promulgated by the Federal Military Government was a usurpation of judicial powers as it deprived the appellant of their property by a legislative act and without compensation. The court also declared that the decree was not in the form of

⁵⁷ [1971] U.I.L.R.201

an alteration of any existing law but was clearly a legislative judgement.

The court quoted the case of Lovett v. U.S.⁵⁸, where it was stated that "those who wrote our constitution well knew the danger inherent in special legislative acts which take away life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." In that case the United States Supreme Court held that the rider to the Urgent Deficiency Appropriation Bill 1943 which instructed that no part of the money made available by the bill should be used to pay the respondents salary was unconstitutional as a bill of attainder contrary to Art.1 subsection 9(3) of the United States Constitution. The Supreme Court of Nigeria faced with a decree which sought to confiscate the property of named persons felt that it could borrow the precedent. Although the court did not specifically declare that the decree was a bill of attainder, since there was no constitutional prohibition of such provision in Nigeria, it held that the decree was nonetheless unconstitutional.

The Federal Military Government promptly responded by enacting Decree No. 28(Supremacy and Enforcement of Powers) Decree 1970 which stated inter alia,

⁵⁸ [1946] 66 Supreme Court Reports 1073 at 1079

"2(b). With a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federation, any decision, whether made before or after the commencement of this decree, by any court of law in the exercise or purported exercise of any powers under the constitution or any enactment or law of the Federation or of any State which has purported to declare or shall hereafter purport to declare the invalidity of any decree or of any Edict (insofar as the provisions of the Edict are not inconsistent with any decree) or the incompetence of any of the governments in the federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making thereof."

With this action by the Federal Military Government, the full import of the military take-over and the extent of the powers assumed by the military executive were made plain. In short, even more so than the British Parliament, the Federal Military Government is legislatively omnipotent.⁵⁹ It has an unlimited power and can make and unmake laws on any subject-matter whatsoever, either for the whole or for a section of the country.⁶⁰

From the above it can be seen that not only did the military executive assume sovereign legislative authority, it exercised its assumed power by setting up what in effect purported to be a unitary constitution. The distribution of powers, which under the Canadian constitution and any other federal system is a sacrosanct part of the constitution, was largely ignored.

It is interesting to observe that in spite of the fact that the Federal Military Government assumes the authority to,

⁵⁹ Ewelukwa D.I.O., Constitutional Law in Okonkwo C.O., (ed.) Introduction to Nigerian Law Sweet and Maxwell (1980) p. 204

⁶⁰ Ibid.

legislate for the whole country if it so wishes, the government insists that the federal system is still retained. As a matter of fact, the promulgation of Decree No.34 of 1966 which purported to make Nigeria a unitary state⁶¹ led immediately to another coup in July of the same year.⁶²

The constitution of the country under the military is thus made up partly of decrees and partly of those parts of the 1963 (and now the 1979) constitution that had been revived or maintained by decrees.⁶³ It can thus be described as being similar to the Canadian constitution in that it is not found in one comprehensive document but must be discovered in several different documents and possibly practices.

Even those parts of the Constitution preserved by decrees have to be read in conjunction with the decrees in order to make any sense and they have sometimes been completely replaced by the decrees seeking to amend them.⁶⁴ As has been seen, in some cases the amendment of the constitution has been brought about as a direct response to a judicial decision that the executive felt was derogating from its powers. What is

⁶¹. The regions were to be regarded as groups of provinces and for purposes of administration were subject to the authority of the Head of the National Military Government. Also the regional public services were unified and constituted into a National Public Service.

⁶². Some ethnic groups felt that the abolition of the federal structure would make them vulnerable to the other groups.

⁶³ Ewelukwa op cit p. 201

⁶⁴ Ewelukwa OP cit p.201

left of the democratic constitution is therefore no longer the supreme law of the land but is completely subordinate to the powers of the executive.

With one of the main criticisms of the Canadian constitution being that the executive is constantly encroaching on the powers of the legislature, it is difficult to resist the temptation to draw similarities between the Canadian executive and the scenario described above. However, the situation can never be quite the same with an active judiciary willing every day to assume a more positive role as the watch dog of the constitution. With the proclamation of the Charter of Rights this role increases everyday and it is expected that the Canadian Courts might develop the same influence in the determination of policy that is enjoyed by their American counterparts.⁶⁵

Furthermore it must be remembered that while the military remain in power in Nigeria, there is in effect a state of emergency in the country. The powers of the executive at this time are more comparable to those exercised by the Canadian executive during the war under the War Measures Act⁶⁶, the

⁶⁵ See Operation Dismantle Inc. v. R. [1985] 1 S.C.R. 441 (S.C.C.)

⁶⁶ The War Measures Act R.S.C. 1979 c. W-2 has recently been replaced by the Emergencies Act (Bill C.76 passed to the Senate in May of 1988) which considerably cuts down on the powers of the executive during an emergency. It also makes the executive subject to the Canadian Charter of Rights and Freedoms Constitution Act 1982 as enacted by Canada Act (U.K.) 1982 c.11 and the Canadian Bill of Rights S.C., 1960 c.44 in the exercise of those powers.

difference being that in Canada the powers would be assumed by democratic methods, with the full sanction of the legislature and the courts.

It has been said that military rule may share some of the characteristics of colonial rule, not the least in the manner of its departure.⁶⁷ Both involve the preparation of a successor regime, and a military regime that has assumed responsibility for correcting the deficiencies of its predecessor may act like a colonial government exercising powers of tutelage, and reserving for itself the right to insist upon certain constitutional provisions.⁶⁸ The military rule in Nigeria up to 1979 certainly shared these characteristics.

The only reason that the military regime remained in power for so long was because of the Biafran civil war.⁶⁹ As a matter of fact as soon as the head of state who had been in power from 1966 stopped acting in accordance with the image of the military as a corrective regime, working towards restoring democracy to the country, he was overthrown by his colleagues, who immediately worked towards that goal.

The reins of government were handed over to the civilians according to schedule on 1st October of 1979. Unfortunately

⁶⁷ Panter-Brick K, Op cit. p.291

⁶⁸ Ibid.

⁶⁹ The Eastern Region of the country attempted to secede in 1967, and in a bid to prevent the secession, a civil war was fought from July of 1967 to January of 1970.

the civilians did not enjoy power for long. In December of 1983, the military once again took over the government of Nigeria. The mode of government was the same and the institutions set up very similar to those set up after the first coup d'état of 1966.

CHAPTER TWO

OPERATION OF THE CONSTITUTIONSIntroduction

The framework of the constitution in any system is substantially embellished by the actualities of its operation. A constitution, say Cheffins and Tucker, is more than a basic document. It is also a whole structure of statutes, decisions, conventions and political relationships always adapting and adjusting to new realities.¹ These basic factors which make up the constitution are developed in the course of its operation. The way they develop and the form they take depend wholly on the national context of the constitution.

What really accounts for the smooth operation of the constitution is an elusive factor which Nwabueze has chosen to describe as the "national ethic."² It is this factor that is peculiar to each country and that determines the values that are not only reflected in the constitution but also exist in actuality. It also determines the attitude of the people towards the constitution. Basically it involves an understanding of the rules of constitutionalism.

In discussing the operation of the Canadian and Nigerian constitutions therefore this important point must be borne in

¹ Cheffins and Tucker, The Constitutional process of Canada p. 133

² Nwabueze B.O., The Presidential Constitution of Nigeria, p.102

mind, that for the constitution to succeed and evolve smoothly, the rules of constitutionalism must be practiced. Understanding and complying with these rules also influence the direction in which executive powers develop in each constitution.

In Canada there was an assumption by the Canadian nationalists that the national ethic already existed and that the rules of constitutionalism were properly understood. The task for the nationalists was thus that of adapting and modifying the conventions of the constitution to assist in the development of the Constitution. In Nigeria, a similar assumption proved fatal and the country was faced and is still faced with the task of developing a "national ethic".

The task is certainly not a new one in Nigeria. While trying to find a suitable constitutional form for the country in 1944, the Governor sent a dispatch to the Secretary of State saying that-

"The problem in Nigeria today is how to create a political system which is itself a present advance and contains the living possibility for further orderly advance- a system within which diverse elements may progress at varying speeds, amicably and smoothly, towards a more closely integrated economy, social and political unity without sacrificing the principles and ideals inherent in their divergent ways of life."(Emphasis mine.)

This seems to be the problem that Nigeria is still trying to solve today, and in effect involves the creation of a

³ Governor's Dispatch to Secretary of State dated Dec.6th 1944 quoted in Odumosu O.I., the Nigerian Constitution, History and Development p. 43.

system within which the rules of constitutionalism can be comfortably practiced. A national ethic can only be developed after the rules of constitutionalism are in place. The result is thus a conflict between accommodation of the differences between the various people in the country, and the need to get them to think as one.

The same problem of accommodating the different interests of the people without sacrificing the principles and ideals in their divergent ways had to be confronted by Canadian nationalists. To solve the problem, Canadian federal governments spent years trying to "create a national will, (and) a sense of national identity."⁴

The national will that the Canadian federal executive sought to create must however be distinguished from the national ethic that needs to be developed in Nigeria. Although both are essential for the solution of similar problems in the two countries, the political awareness of Canadians allows them to operate on very different political levels from Nigerians.

For instance there is no doubt that the Canadians fully understand the rules of constitutionalism and are prepared to operate within them. The Nigerians however must be taught the rudiments of the political and constitutional game. In Canada the need is to foster among Canadians a sense of national identity that would enable them to think as one and destroy the tendency of the provinces to act as autonomous units and

⁴ Senate Debates of March 30th 1988, 2984

hold the country to ransom.

The basic national ethic which Nigerians lack and which is taken for granted in Canada is also important in determining the operation of the constitution from another perspective. Usually the picture as portrayed in the basic constitutional document varies considerably from the way in which the state is actually run.⁵ In Canada as has been seen above the founding fathers had enough confidence in the national ethic to provide a mere framework of a constitution, content to allow the very considerable executive powers to be governed by mere conventions. This single factor has contributed immensely to holding the Canadian constitution together because in spite of the obvious differences between the express words of the constitution and what obtains in practice the operation of the constitution falls within the ambits of well understood rules. The result is that, in Canada the constitution is "more important for what (it) does not say rather than what (it) does say."⁶

Operation of the Canadian Constitution.

As has been seen, the basic Canadian constitutional document is a mere framework depending on other sources for the bulk of its workings. A literal reading of the provisions of the Act

⁵ Cheffins and Tucker, The Constitutional Process in Canada
p.3

⁶ Ibid

and of the letters patent which constitute the office of the Governor General would endow the Crown's representative and thus the Crown with much greater influence and control in Canada than is the case in Britain. In the Canadian constitution therefore, usages and conventions play an important role in filling in the gaps left out in the constitution.

The existence of constitutional conventions devised through the ages and assumed to be a part of the constitution has meant that the specifics of the exercise of executive powers were omitted from the Constitution Act. In Re Amendment of the Constitution of Canada⁷ the Supreme Court of Canada held that the phrase "a constitution similar in principle to that of the United Kingdom" might well involve a recognition of the principle of responsible government. Although the courts have always accepted that the phrase involved a recognition of the principles of civil liberties and supremacy, it is little wonder that it took so long to pronounce that the principles of responsible government, which are based on conventions and thus unwritten, were also recognised by the same phrase.

In Re Amendment of the Constitution of Canada,⁸ it was said that the purpose of conventions was to "ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or

⁷ [1981] 1 S.C.R. 753

⁸ Ibid, p.880

principles of the period". The Constitution Act was therefore drafted the way it was because "the framers knew that the extensive powers vested in the Queen and Governor General would be exercised in accordance with the conventions of responsible government."

According to Hogg conventions are non-legal rules, not enforced by the law courts, that regulate the working of the constitution, and prescribe the way in which legal powers shall be exercised.⁹ The legislative and executive arms of the government are coordinated by convention, and conventions also operate in a number of ways to change the actualities of the constitution.

Although conventions are not enforced by the law courts, Marshall¹⁰ states that the courts may recognise conventions in various ways. For instance, the courts may recognise or note that a convention has been enacted in more or less the same terms into law and that the law is in that sense based on convention. Secondly, some conventions (especially those of responsible government) may be incorporated into a constitution.¹¹ Thirdly conventions may be the subject of enquiry in statutory construction. In these ways conventions though not actually applied are taken notice of to help verify

⁹ Hogg Peter W., Constitutional Law of Canada p.12

¹⁰ Marshall Geoffrey, Constitutional Conventions, Yale 1984, Pp 13-14.

¹¹ As was done in Nigeria.

existing law.¹²

Wheare¹³ has identified various ways in which usage and convention operate to change constitutions. According to him, conventions nullify a provision of the constitution, by making its use impossible. As an example he cites the legal power of the head of state in a parliamentary system to veto or refuse assent to a bill.

Another way in which conventions change constitutions according to Wheare is by shifting the exercise of some powers from the legal person in whom those powers are vested to some other person. Conventions in short transfer powers granted in a constitution from one person to another. In Canada, this is the case with respect to the Cabinet. While the Constitution Act vests executive powers in the Crown and its representative, in actual fact those powers are exercised on the advice of the Prime Minister and his Cabinet. By convention the Governor General is bound to follow the advice of the Prime Minister.

It is interesting to note that in Canadian constitutional history there are a couple of instances where the Governor General has refused to follow the advice of the Prime Minister.¹⁴ Admittedly there are no such examples in recent

¹². Ibid.

¹³ Wheare K.C., Modern Constitutions p.123-127

¹⁴. In 1892, the Governor General refused to appoint members of the Senate on the advice of the Prime Minister who had just lost an election; and in 1925 the Governor general refused to

history, yet it leads to an assumption that conventions can successfully be set aside where occasion demands. It also seems to indicate that the legal powers in the constitution are not rendered completely impotent by conventions, but merely made dormant.¹⁵

These examples of Wheare's can be regarded as the negative aspects of usages and conventions. He also gives what may be regarded as the positive roles of usages and conventions. These are firstly that they provide safeguards for minority rights. Secondly they profoundly affect the relation of the executive with the legislature by regulating the relations between the two houses of a legislature and by governing the internal organization of a legislature. Thirdly they link the force of party with the legal institutions of government and in so doing may transform its nature and alter its balance of power. Finally they provide flexibility and change when recourse to the machinery of formal amendment might be premature, inopportune or even disastrous and bring about changes that the law can not comprehend.¹⁶

In effect as Marshall puts it, for the most part
 dissolve Parliament on the advice of the Prime Minister, and instead called on the leader of the opposition to form a government. See generally, Dawson, Op cit.

¹⁵. Another instance where convention was almost ignored in favour of legality was in 1981 when the Canadian Federal Government proposed to patriate the Constitution unilaterally even after the Supreme Court said in the Patriation Reference that this would be unconstitutional in the conventional sense.

¹⁶ Wheare K.C., Modern Constitutions, p. 136

conventional rules modify legal rules "by inhibiting in practice the exercise of lawful powers. They cannot, or should not modify the rules by permitting in practice the exercise of unlawful powers".¹⁷

Constitutional conventions in Canada have developed their own distinctive flavour. In particular they have had to play a complementary role to a written federal constitution and to take into account various interests provided for within the framework of the written constitution.

An example of a convention with a peculiar Canadian flavour, and brought about by peculiar Canadian circumstances is in the composition of the cabinet. Convention has dictated that regional representation be taken into account in the appointment of federal ministers. In this way convention supplements the law of the constitution which did little more than provide in outline for an institution through which executive power is to be exercised.¹⁸ Another peculiar Canadian example is the one recognised by the courts in Re Amendment of the Canadian Constitution,¹⁹ in which it was stated that it was a convention that the consent of the substantial number of the provinces was required before a constitutional amendment can be obtained.

As has been seen the most fascinating example of the

¹⁷ Marshall, Op cit p.168.

¹⁸ Wheare K.C. Modern Constitutions p.2

¹⁹ Op cit

flexibility of the Canadian constitution can be attributed to conventions. These conventions have so acted on the Canadian political process as to make the literal constitutional document very different from what obtains in practice. They have not however acted alone and a discussion of the operation of the Canadian constitution would be incomplete without at least touching briefly on the role of the courts in its adjustments. The effect of the courts on the exercise of executive power, though considerable, has been rather indirect. The most effective influence that the courts have exerted on executive powers has been in the adjustment of power between the federal government and the provinces.

The Constitution Acts 1867-1982 create a strong central government. Wheare was so impressed by the elements of provincial subordination that he refused to describe the Canadian constitution as federal, stating that Canada has a quasi-federal constitution.²⁰ Centralist features in a constitution usually mean that great powers are vested in the federal executive. However, says Hogg, the subsequent development of case law, convention and practice has virtually eliminated the elements of provincial subordination.²¹

The role of the courts in adjusting this imbalance has been so effective that Canada can now be regarded as an ideal federal state. The indirect result has been that the immense

²⁰ Hogg, Op cit p.88

²¹ ibid

powers that a strong central government would repose in the federal executive have been effectively eroded.

In spite of the adjustments made by the courts the effect of conventions on Canadian constitutional law has been a continued increase in the powers of the executive. It has been observed that in the Canadian constitutional and political system, power has shifted inexorably in the direction of first the Cabinet and, increasingly in recent years, the first minister.²² According to Cheffins and Johnson,²³ one of the tragedies of the compromise of 1982 is that the functioning of the parliamentary system and its increasing tendency to fall under executive dominance has not been reviewed and revised.

It is submitted that the "compromise of 1982" was a further reflection of the pragmatism of Canadian politicians. It is not fair to contend that the parliamentary system was not revised in 1982 because it would have derogated from the powers of the first ministers who were revising the Constitution.²⁴ The introduction of the Charter of Rights in 1982 has quite effectively eroded those powers and brought within the purview of the courts executive actions that were hitherto beyond it. The effect of the Charter is to put the individual above the executive and legislature with respect to

²² Cheffins and Johnson Op cit p.3

²³ Ibid p.6

²⁴ Ibid.

certain rights and so give to the courts jurisdiction to examine the acts of government to determine if those individual rights have been violated.

The Charter has been criticised as reflecting more the individualistic political nature of the Americans than the political nature of Canadians,²⁵ but it could not have come at a better time to curb the power of the executive. The shift of power from legislative supremacy and thus executive supremacy, to "judicial supremacy", by way of the Charter, is but another way in which the flexible Canadian constitution has adjusted in its operation to meet the exigencies of the situation.

Before going on to discuss the operation of the Nigerian Constitution it is important to reiterate that the constitutional adjustments to the Canadian Constitution that have been discussed were possible because of the basic fact that the national ethic or national consciousness of the people was sufficiently developed. They were therefore able to appreciate and accept the basic ground rules of democracy and the law of the constitution.

In spite of criticisms of the role of the executive, those criticisms are concentrated on the details of the operation of the constitution and not the substance. The ground rules of constitutionalism are agreed upon by the operators of the constitution.

The rules state that the executive in the Canadian cabinet

²⁵ See Cheffins and Johnson Op cit.

is in control until it loses the confidence of the legislature. Even if some people are not happy with the extent of that control, and feel that it has been increased inexorably, the fact remains that the rules have been complied with.

While in power, the executive exercises enormous powers. Of course the opposition keeps it in check, and there are other constitutional safeguards that are enforced by the courts.²⁶ While enjoying the confidence of the majority of the House however, the executive can usually contrive to ensure that government measures are passed.

The trick however is in enjoying the confidence of the House. Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its "unlimited" power of legislation in an oppressive and tyrannical way.²⁷

It is also assumed that the national ethic is such that an executive that attempts to introduce unpopular measures would lose the confidence of the House. Furthermore even if the executive does not lose the confidence of the House for its unpopular measures the media act as constant constitutional

²⁶ e.g. The rules of federalism and the Charter of Rights and Freedoms.

²⁷ Magnet J.E., Constitutional Laws of Canada p.39; see also Marshall Geoffrey, Constitutional Conventions (Oxford 1984) p.9.

watchdogs checking every executive action. Also the political awareness of the Canadian public is enough to bring democracy into play by changing the government at the next opportunity.

In defence of the cabinet system against those who insist that it encourages cabinet autocracy, Wheare²⁸ has said that those who are afraid of cabinet dictatorship ignore the fact that although the government seldom loses a Bill, it seldom introduces a Bill it would be likely to lose.²⁸

To remain in power, the Canadian Cabinet has to remain both "responsive and "responsible" and this contributes to the relative success of constitutional changes in Canada. Because of the diversity of the people that make up Canada, proposals for constitutional change are always controversial. In 1982 when the government took positive steps to patriate the Constitution, Quebec in particular refused to accept the amendments proposed. Currently the Meech Lake accord, designed to rectify the situation and bring Quebec more fully into Canada's constitutional processes²⁹ has not been fully accepted. The fact remains however that in spite of the controversies, major as they sometimes are, the national ethic

²⁸. Wheare K.C., Legislatures p.114

²⁹. Up to now Quebec has refused to participate in Constitutional conferences because the patriation of the Constitution in 1982 had gone ahead without its consent and it was thus frozen out of the process.

ensures that the machinery of government remains in place.³⁰

Operation of the Parliamentary Constitution of Nigeria

In Canada, the machinery of government remains in place despite the problems encountered in attempts to accommodate and reconcile the various interests. A study of the operation of the Constitution in Nigeria proves the accuracy of the views that it is futile to have a written positive law in the face of a social environment that refuses to accept the original statutory intention,³¹ and that theoretical rights written into a nation's constitution mean very little if the people of that country are indifferent to the protection of those rights.³²

As has been seen from the study of the nature of the Constitutions, the Nigerian politicians were completely devoid of the complacency that allowed the Canadian politicians to take over from Great Britain most of the essential British constitutional principles and practices and accept the rights of British citizens as sufficient for them. The Nigerians at independence set out to produce a water tight

³⁰ In fact so well established are the rules of constitutionalism in Canada that even though the Parti Quebecois wants to secede, an act which would in fact destroy the Constitution as it is now known, it insists on doing it by constitutional means.i.e it wants recognition in the preamble of the right to secede and wants to secede only by negotiation. See Partie Quebecois White Paper 1980

³¹ Cheffins and Tucker Op cit p. 30

³² Ibid p.34

document, which not only set out all the rights of the people and the powers of the executive, but also attempted to regulate to the minutest detail, the operation of the constitution.

The rigid regulation of constitutional practice is however not the way to ensure stable government. The Nigerian Independence Constitution set up a parliamentary system of government, but it became obvious almost immediately that the national ethic necessary to ensure compliance with the rules of the system was sadly lacking.

The parliamentary system of government is "essentially dependent for its success... on the existence of parties whose representatives agree on a common policy, work together in support of their party's decisions and preserve on all major issues a united front in parliament...It is the party system that renders politics intelligible to the electorate"³³ (emphasis mine) In Nigeria under the parliamentary system, the party system did not in any way help to render politics intelligible to the electorate.

It is interesting to observe that though the composition of the Canadian society is such as could allow ethnic considerations to influence politics, the Canadian party and electoral systems are designed so that the Canadian political

³³ Odumosu O.I., Op cit p.197 Quoting from Report of the Special Commission on the Constitution of Ceylon Cmd 1928 3131. p.41.

parties do not divide along any major ethnic lines.³⁴ In Nigeria on the other hand, in spite of the high national spirit which marked the original agitation for independence, political parties subsequently aligned themselves on ethnic rather than ideological lines.

Wheare has observed that in some societies, where tribal or other traditional authorities are strong, indirect election from such traditional bodies is probably the most effective method of making national legislatures because territorial constituencies with direct election, would in many such cases, be an artificial, not to say unintelligible method of organising the electorate.³⁵ The use of traditional authority in this way would be practical if the traditional authorities involved were conversant with the concepts of constitutional government. In that case, a situation similar to that which obtains in Canada would have developed. Sub-cultural elites (in this case traditional authorities) would cooperate to work out compromises among themselves and the modes of accommodation of their various interests.³⁶

Instead, in Nigeria, the concepts of constitutional government are completely foreign to traditional authorities. In fact it has been said that the constitution lacks sanctity

³⁴. Magnet Joseph Eliot, "Collective Rights, Cultural Autonomy and the Canadian State" McGill Law Journal vol. 32 No.1 (Dec. 1986) p.170-186 at p.173

³⁵ Wheare K.C. Legislatures p.33

³⁶. Magnet, Collective Rights, Op cit p.173

because the values and ideas it enshrines are different and opposed to those of rulers and society alike.³⁷

The end result under the Nigerian parliamentary system was that because of the failure to understand or accept the rules and because of ethnic loyalties, the power of the electorate to decide who governed was not properly exercised. The provisions in the constitution were therefore rendered futile as the politicians who operated the constitution did not follow them.

It is obvious that the achievement of stability in a democracy, despite a fragmented political culture, economic geographic regionalism, and disparate religious and language groups may be brought about through the efforts of the various elites to accommodate the divergent interests and demands of the subcultures.³⁸ To fulfill such a key role, the elites must have the ability to transcend cleavages and to join together with one another in the common effort.³⁹ In Canada the political process and the acceptance of constitutional rules has ensured that the subcultural elites are more or less committed to making the system work. The Nigerian political process failed to make this accommodation.

The failure of the Nigerian national leaders to provide

³⁷ Nwabueze B.O., *Constitutionalism in the Emergent African States*, p.301

³⁸ Matheson, W.A., *The Prime Minister and the Cabinet* (1976) Introduction p.ix

³⁹ Ibid

effective leadership and to accommodate properly the divergent interests of the different subcultures has been blamed on the diffusion of power between the titular head of state, the president, and the effective head of state, the Prime Minister. It has been said that the historical circumstances that allowed the system to work in Britain are non-existent in Nigeria and so the arrangement merely led to confusion.

While the historical circumstances in Nigeria appear not to favour the parliamentary set up, it is alarming to observe that circumstances in Africa generally seem to favour an authoritarian president.⁴⁰ This is because the "relative impotence of extra-constitutional sanctions against the abuse of power"⁴¹, invests the President with a great deal of responsibility in the government of the country.

Adegbenro v. Akintola⁴², is an important constitutional precedent respecting the exercise of executive powers under the Nigerian parliamentary constitution. This case is a classic example of either a lack of understanding of political and constitutional rules or a blunt refusal to accept them. There appeared to have been a complete failure to grasp the importance of party loyalty, which is the bulwark

⁴⁰ Nwabueze B.O. Presidential Constitution of Nigeria p. 103

⁴¹ Ibid. The ineffectiveness of elections, lack of public reaction to the degree where the official may be forced to resign as a result of public outrage can be cited as a few of these extra-constitutional sanctions.

⁴² Discussed in detail in chapter 1.

of Canadian and parliamentary politics. The case arose basically, not between the opposition and government, but as a result of a split in party loyalty.

Suppose for an instant that the Nigerians had followed the Canadian example by adopting a constitution "similar in principle to that of the United Kingdom", and had accepted constitutional conventions without spelling them out. The results in the case would have been quite different.

In the first place, since the office of the Prime minister would have been governed by conventions, there would have been nothing to take to court. Even with their recognition of the Cabinet, the courts would not have presumed to look into the validity of conventions or try to enforce them.

Secondly, in accordance with convention there would have been no question of a petition written outside the House and presented to the Governor, as the matter would have been decided on the floor of the house. The mere fact that the petition was brought by members of the government party would have led to immediate resignation of the government.

Thirdly had it come to a point where the Governor was forced to ask the Premier to resign, the decision would have been accepted, and the government would then have had the opportunity to test its popularity in an election.

Contrasting the situation in Nigeria with that in the United Kingdom, the Privy Council in the Adegbenro v. Akintola case observed that the application of principles to a given

situation if they arose in the United Kingdom would depend less upon any simple statement of principles than upon the actual facts of the situation, and the good sense and political sensitivity of the main actors called upon to take part.⁴³ The distinction between the situation in Nigeria and Canada is properly reflected by this observation. In Canada; the basic rules are agreed upon and the points of controversy are based on specific issues.

With every little detail spelt out in the Nigerian Parliamentary Constitution, it was impossible to take advantage of the flexibility of constitutional conventions. It is also difficult to operate a constitution if the people involved do not have the right attitude towards it. Nigerians are yet to develop the right attitude towards the constitution and learn to regard and respect it as an "umpire above political struggle" and not as "a weapon in that struggle which can be used and altered in order to gain temporary and passing advantages over one's political opponents".⁴⁴ Nigerian politicians accept whatever system of government they find themselves operating, but appear within that system, to use unconstitutional means to gain political advantage over their opponents.

The inclusion of a Chapter in the 1979 Constitution

⁴³ [1963] 3 W.L.R. P.63 at Pp.70-71

⁴⁴ Nwabueze B.O., Constitutionalism in the Emergent States p.301 quoting from Ghai and MacAuslan, Public Law and Political Change in Kenya, 1970 p.511

embodying what was called the "fundamental objectives and directives of state of state policy" was hailed as being in the best tradition of a constitution, because "a nation without an organising idea is not worthy of its name".⁴⁵

As experience has shown, the mere spelling out of objectives and ideals are not enough. Those ideals must coincide with what the people want. Furthermore, the notion of national consciousness has to be equivalent to the ideals and objectives set out in the constitution. Since Constitutional Law cannot be based on the customary law with which the people are familiar, the people must be educated in such a way as to enable them adopt the notions of constitutionalism into their national consciousness.

In conclusion, it is reiterated that the failure of the 1963 Constitution was due entirely to the failure to follow the rules of the Constitution especially by the executive.⁴⁶ In the midst of the confusion that arose from a constitutional stalemate, a small segment of the Nigerian army decided to step in and take over the government of the country.

The initial military take-over was not successful and power was handed over to the military by some federal ministers

⁴⁵ Nwabueze B.O., The Presidential Constitution of Nigeria p.18

⁴⁶ After the 1965 regional elections, which were the second elections held under the 1963 constitution, there was complete bedlam, especially in the Western region. There had been outright fraud and violence, and two people from two factions of the same party claimed to have been successful in the elections.

after that revolution had been quashed. There has been some question as to who handed over the power as the Prime Minister was missing and presumed dead, and there was no proper cabinet at the time.

Section 92 of the Constitution of 1963 provided that-

"Whenever the Prime Minister is absent from Nigeria or is for any other reason unable to perform the functions conferred on him by this constitution, the President may authorise some other member of the Council of Ministers of the Federation to perform those functions... and that member may perform those functions until his authority is revoked by the President."

If the rules of constitutionalism had initially been followed this provide would have been called into play. With the initial rebellion quelled by the commanding officer the constitutional thing to do would have been for the army, which would have been acting under the direction of the executive to move out of the way and allow the provisions of the constitution to be called into play. For while the Constitution did not make provision that the ~~Cabinet~~ could in certain circumstances hand over power to the army, it did provision for a situation where the Prime Minister was dead or missing.

The breakdown of the constitution was such that not only did a segment of the army decide to take matters into their own hands, the politicians found themselves unable to handle the situation after the rebellion was quelled and decided to hand over power to the military.

Operation of the Nigerian Presidential Constitution.

It is easy to see that part of the Nigerian attraction to the presidential executive can be attributed to the downplaying of the influence of political parties evidenced in the presidential system. The mandate of the Committee that drafted the 1979 Constitution aside from enjoining the committee to avoid institutionalised opposition, stated also that they should provide for genuine and truly national political parties and an executive presidential system of government that ensured that the choice of members of the cabinet reflected the federal character of the country.⁴⁷

The Supreme Military Council in deciding the lines on which constitutional reform should go clearly pinned its hopes on "a good constitution", and although behavioral patterns were not completely discounted, the emphasis throughout the Head of State's address was on transformation of behaviour through wise constitutional provisions.⁴⁸ In his words "this Administration strongly believes that the provisions of the Constitution can be used for removing or minimizing some of our basic problems."⁴⁹

In addition to making provision for political parties

⁴⁷ Awogu F. Olisa, Op cit. p.5

⁴⁸ Panter- Brick K., The Constitutional Drafting Committee, in Soldiers and Oil, Panter-Brick K (ed.) p.293

⁴⁹ Ibid.

within the Constitution itself, the Nigerian Constitution of 1979 deviated from its American model in the greater emphasis placed on checking the executive. The Constitution did not effectively provide a system with proper checks and balances, but rather, the Legislature seemed to have been given the responsibility of acting more as a disciplinarian and supervisor of the other arms of government than as an equal partner in the same government.

The best example of this role of disciplinarian can be seen in the extensive investigative powers given to the Legislature. Sub-section 82 (1) of the Constitution provided that

- "(1) The Legislature may conduct investigation into
 - (a) any matter or thing with respect to which it has the power to make laws; and
 - (b) the conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty of or responsibility for
 - (i) executing or administering laws enacted by the National assembly; and
 - (ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly."

Further the provisions in the Constitution that the President consult some body or other before exercising the different powers vested in him, also marked some deviation from the American model. To further compound matters the Executive Council or Cabinet was entrenched in the Constitution with the provision that the President hold regular meetings and seek the advice of the Council. Consequent to this provision the Court of Appeal held in the

case of Lawal Kagomo v. The Governor of Kaduna State⁵⁰ that without an executive council, the political administration of government by the President alone is to a large extent unconstitutional.

According to Nwabueze, the presidency under the 1979 Constitution may well be described as a consultative one.⁵¹ He further observes that checks and restrictions were a conspicuous feature of the presidency as instituted by the constitution, that the constitution left the exercise of the executive power with the presidency while imposing checks and restrictions on the manner in which it was to be exercised and that such checks and restrictions constituted a serious qualification upon the power.⁵²

In O'Donoghue v. United States⁵³, it was said, that "if it be important to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others- independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the constitution, but in the sense that each shall never be

⁵⁰ FCA/K/99/80 of 16th January 1981

⁵¹ Nwabueze B.O. The Presidential Constitution of Nigeria p.137

⁵² Ibid pp. 136 & 137

⁵³ Vol.77 Lawyers Ed. U.S. 1356

controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments."

It is doubtful that under the 1979 Constitution the different arms of the government can be said to have been independent in the sense intended under the American Presidential system. As has been seen above, the investigative powers of the legislature were so extensive as to amount almost to a control of the executive by legislature.

A further example of the supervisory powers of the legislature over the executive were the impeachment powers, which incidentally the legislature could also exercise with respect to judges. Those powers as provided in the Constitution were quite extensive. Even though it is said that the impeachment power "is not nor was it intended to be, an extraordinary device for registering a vote of no confidence",⁵⁴ the power in the 1979 Constitution was so wide that "gross misconduct" could conceivably be interpreted by the legislature to mean what it wanted.⁵⁵ An ingenious legislature could twist it to mean a loss of confidence in the President, and as the President has no recourse to the courts on the issue, nothing could be done to control such a recalcitrant legislature.

The handicaps discussed above do not exist in the American

⁵⁴ Clinton Rossiter, *The American Presidency*, 2nd edn(1960), 52-3 quoted in Nwabueze *Presidential Constitution of Nigeria* p.142

⁵⁵ See Chapter 1, page 30-31 of this paper.

model. The United States constitution is much briefer and drafted in a more businesslike manner. The Nigerian constitution consists of 279 sections and is contained in 118 pages of print, with much of it so detailed as to make breach inevitable.⁵⁶ According to Aguda, though the verbosity of the constitution is most unfortunate, the Constitution Drafting Committee and the Constituent Assembly felt obliged to plug in all holes that might lead to misinterpretation.⁵⁷

The brevity of the American Constitution allows for latitude in the operation of the Constitution. It allows for the development of conventions with respect to executive powers, which, because of the difference in emphasis, are completely different from those that operate under the Canadian Constitution. It also allows Congress to regulate the operation of the Constitution by laws which can be easily manipulated without recourse to the complicated machinery of constitutional amendment. The Nigerian Constitution of 1979 was deprived of these benefits as was the Constitution of 1963.

Most importantly, the American Constitution has allowed the courts an active role in its development, more active than that played even by the Canadian courts. The courts' participation in constitutional development in Nigeria has

⁵⁶ Aguda, T. Akinola, *The Judiciary in the Government of Nigeria* (1983) p.32

⁵⁷ *Ibid* p.110

virtually been a life and death struggle. The effect of the verbosity of the Nigerian constitution has been to hamper to a large extent, the development of the Constitution by the courts.⁵⁸

It has been said that an executive presidency was established for the country with the idea among other things that it should serve as the focal point of loyalty in the nation.⁵⁹ With all the checks entrenched in the constitution, the idea of the President as the focal point is considerably attenuated. The 1979 Constitution portrays Nigerians as attempting to enjoy the benefits of the Presidential system, without the innate trust to take a chance with the hazards that are found mainly in the latitude allowed the President in the exercise of his executive powers. The Nigerians feared that such a latitude might create a constitutional Frankenstein's monster.

There is of course under the American system, the mandatory congressional check of executive powers. According to Taft, "the true view of the executive function is that the President can exercise no power that cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in

⁵⁸ Aguda, Op cit, p.111

⁵⁹ Nwabueze Presidential Constitution of Nigeria p.18

its exercise."⁶⁰

However the extent of the discretion reposed in the American President on important matters considerably increases the extent of his powers. For instance, the presidential war power has been given such a liberal interpretation that all constitutional limitations virtually disappear.⁶¹ Further, the influence of the political system is such that "party loyalties and interests, sometimes more binding than law, extend the president's effective control into branches of government other than his own and he often may win, as a political leader, what he can not command under the constitution"⁶²

Whereas ultimate power to formulate domestic policy resides in Congress, the primary responsibility for the formulation and implementation of national security falls on the American president.⁶³ The conduct of foreign affairs, defense and intelligence policy are constitutionally reserved for the President.⁶⁴

⁶⁰ W. Taft, Our Chief Magistrate and His Powers, quoted in E.S. Corwin, The President-Office and Powers 1787-1984 (New York, 5th ed. 1984) p.175

⁶¹ Akande J.O. Introduction to the Nigerian Constitution, Sweet and Maxwell 1982 in her explanatory notes for section 5 of the Nigerian Constitution.

⁶² Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579

⁶³ Tower Commission Report p.87

⁶⁴ United States Constitution Art. II subsection 2(2).

Events uncovered in the Iran Contra scandal truly indicate the extent of the President's powers in actual practice and raise questions as to the effectiveness of the congressional oversight committees in curbing the President's power. They seem to indicate that even in a time honored system like that of the United States, the reins of government can be found in the wrong hands. The enormous powers exercised without supervision by various government officials was such a subversion of normal constitutional functioning as to be classed with a successful coup d'etat. The Iran Contra scandal would seem also to prove to Nigerians that they were right to attempt to plug all loopholes in their own constitution.

The Iran contra scandal was possible because the National Security Council, one of the most sensitive of the executive departments, and the National Security Adviser answer only to the President. The National Security Adviser is appointed by the President without the approval of the Senate and owes allegiance to the President alone. The way in which the National Security staff is used reflects the individual preferences and working style of each president. Though the council has developed an important role within the executive branch, it has generally operated out of public view and has not been subject to direct oversight by Congress.⁶⁵

The result is that if the President does not exert effective control over the department, it has immense powers within its

⁶⁵ Ibid

grasp with no supervision from any quarters. Given the nature of security matters, it is possible to exercise inordinate powers outside the watchful eye of congress and carry out what could be tantamount to a coup d'etat, without in any way disturbing the democratic institutions of the constitution. This is what happened in the Iran case where "a kind of parallel government came into being, operating in secret, paying scant heed to laws, deceiving congress, and avoiding oversight of any kind." ⁶⁶

In spite of the fact that the Iran Contra affair seems to prove that even with democratic institutions in place, it is possible to have extra constitutional events occur, that amount to a political coup. What sets it apart from the Nigerian situation is that with the existence of a national ethic, the people can protest effectively and a thorough investigation be seen to be undertaken. The people directly involved can then be subjected to the system to answer for their actions. It is interesting to note that in spite of the gravity of the acts of the Security Council the recommendation was made, after an objective inquiry into the institutions involved, that those institutions had not outlived their usefulness.

What is evident therefore is that in spite of the fact that the United States presidential constitution is found in a single comprehensive document, which lays down the essentials

⁶⁶ Tower Commission Report, Introduction p.xv

of government outlining the powers of the Executive, Congress and Judiciary, there is some allowance made especially within the executive for flexibility and adaptation to prevailing circumstances. Although it can be contended that drafted the way it was, the Nigerian constitution was deprived of the benefits inherent in the United States model, it must be admitted that the Nigerian political scene is not mature enough for such flexibility.

Another interesting point however is that the reason for choosing the American model in Nigeria, namely the need for an efficient leadership and strong executive, is at cross-purposes with the reasons the American system was developed. The American president does exercise immense powers, but the American system, was developed because in certain cases "it is necessary to govern with a weak rein if one is to govern at all."⁶⁷ The system was not meant to create a strong executive, but to accommodate the different people and diverse interests that make up the United States. The best way to accommodate and protect those interests was to ensure that the executive was not too powerful.

Nigeria may be made up of various people and diverse interests, but contrary to the American experience, this does not mean that the country should be governed with a "weak rein". Rather the circumstances seem to favour a very strong executive. The failure of the different political systems and

⁶⁷ Wheare K.C., Legislatures p. 72

the relative success of the military seem to indicate this. The temperament of the people however seems to be that while they may acquiesce to authoritarian rule by the military they would balk at the same rule from a civilian president chosen by them. To have a civilian government therefore some system of democracy must be established for the country. For such a system to be successful the political leaders must engage in "political engineering."⁶⁸ In other words they should organise the society in such a way that the centrifugal tendencies inherent in the society are counteracted by the cooperative attitudes and behaviour of the leaders of the different segments of the population⁶⁹.

Just as was the case with the Parliamentary Constitution, the failure of the 1979 Constitution can be attributed to a number of factors, all of which can be traced to the attitude of the politicians towards the constitution and their refusal to abide by the rules. The main reason given by the military for stepping in again, was that the elections to choose a new government under the 1979 Constitution were not free and fair and that there had been widespread electoral fraud by all the parties.

There was however in addition to this, gross abuse of power especially by the executive arm of government in some of the states. The sad part of it all was the impotence and even

⁶⁸. Lijphart Op cit p.223.

⁶⁹. Ibid p.1

unwillingness of the electorate to do anything about the situation in spite of all the rights entrenched in the constitution. The executive in some of the states began to abuse the powers vested in them soon after the Constitution came into force. In one of the states, members of the Governor's political party convicted of arson committed in the course of attack on political opponents, were pardoned by the Governor.⁷⁰ In another state several cases against members of the Governor's political party were ended by a nolle prosequi entered by the Attorney-General.⁷¹ In both these examples, the Governor and the Attorney-General in effect approved of election malpractices which broke the rules of the Constitution.

In yet another case, the Attorney-General attempted to enter a nolle prosequi in a case where the Solicitor-General was charged with contempt of court. Although the judge dismissed this attempt on the grounds that there was no charge laid before his court, the Governor pardoned the Solicitor-General within an hour of his conviction.

In one of the cases involving a nolle prosequi, an appeal was brought by an interested party. The court held that the Attorney-General enjoyed absolute discretion in the matter of nolle prosequi and the only sanction if there was an abuse, "is the reaction of his appointor, or adverse opinion may force

⁷⁰ Awogu F.Olisa Op cit p.26 & 27

⁷¹ Ibid p.28

him to resign".⁷² In spite of protests from the press there was hardly any meaningful public reaction.⁷³ The political officers who abused their powers were again fielded by their parties for re-election and were even re-elected in some instances. Where they were not re-elected, their failure at the polls had nothing to do with their abuse of office.

In the second election held under the 1979 constitution, lack of faith in the system was manifested by the wanton rigging of the election by the different parties and other election malpractices. In the face of all this the electorate appear to have been impotent, and in spite of the evidence seen of abuse of office and allegation of corruption, voted for the various parties:

The 1979 Constitution proclaimed freedom, equality, justice, participatory democracy and social justice as the ideals upon which the nation is founded, and declared that the welfare of the people shall be the primary purpose of the government, that the Government shall be responsible and accountable to the people, that every citizen shall have equality of rights, obligations and opportunities before the law, that the sanctity of the human person shall be maintained and enhanced, that governmental actions shall be humane, that human exploitation in any form whatsoever shall be prevented and that the independence, impartiality, integrity and easy

⁷² The State v. S.O. Ilori & 2ors (1983) 2 S.C. 155

⁷³ Awogu Op cit p.28

accessibility of the courts shall be secured and maintained. It declared that unity, faith peace and progress shall be the national motto and that discipline, self reliance and patriotism shall be the national ethic.

Lofty and worthy ideals all of the them, but they amounted to just words on paper when it came to the conduct of the elections and the running of the government. Some of the rights mentioned above were indeed maintained, but only when they did not interfere with the ideas of the politicians. Participatory democracy was interpreted to mean bullying and misleading the illiterate majority to vote the government in power in for a second term and this was supplemented by electoral fraud.

The ideals and objectives or fundamental objectives and directives of state policy as they were called in the constitution were not justiciable, but were political issues which the electorate should have decided at the polls. As has been seen however the elections are not a true gauge of the general will. Even with the mechanics and institutions in place for Nigeria the constitution was in effect protecting rights which the people did not really understand or care about.

In the face of all this it is difficult to lay any blame on the Constitution or the system of government practiced, yet the search is on to find yet another system of government for the country now that the military has again

taken over power.

The Constitution of 1979 provided for a National Defence Council and a National Security Council. It does not appear that the President was in any way obliged to consult with them. The Constitution merely stated that the National Defence Council "shall have power to advise the President on matters relating to the defence of the sovereignty and territorial integrity of Nigeria"; and that the National Security Council shall have power to advise the President on matters relating to public security including matters relating to any organization or agency established by law for ensuring the security of the Federation.

In Canada, as in the United Kingdom, the military are insulated from politics. They are trained that way and the parliamentary system does not encourage their active involvement.⁷⁴ Given the propensity of the military to step into government in Nigeria the active role of the military in government under the presidential system would have been a decided advantage.

Operation of the Constitution Under the Military.

The military coup of January 1966 was very different from the other coups in Nigeria carried out before and after the

⁷⁴ The senior cadre of the Nigerian military also exercised the same reticence in politics before 1966, having received the same training. In the reason the first coup was initiated by junior officers was that the senior officers were just not trained to run the government. This lack of training led the first military head of state in Nigeria to make a lot of blunders which led to his downfall.

1979 Constitution. The institutions set up by the military to govern are however basically the same and the format of Decree No.1 is becoming more or less a convention.

The main difference between the 1966 January coup and the others is that in January of 1966 there was a purported handing over of power by the civilian government to the military. Also, the political atmosphere in the country was such that it is doubtful whether the army would have desisted from taking over power had the civilians not handed it over to them. With the 1983 coup on the other hand the military just stepped in and took over because they felt the civilians were not doing a good job. Skeptics might even say that there was no real justification for the coup, as the government seemed to have been going on smoothly in spite of election malpractices.

In all the circumstances however, the general public was relieved when the military took over, leading some people to believe that the military were in fact more responsive to the needs and general will of the people than the civilians. It is not a matter of doubt that the people of Nigeria, whose behaviour the federal military government has been regulating by means of decrees, have behaved by and large, in conformity with the new regime.⁷⁵

It would appear from the evidence in Nigeria that whether or

⁷⁵ Aihie and Oloyede, Nigerian Constitutional Cases and Materials p.240

not a government is legitimate at the outset is a less important question than how effective a government is.⁷⁶ Some Nigerian political scientists seem to hold this view tending to dismiss the constitution as an entirely superfluous document. The military themselves do not seem to agree and while making the Constitution subordinate to their decrees, do make some concession to some of the provisions of the Constitution. To assert that the military regime is the best government for the country is to assert that the people are so incapable of governing themselves that it is best that the country remain in a state of emergency.

The curious thing about the Nigerian military government however is that they appear to observe the unwritten convention not to use its "unlimited sovereign power" in a manner that is oppressive and tyrannical. Laws passed seem to be absolutely necessary to carry on an emergency government which is abnormal as it is. In fact the Buhari government was overthrown by his fellow officers because it had become too rigid and had begun to pass laws which were apparently oppressive.

Odetola who seems to approve completely of the military as an alternative system of government, believing that the military produces better results than the civilians says that-

"coercion, as traditionally conceived has declined as

⁷⁶ Odetola Theophilus O., Military Politics in Nigeria.p.25

the dominant mechanism of control in the modern military. The characteristics of cooperation, participation, manipulation and persuasion appear to have given added flexibility and military capability to maneuver in difficult political bargaining situations."⁷⁷

It has also been said that the military because of the values of order and discipline, is a stable alternative to the party system.⁷⁸ Suggesting the military as an alternative acceptable mode of government has been encouraged by the fact that few political parties can match the centralization, discipline, and communication of the smallest professional army on that continent.⁷⁹ Furthermore the ruled accept a government as legitimate to the extent that it satisfies their needs, is effective and it shows authority.⁸⁰

The people who make these assertions fail to take cognisance of the fact that the only reason the public is somewhat complacent towards military rule is that it recognises it for what it is supposed to be, a temporary emergency government. In other words, the military is accepted by the general populace because there is always the implied promise that once things get back to normal, power will be returned to the people.

⁷⁷ Odetola Op cit p.18

⁷⁸ Shils Edwards, "The role of the Military in the Political Development of the New Nations" in J.J. Johnson, ed., The role of the Military in the Underdeveloped Countries (Princeton 1962) quoted by Odetola Op cit P.16

⁷⁹ Welch, C., Soldier and State in Africa (Evanston, Ill. 1970) p.36 quoted in Odetola Ibid.

⁸⁰ Odetola Op cit p.25

Although the civilian public does have a say in the government during a military regime, this does not mean that the civilians are entirely content with their passive role in government. In discussing the interplay between the military and the civilian polity, Odetola states that in military rule in Nigeria, where the military establishment and the civilian polity are the two parties in an exchange situation, the power possessed by both is not of the same quality. He asserts that the military has the power of physical force while the civilian public can mobilize public opinion and force the military to resign. ⁸¹

It is doubtful if the civilians in Nigeria can unite in that way against the military given their impotence while the politicians were in power. In practice, public opinion works indirectly in Nigeria. While it does not force the government to resign, it encourages another set of soldiers to overthrow the current regime and take over power.

⁸¹ Ibid

CHAPTER THREE

INCREASE IN THE POWERS OF THE EXECUTIVE.

Introduction.

Whatever the nature of the constitution or the pattern of development that executive powers assume, an increase in the powers of the executive seems to be the historical trend in constitutional development. The manner in which these powers develop however, depends on the nature of each constitution. The propensity for the increase in power can be found in the fact that while "legislative power" and "judicial power" today denote fairly definable functions of government as well as fairly constant methods for their discharge, 'executive power' is still indefinite as to function and retains, particularly when it is exercised by a single individual much of its original plasticity as to method¹

According to Wheare, this change in the distribution of power in a system has owed a great deal to changes in, circumstances that have in themselves given opportunity or scope for the executive to exercise more fully the powers that the constitution conferred upon it.²

What this implies is that the executive is not acquiring powers to which it is not entitled, but simply realising fully the potential power inherent in each

¹. Corwin E.S., The President: Office and Powers, (1984) p.3.

². Wheare K. C., Modern Constitutions, p.74.

constitution. To those who fear that this implies that all governments, even democracies, are heading towards autocracy, it can only be said that so long as "the State and the citizen recognise the supremacy of the law and respect the principle of legality,"³ the chances of autocracy and executive abuse of powers are virtually nonexistent. No matter therefore how much executive powers increase, they cannot grow beyond what is allowed by the constitution, written or unwritten.

Wheare contends further that almost all the powers that have worked towards centralization have also worked for the increase of the power of the executive.⁴ He breaks down the forces that work for the increase of the power of the executive as (1) war or the fear of war, (2) economic crisis, (3) the policies of the 'welfare state', (4) the growth of democracy with universal suffrage, and (5), the demand for equality of conditions, and says that they have produced situations in which it has been thought proper that the executive should enlarge its powers.

In a parliamentary system the executive is more likely to increase its powers through its control of policies and legislation. It can exercise a tyranny through the exercise of powers of delegated legislation, or simply by the policies that it introduces for legislation.

³. Dussault, *Traite De Droit Administratif* (1974) 11, pp. 1089-1099 quoting Yves Prevost in Magnet J.E. p. 27.

⁴. Wheare *Modern Constitutions* Op cit p.74

In the presidential system, on the other hand, the government does not have sufficient control over the legislature to accomplish tyranny through delegated legislation. Executive powers are therefore increased in this system by other means.

Increase of the Powers of the Executive under the Parliamentary System in Canada.

The very structure of the parliamentary system provides a fertile ground for the growth of executive powers. Under the parliamentary system it is easy to develop executive powers under any of the heads listed by Wheare. Also the emergence of fiscal and monetary policy as economic regulators has become so important a factor today as to make us forget the question of legislative jurisdiction.⁵ Ottawa learns to induce where it can not command.⁶

This development naturally leads to the greater centralization of powers, and if it is accepted as proposed by Wheare that the factors that encourage centralization also foster an increase in the power of the executive, then this is another avenue through which the executive can increase its powers. It has been said that Federal Provincial conferences are here to stay and that they are likely to play a part in Canadian evolution to which there is no real parallel in the

⁵. Scott F.R., Our Changing Constitution in Lederman W.R. (ed.) The Courts and the Canadian Constitution p.27.

⁶. Ibid.

United States constitutional behaviour.⁷ Wheare might have had just such developments in mind when he observed that governments now do a great deal that they did not do formerly, . . . but most of what they do was not done by anybody before.⁸

As well the executive power has shown startling increases through encroachment into the legislative field through delegated legislation. . Parliamentary democracy entrusts to the heads of government much more power than can be wielded by American governors or the President of the United States.⁹

At first it seemed as if dire circumstances like war, the fear of war or economic crises had to exist before the potential of this power was even explored. In Re Gray¹⁰ the courts had to decide whether the extent of delegation of power by Parliament in an emergency was so wide as to amount to an abdication. The matter before the court was the validity of an Order in Council passed under section 6 of the War Measures Act. The order had amended the Military Act of 1917. The Court held that the Order was properly within the authority of the executive. The then Chief Justice said that "Parliament cannot indeed abdicate its functions, but within reasonable

⁷. Ibid p.30.

⁸. Wheare K.C, Legislatures, p. 148

⁹. Black and Cairns, A different perspective on Canadian Federalism in Magnet Op cit, p.9

¹⁰. [1918] 57 S.C.R. 150

limits at any rate, it can delegate its powers to the executive government."¹¹

This statement, according to Laskin, accepts a distinction between delegation and abdication and leaves the door open to judicial control.¹² However in that case the Chief Justice did admit that "taken literally... the language of section 6 of the War Measures Act contains unlimited powers."¹³

Twenty five years later in The Chemicals Reference¹⁴ the same provision (now section 3) of the War Measures Act¹⁵ was considered by the Court. The section provided that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the existence of real and apprehended war, invasion or insurrection deem necessary for the security, defence, peace, order and welfare of Canada¹⁶. Duff C.J. had this to say: "when regulations have been passed by the Governor in Council in professed fulfillment of his statutory duty, I cannot agree that it is competent for any court to

¹¹. Ibid at p. 157.

¹². Laskin Bora, Cases and Comment: Subdelegation of Legislative Power without Express Statutory Authorization [1943] 21 Can Bar Rev. 141 at 144

¹³. Re Gray Op cit at p.158-159

¹⁴. [1943] S.C.R. 1

¹⁵. The War Measures Act has been replaced by the Emergencies Act see Chapter footnote 66

¹⁶. Section 3 of the War Measures Act

canvass the considerations which have or may have led him to deem such regulations necessary or advisable for the transcendent objects set forth."¹⁷

As can be seen, the main judicial decisions allowing that the executive can exercise extensive legislative powers were war time cases and it has been suggested that the emergency situation might have contributed to the court's liberal and wide interpretation of the War Measures Act.¹⁸ It would only be logical to conclude at this stage that extensive legislative powers can only be exercised by the executive during periods of extreme emergency, and at most only indicates a false increase in the powers of the executive since power must still emanate from Parliament.

In R v. Halliday¹⁹ Lord Finlay L.C. said "it appears to me...that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council and that Parliament may do so feeling certain that such powers will be reasonably exercised."²⁰

It is not strictly true however that these powers are only exercisable during periods of great public danger. Although Duff C.J. in The Chemicals Reference case observed that "it

¹⁷. Chemicals Reference Op cit at p.12

¹⁸. Driedger E.A., Subordinate Legislation [1960]38 Can Bar Rev. 1 at 20

¹⁹. [1917] A.C. 260

²⁰. at p.268-269

must not... be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed to the executive for legislative action in the case of an emergency,²¹ Laskin was of the opinion that judicial restriction on the authority of Parliament to delegate to the executive, legislative power it possesses would only be gratuitous, and that the fact of emergency could only make the case for delegation stronger.²²

In point of fact the court in the Chemicals Reference, although it was ostensibly following the decision in Re Gray, was a bit more liberal. To admit to a lack of competence to enquire into the activities of the Governor in Council, as the court did in the Chemical Reference was tantamount to shutting the door "left open" in Re Gray.

The growing liberality of the courts is not surprising, in view of the complexities of modern government. As the machinery of Government becomes more complex and government policies more intricate, the powers needed for day to day running of the of the government become even more extensive than those needed to fight a war. It can only be surmised that if Parliament may entrust great powers to the executive in time of great danger feeling certain that such powers will be reasonably exercised, then the same trust must be reposed in the executive in today's government.

²¹. Op cit at p.10

²².Laskin Op cit at 145

It would appear therefore that it is within the legislative competence of Parliament to delegate to the executive as much legislative authority as it pleases, so long as it does not abdicate its legislative functions completely, but retains the right to take away the delegated powers at any time. It must be admitted that this is a fine distinction. It is particularly difficult to decide that Parliament has not abdicated its legislative functions when one is faced with the very open ended enabling provisions that have become the norm in today's legislation.

The conclusion to be drawn is that whether in ordinary times, or during an emergency, the courts are rather restricted when faced with enabling provisions which empower the governor in Council to make such regulations "as he may deem necessary". As has been seen in the Chemicals Reference, words like these place the discretion fully on the Governor in Council and the courts are loath to enquire into the reasons or motivation behind the Governor in Council's exercise of his discretion.

Today, court decisions are found echoing the decisions in the wartime cases without the excuse of a war in the background to back them up. It would appear that the experiences of wartime legislation and the efficacy of delegated legislation in those circumstances, brought to light the fact that the exercise of immense powers by the executive does not necessarily mean the collapse of democracy. It also

seems to have revealed that there was more potential and latitude within the constitution for the exercise of executive powers than was hitherto realised. Whatever the case, the courts have cautiously but decidedly accepted and recognised the formidable power which reposes in the executive.

In Reference Re Proclamation of s.16 of the Criminal Law Amendment Act²³ Judson J. said that "once it has been ascertained that Parliament has given the Executive a certain power as it has done in this case by virtue of section 120 then it is beyond the power of the courts to review the manner in which the Executive exercises its discretion. Courts cannot examine the policy considerations animating the Executive."²⁴ The only concession made in these considerations is that executive powers be exercised only for the purpose of the object of the Act. Although this concession allows a measure of judicial control of executive powers, it is submitted that the extent of control by the courts is not very wide.

In that case the legislature had given to the executive power to proclaim and bring into law "any" of the "provisions" of the Criminal Law Amendment Act. The Governor in Council proclaimed just part of section 16 of the Act. It was argued that the proclamation of just part of the section was beyond the competence of the executive and amounted to an amendment of the statute; and that the act of the executive in fact

²³. [1970] 10 D.L.R. (3d) 699

²⁴. Ibid at p. 711

defeated the main object of the Act. The Supreme Court however refused to look into whether the executive had exceeded the legislative authority given to it by Parliament.

According to Hall J., under the Canadian system of Parliamentary responsible government, "the Executive is answerable to Parliament, and when Parliament by enacting s.120 gave the Executive a free hand to proclaim 'any' of the provisions of the Act... the responsibility for the result rests with Parliament which has the power to remedy the situation if the Executive actually acted contrary to its intentions".²⁵

Although Laskin pointed out in that case that the promulgation of subordinate legislation stands on a different footing because in such cases there is already in force the master legislation with which the subordinate enactment must comport, the attitude of the Supreme Court in this instance seems to indicate the Court's acceptance of the extensive legislative powers of the executive and a reluctance to review or enquire into the exercise of those powers.

Apart from the discretion that the courts must needs read into certain words where Parliament empowers the Governor in Council to make regulations for a stated purpose,²⁶ the

²⁵. Ibid at p. 716

²⁶. Driedger Op cit. Also Legislative Forms and Precedents (2nd ed.) p.192 e.g. The Governor in Council may make regulations for the control and regulation of air navigation over Canada and the territorial waters of Canada.

regulation making authority has a free hand to establish not only the details but also the main principles, and the entire law is therefore to be left to the Governor in Council.²⁷ So long as the regulation is within the stated purpose, it cannot be challenged.²⁸

Another great contributor to the increase of the powers of the executive under the parliamentary system is the status of the executive vis-a-vis the legislature. The members of the Cabinet are chosen from the legislature and in theory are responsible to Parliament. In practice however, the Cabinet controls Parliament. According to Matheson, it was only during the early years of Canada's history that Parliament was able to exercise some control over the Cabinet. In fact dominance of Parliament by the Cabinet has been the norm rather than the exception.²⁹ In describing the position in England, Halsbury states categorically that as a result of (constitutional) conventions, the most marked feature of the English system of government is the control of both legislative and executive functions in a small body of men, who agree on fundamentals and decide the most important questions of policy secretly in the Cabinet.³⁰

²⁷. Ibid.

²⁸. Ibid.

²⁹. Matheson W.A., The Prime Minister and The Cabinet Op cit p.181

³⁰. Halsbury's Laws of England(3rd ed.)vol.7, p.194.

The mechanics of this control are not difficult to fathom. Cabinet ministers are chosen from those members of the House most likely to command the support of a majority of the House. As a result, most of the legislation debated and passed in Parliament are government bills with very little time allotted to Private Member's bills. As Hogg puts it, "it must certainly be frustrating for legislators to find their role confined to ratifying of arrangements worked out elsewhere."³¹

An overt expression of this frustration can be read into the words of a new Member of Parliament who declared that as a new member she....is absolutely amazed at how little input private members have in the formulation of legislation, policies and/or regulations; and that it appeared to her that most of the time they (private members) are told what the minister will be announcing in 48 hours and they do not have access to, or any means to study or contribute or change the finished product.³²

In the report of the Special Committee on Reform of the House of Commons, it was said that years ago Parliament was the primary source of legislative initiatives, but today the legislative role of Parliament and its members is not to formulate but at best to refine policy.³³ Further it was

³¹. Hogg Peter W., Op cit p.108

³². Report of the Special Committee on Reform of the House of Commons (1985) p.1

³³. The Report of the Special Committee on Reform of the House of Commons p.2

stated that the onus of presenting initiatives is now borne by the Government whose wishes are carried out by its supporters.³⁴

It cannot but be wondered at how the executive came to be endowed with such immense powers. In the Report, the Special Committee said that the change in the Canadian system of government whereby the executive came to exert such influence was not the work of any single person or group. Rather it is the result of an increase in the responsibility of the government and the steps taken by the executive to deal with these duties. According to that report, it was inevitable that the expansion of government activities would require changes in the executive function of the government and a decline in the ability of the legislative branch to serve as the conduit through which individuals or groups could initiate or influence policy.

With the executive in such control, it is hypocritical to ignore the fact that even within the Parliament, the Executive is the main legislative authority. It would not be extreme to state that the executive actually delegates legislative authority to itself. The courts are even beginning to accept as fact a situation that has been stealthily creeping in on them since the war years.

In A.G. of Quebec v. Blaikie,³⁵ the Supreme Court said that

³⁴. Ibid.

³⁵. No.2 [1981] 1 S.C.R.312

"indeed it is the Government which does in practice control...the Legislature,...allocates time to its own measures and in most cases decides whether or not the legislative power is to be delegated." (emphasis mine)

Further emphasizing the powers of the executive, the Court in that case said that the Government of the province is not a body of the legislature's own creation; that it has a constitutional status and is not subordinate to the legislature in the same sense as other legislative agencies established by the legislature. Therefore "legislative powers so delegated to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the legislature." 36

It would appear therefore that not only are the power and influence of the executive increasing daily, but the courts recognise the Cabinet, and admit its immense legislative powers. As the Supreme Court observed in the Blaikie case, although the delegation of legislative powers to the executive was not unknown in 1867, such delegation was used sparingly and almost by way of exception, "the exception has now become the rule in some matters, to the point where a large and important part of the laws in force in the province consists of regulations passed by the Executive."³⁷

In effect therefore, when the courts declare that Parliament

³⁶. Ibid at 320.

³⁷. Ibid at p. 320-321

delegated power to the executive and that Parliament should remedy the situation if the executive has actually acted contrary to its intentions, the executive is fully involved in the decision whether the powers granted were excessive. In most cases it is unlikely to rule that the power was excessive.

Those who believe that "a strong executive even if you can have it, is a bad thing... that executive power tends to corrupt and...is easily abused,"³⁸ will view these developments with alarm. For them, consolation is to be found in the fact that for an executive to remain in power under the Parliamentary system, it must remain responsive both to the legislature and to the people.

It is a bit extreme to relegate the role of the legislature to that of merely "ratifying" arrangements worked out elsewhere. So long as democracy survives, the legislature retains a key role in ensuring that no matter the extent of the powers acquired by the executive, such power remains within constitutional boundaries.

Furthermore, in a constitutional atmosphere such as that found in Canada, the flexibility of conventions allows the balance to be adjusted if it appears that executive powers are increasing intolerably. An example of such an adjustment can be found in the recommendations of the Special Committee for the Reform of the House of Commons.

³⁸. Wheare, Legislatures p.72

The purpose for the reform of the House of Commons, said the committee, is "to restore to Private Members an effective legislative function, to give them a meaningful role in the formation of public policy and, in so doing to restore the House of Commons to its rightful place in the Canadian constitutional process". The Committee observed that the standing of the government in the house and the passage of its legislative programme has come to be regarded as essential parts of responsible government. The rarity of defeats of government measures in Great Britain led rapidly to the constitutional myth that every vote was a test of confidence.³⁹

This myth has persisted although precedent has shown that responsible government does not become unworkable when the executive bows to the wishes of the House on a wide variety of matters in a wide variety of circumstances.⁴⁰ An examination of the confidence convention by the committee members led them to conclude that a necessary step to conceding greater independence to individual members was for Government to relax their discipline over their supporters, at least to the extent of indicating in advance those measures and policies to which the confidence convention would apply.⁴¹

³⁹. Report of Special Committee on Reform of the House of Commons. p.6-7.

⁴⁰. Ibid.

⁴¹. Ibid chapter II p.5

Full implementation of these recommendations would mean a considerable check or curtailment of executive powers. If the myth that every vote is a vote of confidence is destroyed, then government policies will not automatically get passed. The ramifications of this would be that legislators would be able to vote independently in certain cases without bringing down the Government except where the vote is actually a confidence vote. Legislators would in fact enjoy an independence not quite as complete but akin to that enjoyed by their United States counterparts, who can effectively destroy government measures, secure in the fact that their actions do not affect the tenure of office of the Executive.

According to Marshall, traditional rules are not wholly to be relied on because of the vagueness of conventions relating to responsible government. Consequently the myth that governments resign when their measures are defeated has become just that in England as experience has shown that this is not strictly so.

Delegated legislation was another aspect of executive powers examined by the committee. In this respect, the committee observed that Parliamentary control of delegated legislation is not possible unless there reside in the Houses of Parliament a power to disallow such legislation. The Committee recommended a mandatory procedure for affirming or disallowing delegated legislation and regulations made pursuant to an Act of Parliament.

It is only fitting that the House of Commons should be the right avenue through which the increasing powers of the executive might be curbed, since the powers were allowed to the executive by Parliament in the first place. Even if the recommendations of the Committee are not implemented in full, the report would have acted as an alarm signal, and, given the trend in Canadian Constitutional history, the necessary adjustment, however slight will be made. It is doubtful however that whatever adjustments are made will result in any significant reduction in the powers of the executive, for in today's complex government the executive to maintain a "firm hand at the tiller" must retain a great deal of its discretionary powers.

Increase of the Powers of the Executive in Nigeria under the Parliamentary System.

It is difficult to speculate on the direction in which executive powers would have developed under the Parliamentary system in Nigeria. The only obvious fact is that in spite of the details spelt into the constitutional document the powers would have been considerably abused. In fact, the nightmare of executive dictatorship and autocracy dreaded in parliamentary democracies would have been fully realised under the system.

To support this conclusion the exercise of the emergency powers of the President need only be discussed. The Nigerian statute which can be regarded as the equivalent of the

Canadian War Measures Act (now Emergencies Act) is the Emergency Powers Act enacted with effect from March 31, 1961. To understand the origin of this Act, the Constitution of 1963 must be referred to.

Section 70 of that Constitution, provided that "Parliament may at any time make laws for Nigeria or any part thereof with respect to matters which appear to Parliament to be necessary for the purpose of maintaining the Peace, Order and Good Government of the nation during any period of emergency". For this purpose, a period of emergency was defined by subsection (3) of that section to include "any period during which-

(ii). there is in force a resolution of each House of Parliament declaring that a state of public emergency exists; or

(iii) there is in force a resolution of each House of Parliament supported by the votes of not less than two thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion".

In exercise of the power to make laws with respect to the maintenance of Peace Order and Good Government, Parliament passed the Emergency Powers Act of 1962. The Act authorised the President in Council to make "such regulations as appear to him to be necessary or expedient for the purpose of maintaining or securing Peace, Order and Good Government in Nigeria or any part thereof". It further empowered the President in Council to amend, suspend or modify any law enacted by any legislature in the country. Any regulation made had effect "notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which is

inconsistent with such regulation... shall to the extent of such inconsistency have no force so long as such regulation remains in force".

It is obvious that even the courts in Re Gray and the Chemicals Reference would be hard put to hold that there was no abdication in this instance. According to Nwabueze, a delegation of power in these terms not only destroyed the already "attenuated foundation of the separation of powers under the Constitution, it also impaired that aspect of the rule of law which requires that executive acts be justified by law and that the executive should not be the body to confer the necessary legislative authority on itself.⁴²

The actual exercise of the powers by the President in Council completely betrayed the confidence expressed in R v. Halliday⁴³ that in times of great public danger Parliament can delegate immense powers to the executive and that Parliament may do so feeling certain that such powers will be reasonably exercised.⁴⁴

In the disturbance that arose as a result of the Court's decision in Adegbenro v. Akintola⁴⁵, Parliament declared a state of emergency in the Western Region. The President in

⁴². Nwabueze B.O. - Constitutionalism in the Emergent States, p.176.

⁴³. Op cit. Discussed on p. 81 of this paper.

⁴⁴. at p.268-269

⁴⁵. Discussed in great detail in chapters one and two of this paper

Council in exercise of the powers given to him by Parliament passed a stream of regulations which gravely endangered the practice of democracy.

In Nwabueze's estimation of the situation, the declaration of the state of emergency was in itself ill-motivated.⁴⁶ According to him the only thing that had ceased to function was the Legislature. The rest of the region was going on with its business. The exercise of the powers in this instance was a great abuse as the federal government would have been able to deal with the matter without resorting to such drastic measures.

As can be seen the combination of the provisions in the Constitution and the Emergency Powers Act created for the executive, potential powers far beyond that contemplated in Canada by the War Measures Act. From the account given above of the exercise of those powers, there is little doubt that the powers were grossly abused. Faced with provisions which have been termed "subjective" rather than "objective" the politicians played the subjectivity to its fullest extent.

It is significant to note that in the instance reported above, the provisions of the Emergency Act and of the Constitution were called into play, in circumstances that some constitutional lawyers have found difficult to justify. Also worthy of note is the reaction of the courts when asked

⁴⁶. Nwabueze B.O., Constitutionalism in the Emergent States, p. 176

to decide on the validity of the Emergency Powers Act. According to the then Chief Justice of the Federation, "the existence or non-existence of a state of public emergency is a matter apparently within the bounds of Parliament, and not for the court to decide."⁴⁷

It is obvious that had the legislature and the executive been able to maintain the delicate balance of power essential in a parliamentary system, and had democracy prevailed, this decision alone was enough to act as a catalyst for a rapid increase in the powers of the Nigerian executive. It can only be concluded that despite the fact that under the Nigerian Parliamentary Constitution, executive powers were properly delineated, the Nigerian Parliament would still have used its prerogative to delegate to the executive whatever legislative or other powers it chose.

The tendency of the Nigerian Parliament to delegate its powers in emergency situations, to the point of abdication, and the leeway provided in the Parliamentary Constitution, can be attributed to the nature of the problems generated by the composition of the society. Nwabueze succinctly describes it when he says-

"Emergent nations are having to live under an almost continual state of emergency. Their societies are not only plural, but are often riven by deep-seated division between component groups. The process of transforming a primitive, traditional society into a modern one has also imposed its own

⁴⁷. Williams v. Majekodunmi [1962] 1 All N.L.R. 43. In this decision the court avoided the main question as to the constitutionality of the Act itself.

strain....."⁴⁸

The fact that as a result of tribal differences the leaders of the nations believe themselves to be in a state of emergency all the time, does not however excuse the blatant advantage taken of the situation in Nigeria under the Parliamentary Constitution. It is unfortunate that in addition to the basic characteristic of the parliamentary system, the circumstances in Nigeria are such that if the Prime Minister is capable, and has the personality to carry it off, executive powers can very easily be increased to autocratic levels.

In discussing the sources of executive power in Nigeria, Nwabueze⁴⁹ has said that the constitution is only one of the sources of presidential power, though no doubt an extremely important one, but that the reality of the power depends on other factors besides its formal structure as defined in the Constitution.⁵⁰ These factors include the deference to authority that tradition has inculcated in the population. This attitude towards authority tends to be transferred to the modern political leader.⁵¹

In conclusion Nwabueze states that the President is thus a popular leader of "apersonal and spiritual kind for he

⁴⁸. Nwabueze B.O., Constitutionalism in the Emergent States p.173.

⁴⁹. Nwabueze, Presidential Constitution of Nigeria, p. 102.

⁵⁰. Ibid.

⁵¹. Ibid p.104

has to be at once leader, guide, and teacher, and as the leader of a blind man has to establish an intimate personal identification with him, so it is with the leader of a new nation".⁵²

In the face of this combination of factors, the type of constitution in force becomes irrelevant. The Nigerian leader is expected to play the same role played by George Washington for the Americans at Independence. He is expected to be a figure to be looked up to with respect and admiration.

Whether or not the Nigerian executive is able to turn the circumstances to its advantage, it can be seen that the state of affairs where "tribal conflicts create a state of affairs comparable to a state of emergency and demand action of an authoritarian type to preserve peace and integrity of the state" are but mere variations on Wheare's theme on the basis for the increase of executive powers.

Increase in Executive Powers Under the Nigerian Presidential Constitution.

As the executive is not part of the legislature under this system, its influence on the legislature is considerably reduced. Any increase in the powers of the executive must be brought about through other avenues. In the American Constitution, says Wheare, the government is so closely controlled and criticised by committees of the Legislature

⁵². Ibid, p.105

that tyranny through the exercise of powers of delegated legislation cannot be easily accomplished.⁵³ From the provisions of the Nigerian Constitution discussed in chapters one and two, it is obvious that this was the state of affairs desired by the drafters of the Nigerian Presidential Constitution of 1979.

While it has been seen that within the legislative field, the Canadian executive is very active, under the presidential system the legislature is reluctant to delegate wide powers with unbridled discretion to the executive. Although delegated legislation is not unknown in the Presidential system it has been held that powers delegated must be specifically described and standards of exercise controlled by the legislature.⁵⁴

According to Nwabueze, by separating the function of execution from that of lawmaking, by insisting that every executive action must in so far as it affects an individual, have the authority of some law, and by prescribing a different procedure for law-making, the arbitrariness of executive action can be effectively checked.

Executive powers under the presidential constitution are thus increased mainly by interpretation of the provisions of the constitution both by the courts and by executive interpretation of legislation. According to Corwin, while the

⁵³. Wheare, Legislatures p.112.

⁵⁴. Schecter Poultry Corporation v. U.S. 295 U.S.495; 55 S.Ct,837.

court has sometimes rebuffed presidential pretensions, it has labored more often to rationalize them; but, most of all it has sought one pretext or another to keep its sickle out of this 'dread field'. He explains that this policy may be owing partly to the fact that the President has the 'power of the sword' or the immediate command of the physical forces of the government; and partly to the related fact that while the court can usually assert itself successfully against Congress by merely "disallowing" its acts, presidential exercises of power will generally have produced some change in the external world beyond ordinary judicial competence to efface.

The American Constitution provides that the President shall "take care that the laws be faithfully executed" and the interpretation of that provision has been responsible for a great percentage of the increase in the powers of the executive.⁵⁵ Under the Nigerian Constitution, section 5 (1) provides that "subject to the provisions of the Constitution, the executive powers of the Federation shall be vested in the President and shall extend to the execution and maintenance of the Constitution, to all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being powers to make laws".

This provision is apparently wide enough to validate the observation made of the American Constitution that the

⁵⁵. See generally Corwin E.S. THE PRESIDENT Office and Powers 1787-1984.

Assembly appears to have studiously selected such loose and general expressions as would enable the President, by implication and construction either to neglect his duties or to enlarge his powers.⁵⁶ The provision in the Nigerian Constitution that the power of the President extended to all matters with respect to which the legislature has the power to make laws can only mean that the President can "acquire authority from the silences of the (Legislature) as well as from its positive enactments."⁵⁷

One of the other provisions of the Nigerian Presidential Constitution that has the potential to increase the powers of the executive greatly is the provision that the President shall be the Commander in Chief of the Armed forces. In the United States it has been said that the Commander in Chief clause along with the provision that the President "take care that the laws be faithfully executed" has supplied the basis for most of the vast expansion in the Presidency.⁵⁸ It has also been said that "of all his powers, the most basic, spectacular, and injurious to private rights is that which the

⁵⁶. Corwin, Op cit, p.22

⁵⁷. Ibid p.143

⁵⁸. May Ernest R., "The President Shall be Commander in Chief" in May Ernest R., (ed.) THE ULTIMATE DECISION The President as Commander in Chief (George Braziller, New York 1960)p.5

President holds as Commander in Chief".⁵⁹

The decision to make the President the Commander in Chief is said to have been influenced by George Washington's experience, prestige and personality.⁶⁰ In explaining the reason behind the Commander in Chief clause, Woodrow Wilson wrote that it is the fundamental principle of the American institutions that the military power is subordinate to the civil, and that the idea of making the President the Commander in Chief of the Army and Navy of the country was that the armed forces of the country must be the instruments of the authority by which policy was determined.⁶¹

Unfortunately, in Nigeria this provision in the constitution has not been very effective in keeping the military subordinate to civilian power, or in ensuring that control of the armed forces remains in politically responsible hands. As a tool for the increase in the power of the civilian executive, it has proved to be a dead letter.

Even under the parliamentary constitution, the provision that the President should be the Commander in Chief led to some confusion. This confusion probably arose from the fact that the President's power in this case was analogous to that of the Queen in Canada. The problem was that while the

⁵⁹. Clinton Rossiter, The Supreme Court and the Commander in Chief quoted in May, op cit.

⁶⁰. May Op cit p.7

⁶¹. Letter by Wilson, quoted in May Op cit p.3-4.

constitution designated the President as the Commander in Chief of the armed forces, and provided that his functions as such would be such as might be prescribed by Parliament, the statutes governing the armed forces made no reference to the Commander in Chief.⁶²

Under those statutes overall responsibility for the operational use of the forces was vested in the Council of Ministers. At the same time the Prime Minister was empowered to direct the commanders of the various units of the armed forces with respect to the operational use of the forces for the purposes of maintaining and securing public safety and public order, notwithstanding that the directions of the Council of Ministers had not been obtained.⁶³ It was therefore hard to tell in whose hands the real power over the military really rested.

Under the Presidential Constitution the problem acquired another form. Power over the armed forces was by the 1979 Constitution unequivocally vested in the President, but the President seems not to have been able to exploit this immense power, both to increase his own powers, and to keep the military in check.

In the United States therefore the provision has ensured that with the President as Commander in Chief, military decisions are made by someone politically responsible, and

⁶². Nwabueze, Constitutionalism, p.60.

⁶³. Ibid.

also that to some extent, military men and military issues are kept out of politics in time of peace. In Nigeria, on the other hand, the provision seems to have been put into the constitution without regard to its full implications.

The attitude of the military towards the Constitution might have something to do with the situation in Nigeria. The mere fact of a military take over indicates that the military themselves do not accept the President as the Commander in Chief. It would appear that prior to the first military take-over of 1966, there was no question but that the military in Nigeria accepted that civilian politics was completely outside their realm, and thus technically accepted the command of the civilian head of state, such as it was.⁶⁴ It would appear however that with the eventual handing over of power to the military by the civilians in 1966,⁶⁵ and the exercise of that power by them for so many years, the military gradually ceased to regard the civilian head of state as the de facto Commander in Chief no matter what the constitution said⁶⁶. Certainly a Commander in Chief who can be so easily displaced with no serious repercussion, cannot be worthy of his command.

Another point is that the military in the United States have

⁶⁴. Some accounts of the first coup seem to indicate that the senior commanding officers in the Nigerian army were unwilling at first to take over power.

⁶⁵. see Chapter 2 of the thesis.

⁶⁶. The proliferation of military coups in other third world countries has also helped in encouraging the military to continue interfering in civilian government.

specific and particular roles which they play in the government of the country and so do not need to take over political power before the government can benefit from its contributions. The Joint Chiefs of Staff meet weekly to discuss reject, amend, or accept recommendations on papers in which their staff have informed, advised or warned them. They then send their recommendations to the White House through the Defense Secretary and Assistant Secretary for the final decision of the President.⁶⁷

In Nigeria, it appears that the role of the military in government has not been properly defined, and they do not therefore make the considerable contributions in the fields of specialization that the military in the United States seem to make. The military thus assume that to meaningfully contribute to the government of the country they have to be completely in power or not at all. Furthermore with their acquired experience in government the military now seem to regard themselves as a legitimate alternative government with the prerogative to take over power whenever they feel that the civilians are not governing properly.

The additional task Nigerian politicians now face is that of winning back the confidence of the military and convincing them that a civilian government can govern according to the rules and that it also deserves to be in control of the military. If the civilians were able to do this under the

⁶⁷. May, (ed.) Introduction p.xii

presidential constitution then the provision that makes the President the Commander in Chief would have become the same active tool of executive power that it is in the United States. It is possible that with the increase of executive powers allowed by this provision, section 1 of the Presidential Constitution, which provided that no person shall take over the government of the country except in accordance with the provisions of that constitution would not have been so futile.

The idea of allowing the military more involvement in civilian government in order to prevent further coups was blown to controversial proportion by Dr. Nnamdi Azikiwe, first Nigerian president when he proposed in 1972 that the country adopt what he called a dyarchy. According to him, the military should not transfer power completely to a civilian ruler, but rather a combined civil and military government should rule the country on a democratic basis for five years. Thereafter the continuation of such a regime should be reviewed in the light of experience and reason.⁶⁸ This proposal however smacks of despair and as admitted by the proponent was influenced by his preoccupation with "stability", past failure of democracy in Nigeria, fear of "cyclical recurrence of revolutions or coups", and general pessimism.

Another way in which executive powers can be greatly increased under the presidential system is by way of covert

⁶⁸.Adekson, Op cit p.13-14

action and the President's prerogative and discretion in security matters. This was evident in the events brought to light as a result of the Iran/Contra scandal. As has been seen in chapter two of this thesis, security matters and foreign policy are constitutionally reserved for the President. In this regard the Legislature has very little control over executive actions. The extent of the President's power is thus more obvious in foreign policy as domestic policy is strictly policed by Congress.

Presidential findings under the American system are the zealously guarded prerogative of the executive branch. The President decides on covert action and the Congressional committees are "informed".⁶⁹ Of course Congress can always refuse to vote the money for the action if it disapproves strongly enough, but it has no power to change the President's decisions in any way.

It is difficult to speculate on how this aspect of the American presidential system would have translated in terms of the Nigerian version. It appears a safe assumption that this is one aspect of the American Constitution that would have followed the American model precisely. The main impediment however would have been found in the constitutional obligation that the President consult with the Council of Ministers on all matters of policy unless the Constitution provides that he

⁶⁹. Woodward, Op cit p.252.

consult some other body.⁷⁰ This provision placed more restraint on the Nigerian President than on his American counterpart. Given the status of the country as a leader nation in Africa, it is safe to assume that the role of the President would have been such as would have required him to exercise those powers that flow from security and foreign policy that come with the Presidential Constitution.

It is the practice in most countries that one country speaks to another through its Executive.⁷¹ Although a treaty made by the President is not effective until ratified by Congress the President can circumvent Congress by entering into an Executive Agreement.⁷² This means that if the President wishes to conclude some arrangement with a foreign state, he is not bound to make it in the form of a treaty, but may simply make an agreement on his own authority and sign it.

In U.S. v. Belmont⁷³ the court held that such an Executive Agreement had the same legal effect as a treaty duly made and ratified. Although Congress can repudiate such an agreement by law, and a later President can abrogate it, Executive Agreements appear to have worked in the United States as an effective way of allowing the President to operate without concurrent congressional approval.

⁷⁰. Section 132 of the Nigerian Constitution of 1979

⁷¹. Wheare, *Legislatures*, p.115

⁷². Wheare, *Legislatures* p.118-121.

⁷³. (1937) 301 U.S. 324

In Nigeria, while the President had the power to make treaties with other countries, no treaty concluded by him had the force of law except to the extent to which it had been enacted into law by the National Assembly.⁷⁴ The brief sojourn of the civilian President makes it impossible to determine whether or not he would have been able to increase his executive powers by means of Executive Agreements as developed in the United States.

In the absence of a separate legislature to pass treaties into law under a military government, the military executive enters into Executive Agreements all the time. As the military has enjoyed long periods of power in Nigeria, it is possible that the civilian president would have adopted some of the military's long time habits, and Executive Agreements would have become the most effective means of avoiding the delay arising from the need to wait for the National Assembly to pass a law.

Another common reason for an increase in the power of the executive, in every system of government, is in the exercise of emergency powers. The emergency powers in the Nigerian Presidential Constitution are however not nearly as wide as that provided for under the Parliamentary Constitution.

Subsection 265(1) of the Presidential Constitution provided that "the President may by instrument published in the (federal) Gazette, issue a proclamation of a state of

⁷⁴. 1979 Constitution of Nigeria Section 12.

emergency in the Federation or any part thereof, if the Federation is at war, or there is an imminent danger of invasion or involvement in a state of war, or there is an actual breakdown of public order and public safety, or a clear and present danger of such a breakdown. Further the President could also declare an emergency if there is the occurrence of imminent danger, or the occurrence of any disaster or natural calamity affecting the community or a section of the community in the Federation, or if there is other public danger that clearly constituted a threat to the existence of the Federation. Another instance in which the President could declare an emergency was if requested to do so by a state governor after a resolution passed by two thirds of the members of the state House of Assembly declaring that one of the situations mentioned above existed in the state.

It can be seen that the Presidential Constitution of Nigeria was much more explicit in its definition of a state of emergency than was the Parliamentary Constitution. The Emergency Powers Act passed under the Parliamentary Constitution was not repealed under the Presidential Constitution, but it is probable that if its provisions were tested under the provisions of that constitution the courts would have declared them unconstitutional.

Under the American Constitution, although the President's war powers have been given wide interpretation, it still does not seem to repose in the President the immense powers that

have been evident under the parliamentary system. After studying the American cases on the issue, Nwabueze is of the opinion that the fact that martial law has been declared does not by itself confer unlimited power on the executive.⁷⁵ Under the Parliamentary system, the doctrine of parliamentary supremacy, together with the status of the cabinet have precluded the courts from enquiring too closely into the exercise of powers purportedly vested in the Executive by Parliament. The American courts on the other hand have been able to examine each case closely and to enquire into the constitutionality of each exercise of emergency powers.

In addition to the fact that executive powers under the Presidential system are open to review by the courts, the Nigerian executive also had to contend with the greater powers exercised by the Legislature under its Presidential Constitution. However given the short span in which the Constitution was operated the nature of the increase in the power of the executive can only be speculated upon. The character of the President and of the people, and the circumstances in the country which place enormous responsibility on the President might have brought about an increase in presidential powers on a different pattern from that seen under the American system.

From the trend noticed in other countries, it becomes apparent that for the government to function effectively in

⁷⁵. Nwabueze, Presidential Constitution of Nigeria, p.101

modern times the powers of the executive in Nigeria would have had to increase. It might not even be an exaggeration to say that the failure of the executive to exercise its substantial powers contributed in part to the failure of the presidential system in the country.

Increase of the Power of the Executive Under the Military.

Undeniably the most blatant display of increase in the powers of the executive is to be found after a military coup. It is as if the military come to power determined to bring to light the fact that the executive can make as well as execute laws.

The increased involvement of the military in government however is not necessarily associated only with military take-overs. In democratic presidential regimes like that of the United States, the involvement of the military in politics has been used to increase and enhance the powers of the executive. The position of the President as the Commander in Chief has been discussed in detail above. The increasing influence of the military in American affairs has been described as the most ominous aspect of modern history.⁷⁶

That military involvement in civilian government is ominous, whether looked at in terms of the increase in the power of the executive, or otherwise becomes obvious under a military regime. As has been seen in chapters one and two,

⁷⁶. Justice William O. Douglas in Look Magazine quoted by May Ernest R., "Eisenhower and After" in May (ed.) Op cit p.213

under the military regime in Nigeria, the military executive assumes unlimited powers. In a democratic nation like the United States or Canada, the courts can intervene on behalf of the people, and curb the power of the executive, but under the military government, the people are completely at the mercy of the executive. It is only through the forbearance of the head of state that the rights of the executive are curtailed in any way.

The advantages evident in the separation of the function of execution from that of law making are completely lost under a military regime. The plenitude of powers assumed by the military executive can, when expedient, even encroach on the hallowed domains of the judiciary.

With their increased experience in politics however the military-bureaucratic system has attempted to strengthen the centre, while yielding a measure of initiative and power to the states.⁷⁷ In particular with the carving out of more states from the existing structure,⁷⁸ and the assumption of enormous powers by the central government under the military

⁷⁷. Odetola, Op cit Introduction p.xiv

⁷⁸. At independence the sizes of the regions which made up the country were quite disparate and each one was able to strengthen its power base against the federal government and the other regions. In 1967 military government created twelve states out of the four regions which made up the country, by dividing up each region and creating more governments in the country. A similar exercise in 1975 further divided up the country and produced a total of nineteen states. Very recently in 1987, two of the states in the country have again been subdivided bringing the total of states in the country to twenty- one.

regime, immense powers which were exercised by the regional governments under the parliamentary system, with which they were able to hold the central government to ransom have been diffused. At the same time the creation of new states has meant that no one state is big enough to hold either the federal government or the other states to ransom.⁷⁹

This means that in spite of the fact that there is actually nothing to curb the exercise of immense powers by the military executive in Nigeria, the military has been more accountable than the civilian regime. Also, in its tendency towards centralization it has also assumed similar characteristics to modern democratic governments. Its most obvious characteristic has been of course the assumption of greater powers by the executive.

The fact remains however that it is not normal for the military to be so actively involved in politics. The central thrust of modern democratic government is that the people should be able to choose their governors, and although the fundamental human rights entrenched in the Nigerian Constitution are more or less honored by the current military regime, the idea that it is within the power of the government to abrogate those rights at any time is out of keeping with the spirit of democracy and quite frightening.

Furthermore it is not healthy for any society to remain in a state of emergency for an indeterminate length of time. No

⁷⁹. Odetola, Op cit Introduction p.xiv

matter how well the military executive equates to modern government in terms of bureaucratic expertise and centralization of government, the means of putting the machinery of democracy and constitutional government should be pursued. With the military in power the process can only be brought about under their supervision and this by itself further enhances the position of the military.

CHAPTER FOURConclusion.

Having discussed and compared the nature of the constitutions, their operation and the results of that operation in the first three chapters, this chapter summarises the major points that have been made so far, considers contemporary developments in the constitutional law of Nigeria and Canada and speculates on future constitutional developments in the two countries.

As has been seen, the nature of a constitution and the provisions for executive powers are dependent on the problems that the constitution is expected to solve. The operation of the constitution, and thus its success or failure depends on the people operating the constitution and their attitude towards it. Finally, whatever the nature of a constitution, or the manner in which it is operated, the result in terms of modern government is an increase in the powers of the executive.

To charges that the Constitution of Canada has outlived its usefulness and that the federal executive has exploited it to develop its powers to an extent not envisaged by the founding fathers, various answers have been given. In the first place it has been pointed out that the Constitution of Canada is much more than a single document, and "depends on statutes, and common laws rules which declare the law and have the force of law, and conventions developed in political science which, while not having the force of law in the sense

that there is a legal enforcement process of sanction available for their breach, form a vital part of the constitution without which it would be incomplete and unable to serve its purpose."¹

To amend the Canadian Constitution or draft a new one in its place would thus involve major surgery to remove practices that have become so much a part of the system that they are almost incorporated into the national character of Canadians. In the opinion of Black and Cairns,

"The present structure has exhibited a marvelous degree of flexibility, but if the assumption gains currency that this structure must be scrapped and a new constitution written in both form and substance, then the prospects will not be hopeful. Rewriting constitutional documents is neither a mere exercise in legal logic nor a simple process of transforming a few accounts from one side of the ledger to that. In rewriting such documents one embarks on the reshaping of the entire set of interdependent relationships between government and peoples which has evolved during a full century."²

According to Scott " the choices they (the fathers of confederation) made are not necessarily the best for today. But it seems... both interesting and relevant to know why they made them, so that if we decide to alter their scale of values, we do so deliberately and consciously."³

As certain important criticisms levied against the constitution have centred around the executive provisions, it

¹. Re Resolution to Amend the Constitution of Canada [1981] 1 S.C.R. 753 at 852-853.

². Black and Cairns, A Different Perspective on Canadian Federalism (1966), 9 Can. Pub. Admin. 27 at 28.

³. Scott, Op cit p.24.

makes the task of drafting a new constitution when contemplated even more arduous. A new document would have to define and circumscribe executive powers that have hitherto been implied and understood. The drafters would have to decide whether this can be done successfully within the framework of a parliamentary system. If they decide that it cannot be so done they would have to decide on what new system of government should be adopted, one of course that would have to be generally accepted by Canadians in order to make it valid and effective.

Should the drafters choose to look towards the United States as an example they would have to decide on how to surmount the problems that have been highlighted in the American system, and in addition, tailor that system to fit specifically into peculiar Canadian circumstances. It would be equivalent to throwing away the experiences of over a century and rebuilding a new nation.

As has been pointed out by constitutional lawyers,⁴ the constitution as it stands has seen the country through two wars, and has survived economic depression. It has shown itself so capable of adapting to the circumstances that it seems rather futile even to contemplate any drastic changes.

Discussions of constitutional reform in Canada has so far only brought about what can only be described as compromises. The first major compromise was in 1982 with the patriation of

⁴. Cheffins and Tucker specifically.

the Constitution, and the adoption of the Charter of Rights, an amending formula, minor changes in the distribution of powers and certain other changes. Currently the Meech Lake Accord is being proposed to re-examine the status of the provinces and their relationship with the federal government. It is in effect an attempt to reach a compromise with the province of Quebec, and incorporate constitutional amendments that would be acceptable to the province and gain its consent to the 1982 reforms.

For Canada these are major constitutional adjustments, but adjustments that have not really affected the framework of cabinet government in any direct way. It is expected that future constitutional developments in the country will continue to reflect the pragmatism of Canadian politicians, and to comply with the rules of constitutionalism.

On the other hand changes to the Nigerian constitution are again being contemplated. A Constitution Review Committee was set up within the last year to again study the constitution and submit its recommendations for change. Before this a series of debates were held to solicit opinions as to which system was most suitable for the country.

The Constitution Review Committee has since submitted its report, but its recommendations have not yet been published. It has been reported in the newspapers however, that one of the recommendations made by the committee is that the President should hold office for a term of six years and

should not be eligible for re-election. It is also reported that the committee, to take care of the fears of the minority, has also recommended that the presidency be rotated from one ethnic group to another.

It is interesting to consider why it should be so easy to keep changing the constitution in form and content in Nigeria, while a similar project is almost impossible in Canada. In the first place while the Nigerians have hardly had time to become familiar with the provisions of the different constitutions, the Canadians have gradually developed and created their own Constitution over the span of a century. The different Nigerian constitutions have thus not had the opportunity to be assimilated into the fabric of the nation the way the Canadian Constitution has been.

With the Canadian Constitution so much a part of the fabric of the nation any drastic change is almost a painful experience. The two major compromises discussed above met with considerable resistance. Patriation of the Constitution had to go ahead without Quebec. The fact however is that no matter the controversies engendered in the process of constitutional change in Canada, the institutions of government remain in place after the matter is resolved. The rules of government have been worked out and are observed by the Canadian government even in the midst of the most turbulent times as witnessed by the ultra-legal processes sought for and observed by the government of Quebec in its attempted prelude secession

of 1980.

In contrast to the Canadian situation, the actual provisions of the constitutions in Nigeria and the government of the country have remained total strangers. To change the state of affairs, whatever the type of constitution decided on by Nigeria, the politicians should be prepared to follow the basic rules established by the document and try to adapt it to the needs of the society. The executive in particular should be ready to play the leadership role expected of the executive in any system of government. In this way, with the passage of time, the Constitution could be adjusted and assimilated into the fabric of the nation.

With the long duration of military government in the country, it can almost be said that the "military constitution" such as it is, has become more a part of the Nigerian society than any of the civilian constitutions. It is probable that the politicians can learn valuable lessons from the military executive. It would be extreme to suggest that the civilians dispense with the separation of powers and govern by decrees, no matter how efficacious this has been under the military government.

One way in which the lessons learnt under the military could be put to constructive use is in the adaptation of the more efficient military institutions into the civilian mode. A little of this was done under the 1979 Constitution, when institutions like the National Council of State set up by the

Military, to advise the military executive, were retained with modifications under the civilian regime. The National Council of States⁵ with its representatives from all the parts of the country was one way in which to ensure that the problems of ethnic and tribal conflicts experienced under the first republic were ameliorated.

It has been said that the problems of national integration and modernization make the establishment of a strong government in Nigeria inevitable.⁶ The relative success of the military government in Nigeria seems to support this theory as the military government is nothing if not strong.

The point should however be remembered that the mere fact of military rule indicates that there is some irregularity in the government. Because man is basically a political animal, the military can only govern where a state of emergency is seen to exist. In Nigeria, the military executive has seemed relatively successful because despite the suspension of democratic institutions, and of the electoral and political machinery, the fundamental human rights embodied in the Constitution have been generally honored. It would appear from the Nigerian experience that for the military executive to become oppressive, it needs to remain in power for some length

⁵. The National Council of States is an advisory body that was introduced by the military, and is made of all the governors of the different states and some traditional authorities chosen by the local governments. All former heads of states of the country are also members of the Council.

⁶. Odetola Theophilus O., Military Politics in Nigeria, p.23

of time. The Nigerian society is such that no military ruler has been allowed to remain in power long enough to acquire oppressive powers.

In 1985, the military regime that had been in power from January of 1984 was overthrown because its decrees were becoming oppressive. In particular the Supreme Military Council had promulgated Decree No. 4 that almost effectively muzzled the press. Apart from that short period, the Nigerian press are, when compared to other countries under military rule, reported to enjoy a surprising degree of freedom. Because some newspapers are privately owned, they have formed a medium through which the actions of the government can be monitored to a certain degree. The Nigerian press is however not as vocal as the Canadian or the United States press, and it is difficult to have a true gauge of its freedom. The Nigerian press is not really vigorous and investigative enough to actually challenge the military authorities, and though the press does criticise government actions, unsubstantiated rumours of government intimidation of the press make it difficult to tell whether there is some subtle government censorship and the acclamation of its freedom mere window dressing.

The few good points discussed in favour of the military are not to be construed as advocating military rule as the ideal government for Nigeria. Under the economic depression now plaguing the country, and because of the important role which

the military has assumed in the country's politics, the military appears to be the most effective instrument to bring the economy back to normal. Though there is no proof that a civilian government would not have performed the same job, the failure of the politicians to play by established constitutional rules seems to indicate that they would not have been able to act effectively under an emergency like the one currently caused by the state of the national economy. It must be observed however that some of the policies implemented by the military executive were actually spawned by the civilians. Unfortunately, the civilians were not focused and disciplined enough to implement the policies themselves.

It has been said that political modernization of a state involves the rationalization of authority and the replacement of a large number of traditional relationships.⁷ For political modernization to succeed however it needs more than the mere replacement of traditional relationships. In fact the failure of the civilian executive to take cognisance of the importance of traditional relationships and the failure to assimilate them properly into the system, might have contributed in part to the fall of the different civilian governments.

It is true that under the Parliamentary Constitution in particular, the traditional rulers were a part of the government by way of the various Houses of Chiefs but the effectiveness of their assimilation is doubted. Through the

⁷. Ibid.

re-organization of the local government system the military has been able to assimilate traditional relationships better at the grass root level.⁸

As has been stated earlier, the role of the military in government should be properly defined. With the propensity of the military to take over the government, it is no longer enough to assume that the military are aware of their duties. The tendency is that without clearly defined rules and a workable compromise the military then assume that their role is to oversee the government and not only keep the politicians on their toes, but also be ready to step in if needs be. Whatever rules or compromises are worked out there should be a strong caveat that the military should remain subordinate to civil rule.

In this way the civilian executive would continue to benefit from the experiences, training and knowledge that can be contributed by the military. At the same time the civilian executive would develop on its own terms, establishing conventions of its own through experience and usage.

A new Nigerian constitution would in these circumstances, not necessarily mean that the country has to start afresh as a new nation. Instead, just as the Canadian constitution has developed through the years, and benefitted from experiences accumulated both in Canada and the United Kingdom, so the

⁸. See generally Oyeleye Oyediran Op cit and Panter-brick, Op cit.

Nigerian Constitution would develop, benefitting from experience accumulated during the military regime.

A healthy political system must have smoothly functioning political institutions which are capable of evolving to take account of changing demands and expectations on the part of participants within the political system.⁹ This in effect has been the experience in Canada and Nigeria can learn much from Canadian Constitutional history and tradition. If proper stock is taken of existing government institutions and allowances made for established practices and conventions developed over the years then the Nigerian constitution would properly be regarded as a body of principles, and not as a rigid system of rules.

If the Nigerian constitution can be taken as the flexible body of principles that it should be, then the inadequacies of the executive and the other politicians would not be blamed on the constitution every time a government fails. According to Cheffins and Tucker, "since political institutions usually have some basic reason for their existence and form, they must be compared with and weighed against the demands and reason for change."¹⁰ If this can be done in Nigeria and in Canada, the chances are that the scale will be tipped in favour of the retention of the old familiar institutions.

⁹. Cheffins and Tucker, The Constitutional Process in Canada p.1

¹⁰. Ibid.

As some Canadians complain against the excesses of the executive under their constitution, and the various flaws found within that constitution, they should look beyond the form to the substance of the constitution. It is then that they can really decide whether at this stage of their development, they are ready to do away with a system which has served them so well, and venture into uncharted waters. They should also consider whether the elasticity of the system which has been so flexible and adaptable cannot be stretched to remove whatever flaws are now found within it.

Meanwhile in Nigeria, an attempt should be made to ensure that the constitution, whether or not the old one is retained, is endowed with the elasticity necessary for a workable constitution. The constitution is usually declared unworkable after the military takes over power. It can be accepted that the "ultimate sanction against usurpations of power" the bane of the Nigerian Constitution is a "politically conscious society jealous of its constitutional rights to choose those who direct its affairs."¹¹

In the long run

"When all is said, there is hardly any frame of government so ill designed by its founders that in good hands would not do well enough; and story tells us the best in ill ones can do nothing that is great and good...Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too"¹²

¹¹. Panter-Brick K., "The Constitution Drafting Committee", in Panter-Brick K. (ed.) Soldiers and Oil p.311

¹². William Penn quoted by Corwin, Op cit p.37.

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