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## **ABSTRACT**

Nigeria operates a governmental system based on a written constitution. The idea of constitution and constitutionalism is of a more recent one as the country has witnessed a long era of military rule. While the country, at present, has a written constitution which in reality, was derived from a military decree, there has been constant debate as to whether what the country has is really a constitution and whether the subsequent civilian regimes are constitutional governments. This paper attempts to analyse the constitutional development of Nigeria with a view to really determine at what point can it be said that Nigeria had a constitution. The various determinants of constitutionalism will be x-rayed and same will be juxtaposed with the activities of the government particularly the fourth and fifth republic. The paper concludes that constitutionalism is a relative term even though there are some benchmarks. Nigeria's constitutionalism is an evolving one even if certain factors are militating against its full entrenchment. Some basic recommendations are offered as to how real constitutionalism could be actualised in Nigeria.

Key words: constitution, constitutionalism, good governance, transparency, accountability.

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## CONSTITUTIONALISM AND GOOD GOVERNANCE IN NIGERIA: (1999-2014)

**Lateef Ogboye & Abubakri Yekini\***

Clearly in the discharge of the functions of – law-making, watchdog of public finance, conduct of investigations, control over personnel, removal powers, and policy formulation – the legislature does not only define the scope and limits of the exercise of executive powers thereby giving effect to the Constitution, but also sustains the idea of the rule of law, good governance and accountability that are the very essence of constitutionalism...Prof. Oyelowo Oyewo<sup>1</sup>

### INTRODUCTION

Nigeria is a Federal State with a written constitution<sup>2</sup>. The country got her independence in 1960 from England after a series of constitutional conferences. In other words, the concept of constitution and constitutionalism could not have been new in the country.

Nigeria's idea of governance has been polymorphous. Prior to the colonial experience, the various communities have their *Obas* and *Emirs* who administer the affairs of the communities. In other words, monarchical system could be said to be the indigenous form of government known to the people of Nigeria.

Around 1860, the British introduced the indirect rule with the colonialists centrally controlling the affairs of the colony and protectorates and then Nigeria as a country after the amalgamation. The Colonialists ruled with their Ordinances, Proclamations and Orders-in-Council which were handed down to us with little or no inputs from the governed. This is prevalent till the era of independence. Prior to independence however, the idea of what we can really call a constitution was introduced in our polity and same was carried over after independence.

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<sup>1</sup> Oyewo, O., 'Constitutionalism and the Oversight Functions of the Legislature in Nigeria', Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi, April 2007, p.21.

<sup>2</sup> The country now has 1999 Constitution of the Federal Republic of Nigeria (as amended).

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The concept of Constitutionalism was first experienced in Nigeria when the Willinks Commission recommended that the idea of Fundamental Human Rights be introduced into the Independence Constitution to allay the fear of the minorities<sup>3</sup>. However, successive military regimes that intervened in our polity dealt a big blow on the whole essence of constitution and constitutionalism in the country.

Normalcy was only restored in 1999<sup>4</sup> when the country return to civil rule. Since then the idea of constitutionalism has been at the forefront of our political, socio-economic, judicial and academic discourse.

This paper shall examine the idea of constitution and constitutionalism, the various derivatives of the concepts vis-a-vis Democracy, Rule of Law, Accountability, Transparency and Good Governance and how these concepts are being practiced in Nigeria.

## I. CONCEPTUAL CLARIFICATION

### A. *Constitution*

The word derives originally, of course, from the latin verb *constituere*, 'to set up, establish, erect, construct, arrange, to settle or determine,' and *constitutio* is the noun form. A *constitutio* becomes a 'regulation,' 'order,' or 'decree' as a result of some arrangement, or some establishment being made.<sup>5</sup>

Constitution like other legal concepts is very difficult to define. This is because it can either be defined in abstract term or by reference to a particular constitution. The political history and culture of states of the world are different. By necessary implication, the constitutions

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<sup>3</sup> Sokefun J.A, *et. al.*, **Human Right Law**, (Lagos, National Open University of Nigeria, 2008), p.14. I am not unaware of various constitutions that the country has had before independence i.e Clifford's Constitution of 1922, Richard's Constitution of 1946 and Macpherson constitution of 1951. These constitutions apart from the fact that they were colonial promulgation named constitution; they do not contain Fundamental Human Right. Hence, they lack a basic ingredient of an ideal constitution.

<sup>4</sup> We had a brief civil rule between 1979 and 1983 before the military took over again. During this period, we had the 1979 Constitution- which modelled the current 1999 constitution (as amended)

<sup>5</sup> Maddox, G., 'A Note on the Meaning of 'Constitution': **The American Political Science Review**, Vol. 76, No. 4 (Dec., 1982), pp. 806

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which are reflective of the socio-political history and evolution of the states would definitely be different. This is the difficult challenge that any one that seeks to venture into defining or describing a constitution would certainly have.

According to Lawrence Tribe, ‘the constitution is a historically discontinuous composition, it is the product, overtime, of a series of not altogether coherent common promises; it mirrors vision or philosophy but reflect instead a set of sometimes reinforcing and sometimes conflicting ideas and notion.’<sup>6</sup>

The definition of Tribe definitely must be referring to the kinds of American constitution where the people thoroughly debated before they arrived at what can be called peoples’ constitution. This may not be applicable to our own case where the current constitution was a military promulgation.

According to Wade, a constitution normally means a document having a special legal sanctity which sets out the framework and principal functions of the organs of government of a state and declares the principle governing the operation of those organs<sup>7</sup>.

Again, Bo Li describes constitution as ‘a charter of government deriving its whole authority from the governed. The constitution sets out the form of government. It specifies the purpose of government, the power of each department of the government, the state-society relationship, the relationship between various governmental institutions and the limits of the government’<sup>8</sup>.

From the definitions offered above, one would see that a constitution is the body of laws, rules, convention whether written or unwritten that establishes and defines governmental powers in a state and the limitations on those powers.

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<sup>6</sup> Quoted by Sokefun, J.A., et. al., **Constitutional Law**, (Lagos, National open University of Nigeria, 2008), p.2

<sup>7</sup> Oyewo A.T., and Yakubu J.A., **Constitutional Law in Nigeria**, (Ibadan, Jator Publishing Co., 1998), p.1

<sup>8</sup> Bo Li: ‘what is Constitutionalism’, **Perspectives**, Vol. 1, No. 6, n.d.

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Therefore, it does not matter whether this body of laws, rules and conventions are contained in a single document (as we have it in countries like Nigeria, United State of America, India etc) or scattered in different documents like the case of United Kingdom<sup>9</sup>.

Prof Akin Oyeboode has opined that constitution has arisen in variety of forms and ways from sacred text in theocratic states to secular enactments. As a matter of fact, he posits that the precursor to contemporary constitutions include the Ten Commandment, Law of the twelve Tables, Laws of Medes, Code of Hamurabi, Laws of Manu and the Holy Quran<sup>10</sup>.

Constitution in formal terms has been said to have originated from the ancient Greeks. For instance, Aristotle was said to have used the word *politela* (which approximately means constitution) which means the arrangement of the offices in a *polis* (the state)<sup>11</sup>. However, one author has asserted that the first document that could really be called a constitution is the Charter of Madina<sup>12</sup>. The Charter constituted a formal agreement between Muhammad and all the significant tribes and families of *Yathrib* (later known as Medina), including Muslims, Jews and pagans.<sup>13</sup> Today, virtually all the states in the world (except may be Saudi Arabia) now have a constitution whether written in a single or several documents.

## *B. Constitutionalism*

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<sup>9</sup> Adam Tomkins actually argues that United Kingdom constitution is actually written but in different documents. By this he meant The Magna Carta, the Bill of Rights of 1689, the Parliament Acts of 1911 and 1949, the European Communities Act of 1972, the Human Rights Act of 1998 etc. See: E.A Young: 'The Constitution outside the Constitution' **The Yale Law Journal**, Vol. 117, No. 3 (Dec., 2007), pp. 408

<sup>10</sup> Oyeboode, A., **Law and Nation Building in Nigeria: Selected Essays**, (Lagos, CEPAR, 2005), p55.

<sup>11</sup> Maman, T., 'Slow March to Democracy: Understanding the growth and characteristics of constitutional order in Nigeria' in **Law, justice and the Nigerian Society, Essays in Honour of Hon. Justice Bello, CON, GCON**, (Lagos, NIALS, 1995), p.104.

<sup>12</sup> Now in the present day Saudi Arabia.

<sup>13</sup> The document was drawn up with the explicit concern of bringing to an end the bitter inter tribal fighting between the clans of the *Aws* and *Khazraj* within Medina. To this effect it instituted a number of rights and responsibilities for the Muslim, Jewish, and pagan communities of Medina bringing them within the fold of one community. See Al-Mallah, H.Y., **The Governmental System of the Prophet Muhammad: A Comparative Study in Constitutional Law**, (Lebanon, Dar Al-Kotob Al-Ilmiyah, 2008).

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Constitutionalism like the root word- constitution to use the word of Bo Li, is a fuzzy word. The word is a combination of ‘constitution’ and ‘ism’. Hence we have constitutionalism. Literally, it may mean the idea of practicing constitution i.e a constitutional government. Constitutionalism has not been authoritatively defined. Scholars and Jurists have only put the concept in descriptive form. Bo Li has described constitutionalism thus:

as a system of political arrangements in which there is a supreme law( generally called ‘constitution’), in which all (particularly the entire system of government) is governed by the supreme law, in which only the peoples’ will (as defined through some pre-specified institutional procedure, usually through a super-majority voting mechanism) can supersede and change the supreme law, in which changes can only be made infrequently due to the difficulty of garnering the requisite popular support, and in which there are separation of power, checks and balances and an independent judiciary dedicated to legal reasoning to safeguard the supremacy of the constitution’,<sup>14</sup>

Henkin submitted that a common usage of the concept implies that a constitution has the following elements<sup>15</sup>:

- a. It declares the sovereignty of the people and derives its authority from the will of the people
- b. It prescribes a blue print for representative government responsible and accountable to the people through universal suffrage at periodic elections
- c. Governmental authority is to be exercised only in accordance with law established pursuant to established constitutional process and consistent with constitutional prescription and limitations

Prof. Oyewo in his descriptive conception of constitutionalism posited that

Thus for our purpose one will proffer a descriptive conceptualization and definition of constitutionalism, to mean: a system of political arrangement that is founded and governed by a supreme law, that can only be amended by the will of the people or through their constituent representatives, in which the practice of the rule of law, separation of powers, checks and balances and good governance are observed, and the rights and development of the citizens are paramount<sup>16</sup>

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<sup>14</sup> Bo Li, ‘What is Constitutionalism’

<sup>15</sup> Henkin, L., ‘Elements of Constitutionalism’ in **The Review**, International Commission of Jurists, June 1998, p.12

<sup>16</sup> Oyewo O., ‘Constitutionalism and the Oversight Functions of the Legislature In Nigeria’, Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi, April 2007

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Prof. Nwabueze has captured the whole essence of the descriptions offered by the various constitutional law experts quoted above in a relatively few words when he said – ‘constitutionalism recognises the need for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a limitation on government, it is the antithesis of arbitrary rule; its opposite is despotic government’<sup>17</sup>.

It means therefore that constitutionalism could mean a constitutional government. This is a government that is conducted in line with the laid down rules in a given constitution. But then, one needs to get the message clear. A country may not be said to be running a constitutional government or practices constitutionalism simply because it has one constitution. The content of the constitution and its operation are what will determine if a country is practicing constitutionalism or not<sup>18</sup>. Constitutionalism has also been simply described to mean a democratic government (constitution and democracy) or a limited government<sup>19</sup>.

The indices of constitutionalism as suggested from various works are as follows:

a. Government According to Constitution

Constitutionalism as presented above has as one of its basic principle, the practice of running a government in accordance with the spirit and letters of a constitution which is the supreme law. It means that all authorities and person must derive the power to exercise any

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<sup>17</sup> Nwabueze, B.O., **Constitutionalism in the Emergent States**, (London, Hurst & Co(Publishers) Ltd. 1973), p.1.

<sup>18</sup> This caveat is necessary as it is usually misunderstood that constitutionalism refers to following the law of a particular constitution. if this literal meaning is to be reckoned with then it means autocratic regimes (like Libya, Egypt under Hosni Mubarak) may claim that they are constitutional governments simply because they have a constitution they are working with. Even states that are democratic may not necessarily be practising constitutionalism

<sup>19</sup> Nwabueze, B.O., *Constitutionalism in Emerging States*, supra, p2.

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governmental function from the constitution. Any person elected into any office under the constitution must not stay beyond that period in office<sup>20</sup>.

#### b. A Representative/Democratic Government

Constitutionalism entails that sovereignty belongs to the people who have the right to elect from among themselves those who will constitute the government at a periodic election. This is what distinguishes a democratic government from an autocratic government. No matter the existence of a constitution in an autocratic regime, such regime can never be a 'constitutional' one or be said to have constitutionalism in place<sup>21</sup>.

#### c. Separation of Power

The doctrine of Separation of power was propounded by the French Philosopher Baron De Montesquieu. He reasoned as follow:

Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go.....To prevent this abuse, it is necessary from the nature of things that one power should be a check to another ..... There will be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all their powers<sup>22</sup>

Prof. Nwabueze has summarised the purport of the postulation of Montesquieu in the following words:

Concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute power is by its very nature arbitrary, capricious and despotic<sup>23</sup>

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<sup>20</sup> This is a usual concept in most written constitution as the constitution will always carry a supremacy clause. For instance see s.1 (1) of the **Nigerian constitution**, s.1(2) of the **Constitution of Ghana** and Article 2 (3) and (4) of **Mozambique Constitution** which provides respectively thus: 'The State is subordinate to the Constitution and is founded on legality' and 'Constitutional rules shall prevail over all other rules of the legal order'

<sup>21</sup> For instance see Chapter 7 of the **Constitution of Ghana** on representation and elections; Chapter VI of the **Nigerian Constitution** on similar provision and Article II of the **Constitution of the United States of America**

<sup>22</sup> De L'Espirite Des Lois (translated as 'The Spirit of Laws'), Chapter II, pp 3-6, (1748). The English version of the work can be obtained at [www.efm.bris.ac.uk/het/montesquieu/](http://www.efm.bris.ac.uk/het/montesquieu/)

<sup>23</sup> Nwabueze, B.O., **The Presidential Constitution of Nigeria**, (London, Hurst & Co(Publishers) Ltd, 1982), p.32.



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In explaining the meaning of separation of power, the Nigerian Court of Appeal per Salami JCA described the concept as having the following implications:

- (a) that the same person should not be part of more than one of these three arms or divisions of government.
- (b) that one branch should not dominate or control another arm. This is particularly important in the relationship between executive and the courts.
- (c) that one branch should not attempt to exercise the function of the other, for example a President however powerful ought not to make laws indeed act except in execution of laws made by legislature. Nor should a legislature make interpretative legislation if it is in doubt it should head for the court to seek interpretation<sup>24</sup>

In other words, for a state to practice constitutionalism, the powers of the various organ of its government must be clearly delineated by its constitution<sup>25</sup>. The French Declaration of the Rights of Man (1789) for instance also provides that ‘any society in which the rights are not guaranteed, or in which the separation of powers is not defined, has no constitution’<sup>26</sup>.

#### d. Human Rights

One of the limitations on the powers of government which underscore the whole essence of constitutionalism is the concept of human rights. From the social contract theory, one would appreciate the importance of the protection of human rights. It is the principal reason why the people decided to form a state in the first place- the protection of the individual right.

This has become a vital component of every constitutions of the world. The United Nations Declaration of Human Right of 1948 now forms a model provision in constitutions of the world. Although, the rights that are generally recognised at present are majorly the first generational rights- the civil liberties<sup>27</sup>.

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<sup>24</sup> Ahmad vs. Sokoto State House of Assembly (2002) 44 WRN 52

<sup>25</sup> Ben Nwabueze, *Constitutional Democracy in Africa*, Vol.1, (Ibadan, Spectrum Books Ltd, 2004) chapter 9, p.243.

<sup>26</sup> Henkin, supra, p.13. Although all the constitutions under reference have provisions for separation of power, however, the practice is each state is different. In United States for instance, the Vice President is the President of the Senate (s. 3 Article I) and in democracy like United Kingdom, the executive and the legislature are interwoven.

<sup>27</sup> See for instance, Chapter IV of the Nigerian constitution and Chapter V of the Ghanaian Constitution. Mozambique constitution apart from spelling out individual rights has a very beautiful in its Article 43 which provides that ‘The constitutional principles in respect of fundamental rights shall be interpreted and integrated in

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#### e. Independent Judiciary/Judicial Review

The judiciary is the third arm of government. It is the organ of government responsible for the interpretation of the law and in particular the constitution. From the concept of separation of power, this function is exclusive performed by the judiciary. For there to be constitutionalism in practice, this vital arm of government needs to be independent. Provisions must be enshrined in the constitution to make it work in actual fact<sup>28</sup>.

A corollary to the above is the concept of judicial review. This is a process whereby any actions of the other organs of the government could be presented before the court for scrutiny. It is very significant in safeguarding the rights and liberties of the citizen and as such must be provided in a constitution.

#### f. Control of the Police/Military

In a constitutional government, the police has a vital role to play as the keeper of the peace. The police is the only authority that is allow to bear arm in enforcing public orders. Hence, there is need for a check on the powers and activities of the police in every constitutional government since their actions will have direct effect on the rights and liberties of the citizens. The Military as well must be constitutionally regulated. They should have little or no role to play in the governmental activities. As a matter of fact, they should be kept in the barracks except when the circumstance demands<sup>29</sup>.

#### g. A Well Defined Constitutional Amendment Procedure

Every constitution must have a well laid down procedure for its amendment. The procedure must be one that allows for the will of the people to prevail. It has been suggested that a

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harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights’.

<sup>28</sup> See for instance Article III of the American Constitution and s.6 of the Nigerian Constitution

<sup>29</sup> In state of emergency and when the country is at war.

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constitution though can be amended whenever the will of the people so demands<sup>30</sup> but should not be a frequent exercise being the supreme law of the land

Admittedly, the above enumerated criteria for constitutionalism are universally agreed upon. Some states may have one or two of these criteria missing in their constitutional arrangement. Such states would consider what they have as their own variety or conception of constitutionalism. This is prevalent in Asia, Africa and far Eastern states. However, the criteria listed above represent the dominant view<sup>31</sup>.

## II. THE DERIVATIVES OF CONSTITUTIONALISM

The modern trend is that constitutionalism is not an end in itself but a means to an end. Constitutionalism from the descriptive analysis presented by various legal scholars all point us to the fact that constitutionalism is all about the responsibility of the government to the whole mass of the governed.

Mpazi Sinjela, while commenting on constitutionalism in Africa concludes that ‘in a new democratic constitutional order energies which would otherwise be spent on fighting repression can now be spent on economic and social development of the people. Good governance will foster accountability of the governors to the governed and will lead to economic and social development in which human rights and the worth of the individual can fully be realized by all’<sup>32</sup>.

Prof. Oyewo has expressed a similar view in justifying his approach to describing constitutionalism as cited earlier in this paper thus- ‘This is a deliberate attempt to transcend the liberal constitutionalism and capture the salient feature of constitutionalism not merely as

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<sup>30</sup> As Thomas Jefferson has opined that a generation ought not to bind another generation with a constitution. the constitution must reflect the resolve of any particular people at any given time see: Stanley N. Katz: ‘Constitutionalism and Civil Society’, The Jefferson Lecture, University of California at Berkeley, 25 April 2000 at [www.princeton.edu/~snkatz/papers/JeffersonLecture.pdf](http://www.princeton.edu/~snkatz/papers/JeffersonLecture.pdf) (accessed on 28-2-12).

<sup>31</sup> See *ibid*, for a discussion of the polar views on constitutionalism.

<sup>32</sup> Sinjela, M., ‘Constitutionalism in Africa: Emerging Trends’, **The Review**, *supra*, p.28.

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an imposition of limitation on exercise of powers, but also as a mechanism for accountable and developmental exercise of powers<sup>33</sup>.

It then means therefore that constitutionalism if well practiced must lead every state to provision of societal expectation through accountability, transparency and good governance.

*A. Democracy, Good Governance, Accountability and Transparency*

Democracy, transparency, accountability and good governance are all concepts that are intertwined. The essence of having democracy is to ensure accountability and transparency which will eventually lead us to good governance.

Democracy has been defined by Abraham Lincoln as “government of the people, by the people, for the people”<sup>34</sup>. It envisages that the government is run by the people usually through elected representatives and the sole object of the government is the people. Ademola Azeez while commenting on the responsibility of the government in a democratic system posits that- ‘the ethical responsibility of leadership and the moral code embedded in the constitution they swore to uphold should imply that their mandate responsibility is the mandate they have to deliver on development, welfare and the provision of basic needs<sup>35</sup>

How can the leadership deliver the basic needs of the society in a democratic or constitutional government? It is definitely by governance through accountability and transparency. Transparency has been described as the commitment by all public and government institutions to be open and transparent in their policies and actions<sup>36</sup>.

On the other hand, accountability can be understood in two important but different senses. First, accountability may mean that government must answer to another body. For example,

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<sup>33</sup> Oyewo, O., Constitutionalism and the Oversight Functions of the Legislature in Nigeria, *supra*

<sup>34</sup> A. Azeez: ‘Contesting “Good Governance” in Nigeria: Legitimacy and Accountability Perspectives, *J Soc Sci*, 21(3), p.222, 2009.

<sup>35</sup> *Ibid.*

<sup>36</sup> Owasanoye, B., Transparency, Accountability and Good Governance Under 1999 Constitution’ in **Nigeria: Issues in 1999 Constitution**, I.A Ayua *et al* eds., (Lagos, NIALS, 2000), p.235.

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government action may be challenged through the courts or through the activities of an oversight body such as an Ombudsman or Auditor General with a mandate to assess the efficiency or effectiveness or fairness of government action: Second, accountability may simply mean transparency, the right to expose government action to public scrutiny<sup>37</sup>.

Governance can be defined as the process that is employed to achieve the noble end of the state. Thus, governance simply implies the art of governing a people within a given territory or a state<sup>38</sup>. Good governance is, among other things, participatory, transparent and accountable, effective and equitable, and it promotes the rule of law. It ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources<sup>39</sup>

The idea of good or bad governance is an ethical one. It means that the way governance is carried out towards the realisation of the above stated objectives would determine whether a government is a good one or not. The following characteristics have been identified as the criteria for good governance<sup>40</sup>:

- a. Participation
- b. Rule of Law
- c. Transparency
- d. Responsiveness
- e. Consensus Orientation
- f. Equity
- g. Effectiveness and Efficiency

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<sup>37</sup> Sossin, L., 'The Future of Administrative Law & Good Governance in Nigeria', [www.nials-nigeria.org/pub/NEWFRONTIERSLECTURE2011.pdf](http://www.nials-nigeria.org/pub/NEWFRONTIERSLECTURE2011.pdf) (accessed 28-2-12).

<sup>38</sup> Ogundiya, I.S., 'Democracy and good governance: Nigeria's dilemma' in **African Journal of Political Science and International Relations** Vol. 4(6), June 2010, p.202.

<sup>39</sup> O. Oyewo: Constitutions, Good Governance and Corruption: Challenges and Prospects for Nigeria, p.12 at <http://www.enlsyn.gr/papers/w16/Paper%20by%20Prof%20Oyelowo%20Oyewo.pdf> (accessed 28-2-12).

<sup>40</sup> Ibid.

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h. Accountability

i. Strategic Vision

To sum it all, good governance must be participatory. The people are part and parcel and are at the centre of governance. The government must uphold rule of law and be open and accountable in to the people. It must effectively and equitably allocate the resources of the state among the citizens and must operate within the well articulated objectives of the government.

*B. Constitutionalism and Good Governance: Nigerian Experience*

Nigeria like many other African states could be regarded as a constitutional government<sup>41</sup>. We have had written constitutions since independence and have been maintaining some form of constitutionalism before the intervention of the Military. The first experience of lawlessness or despotism was had around 1966 and it remained with us for over 20 years. This no doubt, has negative effect on the psyche of an average Nigerian towards constitutionalism; as such a concept has almost been obliterated from our political behaviour<sup>42</sup>.

Fresh attempt at restoring constitutionalism was introduced in 1999 with the return to civil rule. The 1999 Constitution of the Federal Republic of Nigeria was enacted and it became the fundamental and supreme law of the land.

The constitution contains about 320 sections which established the various levels and arms of government and their powers. It contained provisions on Fundamental Human Right, separation on power, judicial review, amendment process, representative democracy, independence of the judiciary and judicial review. To this extent, one may say the constitution as it were is founded on the principles of constitutionalism.

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<sup>41</sup> As Henkin as observed, virtually every state of the world now has a constitution.

<sup>42</sup> Udoma, U., **History and the Law of the Constitution in Nigeria**, (Lagos, Malthouse Press ltd., 1994), p.239.

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However, one fundamental defect in this constitution which one may rightly argue as robbing it of constitutionalism is that fact that it is not the will of the people. In other words, it failed to meet one of the fundamental values of a constitution. The 1999 constitution (as amended) is a military decree and the preamble to the constitution is nothing but a false. Be that as it may, we have generally regarded the document as the constitution of the country.

Despite the fact that on the face value, the constitution proclaims constitutionalism, the actions and inactions of the government and its machineries more often than not are not in accordance with the constitution. The following are some of the activities of the government that negate the principle of constitutionalism<sup>43</sup>.

#### 1. Disobedience of Court Orders by the Executive

The sanctity of law depends on the respect for the judicial process through which orders according to the law are made<sup>44</sup>. This is very rampant during the military regime as could be seen in *Governor of Lagos State v Ojukwu*<sup>45</sup> where the Supreme Court observed that the result of the disobedience of court orders would lead to the replacement of rule of law with anarchy.

This trend is still being witnessed under this current democratic dispensation despite the existence of a written constitution. In *AG Lagos v AG Federation*<sup>46</sup>, Niki Tobi, JSC (as he then was) criticised the Federal Government for returning to self help rather the court of law over a dispute between it and the Lagos State Government. His lordship said thus:

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<sup>43</sup> Although it must be acknowledged that the successive regimes since 1999 have improved in the practice of constitutionalism most especially from the regime of late President Yar'adua (2007- 2010) to that of the incumbent president Goodluck Jonathan. President Yar'adua for instance was the first president to declare his asset as required by law. He ordered the payment of the Lagos State Fund that has been withheld by his predecessor, former President Olusegun Obasanjo. One cannot really assess the incumbent President at this moment as he just assumed full responsibility not quite long.

<sup>44</sup> Ijalaiye, D.A., **Executive and Legislative Lawlessness: A Challenge to the Rule of Law in Nigeria**, Faculty of Law Lagos State University Distinguished Jurist Lecture, (Lagos, Lagos State University, 2008), p.2

<sup>45</sup> (1986) 1 NWLR (pt. 18), 621.

<sup>46</sup> (2004) 12 SCJN 1.

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If the federal government felt aggrieved by Lagos State creating more Local Governments, the best solution is to seek redress in a court of law, without resorting to self help. In a society where law prevails, self help is not available to the Executive or any other arm of government. In view of the fact that such a conduct could breed anarchy and totalitarianism, and since anarchy and totalitarianism are antithesis to democracy, courts operating the rule of law, the life-blood of democracy, are under a constitutional duty to stand against such action<sup>47</sup>

What is more worrisome is that despite these strong wordings from the apex court, the Federal government still did not carry out the order of the court until the next administration came on board<sup>48</sup>.

Just recently, the incumbent President Goodluck Jonathan refused to reinstate the suspended President of the Court of Appeal, Justice Isa Salami despite the decision of the National Judicial Council absolving him of all allegations levied against him and recommending his reinstatement by the president<sup>49</sup>.

It needs to be added that the executive arm of the government is not the only one caught in the web of lawlessness. The legislative arm is as well culpable most especially the houses of assembly of some states. In *Inakoju & Ors. v Adeleke & Ors*<sup>50</sup>, *Abaribe v. The Speaker, Abia State House of Assembly*<sup>51</sup> and *Dapianlong v. Dariye*<sup>52</sup> members of the houses of assembly in these cases carried out impeachment processes in violation of clear constitutional provisions. It took the intervention of the courts to reinstate the affected office holders.

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<sup>47</sup> At p.75

<sup>48</sup> Other accounts of the unconstitutional actions of the executive arm of the government particularly in the forth republic was given by Nwabueze, B.O., **How President Obasanjo Subverted Nigeria's Federal System**, Ibadan, Gold Press Ltd., 2007; Nwabueze, B.O., **How President Obasanjo Subverted the Rule of Law and Democracy**, (Ibadan, Gold Press Ltd., 2007).

<sup>49</sup> See: 'NBA Flays Jonatha over Salami's Recall', *Vanguard News*, 31 May 2012; 'NJC Orders Reinstatement of Salami', *Daily Times*, 11 May 2012; NJC, Presidency, poise for a Showdown, *Thisday News*, 10 October 2012.

<sup>50</sup> (2007) 4 NWLR (pt, 1025) 423.

<sup>51</sup> (2002) 14 NWLR (Pt. 738) p.466.

<sup>52</sup> (2007) 8 NWLR (Pt. 1036) 289.



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Other notable cases worthy of mention is *Peter Obi v INEC*<sup>53</sup> and *Rotimi Amechi v INEC*<sup>54</sup>. In the former case, the Independent electoral Commission went ahead to conduct a governorship election when the appellant, who was the incumbent governor was still in court challenging the validity of the proposed election as his tenure was yet to expire. In Amechi's case as well, the electoral commission ignored the court action by Amechi challenging the illegal substitution of his name by the Commission.

## 2. Lack of Due Regard for Fundamental Human Right

This has been another major challenge to constitutionalism in Nigeria. The government at all levels have no due regard for Fundamental Human Right. The recent militarisation of civilians over peaceful protest against fuel subsidy removal; unlawful extra-judicial killing of citizens<sup>55</sup>, indefinite detention of suspects<sup>56</sup>, global acquisition of citizens' asset<sup>57</sup> and other human right abuses are rampant.

Under the current democratic dispensation just like past regimes, there appears to be no respect for right to personal liberty of the citizenry particularly those suspected to have committed crimes. There are inmates who have spent over a decade in prison custodies all over the federation without arraignment in any law court<sup>58</sup>.

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<sup>53</sup> (2007) 11 NWLR (PT. 1046) 565.

<sup>54</sup> (2007)13 All NLR 354.

<sup>55</sup> Apart from the series of reports in the dailies, one clear example is the killing of the leader of the dreaded sect Boko Haram while in police custody. J. Ibrahim: 'Extrajudicial Execution Of Muhammad Yusuf And Legality Of *Boko Haram*' at <http://www.gamji.com/article8000/NEWS8754.htm> (accessed 2-3-12). Apart from this, civilians are being killed daily by the police over the usual N20 extortion from drivers. See Nigeria Police and extra-judicial killings, at <http://www.thenationonline.net/2011/index.php/editorial/letters/24767-nigeria-police-and-extra-judicial-killings.html> (accessed 2-3-12).

<sup>56</sup> See Yekini, A.O., 'Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in Lufadeju Case', *LASULAW Journal*, vol. 2&3, 2012;

<sup>57</sup> For instance, the Lagos State Government in 1972 published a gazette wherein the government purportedly acquired all the lands from Badagry to Ojo (almost a quarter of the state land mass) and other similar areas in the state. See also *Provost Lagos State College Of Education v Edun* [2004] Vol. 4 M.J.S.C

<sup>58</sup> See Yekini, A.O., Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in Lufadeju Case, *supra*.

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It has been judicially noticed that the Nigerian police is a no respecter of human rights. This is better captured by the words of Sylvester Umaru Onu JSC in *Adegboyega Ibikunle v State*<sup>59</sup> as follows:

I am compelled by the facts and circumstances of this case coupled with the now notorious extra judicial killings of innocent people by some members of the Nigeria Police to condemn the inability of some members of the police force to realize that the foundation of the police institution is preservation of life and property. There is the urgent need to revisit the criteria used in recruitment of policemen. The instant extra judicial killing by a member of the Nigeria Police Force is one too many

The trend of human right abuses has continued till date. It would be recalled that the ‘Bring Back our Girls’ rally was disrupted recently by the Nigerian police in Abuja<sup>60</sup>, some opposition party leaders were arrested on the eve of the just concluded elections in Osun and Ekiti States<sup>61</sup>, the International Human Right Watch recently accused the Nigerian government of serious human right abuses in the fight against terrorism<sup>62</sup> and many more.

### 3. Absence of Credible Electioneering Process

There is no gainsaying that our electioneering process is fraught with so many irregularities and fraudulent practices. This has made the constitutional provision that guarantees a representative democracy, a mockery. Electorates’ votes do not always count and voter apathy, lethargy and disenchantment is now the order of the day.<sup>63</sup>

It would be recalled that a number of elections conducted by INEC particularly in the 2007 and 2011 general elections were nullified by the courts as they failed the ‘free and fair’ test. Some of the grounds for nullifying these elections include illegal substitution of names,

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<sup>59</sup> (2007)2 NWLR (pt. 1019) 546

<sup>60</sup> Chibok girls: Court rules on Meleye’s suit July 21’, *The Punch*, July 9, 2014.

<sup>61</sup> ‘Osun election: APC decries plan to arrest its leaders’, *The Vanguard*, August 6, 2014.

<sup>62</sup> ‘The Fed. Govt should investigate Amnesty’s alleged human rights abuses by the military’, *The Nation*, 12<sup>th</sup> August 2014.

<sup>63</sup> Oyewo, O., *supra*, p. 19.

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violence, thuggery, ballot snatching, ballot stuffing, multiple thumbprint, falsification and allocating of votes, inconclusive elections<sup>64</sup> etc.

Militarisation of electioneering process is also a new trend witnessed under the present democratic dispensation. While some have argued that such a move is necessary to ensure a free and fair election and to also act as a check to electoral violence that has bedevilled our electoral processes, others have maintained that no free and fair election could be secured in such a tense and war-like situation<sup>65</sup>.

#### 4. Accountability, Transparency and Good Governance

In the area of accountability, transparency and good governance, the aggregate of opinion of academic writers is that the government has not discharged its responsibilities. Corruption has been the prevalent factor that is debarring the country from attaining that lofty height of good governance<sup>66</sup>. The constitution in chapter II has stated the fundamental objectives and directive principle of state policy. In achieving these objectives, the constitution puts in a number of devices to ensure that government delivers these objectives even though they are not justiciable<sup>67</sup>. Despite various constitutional checks (like the enactment of anti-corruption laws<sup>68</sup>, the establishment of Code of Conduct Bureau<sup>69</sup>, Public Complaints Commission<sup>70</sup>, The Legislature<sup>71</sup> etc.) that have been institutionalised under the constitution, it is rather unfortunate that these checks are not usually and adequately utilised to curb corruption. Due

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<sup>64</sup> See the following cases: *Fayemi vs Oni* [2009] 7 NWLR (PT. 1140) 223; *INEC & Ors vs Oshiomole & Ors* [2009] 4 NWLR (PT. 1132) 607; *Mark v s Abubakar* (2008) 2 NWLR (PT. 1124) 79; *Aregbesola vs Oyinlola* [2009] 14 NWLR (PT. 1162) 42

<sup>65</sup> 'Nigerians Condemn Militarisation of Election' *PM News*, August 11, 2014; 'Osun Election, the Accusation, the Security', *This Day*, August 17, 2014.

<sup>66</sup> Ijalaiye, D.A., 'Democratic Governance in Nigeria: A Critical Appraisal' in **Law, politics and Development: The Challenges of an Emerging Mega City: Essays in Honour of Babatunde Raji Fashila, SAN**, (Lagos, NBA Ikeja Branch, 2010); D.A Ijalaiye: **Executive and Legislative Lawlessness: A Challenge to the Rule of Law in Nigeria**, supra; M.A Belgore: 'Rule of Law and Democratic Governance in Nigeria: Challenges and Prospects', University of Abuja pre-convocation Lecture, Feb., 2, 2008; O. Oyelowo: 'Constitutions, Good Governance And Corruption: Challenges And Prospects For Nigeria' supra.

<sup>67</sup> S.6(6)(c) of the constitution and the case of **AG Ondo v. AG Federation** and Others, supra.

<sup>68</sup> e.g the Economic and Financial Crimes Commission Act, 2004.

<sup>69</sup> S.153 of the Constitution and Fifth Schedule part I of the same constitution.

<sup>70</sup> S.315(5) 1999 Constitution (as amended) and Public Complaints Commission Act, CAP P37, LFN 2004

<sup>71</sup> Especially their investigative functions (as being carried out at present over the fuel subsidy scam); the role of the watchdog of public funds by virtue of s.80 and 81 of the constitution etc.

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to the fact that corruption has eaten deep into our polity, you hardly see transparency and accountability at any level or organ of Government.

One would recall that under President Goodluck Jonathan regime, a number of monumental fraudulent practices were uncovered. The former minister of aviation, Mrs Stella Oduah was accused of N255 car scandal<sup>72</sup>, the current minister of Petroleum Resources, Mrs Diezani was involved in a number of oil/kerosene subsidy scandal of billions of dollars<sup>73</sup>, the former CBN Governor, Mallam Sanusi Lamido Sanusi accused the NNPC of non-remittance of about 20 billion US dollars to the Federal Government's coffer,<sup>74</sup> and many more. Despite all these high profile corruption allegations, neither meaningful prosecution nor conviction was carried out by the Federal Government.

This lack of transparency and accountability is likewise applicable to the legislative and judicial arm of government. In the fourth republic alone, the leadership of the National Assembly was changed quite a number of time on corruption-related allegations<sup>75</sup>. The recent faceoff between the president of the Court of Appeal and the Chief Justice of Nigeria further confirms the much said fact that the judiciary too is not spare of corruption<sup>76</sup>.

Another major impediment to good governance, accountability and transparency in Nigeria is the immunity clause provision in the constitution that prevents the prosecution of the President, Vice president, Governors and their deputies while in office<sup>77</sup>. One may not less agree with S.M.A Belgore CJN, (as he then was) when he noted that if immunity clause is

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<sup>72</sup> ODUAH GATE: Inside story of Aviation Minister's survival battle', *The Vanguard*, November 3, 2013.

<sup>73</sup> 'Subsidy Scam: Rep insists on Diezani's resignation', *The Punch*, April 27, 2012.

<sup>74</sup> 'NNPC cannot account for \$20bn, Sanusi insists', *The Punch*, February 5, 2014.

<sup>75</sup> The fourth republic lasted between 1999- 2007. The Presidents of the Senate affected are: Evan Enwerem, Dr Chuba Okadigbo, and Aldophus Wabara. It should be added that in this fifth republic, the first female Speaker of the House of Representatives, Mrs Patricia Etteh was removed from office while her Successor, Hon. Dimeji Bankole is currently facing corruption charges by levied by the Economic and Financial Crimes commission.

<sup>76</sup> For a detailed discussion on the saga, see: 'The Facts and the Politics', *The Tell Magazine*, August 29, 2011.

<sup>77</sup> S.308 of the Constitution.

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removed, the officials concerned would be careful, since they would no longer be shielded from prosecution<sup>78</sup>.

## CONCLUSION AND RECOMMENDATIONS

Having considered Nigerian constitution and constitutionalism, it would see that the idea of constitutionalism is an evolving concept in the country. One may not be too disappointed with the present state we are. Our constitutionalism as it were must have been affected by the ‘Nigerian/African factor’ which has been identified as firstly by our colonial experience, then Marxist/social democratic idealism and the consensus politics that we play.<sup>79</sup>

With the stability in the civil rule, it is belief that we shall soon get to that stage of western style of constitutionalism. More so, with the passage of the Freedom of Information Act, 2011, it is believed that this will step up the level of accountability and transparency in the Country. Once, a public official knows that someone somewhere can show up and demand as of right information regarding some conduct; it is believed that more restraint will be exercised by those in power.

Meanwhile, the civil society has a big role to play in bringing government to order. Given the level of illiteracy in the country and the nonchalant attitudes of Nigerians, the civil society are in the best position to fight for the full entrenchment of transparency, accountability and good governance in Nigeria.

The courts, as well, have a vital role to play in strengthening Nigerian constitutionalism. The judiciary needs to be dogged, relentless and exercise some bits of activism in any constitutional matter brought before it. It may need to borrow from the constitutional jurisprudence of advance democracies in bringing the government of the day to order. Issues of public interest litigation should be welcomed by our courts as this is the easiest avenue

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<sup>78</sup> *The Nation*, February 10, 2008, p.8

<sup>79</sup> Ould-Abdallah, A., ‘The Rule of Law and political Liberalisation in Africa’ in **The Review**, supra, p.30

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through which public officers could be checked. The spirit and letters of the framers of the constitution need to be affirmed by the courts at all time.

The legislatures must step up their oversight functions in bringing the executive council to account. Public hearings should be held on all issues of public importance, findings must be made available to all and where actions are needed to be taken, the people must ensure through public interest advocacy that such are not swept under the carpet.

In the recent time, the various attempts by concerned interest groups to test some of the constitutional and statutory measures in enforcing constitutionalism, good governance and transparency have been thwarted by the issue of '*locus standi*'<sup>80</sup>. It is high time the courts jettisoned this phenomenon particularly in any issue affecting the constitution. Where this is done, any citizen may approach the court to compel- the president to declare his asset; the National Assembly members to declare their salaries; the Attorney General and/or the police to investigate or prosecute a corruption case and so on.

The National Assembly needs to amend the Foreign Judgements (Reciprocal Enforcement) Act CAP F35, 2004 to allow the judgments of the African Court on Human and Peoples Rights and the ECOWAS Court to have direct recognition and enforcement in Nigeria. This would tame the excesses of the Nigerian government especially in cases of human right abuses. The current legal frame work does not attach any weight to judgments obtained in these courts against the Nigerian government as, more often than not, the government does not appear in cases before these courts.

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<sup>80</sup> For instance, very recently, a Federal High Court threw out a suit calling for the release of the Okigbo's Panel report which indicted former military president, Ibrahim Babangida in respect of the \$12.5 billion gulf oil windfall which has remained unaccounted for since that period. See '\$12.4 bn oil windfall: Court declines to okay probe into Okigbo's report', *The Vanguard Newspaper*, 29 November 2012.