

# CONSTITUTIONALISM AND THE RE-INVENTION OF THE NIGERIAN STATE

(Being the paper presented by Femi Falana at the Gani Fawehinmi Annual Lecture organized by the Ikeja Branch of the Nigerian Bar Association held at the Oranmiyan Hall, Lagos Airport Hotel, Ikeja on 15 January 2009)

## INTRODUCTION

The theme of the 2009 Chief Gani Fawehinmi Annual Lecture/Symposium would seem to suggest that the Ikeja Branch of the Nigerian Bar Association believes that constitutionalism can be a mechanism for re-inventing the Nigerian state. In view of the fact that the National Assembly has, once again, commenced the process of amending certain provisions of the 1999 Constitution this programme could not have come at a more opportune time than now.

However, in my presentation herein I intend to argue that as long as constitutions are imposed on the Nigerian people, from time to time, by the various factions of the arrogant and visionless ruling class the directionless Nigerian state cannot be re-invented in any meaningful sense. The paper concludes with a call on credible civil society organizations led by the Nigerian Bar Association and the Nigeria Labour Congress to mobilize Nigerians to insist on an inclusive, participatory and transparent process of compacting a new Constitution for the nation.

## The Concept of Constitutionalism

In his demystification of constitutionalism Wole Soyinka once maintained that even the so called brutes have a constitution which is unwritten, but clearly understood among the species. However, it is only the homo sapiens which appears to have “constantly adjusted its constitution to changing circumstances and encounters with others. Constitutions are very simply, the protocols of survivals and continuity for any social grouping. They need not be written down, though experience dictates that they are much better off set down. The United Kingdom, viewed by many ex-British colonials as the model of popular, participatory government sometimes known as democracy does not, till today, boast of a Constitution”. (Soyinka 2000).

Most lawyers would agree with bourgeois scholars who have defined a constitution as “a formal document having the force of law, by which a society organizes a government for itself, defines and limits its powers, prescribed the relations of its various organs inter se and with the citizen.” (Ben Nwabueze, 1973). Apart from being a legal document a constitution is a reflection of the balance of forces in a society. As it cannot exist in vacuo the process of producing a constitution, as well as its nature and content are usually influenced by existing social reality.

Constitutionalism has been described as “a process of political rules and obligations which bind both governors and the governed, both kings and ordinary citizens. There is no constitutionalism under absolute monarchs or absolute presidents. Constitutionalism is of necessity a version of limited government”. (Mazrui, 2001). With respect to the chequered experience of Nigeria with constitutionalism it has rightly observed that under “the various oppressive authoritarian regimes which the country has had the misfortune to chafe under for the greater part of its post colonial history, Nigeria has been treated to a bastardization of constitutionalism and growing impotence of the judiciary in the face of countless acts of impunity, executive lawlessness and economic brigandage by praetorian guards that had imposed themselves on the political landscape of the nation”. (Oyebode 2005).

### **History of Constitution Making in Nigeria**

When the British arrived in Nigeria the various city states, clans and emirates had their unwritten constitutions with which they administered their societies the engineering of the various communities into one Nigeria came into existence “through the unification action of the British administration” (Momoh, 2000). It can therefore be stated that modern constitutionalism began in 1914 when Lord Lugard imposed a Constitution on the territory of Nigeria. Other colonial constitutions viz, Clifford (1922), Richards (1946) and Macpherson (1953) were also imposed in like manner. However, the Constitutions of 1960 and 1963 were made by the nationalist ruling elite.

While military dictators – Ironsi, Gowon, Buhari, Babangida and Abacha promulgated and imposed constitutional supremacy decrees for the governance of the country the 1989 and 1995 never saw the light of day. The 1979 and 1999 Constitutions were enacted by Generals Olusegun Obasanjo and Abdulsalami Abubakar respectively for the second and fourth republics. The dubious plan of President Obasanjo in 2001 and 2007 to elongate his tenure through the manipulation of constitutional amendment was rejected by the Nigerian people. Indubitably, only a few countries can beat the record of Nigeria in producing and discarding constitutions.

### **Constitutionalism and the Rule of Law**

Since the powers of government are defined and limited by law official actions of the various organs of government are required to be in strict accordance with the law. Therefore, constitutional democracy cannot survive without a strict observance of the rule of law. Unlike the Olusegun Obasanjo Administration which had gross contempt for the rule of law President Yar’adua decided suo motu to make the observance of the rule of law and due process the cornerstone of his government. Accordingly, government has been commended for complying with the judgments and orders of election petition tribunals.

But like previous regimes the Yar’adua Administration has ignored certain court orders or engaged in executive lawlessness in total subversion of the rule of law. In many instances grave economic and financial crimes have been condoned under the pretext of upholding the rule of law. Indeed, in a desperate bid to shield certain highly placed Nigerians from prosecution at home and abroad the law has been manipulated by the office of the Attorney-General of the Federation. At this juncture it is pertinent to mention a few cases.

#### **i. Reconstitution of Councils of Federal Universities**

On October 22, 2007 President Yaradua dissolved the governing boards of all federal government parastatals and agencies. The 27 federal universities were affected in the exercise as their governing councils were sacked “with immediate effect”. The several demands of the Academic Staff Union of Universities (ASUU) for the reconstitution of the Councils were ignored. In the circumstances ASUU filed an action at the Federal High Court with a view to compelling the federal government to reconstitute the councils.

In its official reaction to the suit the Federal Government has appointed the external members of the councils. But contrary to Section 2 of the Universities (Miscellaneous Provisions) (Amendment) Act, 2003 which provides for six members who shall be “knowledgeable and familiar with the affairs and tradition of the University”. Government has appointed 10 persons as members of each of the councils. Some of the members have never been associated with the university system!

## **ii. The case of Malam Nuhu Ribadu**

In challenging his demotion from the rank of Assistant Inspector-General of Police to Deputy Commissioner of Police Malam Nuhu Ribadu prayed the Federal High Court to restrain the Police Authorities from imposing any punishment on him pending the determination of the case. In justifying his dismissal from the Nigeria Police Force during the pendency of the case one of the reasons adduced was that he had challenged constituted authority by suing the Police Authorities in the Federal High Court.

When the Inspector General of Police set up a Panel to investigate the allegations against him Mr. Ribadu filed another action at the ECOWAS Court of Justice on the ground that the power to discipline police officers is exclusively vested in the Police Service Commission. The Police Authorities proceeded with the investigation and recommended the Plaintiff’s dismissal from the Police Force. The dismissal was approved by the Police Service Commission in spite of Article 22 (2) of the Protocol of the ECOWAS Court which provides as follows:

“When a dispute is brought before the Court member states or institutions of the Community shall refrain from any action likely to aggravate or militate against settlement”.

Even under the military era when the rule of law was under the jackboots the courts did not hesitate to set aside dismissals that were carried out when suspension of officers was being challenged in Court. Thus, in the case of *Garba v. FRSC* (1988) 1 NWLR (PT 71) 449 the Supreme Court ordered the reinstatement of the Appellant who was dismissed while the case against his interdiction was pending in the Lagos High Court. In berating the military junta Eso JSC thundered:

“What remains now is an examination of the act of the Respondents in dismissing the Appellant from office during the pendency of the action. Such action, I think is contemptuous of the judiciary, which has been seized with determination of civil right under the constitution and which has been left unscathed by all military coups. For the judiciary, a powerful arm of government to operate under the rule of law, full confidence, and this must be unadulterated, must exist in that institution. It must indeed be demonstrable confidence in the judiciary. The responsibility is greater during military rule. The military in coming to power is usually faced with the question as to whether to establish a rule of law or rule of force. While the latter could be justifiable a rule of terror, once the path of law is chosen the mighty arm of

government, the militia which is an embodiment of legislature and executive must in humility bow to the rule of law this permitted to exist.

The rule of law knows no fear, it is never cowed down, it can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence”.

### **iii. The Political Economy of Nigeria**

In rejecting the national honour of the Officer of the Federal Republic (OFR) recently conferred on him by President Yaradua last month Chief Gani Fawehinmi SAN stated inter alia:

“The directionlessness of the Federal Government has been characterized by the following, amongst others: collapsed infrastructure, total paralysis of the health sector at all levels, constant nationwide power failure and the attendant negative effects on all sectors of the economy; pervasive unemployment, thereby generating increased armed robbery cutting across all ages of our people, debilitating homelessness; retrogressive educational programmes and policies, which have made no Nigerian university to be ranked within the first 500 universities in the world, and no effort is being made by the regime to improve on the humiliating situation”.

Since the restoration of civil rule in May 1999 the provisions of the various Appropriation Acts have been observed in their breach by the Federal Government. Although President Yaradua has been commended for ensuring that unspent funds are returned to the treasury it is submitted that the practice is illegal in as much as the projects for which the funds were appropriated have not been executed. In order to stop such brazen violation of the Appropriation Act the Nigerian Bar Association should monitor annual budgets to ensure their full implementation so that projects that are designed to improve the quality of life of our poverty stricken people are executed

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Unlike their counterparts in many other countries Nigerian lawyers have not shown any appreciable interest in the management of the national economy. In fact, the issue of political economy is hardly discussed in the gathering of lawyers. In the light of the implications of globalization on legal practice Nigerian lawyers ought to take more than a passing interest in the current crisis of global capitalism.

When the so-called “economic melt down” was officially acknowledged by the governments of leading capitalist countries last year the triumvirate of the Governor of the Central Bank and Ministers of Finance and National Planning informed the National Assembly that the Nigerian economy would not be affected by the crisis of global capitalism. Since then over \$7 billion has been withdrawn from local banks by foreigner depositors. The value of the stocks and exchange rate of the naira has continued to crash. The price of oil in the international market has fallen from \$147 to \$40 per barrel.

Instead of admitting like President George Bush that “we are all in this together” the Nigerian ruling class is yet to admit the gross mismanagement of the economy. Even the economic team belatedly constituted by the President two days ago has terms of reference that are essentially anchored on discarded neo-liberal theories. The challenge before Nigerians is to

ensure that the economy of the country is run in the interest of the country. As Olorode recently pointed out:

“Ruling classes of the metropolises and their peripheries are now using large chunks of public funds to, as they put it, ‘bail out’ corporate organizations which, they insist as a theology, were driving growth and development. While the catechism of capitalism in the last two decades insists on withdrawal of public funds from public welfare (education, health, housing etc), they are now deploying these same resources to clean up the havocs created by the corruption and greed of their class. Some commentators call it policy reversal; we call it policy reinforcement”. (Olorode, 2007.)

The on-going devaluation of the national currency by the discredited apostles of market forces has been attributed to the crisis in the global economy. But a concerned Nigerian has reminded the National Assembly of the fact that “in the oppressive days of General Abacha, when Nigeria was a pariah nation in the comity of Nations, our total reserve base was \$4 billion which was barely enough for five months’ imports demand cover, and yet our exchange rate remained stable at N80/\$1”. (Ojoimaikre, 2008). Any discourse on constitutionalism that does not address the full implications of global capitalism on the neo-colonial economy of Nigeria may amount to empty rhetorics.

#### **iv. The Jos Crisis**

In November last year Nigerians joined the rest of the world in celebrating the historic victory of Mr. Barack Obama as the 44th President of the United States of America. Even the PDP, the largest conglomeration of election riggers in Africa joined in the celebrations. But the euphoria had hardly died down when the PDP-government in Plateau State declared that it had won all the chairmanship and councillorship seats in the local government election held in December, 2008.

The misdirected violence that greeted the subversion of the democratic process assumed an ethno-religious coloration. But for the presidential order stopping the swearing in of the “winners” of the controversial election the violence would have spread to other states through reprisal attacks. As was the case in the recent past the mindless destruction of lives and property has been put behind us as religious leaders have appealed to the people to “forgive and forget”.

Having forgiven and forgotten such violent attacks on innocent people in several parts of the country over 20,000 people have been killed under the PDP-led government in the last decade. Apart from the direct military invasion of Odi and Zaki Biam ordered by President Olusegun Obasanjo the “do or die” elections of 2003 and 2007 which claimed scores of lives. In the case of Jos it is clear that the Government cannot, on account of political expediency, get to the root of the matter.

The Plateau State and the Federal Governments have set up two panels headed by Prince Bola Ajibola SAN and General Emmanuel Abisoye respectively. Both Chambers of the National Assembly have also announced plans to investigate the crisis. The Nigeria Police Force has since commenced investigation into the same crisis. The constitutional power of the Federal Government to investigate the crisis has been challenged at the Supreme Court by the Plateau State government. Meanwhile, indigenes and “foreigners”, Christians and

Moslems have pitched their tents with either the federal government or the Plateau government.

Without prejudice to the positions of the feuding parties it is my submission that the constitutional duty of the Police to investigate the serious criminal offences of murder, arson, willful damage to property etc and prosecute all the culprits. Instead of usurping the powers of the Police in the circumstances the federal and state governments should dissolve their panels and assist the police in carrying out a thorough investigation of the criminal activities and the prosecution of those who are involved in such genocidal attack on innocent people. In *Military Governor of Imo State & Anor v. Chief Nwauwa* (1997) 2 NWLR (PT 490) 695 at 706 the Supreme Court (Per Iguh JSC) held:

“It is well settled that once a person is accused of the commission of criminal offence, he must only be tried by a court of law established under the Constitution where the complaints of his prosecutors can be ventilated in public in accordance with the law and where his constitutional right of fair hearing would be assured. No other tribunal, investigating panel or committee will do. See *Dr. O.G. Sofekun v. Chief N.O.A Akinyemi and others* (1981) 2 NWLR 135; (1980) 5-7 SC 1 at 18, *Denloye v. Medical and Dental Practitioners Disciplinary Committee* (1968) 1 All NLR 306, *Federal Civil Service Commission v. J.O. Laoye* (1989) 2 NWLR (PT 106) 652. Accordingly, the panel was incompetent to ‘try’, as it were, the Respondent and to find him ‘guilty’ on any criminal charges. The determination of the guilt or innocence of any person accused of the commission of a criminal offence is within the exclusive jurisdiction of a court of law constituted in the manner prescribed under the Constitution of the Federal Republic of Nigeria, 1979. it seems to me that what the State Governments should have done was to refer the criminal allegations of misappropriation of sundry public funds to the Nigeria Police for investigation and prosecution if necessary but not to vest the panel with any authority to deal with the same”.

In the last 10 years three judicial and administrative panels had investigated similar carnage in Jos. But the government was unable to release the reports talk less of implementing the recommendations due to political compromise. To the extent that the killings in Jos have always been targeted against specific ethnic and religious groups they fall under the category of crimes against humanity. Convinced that the crisis was going to be swept under the carpet once again, I was compelled to advise the Federal Government to invite the Special Prosecutor of the International Criminal Court to conduct an enquiry into the pogrom in Jos and prosecute those indicted. Since Nigeria which is a signatory to the Rome Statute is “unwilling or unable genuinely to prosecute” the criminal suspects this appears to be the only way out of the conundrum in which the government has found itself.

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## **v. Credible Elections**

In a critical review of the several judicial authorities on the 2003 General Elections Professor Ben Nwabueze lamented the fact that the Nigerian courts including the Supreme Court had cast themselves “in the image of aides and abettors of rigging”. Convinced that the fraudulent election results would hardly be set aside by the election petition tribunals President Obasanjo declared that the 2007 General Election was “a do or die affair” for the ruling party and the federal government. Following the wholesale fraud and unprecedented violence that characterized the election I had urged the election petition tribunals to jettison “the highly

technical and restrictive interpretation of the electoral laws and guidelines which had tended to promote electoral malpractice in Nigeria”. (Falana, 2007).

Regrettably, majority of election petitions were dismissed on the ground that they were not proved beyond reasonable doubt. In *Osunbor v. Oshiomole* (unreported) the Court of Appeal upheld the decision of the election petition tribunal that the Edo State governorship election was won by Comrade Adams Oshiomole. It was view of the Court that the petition was proved on the balance of probability.

Instead of endorsing the progressive trend the Supreme Court stunned the nation when it held that the Appellant in *Buhari v. Yaradua* (unreported) Suit No: SC: 51/2008 failed to produce sufficient evidence to prove the petition before the Court of Appeal. Pray, what other evidence was the Appellant required to produce when it was established that the ballot papers used for the election were not serialized as required by the law? In his epochal dissenting judgment Ogunlade JSC vehemently maintained that the non-serialization of ballot papers vitiated the entire presidential election. In his lordship’s words:

“The result is that each of the candidates at the Presidential Elections 2007 scored zero or no votes. An invalid ballot paper cannot yield a valid vote. Clearly therefore, the petitioner/ appellant in view succeeded in making the case that the non compliance with Section 45(1) of the elections Act, 2007 substantially affected the result of the election. Let me reiterate very respectfully that the lower court erred by not coming to the conclusion that each of the candidates at the election scored zero as no valid votes were recorded for any of them.”

However, in dismissing the Petition Niki Tobi JSC who read the leading judgment of the apex court stated:

“Nigeria is one vast and huge country made up of so many diversities in terms of tribes, cultures, sociology, anthropology and above all, quite a number of political parties (some large, some small). These diversities, coupled with the usual aggressiveness of Nigerians arising particularly from the do or die behaviour in politics; there must be irregularities”.

This is an unfortunate statement having regard to the successful conduct of credible elections in Ghana in December 2008. Nigerians who have been commending the maturity of political class in Ghana should note that riggers of election in that country do not enjoy immunity from prosecution. I strongly believe that genuine electoral reforms should start with the prosecution of those who committed sundry criminal offences during the 2007 General Election. From the information at my disposal the Police have concluded investigations into allegations of electoral malfeasance and submitted a comprehensive report to the INEC for the purpose of prosecuting a number of election riggers in all the states of the federation. I have it on good authority that INEC has been directed from above to stay action on the plan to file criminal charges against the criminal suspects.

#### **vi. Immunity or Impunity**

President Yar’adua is currently championing a campaign for the removal of the immunity clause from the Constitution. In making a case for the retention of Section 308(1) of the Constitution some public commentators, including senior lawyers, have given the erroneous impression that absolute immunity exists under the law. No doubt, the issuance or service of legal processes on the President, Vice President, Governors and Deputy Governors is

prohibited by the Constitution. But in a plethora of cases it has been held that the immunity clause cannot be invoked with respect to the prosecution of election petitions in order to ensure the credibility of elections in the country. (See *Amaechi v. INEC* (2008) 5 NWLR (PT 1080) 227).

I had argued that such exception be extended to cases of corruption as the menace of corruption constitutes the greatest impediment to the development of the country. This demand is anchored on Section 308(2) of the Constitution which provides that the immunity clause shall not apply to civil proceedings against any person covered by Section 308(1) “in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party”.

Furthermore, Section 52 of the Independent Corrupt Practices and Other Related Offences Commission Act 2000 has empowered the Chief Justice of Nigeria to appoint an independent counsel to investigate allegations of corruption made against the President, Vice President, Governors and Deputy Governors. An independent counsel who shall be a legal practitioner of not less than 15 years standing shall investigate the allegation and make a report of the findings to the National Assembly, or the House of Assembly of a State as the case may be. Even though the ICPC has submitted not less than 25 applications to the office of the Chief Justice of Nigeria no independent counsel has been appointed since the law became operational in June 2000.

As if that is not enough the Court of Appeal has just held, rather curiously, that “the Code of Conduct Tribunal has no power or jurisdiction to hear and determine allegations of contravention of any of the provisions of the Code of Conduct Bureau and Tribunal Act or as contained in the Fifth Schedule to the Constitution of the Federal Republic of Nigeria, 1999 against a President, Vice President, Governor or Deputy Governor, while his tenure of office subsists”. See *AG, Federation v. Atiku Abubakar* (2007) 8 NWLR (PT 1035) 117 at 155.

With respect, the decision cannot stand having regard to the fact that complaints of infraction of the Code of Conduct for public officers such as failure to declare assets, operation of foreign accounts or conflict of interest cannot be classified as criminal charges. In view of Part II of the Fifth Schedule to the Constitution which has stipulated that public officers include the President, Vice President, Governors and Deputy Governors for the purpose of the Code of Conduct ex-president Olusegun Obasanjo has raised a preliminary objection to the writ of mandamus to have him brought to justice before the Code of Conduct Tribunal to justify the primitive accumulation of wealth by him during his 8-year presidency. The basis of his objection is that is no longer a public officer!

In the case of *James Ibori v. Federal Republic of Nigeria* (unreported) the Court of Appeal held that every accused person should be charged where an offence has been committed. Since the Federal High Court has only one jurisdiction which is exercisable throughout the federation it is hoped that the Economic and Financial Crimes Commission will appeal against the curious decision. Otherwise, the security of judges, prosecutors, lawyers and witnesses may be endangered if some federal offences like treason, terrorism, money laundering etc are prosecuted in the villages of accused persons.

In any case, since what is good for the goose is said to be good for the gander I have requested the Chief Judge of the Federal High Court to discontinue the trial of Mr. Henry Okah in the Jos Division of the Federal High Court on the ground that none of the elements

of the 62-count charge took place within the vicinity of Jos, Plateau State. Having regard to the practice of renting crowds to disrupt court proceedings by influential accused persons in Nigeria the Court of Appeal may have unwillingly frustrated the prosecution of certain persons in the country.

## **vii. On the New Constitution**

A critical examination of the history of constitution making in Nigeria reveals that the Nigerian people have never been afforded the opportunity to exercise their sovereign power of producing a constitution. In a move which smacks of arrogance on the part of the ruling class both Chambers of the National Assembly have constituted a Joint Committee for the Review of the 1999 Constitution. Even though the Committee has not commenced the assignment President Yar'adua was reported to have proposed a review of a few provisions of the Constitution. On their own part, different factions of the ruling class are making a case for new states, fiscal federalism, state police etc.

It is indisputable that the Nigerian people and their organizations are being deliberately excluded from the process of packaging a new constitution for the nation. No doubt the crises in the polity can be resolved through genuine commitment and adherence to the tenets of constitutionalism. In other words, the Nigerian State which is expected to be built on the principles of participatory democracy and social justice can be re-invented through constitutionalism.

When President Obasanjo set up a Technical Committee to review the Constitution in 1999 it was observed that "such arrogance of power and disrespect for popular will simply widen the already wide gap between the state and civil society, and between the government and the governed. It is not surprising therefore, that imposed and elite-driven constitutions in post-colonial Africa have never enjoyed widespread acceptability. This lack of acceptability mediates its utility as a veritable weapon to be deployed in the defence of the democratic project. If nothing else, the diversity of approaches to remaking constitutions require some articulation of basic principles and mechanisms of constitution-making in order to establish minimum standards by which we can measure past, present and future exercises". (Ihonvbere 2000).

Once a constitution review is hijacked and made the business of the elite it is bound to fail. This has been the experience of Nigerians under successive regimes that excluded the people and their organizations from constitution making. Therefore, in order to build legitimacy around the constitution the process of producing it has to be transparent, all-inclusive and participatory.

Apart from the unanimous verdict of local and international observers to the effect that the 2007 General Election was highly flawed President Yar'adua has equally admitted that the exercise was devoid of credibility. To that extent the current members of the National Assembly cannot be said to have the genuine mandate of the Nigerian people to review the Constitution. In order to guarantee maximum participation of Nigerians this time around, the government should convene a Sovereign National Conference consisting of accredited representatives of all interest groups including the National Assembly. It should be pointed out that the sovereign nature of the conference is to ensure that the outcome is not manipulated by the government but subjected to a referendum for its ratification by the Nigerian people.

## **Conclusion**

From the foregoing it is crystal clear that the on-going top-bottom approach to constitution making cannot lead to the re-invention of the Nigerian State. It is common knowledge that the Court of Appeal is yet to conclude many governorship and legislative election petitions in several parts of the country. Although the Justice Mohammed Uwais-led Electoral Reform Panel submitted its report last year the Federal Government has not issued a White paper on the recommendations. Yet, the 2011 General Elections are around the corner.

It is submitted that unless the issue of electoral reform is given priority attention by the Federal Government, political parties and other stakeholders the democratic process will continue to be subverted. It is high time the report of the Electoral Reform Panel was released to the public for a robust debate that will lead to enactment of a new electoral law that will assist Nigeria to conduct credible elections. This is the only way the country can be admitted to the comity of democratic nations.

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