AVERTING A LOOMING CONSTITUTIONAL CRISIS IN NIGERIA

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The President of Nigeria, Alhaji Umaru Yar'Adua, has been in hospital in Saudi Arabia receiving treatment since 23 November, 2009. Whilst we pray for his recovery, the country cannot be left without an effective, functioning government; the heavy, onerous duties and responsibilities of his office as President must continue to be effectively discharged on a continuous, day-to-day basis during the period of his incapacitation by illness. The Constitution of Nigeria does not contemplate an abeyance, a period of dormancy, in government; it does not permit a vacuum in the leadership of governmental affairs for such a long period of time.

The issue arising from the President's long absence abroad is not as to whether he can exercise the powers and functions of the presidential office from outside the country unlike in the case of a legislative assembly which can only function from its publicly designated place of business, the President (or Governor) can constitutionally exercise his powers or functions from anywhere; the issue facing the country now concerns, rather, his ability, health-wise, to exercise those powers or functions. It is now public knowledge that he is incapacitated by serious illness from effectively discharging the duties of his office on a continuous, day-to-day basis.

Accepting that undeniable fact, as we must all sincerely do, the question is how else can the country be governed under the Constitution during the period of the President's incapacitation in order to avoid an abeyance of government, a vacuum in leadership of governmental affairs? Several provisions of the Constitution, in particular, the provisions of sections 5, 130, 144, 145, 146 and 148, need to be correctly interpreted in our search for a way out of the looming constitutional crisis.

The first point to notice is the principle of a single executive, otherwise referred to as the unity of the executive, under the presidential system of government instituted by the 1979 and 1999 Constitutions, and the position of the Vice-President under the system.

UNION IN ONE PERSON OF THE TITLE OF EXECUTIVE POWER AND THE EXERCISE OF IT UNDER SECTION 5 OF THE CONSTITUTION

Unlike in the parliamentary system of the 1960 and 1963 Constitutions where the title of executive power was vested in the President (or Governor-General) but the exercise of it, (which is the real essence of the power), was taken from him and given to Ministers, of whom the Prime Minister was primus inter pares (first among equals) - hence the President under that system is called a nominal or

constitutional President - under the presidential system of the 1979 and 1999 Constitutions, on the other hand, both the title of executive power and the exercise of it are united in one person, designated President, with the Vice-President and Ministers merely in the role of assistants or agents through whom the President may act in the exercise of executive power and whose acts, performed in the regular course of their duties, are presumptively his acts, he being the one deemed to be always acting, whether he does so directly in person or indirectly through others he has appointed or authorised to do so on his behalf. This is a cardinal feature setting the two systems apart from each other.

The position of the Vice-President under the system needs to be spelt out in more explicit terms for a proper understanding of how he stands in relation to the title of executive power and the exercise of it.

POSITION OF THE VICE-PRESIDENT IN RELATION TO THE TITLE OF EXECUTIVE POWER AND THE EXERCISE OF IT UNDER THE PRESIDENTIAL SYSTEM

The Vice-President ranks next to the President in terms of dignity, but not in terms of the title of executive power and the exercise of it, except in circumstances indicated below. The impression created by the title, "Vice-President", that the Vice-President is the next or second-in-command in the government after the President, with a right to take charge of government, except in specified circumstances, as indicated below, has no basis in the Constitution. It is a misinterpretation to say that the title, Vice-President, by itself alone, imports, or invests him, by implication, with a right to exercise at any time the powers or functions of the presidential office, except as he is authorised to do so in circumstances provided by the Constitution.

The office of Vice-President is created by the Constitution, not for the purpose of having on seat a constitutionally-designated second-in-command, with a constitutional right to take charge of governmental affairs whenever the President is temporarily absent from office. The purpose is to have at hand someone, already approved by the people at an election, who is to take charge of the affairs of government in circumstances specified by the Constitution. That is the sole rationale for the creation of the office.

(i) Circumstances in which the Vice-President may assume the office of President

Section 146(1) of the Constitution provides :

"The Vice-President shall hold the office of President if the office of President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with section 143 or 144 of this Constitution". (emphasis supplied)

The provision of the sub-section is clear enough as not to require amplification.

(ii) Circumstances in which the Vice-President may exercise the functions of the presidential office as a acting President

The circumstances in which the Vice-President may exercise the functions of the presidential office as "acting President" are prescribed by section 145 of the Constitution, as follows :

"Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President."

The provision is rather clumsily worded, and raises several questions of interpretation and application. The provision does essentially two things, viz (i) it confers on the Vice-President a conditional right, which he did not have under the 1979 Constitution, to discharge the functions of the presidential office as acting President during the limited period of time specified in the section; (ii) it prescribes the condition under which the Vice-President can have and exercise such right.

It needs to be emphasized that the right conferred on the Vice-President by section 145 to discharge the functions of the presidential office as acting President is not dependent upon appointment, delegation or authorization by the President. It arises directly by the force or by the operation of section 145, and cannot be denied him if the condition for its exercise arises.

Under the provision of section 145, the Vice-President cannot validly discharge the functions of the office of President unless and until the condition specified in the section has been satisfied, i.e. until the prescribed written declaration has been transmitted to the two presiding officers of the National Assembly; unless the condition is satisfied, any purported exercise of the entirety of the functions of the presidential office by the Vice-President is unconstitutional, null and void. In order words, no one, whether the Vice-President or a Minister or any other public officer, can function "as acting President" under the Constitution unless the provision of section 145 is complied with. Section 145 is a specific provision prescribing the circumstances under which the entirety of the functions of the presidential office may be exercised by the Vice-President, and cannot be over-ridden by a non-specific provision, such as that in section 5 relating to executive power in general. What needs to be specially noted is that the entirety of the executive power of the Federation vested in the President by section 5(1) cannot be exercised by the Vice-President in any other capacity than as acting President by virtue of the subsection. Excepting a situation when the office is vacant, section 145 is the one and only provision of the Constitution by virtue of which

the entirety of the executive power of the Federation may be exercised by the Vice-President; certainly not sections 5(1) or 148(1).

It is noteworthy that the provision in section 145 does not say that the Vice-President shall during the specified period, hold the office of President in an acting capacity or shall act in the office, only that he shall discharge the functions of the office as acting President compare with the wording of section 146 noted above. There are many things that appertain to the office of President but which do not involve the exercise of functions things like the use of outriders, privileges, dignities and other perquisites appurtenant to the office. As defined in section 318(1) of the Constitution, "function" "includes power and duty", it does not include privileges, dignities or perquisites. In short, the Vice-President is, during the specified period, "acting President" only for the purpose of discharging the functions of the office and for no other purpose. The word "function" in the context of section 145 of the Constitution is a legal term of art with a distinctive meaning.

The provision of section 145 was not in the 1979 Constitution. It is entirely new, and is brought into the 1999 Constitution to take care of the disputation which arose under the 1979 Constitution as to whether a State Governor was right and justified to deny the Deputy Governor the right to "deputise" for him during his absences from the office either on vacation or on long visits abroad. The practice among some Governors was to direct that no one should act for them during such absences. A notable case was that of Ambrose Ali as Governor of Bendel State. When he travelled abroad for two weeks on 27 May, 1981 he directed that the Executive Council would be on recess for the duration of his tour, that no financial commitments, in the form of new contracts, new appointments or otherwise should be entered into, that vital state duties would continue to be attended to by himself wherever he might be, and that the Deputy Governor was merely to represent him at functions at which he was expected to be present in his official capacity : see Bendel State Notice No. 145 of 28 May, 1981.

The question provoked by such practice among some State Governors was as to whether the designation "Deputy Governor" does not, by implication, confer on the Deputy Governor a right to "deputise" for the Governor during his absence on vacation or an overseas tour. The Deputy Governor was of course the logical person to be asked to act if he has not proved himself disloyal to the Governor, but the prerogative as to whom to ask to do so belonged to the Governor. The designation "Deputy Governor" confers upon the Deputy no automatic right to deputise for the Governor in his absence.

That was the background to the insertion of section 145 in the 1999 Constitution. It is important to explain that section 145 has not completely changed the position under the 1979 Constitution as noted above. It is inconceivable that the section could have intended to make it obligatory for the President, when going on vacation, to allow the functions of his office to be discharged in an acting

capacity by a Vice-President who is disloyal, antagonistic, a bitter enemy or who is otherwise in hostile relations with him, the kind of hostile relations that existed between Governors Abubakar Rimi of Kano State, Adamu Atta of Kwara State, Bola Ige of Oyo State, Michael Ajasin of Ondo State, Solomon Lar of Pleateau State and their respective Deputy Governors in the Second Republic. That would be like asking the President to commit political suicide by putting himself and his government in the hands of an enemy.

The main interpretative question arising from the provision of section 145 is as to whether the President is obliged to transmit to the presiding officers of the two houses of the National Assembly the written declaration specified in the section. The interpretation is made difficult because the provision does not say that the President "shall transmit" the prescribed written declaration in the two events specified therein; the wording, "whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives" the prescribed written declaration, seems to leave it in the discretion of the President whether to do so or not.

However, a correct, purposive interpretation requires that a differentiation be made between the two specified events, namely, (a) the President going on vacation and (b) his inability to discharge the functions of his office. A correct interpretation should be informed by the different principles and considerations properly applicable in regard to the two specified events.

As regards the President proceeding on vacation, the interpretation should be informed by the principle of co-equality and independence which governs the relations between the two primary political organs of our Government under the Constitution, the President and the National Assembly. As the Executive or Chief Executive of the Federation, the President has the right to go on vacation without first notifying the National Assembly or obtaining its permission or approval, just as the National Assembly also has the right to go on vacation without first notifying the President or obtaining his permission or approval. To require such notification, permission or approval will run counter to the fundamental principle of co-equality and independence governing the relations of the two organs. Section 145 of the 1999 Constitution has therefore nothing to do with the right of the President to go on vacation without notifying the National Assembly or obtaining its permission. It neither takes away the right nor restricts it by requiring him first to notify the National Assembly or to get its permission or approval.

In regard to this event, i.e. the President going on vacation, he is definitely not obliged to notify the National Assembly before exercising his undoubted right to take a vacation. The issue is rather whether, during his absence from the office on vacation, he can authorise the Vice-President, by delegation or otherwise, to take charge of the Government as acting President without transmitting to the National Assembly a written declaration in terms of section 145. He cannot. It is unconstitutional, null and void for him to do so; and any exercise of the functions

of the office by the Vice-President as acting President on the authorization of the President but without such written declaration being transmitted to the National Assembly is likewise unconstitutional, null and void. As stated earlier, it is the transmission of the prescribed written declaration to the National Assembly that automatically brings into force the right of the Vice-President to discharge the functions of the presidential office as acting President.

In regard to the other specified event, i.e. where he is "unable to discharge the functions of his office", different principle and consideration apply to make it mandatory or obligatory that the President should transmit the prescribed written declaration to the President of the Senate and the Speaker of the House of Representatives. The obligation flows from the provision of section 5(1)(b) of the Constitution to the effect that the executive power vested in the President "shall extend to the execution and maintenance of this Constitution....." (emphasis supplied)

The execution and maintenance of the Constitution imports not only the exercise of power, which is discretionary, but also a mandatory duty. According to New Webster's Dictionary of the English Language, to "maintain" is to "preserve", while to "preserve" is to "keep or save from harm or destruction; to save from deteriorating; to cause to remain good and wholesome". Thus, a mandatory duty is laid by section 5(1)(b) on the President, whenever he is incapacitated by illness from discharging the functions of his office, to transmit the prescribed written declaration to the presiding officers of the two houses of the National Assembly in order to enable the Vice-President to discharge those function as acting President, and thereby prevent an abeyance of government and save the country from ruination that may result from such abeyance. The President is certainly not "maintaining" or "preserving" the Constitution by permitting an abeyance of government, which is something not permitted or even contemplated by the Constitution. He owes it as a duty to the people of Nigeria to maintain or preserve the Constitution, and save them from a situation that may plunge the country into a ruinous constitutional crisis. He should forthwith transmit the written declaration required by section 145, unless he is now able to resume the effective discharge of the functions of the office.

The obligation laid on the President by section 5(1)(b) is reinforced by the Oath of Office in the Seventh Schedule to the Constitution by which he solemnly swears/affirms to "discharge his duties to the best of his ability.....and will to the best of his ability preserve, protect and defend the Constitution....." But it is the subject of disputation whether the obligation imposed on him by the oath of office to preserve and protect the Constitution is a legally enforceable one. On one view of the matter, the purpose and effect of the oath is only to put the President's "conscience in bonds to the law", but not to create a legally enforceable obligation.

INAPPLICABILITY OF SECTIONS 5(1)(a) AND 148(1) OF THE CONSTITUTION AS CONFERRING ON THE VICE-PRESIDENT A RIGHT TO EXERCISE ANY PART OF THE EXECUTIVE POWER OF THE FEDERATION, MUCH LESS TO EXERCISE THE ENTIRETY OF IT AS ACTING PRESIDENT

It is a manifest misinterpretation of section 5(1)(a) of the Constitution to read it as conferring on the Vice-President a right to exercise any part of the executive power of the Federation, except as such right may be delegated to him by the President, much less to exercise the entirety of the power which cannot be delegated, anyway. (As will be shown later below, part of the reason why the entirety of the power cannot be delegated by the President to the Vice-President or to any one particular Minister is because he will thereby have rendered himself functus officio.)

This is because, as stated above, the Vice-President and Ministers are not co-beneficiaries, co-owners or part-holders of the executive power, which belongs alone to the President to the exclusion of the Vice-President and the Ministers as individual functionaries. As individual functionaries, they have only such right of participation in the exercise of the executive power as may be delegated or assigned to them by the President; in other words, their participation in the exercise of executive power derives entirely from delegation by the President, not by right conferred directly by section 5(1)(a) of the Constitution. Their right of participation collectively as a body is governed by section 148(2).

The participation of the Vice-President and Ministers in the exercise of executive power by delegation by the President presupposes that the President remains in office as President and continues to function as such, and that he is able to perform the act of delegation. This flows unmistakeably from the wording of section 5(1)(a) of the Constitution. It reads :

".....the executive powers of the Federation (a) shall be vested in the President and may.....be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation" (emphasis supplied)

The meaning and effect of the provision is controlled largely by the words "exercised by him." To bring out the effect of those words, the provision may be interpolated to read "may be exercised either directly by him or by him through the Vice-President or Ministers. To repeat what is said earlier, the Vice-President and Ministers are merely in the role of assistants or agents of the President through whom he may act in the exercise of executive power and whose acts, performed in the regular course of their duties, are presumptively his acts, he being the one deemed to be always acting, whether he does so personally and directly or indirectly through others he has appointed or authorised to do so on his behalf: see on this point, Runkle v. United States, 122 U.S. 543 at p. 557 (1886), and the host of other decisions there cited.

The words "or officers in the public service of the Federation" are italicised to emphasise that the Vice-President, equally as the Ministers, has no greater claim than other officers in the public service to be authorized by the President as agents through whom he may exercise the executive power vested in him by section 5(1)(a) of the Constitution. It would be absurd to say that some other officer in the federal public service may be authorized by the President to exercise the entirety of the executive power.

The view of section 5(1)(a) as not conferring on the Vice-President and Ministers a right, arising by direct constitutional grant, to exercise any part of the executive power, except as may be delegated or assigned to them by the President, subject to the limitation on the power of delegation, is reinforced by section 148(1), which provides :

"The President may, in his discretion, assign to the Vice-President or any Minister of the Government of the Federation responsibility for any business of the Government of the Federation, including the administration of any department of government." (emphasis supplied)

Under the provision of section 148(1), therefore, an assignment by the President, made in his discretion, is necessary before the Vice-President or a Minister can exercise any part of the executive power. But, by no stretch of imagination can the power to assign "responsibility for any business of the Government" be reasonably interpreted as authorising the assignment to the Vice-President or any one particular Minister the entirety of the executive power vested in the President by section 5(1). The restricted meaning of the word "business" is no doubt sought to be enlarged by the words, "including the administration of any department of government", but even that does not enlarge the meaning of the words to include the assignment of the entirety of executive power to the Vice-President or any one Minister.

The view is also affirmed by the decision of the Court of Appeal in Att-Gen, Kaduna State v. Hassan with respect to a similar provision in section 174(2) of the Constitution, which provides that the power vested in the Attorney-General in respect of public prosecutions, "may be exercised by him in person or through officers of his department" (emphasis supplied) - see also section 211(2). (Judgment in the case, FCA/K/104M/82 was delivered on 17/2/83.)

A prosecution for culpable homicide of a boy was withdrawn by the Solicitor-General after committal on a preliminary investigation by a magistrate, who found a prima facie case to have been made against the accused persons. But the Solicitor-General thought the evidence at the preliminary investigation so contradictory as not to justify the prosecution being continued and accordingly withdrew it. The father of the dead boy, in a separate action in the High Court, then sought a declaration that only an Attorney-General or a person duly appointed to act in the office could withdraw or authorize the withdrawal of a

prosecution without leave of the court, and that in the absence of an incumbent Attorney-General to authorise it, (an Attorney-General had not been appointed at the time) the withdrawal of the prosecution against the particular accused persons was unconstitutional and void.

The propriety of the exercise of the power by the Solicitor-General and other law officers in the Ministry of Justice turns on the provision that the powers conferred by the Constitution upon the Attorney-General in respect of criminal prosecutions "may be exercised by him in person or through officers of his department" (ss. 160(2) & 191(2) 1979 Constitution. The interpretative question raised is whether the words "by him" govern both the exercise of the power by the Attorney-General in person and its exercise "through officers of his department" - whether, that is, what is meant is that the power may be exercised by the Attorney-General in person or by him through officers of his department. The contention of the Solicitor-General was that the phrase "through officers of his department" confers upon the officers of the ministry an independent right to exercise the power, which does not depend upon delegation or authorisation by the Attorney-General.

Affirming the decision of the trial judge, the Federal Court of Appeal, by a majority of 3 to 1, rejected the interpretation contended for by the Solicitor-General. Such a view of the provision would clearly do violence to its true meaning and intent. In the context of the provision the word "through" pre-supposes a person who is to act through others. It implies a delegated authority or agency, the officers of the department being merely agents through whom the Attorney-General may act. Their acts done with his authority are presumptively his acts. In the contemplation of the law, the Attorney-General, provided there is one actually in office, is deemed always to be the person acting, whether the action is done by him in person or through officers of his department. As the learned President of the Federal Court of Appeal, Justice Nasir, observed, "there is nothing in the Constitution to vest the exercise of the constitutional powers of the Attorney-General in any officer of his department without his authorisation" at p. 21 of his cyclostyled judgment.

The contention that officers of the Attorney-General's department have an independent right to exercise it runs counter to the provision that no person not qualified as a legal practitioner with at least ten years' experience shall "hold or perform the functions of the office of Attorney-General", in that, as Justice Wali pertinently observed, it will make it possible for officers without the prescribed qualification to exercise the power.

There is another factor that further bears out the fact that the exercise by the Vice-President or the Ministers of any part of the executive power derives entirely from delegation by the President and not from direct constitutional grant, namely, the principle, arising by necessary or reasonable implication, which requires delegation of executive power by the President to be made by instrument in

writing. A written instrument of delegation is issued by the President from time to time assigning specific responsibilities, with their scope carefully delineated, to the Vice-President, Ministers, Secretary to the Government and other relevant officers in the public service in the form of Government Establishment Circulars under the title Mandates of Ministries, Departments and Agencies and Responsibilities of Honourable Ministers Instrument or the Assignment of Responsibilities to Honourable Ministers, etc - see for example, Instruments of July 1999 and April 2007. The provisions of these Instruments, duly published in the Federal Government Gazette as Establishment Circulars, have the force of law and binding as such; they do not require to be proved by evidence, affidavit evidence or other kinds of evidence.

In cases where the power being delegated is conferred on the President by statute, the delegation is required to be made by Order under the authority of the Ministers' Statutory Powers and Duties (Miscellaneous Provisions) Act, cap M14, Laws of the Federation of Nigeria, 2004, section 2 of which authorizes the President to transfer by order to "a Minister any of the powers and duties which are by any statute directly conferred or imposed on him, or any public official or Minister."

Limits of the power of delegation

A donee of power may, if so authorised by the enabling law or instrument, as with the executive power vested in the President by section 5(1)(a) of the Constitution, delegate part of it to others, but he cannot transfer the power in its entirety to such others, as otherwise he will have made himself functus officio. In the case of executive power under section 5(1)(a), the words "by him" in the provision of the subsection contemplate and pre-suppose that the President remains in office as President, that he continues to function as such and does not make himself functus officio. These words therefore preclude the transfer of the entirety of executive power to the Vice-President as acting President or in any other capacity. The wording of section 148(1) also leaves it in no doubt that what may be assigned to the Vice-President or any one Minister is responsibility for specific businesses of the Government, not responsibility for the entire business of governance.

The impossibility of transferring the entirety of power in the guise of delegation has arisen with particular reference to the delegation of legislative power to the President by the legislative assembly. The U.S. Supreme Court has held in a unanimous decision that the entirety of its legislative power over a particular subject-matter cannot, in the guise of delegation, be transferred by Congress to the President, castigating what was done in that case as "delegation running riot". "No such plenitude of power," the Court held, "is susceptible of transfer." Congress, it further affirmed, "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.....Such abdication is unknown to our law"- see Schechter Poultry Corporation v. United States, 295

US 495 (1935). Although the rationale of the decision is the doctrine of the separation of powers between the legislative assembly and the executive, the decision establishes a principle of general application defining the limits of the power of delegation in all cases. Likewise, the President is not permitted under the Constitution of Nigeria to delegate the entirety of the executive power vested in him.

To conclude : The Vice-President cannot begin to discharge the functions of the presidential office as acting President or otherwise under section 5(1)(a) or section 148(1) of the Constitution by virtue either of a direct constitutional grant or of delegation by the President. The subsections confer no such power on him directly, nor can the President authorise him to do so by delegation. It is therefore unconstitutional, null and void for him to begin to discharge such functions. He can do so only by virtue of section 145.

INAPPLICABILITY OF THE DOCTRINE OF STATE NECESSITY IN THE CIRCUMSTANCES OF AN INCIPIENT ABEYANCE OF GOVERNMENT

The Vice-President cannot also lawfully and competently begin to discharge the functions of the presidential office as acting President or otherwise by virtue of the doctrine of necessity implied in the constitution of every modern state.

The rationale of the doctrine is that, in an exigency imperiling public order or public security, or good government, the safety of the people is the supreme law - salus populi est suprema lex. By this supreme law of necessity, therefore, the organs of the state are entitled, in the face of such an exigency, to take all appropriate actions, in order to safeguard law and order and preserve the state and society. Its application is, however, subject to the following conditions, as laid down in decided cases from various jurisdictions across the world:-

(i) an imperative necessity arising from an imminent and extreme danger affecting the safety of the state or society;

(ii) action taken to meet the exigency must be inevitable in the sense of being the only remedy;

(iii) it must be proportionate to the necessity, i.e. it must be reasonably warranted by the danger which it was intended to avert;

(iv) it must be of a temporary character limited to the duration of the exceptional circumstances;

(v) the temporary incapacitation of the authority (if any) which normally has the competence to act.

A further condition for the application of the doctrine is that it does not operate from outside the law; it is an implied term of the law of the constitution. It follows that the doctrine cannot be invoked to modify the express provisions of the law of the constitution. And where such provisions are couched in prohibitory terms, the application of the doctrine will necessarily result in the nullification or overriding of those prohibitions, contrary to the conception underlying the doctrine, which is that it does not nullify express law.

Thus, where in the situation arising from the Unilateral Declaration of Independence (UDI) in Rhodesia (now Zimbabwe) by Ian Smith and his white gang, the British Government, by a 1965 Order-in-Council, made pursuant to an Act of Parliament enacted earlier the same year, declared "void an of no effect" "any law made, business transacted, steps taken or function exercised in contravention of the provisions" of the Order-in-Council by the Smith regime, the Judicial Committee of the Privy Council held that the need to avoid total chaos in society "cannot justify disregard of legislation passed or authorised by the United Kingdom Parliament, by the introduction of a doctrine of necessity which in their Lordships' judgment cannot be reconciled with the terms of the Order-in-Council": Madzimbamuto's Case 1969 1 AC 645 at o, 729, per Lord Reid delivering the opinion of the Privy Council.

In this connection also, the danger of a looming abeyance of governance cannot, for reasons of state necessity, justify disregard by the court of the express provision in section 1(3) of the Nigerian Constitution which declares void, any law or other act of government that is inconsistent with its provisions and the express injunction in section 1(2) that "the Federal Republic of Nigeria shall not be governed .....except in accordance with the provisions of this Constitution".

The Constitution in section 145 has made explicit provision about how the country is to be governed in the event of the temporary incapacitation of the President by illness, not by tinkering with sections 5(1) and 148(1). The President should, therefore, transmit to the President of the Senate and the Speaker of the House of Representatives the written declaration specified in that section in order to enable the Vice-President to discharge the functions of the presidential office as acting President. There is thus no basis for the application of the doctrine of state necessity.

THE PRESIDENT AS HEAD OF STATE UNDER SECTION 130(2) OF THE CONSTITUTION

The President is, by the express provision of section 130(2) of the Constitution, designated the Head of State. The significance of designating the President the Head of State in express terms in the Constitution is often lost sight of. The provision designating the President, the Head of State, makes him the first citizen. He is such, not by virtue of his designation as "Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation" in

the same subsection of the Constitution, but by virtue of his designation as Head of State. The express designation of the President as Head of State has great significance transcending that of Chief Executive. The Head of State symbolizes, he incarnates, i.e. he embodies in his person, the artificial entity, the state.

Oppenheim expresses the notion aptly thus: "As a State is an abstraction from the fact that a multitude of individuals live in a country under a sovereign government, every State must have a Head as its highest organ which represents it within and without its borders in the totality of its relations". The conception underlying the office is perhaps best stated in a provision in the Constitution of France 1958, which is adopted in the Constitutions of nearly all her former African colonies. The President is conceived as the "guarantor" of the "regular functioning of the governing authorities.....of the continuity of the State, ...of national independence and territorial integrity" (article 5, France).

The role thus cast on the Head of State as the embodiment, incarnation or representative of the state in the totality of its relations within and without its borders, as "the guarantor of the regular functioning of the governing authorities" of the state, makes him the appropriate and rightful organ of the state to swear - in high-ranking government functionaries, like the Chief Justice who is the head of one of the three organs of government in the country. His role as the rightful person to swear-in the Chief Justice of Nigeria has therefore a basis in the Constitution. It has also the sanction of convention evolved from practice that has endured for some time now.

Conventions are a vital part of the constitution of a country. An informed description of the constitution of a country must take into account the practices that have grown around it over the years. Nigeria has an imperative need to build up and nurture the growth of appropriate conventions around our Constitution. What is known as the British Constitution consists in great part of unwritten principles and rules governing the conduct of public affairs that have been evolved from practice over the years, otherwise called constitutional conventions. An unconstitutional act in Britain may mean simply an act that is at variance with established conventions. In this sense of the word, the swearing-in of a new Chief Justice of Nigeria by the out-going Chief Justice, rather than by the President/Head of State, may well be said to be unconstitutional, notwithstanding the Oaths Act, cap. 01 Laws of the Federation of Nigeria 2004 edn.

The written rules enshrined in the constitution as the supreme law of the land and the unwritten rules derived from conventions are both necessary foundations for constitutionalism and, given a developed public opinion, both may serve as effective sanctions for it. It is not disputed, however, that law has a distinct merit over conventions. As Professor Sir Ivor Jennings explains in his book, Cabinet Government, 3rd edn (1961) at page 4, the difference between them lies, not so much in the amenability of law to judicial enforcement, as in "the recognized sanctity of law". As he says:

"To break the law is to do something clearly and obviously unconstitutional.....it is possible to rouse public opinion to indignation; the breach would be proclaimed from every platform and blazoned forth in every headline. Breaches of constitutional conventions are less obvious and can be more easily clouded by a fog of misunderstanding. A judicial decision that a law has been broken leaves no room for argument, save as to its political justification; an accusation that a convention has been broken may be met by an accusation of factious and deliberate misinterpretation."

The swearing-in of a new Chief Justice of Nigeria by the out-going Chief Justice, rather than by the President/Head of State, is not only "unconstitutional in the sense of being at variance with established convention, it may also be unlawful in that the swearing-in took place three days before the office was to be vacated by the retirement of the incumbent Chief Justice; there was thus no vacancy in the office into which the new Chief Justice could be sworn-in. The issue is as to the timing of the swearing-in.

The issue is not as to the incumbent Chief Justice lacking power to swear-in a new Chief Justice; it involves the totally different issue of there being no vacancy in the office until the retirement from the office by the incumbent Chief Justice which would only take place three days after the swearing-in. The case is thus comparable to the election and swearing-in of Andy Uba as Governor of Anambra State at a time when the term of office of the incumbent Governor, Peter Obi, had not expired, and which the Supreme Court held, for this reason, to be invalid. The issue might have been avoided, had the swearing-in taken place on the same day as the incumbent Chief Justice was due to retire : see on this point, the Interpretation Act.

This distinguishes this case from the cases where a swearing-in was done by an officer who lacked the competence or power to do so, and where it has been held on the highest judicial authority, including the House of Lords and the Privy Council in England, that an act regularly done by a de facto officer in the discharge of the functions of his office is valid. A de facto officer has been defined as "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law"; one who, though not an officer de jure because of some defect in his appointment or in his title to an office, yet has in fact functioned as such under some colour of title to that office - per Lord Ellenborough C.J. in R. v. Bedford Level Corporation (1805) 56 East 356 at page 368. In accordance with this principle, the highest courts in England have also sustained the validity of the conviction of a person by a judge whose appointment was later found to be void (Buckley v. Edwards 1892 A C 387; Re Aldridge (1893) 15 NZLR 361), as well as the validity of a distress warrant granted by a magistrate who had not taken the necessary oath (Margate Pier Co. v. Hannam (1819) 3 B8 Ald. 266.

The facts in the case involving the swearing-in of former Governor Chris Ngige of Anambra State by the then Chief Judge of the State are covered by the principle laid down in the above decisions : see Attorney-General of Anambra State v. Attorney-General of the Federation & Others 2005 9 NWLR (Pt 931) 575. The Federal Government had averred that the oath of office and oath of allegiance taken by Governor Ngige on 29 May, 2003 are invalid on the ground that, "from official records from the Honourable Society of Middle Temple in England and the Council of Legal Education, Bwari Abuja", the Chief Judge of Anambra State, Justice C.J. Okoli, "was born on 15/6/37 and should have ceased to hold the office of Chief Judge of Anambra State by 15/6/2002 in accordance with the provisions of section 291(2) of the 1999 Constitution".

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Based on the above averment the Federal Government then asked the Court for a "declaration that the Oath of Office and Oath of Allegiance purportedly administered on Dr Chris Ngige on 29/5/2003 is unconstitutional, null, void, and of no effect", that "Dr Chris Ngige cannot," in view of the nullity of the oaths, "constitutionally assume the functions of Governor of Anambra State, having regard to section 180(1) of the Constitution, and for an order that Dr Chris Nwabueze Ngige be removed from office forthwith as Governor of Anambra State of Nigeria".

Justice Okoli, the Chief Judge of Anambra State, who administered the oaths on Dr Ngige on 29 May, 2003 unquestionably answers to the above definition of a de facto officer. Although the Federal Government's claims against Dr Ngige in this case were later withdrawn and struck out, the Supreme Court took the view that the allegation that Chief Judge Okoli had passed the retiring age when he administered the oaths on Dr Ngige, even if found to be true, cannot invalidate the swearing-in. In the words of Akintan JSC, the alleged

incapacity of the Chief Judge is "a mere irregularity which could not have the effect of nullifying or vitiating the appointment of the Governor" at page 653.

Professor Ben Nwabueze