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CONSTITUTIONALISM AND DEMOCRATIC PROCESS

Preamble

I feel highly honoured to have been invited to deliver a paper on this very important topic and at this very important event. This topic is particularly important at this time when Nigerians again prepare to conduct what has come to be known as a civilian to civilian transition. Without doubt, our experience in constitutional governance these past seven years will play, hopefully, a very major part in that transaction.

I must remind you gentlemen, that this Law week is almost certainly, the last one that will be organized by the Benin Branch of the N.B.A before the 2007 general elections. Therefore, there can be no better time than now to discuss this topic. In this regard, I must commend the foresight of the members of the Law Week Organizing Committee and indeed the leadership of the Benin Branch of the N.B.A for choosing a topic like this for key note address at this event.

In view of the foregoing, I shall be dealing with the topic with particular emphasis on our democratic experience as a nation these past

seven years in other words, I shall examine the concept of constitutionalism as it relates to the democratic process in Nigeria and I shall begin with a fairly detailed examination of the key concept of constitutionalism, what it entails, its relationship with democracy and the Nigeria experience so far.

CONSTITUTIONALISM: WHAT IS IT?

Webster's Dictionary defines constitutionalism "as the doctrine or system of government in which the governing power is limited by enforceable rules of law and concentration of power is prevented by various checks and balances so that the basic rights of individuals and groups are protected". This definition is similar to the one provided by Prof. Nwabueze who stated that the "limiting of arbitrariness of political power is expressed in the concept of constitutionalism"2. He explained further that "constitutionalism recognizes the necessity for government but insists upon a limitation being placed upon its powers"3

From the above expositions, it is clear that the essence of constitutionalism is the prevention of arbitrariness and since it results in the protection of the basic rights of people, its end result is good governance.

What makes a government constitutional? According to Nwabueze "the term constitutional government" is apt to give the impression of a government according to the terms of a constitution. That there is a formal written constitution according to whose provisions a government is conducted is not necessarily conclusive evidence that the government is a constitutional one. Again, the determining factor is: Does the constitution impose limitations upon the powers of the Government?

It is clear from the above that constitutionalism is not merely about constitutions. Albeit, it has to do with constitutions, it does much more. A

constitution has been defined as "… a document having a special sanctity which sets out the frame work and the principal functions of the organs of government within the state and declares the principles by which those organs must operate"5. However constitutionalism goes beyond the form of a constitution and strikes at the substance of it. A study of constitutionalism therefore involves a consideration of the issue whether there are provisions in the constitution which limit arbitrariness in the exercise of political power by providing checks and balances upon such exercise. Thus, according to Nwabueze "there are many countries in the world today with written constitutions but without constitutionalism".

In my earlier lecture entitled "Judicature in constitutionalism" delivered on the occasion of the Idigbe Memorial Lecture at the University of Benin, on 2nd June, 2006, I made the point that obviation of arbitranness in governance and the maximization of liberty with adequate and expedient restraint on government are the core aims of constitutionalism. I add that constitutionalism is not an end in itself, it is a means to an end and that end is good governance.

Thus, it is perfectly possible to have a constitution in place yet the constitution may just be a mere statement of unenforceable "rights" or it may be bereft of provisions guaranteeing liberty or adequate and necessary restraint on exercise of government power. Indeed it is perfectly possible to have a constitution which facilitates the assumption of dictatorial powers.

There can be no constitutionalism without a constitution but there can indeed be a constitution without constitutionalism. The Roman Lawyer and orator Cicero underscored the importance of the constitution in this regard when he declared that the constitution is the society's "higher self" which controls and with the instrumentality of a law, its actions. Although it has been argued and in my view, quite rightly so, that in Cicero's time the word "constitution" may have been also used to refer to

Law, it is also correct that the rule of law at that time was also a reflection of the early facets of constitutionalism.

M.J.C. Vile writing on the concept gave the rationale for constitutionalism thus "Western Institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental powers which is essential to the realization of the values of their societies should be controlled in order that it should not itself be destructive of the values it was intended to promote.

It must be observed that a true insight into the concept of constitutionalism must involve an understanding of the power distribution in a modern state. What internal controls have been planted into the workings of the machinery of government and how have these controls been observed are crucial to constitutionalism. This underscores the point that even where a people have a constitution that has implanted in it, checks and balances, it is very crucial that such checks and balances are observed otherwise, the concept itself will be meaningless, sterile unproductive and abstract. In my view, a government that has constitutional provisions enabling checks on arbitrary exercise of governmental authority honoured more in their breach than due observance, is not a constitutional government. For instance, the constitution of the defunct USSR had in it several rights and contains a guarantee of such rights but those rights were more honoured in their incessant breach than in their observance. Therefore, the emphasis of constitutionalism should be not merely that the checks and balances exist but that they are actually observed.

This view underscores the crucial importance of the relationship or nexus between constitutionalism and the democratic process. Thus, an abstract analysis of constitutionalism without recourse to the democratic process is meaningless. This is because constitutionalism finds

quintessential expression in a democracy. The reason is that democracy is the antithesis of arbitrary rule or despotism which means a government of will instead of law .That is to say, a government according to the whims and caprices of the rulers.

However, the point must be quickly made that elections alone, do not confer constitutionality. The important thing is whether such elected government is limited by predetermined rules.

The doctrine of separation of powers is much credited to the work of the French philosopher Baron de Montesquie. However, it has some roots in Locke's political theory on government. Locke argued that government should be in accordance with the wishes of the majority of the people as invested in Parliament. For liberty to abound, executive and legislative powers should be located in separate authorities with executive authority subservient to legislative authority Locke's theory took for granted the very fundamental role of judges for whom there must be certainty in the laws they are to apply. The requirement of certainty of laws and legal principles assumes a fundamental importance to the maximum liberty standard of his ideal state as it obviates, of necessity, arbitrariness on the part of both the legislative and the judicial authority.

Apparently, Locke's ideas as exposed above impacted on Montesquie who propounded a more comprehensive doctrine of separation of powers based on the desirability for maximum liberty and the need to eschew despotism, arbitrariness and abuse of state powers. Montesquie is thus generally regarded as the "father" of the theory of separation of powers. It must be observed that the doctrine's relevance to the concept of constitutionalism lies in the fact that the doctrine of separation of powers seeks to regulate the location and exercise of power in a state. This is because; constitutionalism is about controlling state power for the purpose

of ensuring liberty and preventing arbitrariness. Indeed separation of powers is crucial to constitutionalism.

In its simplistic form, separation of powers means that the different arms of government to wit, legislative, executive and judicial should be separate and distinct and must not be exercised by the same person or authority. Historically, executive or police functions which originally included the settling of disputes was the primary, indeed, the only function of government, legislation being something of a later development dating back, in the main, to the 16th century. By separating it from law making function, by insisting that every executive action must, in so far at any rates as it affects an individual, have the authority of some law and by prescribing a different procedure for law making the arbitrariness of executive function can be effectively checked [12] This separation of functions and procedure necessarily operates as a form of limitation on arbitrariness of exercise of such functions

If constitutionalism is to be maintained, then a separation of the functions of government and the agencies that exercise such functions of government is a *sine qua non*. As aptly put by M.J.C Ville "the diffusion of authority among different centers of decision making is the antithetic of totalitarianism or absolutism" indeed, it is even more necessary to separate the judicial arm from the others for as Montesquieu wrote "if the power to judge is not separated from the legislative and executive power, "there is no liberty."

It may be observed at this juncture that separation of powers finds very clear expression in a presidential and federal system of Government like the one we run in Nigeria. However, even though it might be argued that extreme separation of powers might itself be antithetical to harmony among the different organs exercising the functions, there can be no justification for a fusion of such functions. The Westminster system of

parliamentary government appears to provide a recognizable exception to this proposition. Even then, like Nwabueze argues even though the members of the executive are also members of Parliament (or vice versa), "such members form a very small proposition of the total membership of the Legislature"

The 1999 constitution entrenches the principle of separation of powers. Unfortunately our experience in democratic governance over the past seven years has shown that friction often arises between the different arms of government exercising different governmental functions. One prominent area of conflict is in the area of appropriation bills.

S. 81(1) of the 1999 constitution requires the President of the Federal Republic of Nigeria to prepare and lay before each house of the National Assembly his budget estimate for a particular fiscal year usually, when such budget proposals are presented by Mr. President, the National Assembly would consider it. As simple as the provisions of this section appears, we have had situations in this country where appropriation bills have been delayed by the National Assembly which has insisted on tinkering, as it were, with specific heads of allocation on the budget proposals. As is expected, on a few of these occasions, Mr. President refused to sign such appropriation bills into law.

It has been argued that since the "preparing" and "laying" of the budget proposals is the business of the Executive headed by Mr. President, the National Assembly being the Legislative arm of the Federal Government cannot increase specific heads or the general figure of allocation. At the annual conference of the N.B.A. in Calabar, in the year 2000, the then Attorney-General of the Federation expressed the view that it is illegal for the National Assembly to increase budgetary allocations as presented by the President.

Professor Nwabueze also holds a similar view. According to him, the National Assembly cannot increase the total amount of the budget beyond what is presented by Mr. President; the rationale being that any increase in the total amount over and above the figure presented must be regarded as having been initiated by the National Assembly rather than the Executive and that is in a position to source for funds.[14]

Albeit, there is a contrary view that since the President is only to prepare and lay his budget proposals by virtue of S. 81(1) of the CFRN 1999, all other issues leading to the passage of the bill is the business of the Legislative. Thus, the Legislature can tinker with the figures to bring them in line with the wishes and aspirations of the people whose "true" representatives members of the N.A are.

The point being made here is that for the purpose of constitutionalism, constitutional provisions entrenching separation of powers must be drafted with the most deserving care and attention so as not to create unnecessary or avoidable conflict. The provision of Section 81(1) which is one of the numerous provisions entrenching the principle of separation of powers is amenable to different interpretations as has been seen. The heat generated by the friction which has arisen from these problems of interpretation has been enormous but certainly avoidable. For instance, we have seen Legislators of the N.A. being "lobbied" by some Ministers to increase their heads of allocation. The show of shame in the 55 million Naira bribery scandal involving former Senate President, Senator Adolphious Wabara and the former Minister of Education, Prof. Fabian Osuji was a direct fall-out of this problem of interpretation regarding S.81 (1).In the interest of constitutionalism, the constitution should lay this matter properly to rest.

Whereas, the need for the different tiers of government to be run separately cannot be over-emphasized, it must be emphasized that absolute

separation of powers is impossible. Thus, it is impossible for any arm of government to be completely independent of the other. Thus in the Nigerian constitution, efforts were made by the draftsmen to create, deliberately, a situation of inter-relationship among them; to ensure checks and balances in the system.

CHECKS AND BALANCES AND JUDICIAL FUNCTIONS

Checks and balances are a necessary ingredient of constitutionalism. Thus, to avoid arbitrariness, it is expedient that each arm of government acts as a watch Dog over the other.

It is important to observe that the limitations which the Law imposes on the Executive and Legislature cannot have any meaning unless there is a separate procedure comprising a separate Agency and personnel for an authoritative interpretation of these functions. This underscores the importance of the judicial arm of Government.

Under the Nigerian Constitution, checks and balances are very well enshrined. Thus, the executive must assent to legislations. Similarly, certain appointments into the judiciary require legislative scrutiny and the courts have the power of judicial review over executive actions. Note carefully that under S. 4(8) of the constitution, the legislature cannot suspend the adjudicating powers' of the judicature by any law. However, S. 292 provides for the removal of judicial officers in a combined action by the legislature and executive. Further provision is made in the constitution for the removal of the executive from office y the Legislature". These are some of the provisions enabling the smooth running of the democratic process by checks and balances.

The importance of the judicature (comprising of the courts) in the scheme of things cannot be over-emphasized. The point must be stressed that unless the Judicature is alive to its role, constitutionalism is inexistent. According to Alexander Hamilton in the Federalist, the Executive and the

Legislature cannot be trusted to be the judges of their constitutional limits. According to Marshal C.J. in the American case of Marbury V. Madison (1803) 5 US (1 cranch) 137, 177 the interpretation of Laws which includes the declaration of the constitutional limits of the authorities of these other two organs of government is the proper and peculiar province of the courts. This is because if for instance, the Legislature has the final say, on the laws enacted by it; certainly, arbitrariness will be the order of the day. Ditto for the Executive, the extent to which such arbitrariness can go was aptly captured by Kayode Esq. JSC in GOVERNMENT OF LAGOS STATE V OJUKWU state when he said that the Military could even legislate to take away judicial powers from the courts. Again, unless the courts are strengthened and made completely independent, constitutionalism is at great risk

To the foregoing end, Nwabueze suggests that it is necessary by appropriate constitutional provisions to insulate the courts from political influence and control. In my opinion, this is a constitutional imperative.

Thank you

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