STRENGTHENING THE FOUNDATIONS AND INSTITUTIONS OF DEMOCRACY IN AFRICA

Being lecture delivered by Prof. Ben Nwabueze at the Annual Memorial Lecture organised by the Goddy Jidenma Foundation at the Nigerian Institute of Foreign Affairs (NIIA), recently.

INTRODUCTORY

The topic of this Lecture, Strengthening the Foundations & Institutions of Democracy in Africa, has three underlying basic assumptions. It assumes, first, that Democracy is a good, indeed the best, form of government for humankind; second, that the welfare of the people or the public good, otherwise referred to as "government for the people" or "democracy dividends", which is an important element of good governance, is an objective of Democracy; and third, that the foundations and institutions of Democracy in Africa are weak or deficient and need to be strengthened. The last of the three assumptions forms the kernel of the topic of the Lecture, but before coming to it, something, albeit brief, must be said about the first two assumptions.

DEMOCRACY AS THE FORM OF GOVERNMENT BEST SUITED TO HUMAN SOCIETY

The first assumption raises the question concerning the merits of Democracy in comparison with other forms of government that may be devised or have been tried as an alternative or in substitution for Democracy. Is there really a viable and acceptable alternative or substitute for Democracy?

Experience shows that no other form of government so far devised by humankind conduces as much to the realization of the ends of human existence upon this earth as one freely elected by the people at periodic intervals of time and limited in its powers by a guarantee of the liberty of the individual under a constitution that has the force of a supreme, overriding law. The truth of this statement is well attested by the evils of arbitrary, authoritarian rule in all its various forms and gradations, viz (i) authoritarian rule that is less than absolutism, as typified by the African one-party system; (ii) an absolute government, as typified by an absolutist military regime; (iii) a fascist government which is an authoritarian system of a type that has not been defined with precision beyond the generalisation that it is a form of dictatorship with socialist, totalitarian orientation and tendencies, such as existed in Italy under Mussolini between 1926 and 1945 and in Germany under Hitler from 1933 to 1945; and (iv) totalitarian government, as typified by the defunct socialist/communist regimes of Eastern Europe and former Soviet Union.

The great French political philosopher and jurist, Alexis de Tocqueville, in his epochal book, Democracy in America (1835), has said that "despotism, taken by

itself, can maintain nothing durable....Do what you may, there is no true power among men except in the free union of their will." He is reechoed nearly a century later by Lord Bryce, writing in 1920: "No gains," he says, "compensate for the sufferings it (i.e. despotism) inflicts. The only thing it creates is the will to destroy it and start afresh." James Bryce, Modern Democracies, Vol. 1 (1920)

Yet, in spite of its well-attested evils, some people are still sometimes inclined to opt for despotism, because of its pretended advantages or because of the shortcomings of constitutional democracy. Denouncing this aberrant inclination, Professor Charles McIlwain has pointedly admonished that "autocracy is worse for mankind than even the feebleness of constitutionalism". Constitutionalism and the Changing World (1939), p. 268.

The pernicious evil of tyranny by a dictatorship does not consist solely in the mass killings, murders, disappearances, tortures, etc; no less pernicious is its effect in eroding the capacity of the people to resist. It is the capacity of society and its various institutions - the press, the churches, professional and trade associations, students' unions and so on - to maintain vigilance at all times, to know at the earliest moment when tyranny begins to rear its ugly head and to be resolute in resisting it, that provide the necessary foundation of freedom.

Tyranny, once allowed to establish itself, deprives the people of the capacity to resist because of the pervasive atmosphere of terror, fear, tension and insecurity created in them by the mass killings, murders, disappearances and tortures. It cows them, and induces in them a mood of cautiousness so as not to risk one's life or liberty, an attitude of resignation, submissiveness and even timidity. This evil effect is tragically brought home to us by Idi Amin's brutal tyranny in Uganda. Subjected to one of the bloodiest of tyrannies imaginable, the people of Uganda, while they were inside the country, were rendered impotent to resist, and were forced into silence, believing in the truth of the age-old adage that discretion is the better part of valour. "As Amin picked them off one by one they continued to entertain the illusion that after one wave of atrocities the country would return to normality."

Idi Amin's brutal tyranny in Uganda (January 1971 - May 1979) was just one of the many such bloody reigns of terror that had been unleashed on Africa over the years since independence. There were those of Field Marshal (Emperor) Jean - Bedel Bokassa in Central African Empire (December 1965 - September 1979), Life President Macias Nguema in Equatorial Guinea (September 1968 - August 1979), Col. Mengestu Haile Mariam in Ethiopia (February 1977 - May 1991), and Gen Al-Bashir of Sudan (1985 - date) a warrant for whose arrest has recently been issued by the International Criminal Court,; they also include the tyrannies, albeit short of bloody reigns of terror, of Lt-Col. Seyni Kounteche in Niger (April 1974 - November 1987), Gen Sani Abacha in Nigeria (November 1993 - June 1998), Gen. Siad Barre in Somalia (October 1969 - January 1991).

But that is not all. Tyranny is, after all, an incident, an extreme manifestation, of absolute power, and must therefore be viewed in the light of the evil of absolute power in corrupting a people and its cherished values and virtues. The wielder of absolute power is of course the first to be corrupted. No ruler in all history has been known to be above the corruptive influence of absolute power. It transforms a person's natural disposition; the wielder becomes a quite different person after some years in the enjoyment of absolute power. Exposure to the arrogance and adulation of absolute power invariably turns even a person of a naturally kind, modest and tolerant disposition into a vainglorious, intolerant, immodest and unfeeling person, suffused with a false belief in his superior abilities and in his infallible wisdom and a desire for unquestioning obedience to his whims and caprices. He comes to think of himself as not only infallible but also indispensable, a demi-god without whom the ship of state would become rudderless, floundering sooner or later.

Those around the wielder of absolute power are also corrupted into fawning sycophants. Indeed, one of the worst tragedies of absolute power is the large number of people it turns into sycophants and praise-singers, and the longer a dictatorship endures, so do more and more people take to sycophancy as a way of feathering their own nest. They see nothing wrong in taking advantage of the current of events in national life, even when the current is something as immoral and hideous as a dictatorship.

The adulation of a leader or the worshipping of him as a hero is not a bad thing in itself, but in the context of a dictatorship, it easily turns into the deification of him. This is especially the case where such deification is consciously inspired, encouraged or even promoted by the dictator himself, as by Nkrumah speaking approvingly about the "inevitability of deification." It was natural, he told his audience, for the masses to think of their leader as a messiah, a god, likening it to the worship and deification of Jesus by Christians. Now, a people deifying its leader loses the capacity for criticism, for critical appraisal of his performance as ruler, not to talk of resistance to tyrannical rule. They would have bonded themselves to him, becoming mere slavish, obsequious followers, ready to invest him with infallibility and to accept, without question, his idiosyncratic whims and caprices, even those destructive of their liberties. Such was the tragic fate that befell the people of Ghana under the dictatorship of Nkrumah.

Absolute power corrupts the values and virtues of a people in that the standards of integrity, probity, fairness and morality of the absolute ruler set the moral tone of the whole society. Moreover, absolute power induces indifference, apathy and passivity in the people, which is the inevitable result of the lack of popular participation in government. In a state of government-induced indifference, apathy and passivity, people concern and busy themselves, both in their thoughts and sentiments, only in their private affairs, in "the amusements and ornamentation of private life." As John Stuart Mill pertinently observed, "a good despotism is an altogether false ideal.....It is more noxious than a bad one, for it

is more relaxing and enervating to the thoughts, feelings, and energies of the people." J.S. Mill, Representative Government, reprinted in Utilitarianism, Liberty and Representative Government (1910), p. 209.

Based on what is said above, it must be concluded that there is no viable, credible and acceptable alternative or substitute for Democracy as a form of government for human-kind.

THE WELFARE OF THE PEOPLE AS THE OBJECTIVE OF DEMOCRACY

The issue raised by the second underlying assumption of the topic of the Lecture is as to whether Democracy is adequately defined by its constitutive elements alone - free and fair election of rulers by the people at periodic intervals of time and limitations on state power, especially the limitation of the guarantee of the liberty of the individual, under a constitution as the supreme, overriding law of the land - without reference to the social objective of securing the happiness, the good life, security and the welfare of the people generally. In other words, is Democracy solely about "government of the people by the people" without reference to "government for the people" in the phrase popularised by President Abraham Lincoln?

It is asserted in some quarters, as, for example, by Michael Bratton and Nicolas Van de Walle,that a proper definition of Democracy must "dissociate it from rule for the people" which, they say, "implies, substantively, a distributive socio-economic order". This suggests that democracy or "rule by the people" is an end in itself, and not a means to an end, which means that democracy has no social objectives that it is designed to serve. Such would be a mechanical, formalistic conception of democracy. Commentators on democracy, like Bratton and van de Walle, who "speak as if participation in public affairs is an end in itself, a part of the good life", or, like a member of the National Assembly of Nigeria who, in a television interview, asserted, rather didactically, that democracy is only concerned with the protection of individual freedom and the rule of law, and not with the securing of social welfare, do a lot of harm to its cause.

Democracy, dissociated from the welfare of the people, is like a person embarked upon a journey and yet with no clear direction as to which way to go and no idea of where he is going, or, to change the metaphor, it is like a boat adrift in the sea. The social objectives of democracy - what has come to be known as social democracy - have, since the advent of the Welfare State, given to democracy a vitality that has greatly enhanced its appeal. Free, fair and competitive multi-party elections every four or so years, with critical comments by people and freedom to engage in other political activities in-between elections, while of crucial value, do not by themselves alone, and without the social objectives noted below, provide full justification for democracy. And to regard social democracy and liberal democracy as two incompatible concepts is to

misconceive the true nature of democracy. Good governance requires that both be provided for the people.

The notion of the welfare of the people as the object of governance, as indeed it should be of Democracy, is well established. It has passed through three historical periods. It first began with the ideology of republicanism which emerged in the 18th century following the French Revolution of 1789. Republicanism as an ideology conceives government as the exercise of power, not for its own sake or for the selfish aggrandizement of the rulers, but for the welfare of the people as a whole. It became "a counter cultural ideology of protest, an intellectual means by which dissatisfied people could criticise the luxury, selfishness and corruption of monarchical culture". It was a radical ideology which in time was to revolutionalise the theory and practice of government through its insistence on the public good or the welfare of the people as the object of government.

But the change took time to come. For, in a society built upon laissez-faire and economic individualism, as most societies were before the twentieth century, the securing to the people of social and economic amenities was regarded as none of the state's business. Constitution - makers had preoccupied themselves largely with constitutional power and limitations on it. Concern by some private individuals about the condition of the masses and how to ameliorate it dated, of course, back to the 19th century, and found powerful expression in the writings of Karl Marx, particularly in The Communist Manifesto of 1848.

But the economic and social consequences of the two world wars proved to be a catalyst, triggered by the revolution in Russia in 1917 which brought into existence the world's first socialist state, a state in which the claim of the poor, exploited masses on the state for social amenities, for social and economic rights, and for social protection against the exploiting bourgeois class, was avowed as an organizing principle, and was accordingly written into the state constitution as part of its ideology and socio-economic objective. The socialist state in Russia, with the socialist socio-economic ideology enshrined in its constitution (1918), was later expanded into the extensive Soviet Union. The years after the end of the Second world War saw the emergence in Eastern Europe and elsewhere in the world, of other socialist states built around the same principle of securing to the suffering masses, social and economic rights and other social amenities, which also formed a cardinal feature of their constitutions.

Even countries in the Western Democracies in which liberalism still reigned had felt obliged by the social and economic consequences of the war to espouse the notion of the Welfare State, some of whom took steps to guarantee, through the constitution, social and economic rights to their peoples. Thus, were social and economic rights enshrined in the 1946 Constitution of the Fourth French Republic (preamble), the 1947 Constitution of Italy (arts. 29 - 47), and some others. The

precedent was taken further by the Directive Principles of State Policy proclaimed in the Constitution of India of 1948.

The constitutions of African countries have been quite notable in these developments, no doubt because of the role of "general provider" cast on the state by the poverty and backwardness of the countries. Thus, "government of the people by the people and for the people" is explicitly affirmed as a guiding principle of the democratic state established by the independence constitutions of 11 Francophone African countries, re-enacted by their democratization constitutions - Benin 1964 (re-enacted in the 1990 Constitution) Central African Republic 1959 (re-enacted in the Constitution of 1995); Congo (Brazzaville) 1963 (re-enacted in the Constitution of 1992); Cote D'Ivoire 1960 (as amended for purposes of transition to multiparty democracy in 1990, 1994 and 1998); Gabon 1964 (re-enacted in the 1995 Constitution); Guinea 1958 (re-enacted in the 1992 Constitution); Mali 1960 (re-enacted in 1992); Niger 1960 (re-enacted in 1996); Rwanda 1960 (re-enacted in 1992). An identical provision in the 1960 Constitution of Burkina Faso is omitted from its 1991 transition Constitution.

Perhaps even more remarkable is the provision in the transition Constitution of Nigeria 1999, re-enacting an identical provision in its 1979 transition Constitution. It affirms that "the security and welfare of the people shall be the primary purpose of government", (section 14(2)(b)). The transition constitutions of three other countries of former British Africa contain provisions to like effect. The Constitution of South Africa 1996 enjoins all organs of government to "ensure the well-being of the people of the republic" (section 41(1)), while those of Ghana 1992 and The Gambia, 1996, affirm that "the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty", one that also secures "maximum welfare, freedom and happiness of every person" (art 36, Ghana; art. 215, The Gambia).

The provisions noted above in the Constitutions of Nigeria, Ghana and The Gambia are embodied in a chapter titled "Fundamental Objectives and Directive Principles of State Policy" clearly one of the most significant innovations brought about by democratisation in Africa. First introduced by Nigeria's 1979 transition Constitution, it has since been adopted in the democratic transition constitutions of 10 other African countries - Zambia 1991, Ghana 1992, The Gambia 1996, Uganda 1995, Tanzania 1984 (as amended for purpose of democratic transition in 1992), Malawi 1992 (as revised in 1994 and 1995), Lesotho 1993, Sudan 1998, Sierra Leone 1991 and 1996, and Eritrea 1997. The Objectives and Directive Principles vary in the range of economic, social and cultural rights covered, with some following closely the Nigerian prototype. (Sierra Leone's is almost identical in format and wording with the Nigerian.) Without going into the details of the variations, Nigeria's will be used here to illustrate the social welfare amenities and benefits required of the state for the benefit of its citizens in the new democratic dispensation.

A positive duty is laid on the state to direct its policy towards securing for all citizens suitable and adequate shelter, medical and health facilities, facilities for leisure and for social, religious and cultural life, and free education at all levels. On the economic side, the state is required to direct its policy towards ensuring that all citizens have the opportunity for securing adequate means of livelihood and suitable employment; that for all Nigerians there should be a minimum living wage, unemployment benefits, old age care and pensions, just and humane conditions of work, and equal pay for equal work without discrimination on account of sex; that the health, safety and welfare of all persons in employment be safeguarded and not endangered or abused; that children, young persons and the aged be protected against any exploitation whatever and against moral and material neglect; that provision be made for public assistance in deserving cases or other conditions of need; that the national economy be controlled in such a way as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; that the material resources of the community be harnessed and distributed as best as possible to serve the common good; that the economic system should not be operated in such a way as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and that planned and balanced economic development be promoted.

All organs of government and all persons or authorities exercising executive, legislative or judicial functions are required, as a matter of constitutional duty, to conform to, observe and apply these principles. It must be emphasised that the duty thus cast on the state is only to pursue a policy that is geared towards securing the amenities specified; it does not confer on any individual a corresponding entitlement to demand the amenities as a right, and no machinery is provided by the constitution for ensuring such compliance, the use of the courts for the purpose being explicitly excluded. The non-justiciability of the duty laid on the state by the Directive Principles is a much-debated question a discussion of which is not appropriate here.

Although South Africa's democratic transition Constitution 1996 does not have Directive Principles of State Policy specifically so titled in a separate chapter, many of the benefits and amenities in the Nigerian Directives noted above are covered in its "Bill of Rights" chapter (chapter 2), as they are indeed covered in the constitutions of many other African countries - housing, health care, food, water ,social security, education, protection for children (sections 26 - 29). While everyone has, in terms of the provisions, a "right" to the benefits and amenities there stipulated, the duty they cast on the state is again only a duty to "take reasonable legislative and other measure within its available resources to achieve the progressive realisation of each of these rights".

The Objectives and Directive Principles of State Policy declared in the transition constitutions of the African countries mentioned above remain largely on the pages of those constitutions; they have hardly any existence as active principles

in the governance of society. The democracy dividends they promise to the people are not being actively pursued, not to say realised. The notion of the welfare state remains a dream in Africa, so is the vision of social democracy.

In Nigeria since its transition to democracy, the main measures by way of implementation of the Objectives and Directive Principles of State Policy declared in chapter 2 of the Constitution are the poverty alleviation scheme, the universal basic education scheme, telecommunications development, electricity generation, supply and distribution, and the anti-corruption measure. But these measures are not yet making any impact, owing to faulty conception or abuse and corruption in their execution. But even had the measures been properly conceived, designed, and executed, they are but a small part of the objectives and directive principles enshrined in the Constitution. These objectives and directives should be a constant guide and reminder of the democratic obligations owed by Government to the people who expect so much from it by way of "democracy dividends".

PART A: WEAKNESS OR DEFICIENCY OF THE FOUNDATIONS OF

DEMOCRACY IN AFRICA

We are now moving into more difficult terrain. Now, democracy is a system for the government of a society constituting a state. It pre-supposes therefore the existence of a state formed or constituted by a society of people. The state and the society on which it is built provide the foundations of Democracy. If these (state and society) are weak or shaky, if they are afflicted by inadequacies and immorality as manifested, for example, in pervasive corruption, by contradictions and anomalies, then, Democracy itself stands on a weak, shaky or wobbly foundation, and its quality and sustainability are undermined. Such inadequacies and immorality, contradictions and anomalies will need to be eradicated or rectified in order to strengthen the foundations of Democracy and enhance its quality and sustainability.

Two questions are thus prompted : first, what, apart from society, are the essential, the constitutive, elements of the state for this purpose? Second, what are the inadequacies, immoralities, contradictions and anomalies in the state/society in Africa that weaken the foundations of Democracy and consequently undermine its quality and sustainability?

The state, in the strict connotation of the term, may be here defined as an organisation of people which, through various institutions and instrumentalities, and by means of laws, particularly legislated law, and executive acts, backed and enforced by organised coercive force - mainly physical force of which it has or claims monopoly - regulates, orders and manages the affairs of its members for the common good or welfare of all as a society of men and women.

Even when a people has progressed beyond the nomadic stage, and has evolved an advanced form of political organisation, a certain level of civilisation would seem to be implied by the concept of the state; advanced level of civilisation is a necessary foundation for statehood. The state is an advanced, sophisticated organisation of society; it is an organisation of society at an advanced stage of intellectual, technological, economic, institutional, social and cultural development. Statehood also requires certain habits among the people, that is to say, it requires a population habituated to order, obedience to law, respect for constituted authority, discipline, public service, loyalty, love of country. (The word "civilisation" is italicized for purposes of emphasis.)

The term "civilisation" is no doubt a concept which, as Felipe Fernandez-Armesto observed in his book, Civilisations (2000) at page 3, "has meant so many different things to different people that it will be hard to retrieve it from abuse and restore useful meaning to it." For purposes of this Lecture, the term is used in the sense in which it is defined in New Webster's Dictionary of the English Language, viz "the state of human society marked by a high level of intellectual, technological, cultural and social development." Also the word "civilise" will be used in the sense of its definition in the same dictionary as "to bring out of a savage state; to introduce order and civic organisation among; to refine and enlighten; to elevate in social life." To Felipe Fernandez-Armesto, however, the characterisation of any society as barbaric, savage or primitive is unsatisfactory because "barbarism, savagery and primitivism are nebulous terms," used "in eighteenth-century Europe, where politesse and manners, sensibility and taste, rationality and refinement were values espoused by an elite anxious to repudiate the 'baser', 'coarser', 'grosser' nature of men. Progress was identified with the renunciation of nature; reversion to the wild was derogation." op. cit., page 14.

It is on the grounds stated above, among others, that primitive peoples everywhere and in all ages, including the peoples of Africa before European colonisation of the continent, are considered not to possess the status of a state, strictly so-called; quite often, of course, the term "state" is loosely applied to them. Whilst it is such and is generally so described and referred to, the state created in Africa by European colonialism and passed on to its African inheritors at independence suffers from inadequacies and deficiencies, judged by the definition above, which necessarily weaken the foundation it provides for Democracy, and consequently undermine its quality and sustainability.

However, I will not go along with Professor (Lord) Bryce (Modern Democracies, Vol. 2 (1920) chap. Lxxi) in saying that democracy and free government are not suitable nor meant for, and should not be embarked upon by, "backward peoples" amongst whom he classified the rest of humankind apart from Britain, Europe, North America, New Zealand and Japan : at pages 545 - 568, Despotism, he says, is what is good for them, and the democratic "experiments that are now being tried might have been better left untried: ibid page 549. And if at all "the work of fitting" such peoples for self-government are to be attempted, it

should be done by "slow degree": ibid page 568. It did not occur to him that a world, half free and half unfree, is hardly realistic nor even possible in our present conditions of mass education, of enormous intellectual development and of fast communications which have brought it closer and closer together in feelings, aspirations and outlook; and that the capacity for self government, which took the advanced countries centuries to acquire, may today, given the free flow of ideas and under the stimulus of influences from the advanced peoples, be acquired in a comparatively shorter time.

John Stuart Mill in his influential book is guilty of the same error, although he appears less sweeping in terms of types of peoples for whom democracy is not meant. According to him, liberty is not meant for backward societies, or for a people of violent disposition, or a people lacking in public spiritedness, or in a sense of civic responsibility. "Despotism," he asserts, "is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate to find one". He concedes, happily, that "all nations with whom we need here concern ourselves" have "long since reached" the state of maturity to embark on the experimentation with liberty and democracy, and can over time learn their ways and habits. (Akbar was the commander of the Arab forces whose bravery in war, as described by Edward Gibbon in his Decline and Fall of the Roman Empire, was a decisive factor in the Arab conquest of North Africa in the seventh century A.D. Charlemagne (768-814 A.D.) was the masterful Germanic ruler who, after the fall of the Roman Empire in the West in 455 A.D., tried to re-create it with himself as successor emperor.)

George Sorensen (Democracy and Democratisation (1998) pages 24-27) seems to have misconceived the proper place in democratisation of what he inaptly terms "pre-conditions" Democracy can be established at any time and in any organised society capable of government, but its quality and sustainability are another matter on which factors he characterised as "pre-conditions" have a significant bearing. The idea that there are factors which determine whether or not democracy can emerge or be established runs counter to the universality being claimed for democracy as a form of government for all organised human societies everywhere - rich and poor, civilized and backward, and whatever its class structure or system of values. The quality and the prospects for the sustainability of democracy established in a poor, largely illiterate, backward and classless society, with no firmly rooted tradition or habit of justice, equality, the rule of law and respect for human rights, are almost certain to be low. But that is no warrant for saying that democracy, as a form of government, is not applicable to it, and that it should not therefore be established there or be embarked upon at all.

Constitutional democracy, like other forms of government, is an art which has to be learnt and developed, and the learning involves a process of experimentation over time, of trial and error. It is wrong therefore to think that the experiment should not begin unless and until all the factors necessary for its success are present. These factors can be created or developed in the course of the experimentation. While certainly it functions better under conditions of modernity and development, constitutional democracy is not a form of government for civilised or developed societies only. In a society of men, whatever their state of development, and whatever their national character may be, whether self-restrained and public-spirited or not, there is no other viable alternative form of government. We are not of course talking about a society of savages or barbarians.

The position taken here is that liberty and democracy, if they are to take firm root and thrive (not if they are to be embarked upon at all) must have a foundation in certain shared sentiments that bind a society to respect human rights and to behave democratically, common sentiments expressed in habits, traditions, attitudes, a moral sense and a transcendental spirit. "The ultimate foundation of a free society", Justice Felix Frankfurther has remarked, "is the binding tie of cohesive sentiment": Minersville School District v. Gobitis 310 U.S. 506.

Inadequacies, immoralities, contradictions and anomalies in the state/society in Africa that weaken the foundations of Democracy and consequently undermine its quality and sustainability

Eleven inadequacies, immoralities, contradictions and anomalies in the state/society in Africa are here identified as factors that weaken the foundations of Democracy and consequently undermine its quality and sustainability.

1. The contradiction of a state without citizens

It needs hardly be said that there can be no meaningful Democracy in a state that has no citizens. A state without citizens has the ring of a palpable contradiction in ideas, but it is a phenomenon prevalent in many, if not most, African countries. It occurs where the state becomes alienated or divorced from its citizens or becomes morbid existing only as a mere verbal or geographical expression, a phenomenon described as "the failed state". The latter situation has occurred as an accompaniment of the privatisation of the state under a one-man rule, as in Zaire under the one-man rule of President Mobutu, where the decay of the state accompanying its privatization went beyond intellectual, political, ideological and moral decay, and became general, permeating the very existence of the state itself. Such general decay occurs when the ruler is not a person with outstanding capabilities to an extent enabling him to attempt, with some measure of success, the impossible task of governing a country alone, as did Nkrumah in Ghana and Banda in Malawi. With a much less capable ruler, the decay, sooner or later, permeates the entire fabric of the state itself, in the sense,

not just of its malfunction, of deterioration in its ability to discharge its functions effectively, but of its atrophy through an inability to maintain its existence in a recognisable form necessary to fulfil its essential purposes, namely, maximal utilization of national resources for the welfare of the people, provision of adequate security for life and property, securing its territory against armed incursion from outside and effective execution of its policies, so as to thereby command public confidence in its guardianship of the overall interests of the citizenry. For, though weakened and diminished by the malfunctioning of its instrumentalities - the government and its institutions - the state in the hands of a capable sole personal ruler still continues to exist and to function tolerably well; with a ruler not so outstandingly endowed or a kleptomaniac, it still continues to exist but only more or less as a mere verbal expression; it continues to exist only in name or on the map as a mere geographical expression, or what John Ayoade aptly calls a "state without citizens." - see his "States Without Citizens : An Emerging African Phenomenon," in Donald Rothchild and Naomi Chazan (eds), The Precarious Balance : State and Society in Africa (1988), p. 100

What this means, in more explicit terms, is that, of the three component elements of the state - people, government and territory - the first two are largely denuded of all practical meaning as functional entities. Divorced and alienated from the state, the people exist, not as citizens with a claim against the state for protection and to be catered for, matched by reciprocal duties to it, but simply as individuals struggling for survival on their own. A state without citizens is like a disemboweled person hanging precariously to life, or, to borrow John Ayoade's other metaphors, a "bed-ridden state" functioning by "fits and starts" on the way to becoming an "expired state" or a "morbid state." ibid pp. 100 - 101. Government too, ceases to exist as an organisation whose activities are "systematized, co-ordinated, predictable, machine-like and impersonal," and is absorbed in the person of the ruler and subjected to all his personal whims and caprices, his misperceptions and miscalculations. "State agencies become involuted mechanisms, mainly preoccupied with their own reproduction. Their formal activity tends to become symbolic and ritualistic" (Crawford Young and Thomas Turner, The Rise and Decline of the Zairean State (1986), p. 399), and so arises the tragic phenomenon of a state existing only as "an idea without an existential content." (Basil Davidson, The Black Man's Burden (1992), p. 255. Even territory is not effectively policed and controlled, making possible incursions by exiled insurgents operating from neighbouring countries as well as mass movement of refugees across the porous borders from or into the state and its boundaries are often disputed.

Yet, as an idea, the state remains very much part of the social order of African countries. "So deeply rooted is this notion that the state is taken for granted both as empirical fact and normative expectation. The idea of state is ritualized in innumerable ceremonies, small and large.....The banal artifacts of every day life - coins, bank notes, stamps, party buttons worn by officials - still image the state", (Crawford Young and Thomas Turner, op. cit., pp. 403-404) but they are all that

remain as physical emblems symbolizing the existence of the state. It has thoroughly been denuded of its existential contents. Its principal existential content is of course its citizens who, at some point in Mobutu's 32-year rule, consisted of "a kinship or extended-family network" and a small band of a politico-commercial bourgeois class, "predators upon civil society", (ibid p. 399) reckoned to number just about 300,000, who fed themselves fat upon the wealth of the nation and the spoils of the Zaireanisation measure.

Such was the state to which the Zairean State was reduced by its privatization under President Mobutu's one-man rule. It was bled to near-death by his unbridled kleptomania, his repressions and oppressions, and by the sheer ineptitude of his one-man rule in the management of public affairs.

As exemplified by Mobutu's Zaire, an expired or moribund state, that is to say, a state denuded of the functional attributes of a state but existing only as a mere verbal expression or a mere geographical entity on a map, is an extreme case of what is generally denominated as a "failed state", which exists in varying degrees. A failed state, other than in its extreme form represented by Zaire under President Mobutu, is alive as a functional entity but is unable to discharge effectively and adequately, even to a minimal level, the essential functions and responsibilities of a state.

Among the factors considered as constituting "failure" for this purpose are :

Social indicators:

(i) demographic pressures resulting from drought, crop failure, etc; (ii) incidence of massive movement of refugees and internally displaced persons; (iii) civil disorders caused by ethnic, racial or religious conflicts (iv) chronic and sustained human flight.

Economic Indicators:

(a) uneven economic development along group lines as manifested in group-based inequality in opportunities for education, jobs, and economic advancement, and as measured by group-based poverty levels, infant mortality rates; (b) sharp and/or severe economic decline as measured by a progressive economic decline of the society as a whole (using per capita income, GNP, debt, child mortality rate, poverty levels, business failures) etc;

Political Indicators:

(a) endemic corruption or profiteering by ruling elites and resistance to transparency, accountability and free election; widespread loss of popular confidence in state institutions and processes; (b) progressive deterioration of public services particularly basic state functions that serve the people, including

failure to protect citizens from terrorism and violence and to provide essential services, such as health, education, sanitation, public transportation etc; (c) widespread violation of human rights etc; (d) private security apparatuses and "praetorian" guards operating with impunity more or less as a "state within a state"; (e) state-sponsored or state-supported private militias, operating as an "army" outside the regular army of the state, which terrorize political opponents, suspected "enemies", or civilians seen to be sympathetic to the opposition in furtherance of the interests of the dominant political clique; (f) factionalization of the ruling elite and state institutions along group lines, etc (g) incursion of other states or external factors into the national territory.

The "Failed States Index 2008" categorises states - 177 states are covered in the exercise - according to the indicators stated above, eleven out of the twenty states listed as the "worst" cases being in Africa, namely (in order of ranking) (1) Somalia, (2) Sudan, (3) Zimbabwe, (4) Chad, (6) Democratic Republic of the Congo, (8) Cote d'Ivoire, (10) Central African Republic (11) Guinea, (16) Ethiopia, (17) Uganda, (18) Nigeria.

2. The contradiction of a state without civil society

Civil society is a term which, like a recurring decimal, recurs so repeatedly in the literature on democratisation in Africa, but it is being used in an undiscriminating way to mean "different things to different people and often degenerates into a rabid political slogan;" such is the ambiguous and confusing array of usages that the term sometimes conveys no intelligible meaning at all. The confusion is worse confounded by its being used as if it is synonymous with society simpliciter, as if the word "civil" is a mere surplusage that adds nothing to the term.

"Civil" in the term civil society, as in the terms "civil rights" or "civil liberties", is a word with a distinctive meaning derived from the word "citizenship". The New Webster's Dictionary of the English Language defines it (i.e. civil) as "pertaining to, consisting of, or proper to citizens", and "civil rights" as "the individual rights of citizens". Citizens or citizenship underlies not only the meaning of the word "civil" but also the meaning of the cognate word, "civic" which is also defined in the same dictionary in terms of "a citizen or citizenship" while "civics" is defined as "the political science of the rights and duties of citizens." Thus, "civil", as in "civil society", "civil rights" or "civil liberties", draws its distinctive meaning from the term citizens or citizenship.

It is necessary next to determine the meaning of "society" in the context of the term civil society. Society in this context implies an organised society (or bodies) of citizens, distinct from the state and its government, and existing and functioning autonomously and independently of them. In this sense, civil society is complementary to it is the counterpart of, a nation.

Effective autonomy vis-à-vis the government conceives civil society as an entity that is able to act as a counterpoise against it (i.e. the government), to check any dictatorial or other authoritarian tendencies on its part and, if need be, to remove it, serving thus to define and demarcate the boundary between them. The accountability of government to the citizenry, which is a cardinal element of democracy, can scarcely be maintained without civil society as an entity truly autonomous from the government. Civil society connotes the existence of a "tight network of autonomous institutions and organizations which has not one but a thousand centres" (Ralf Dahrendorf, Reflections on the Revolution in Europe (1990), p. 95) - institutions and organizations which may be national, regional, local, professional or occupational. The entire society too, as a single national body, must be able to act autonomously, and must not be tied to the apron-string of the government. The control of the rulers by the citizenry is possible only if the society and its various institutions and organisations are independent of the state. In the ultimate analysis, democracy is not so much about institutional forms, important though they are, as about the accountability of the government to the citizenry, about the ability of the citizenry to control and remove the rulers. This is an essential element distinguishing the society in a Western democracy from the society in the socialist, totalitarian state which integrates society into itself as one of its subservient organs. A by-product of the French Revolution and the Industrial Revolution, the notion of civil society "emerged as a key construct of Western political thought at a point in time in the nineteenth century when individual freedoms were threatened by mass totalitarian regimes".

The definition of civil society to refer only to organisations or associations intermediate between the state and the family as the basic unit of society but excluding the entire society itself as an entity seems rather unreal and inadequate. As earlier stated, the entire society, as a single national body, must be able to act together, if the notion of civil society is to be able to serve as an effective counterpoise against the government.

The power of the citizenry to act as a counter-force, a checking force, against the government lies primarily in a united public opinion, but such a power is impossible in a society without fellow-feeling. We have it on the great authority of John Stuart Mill that in such a society "the influences which form opinions and decide political acts are different in different sections of the country. Their mutual antipathies are generally much stronger than jealousy of the government. That any of them feels aggrieved by the policy of the common ruler is sufficient to determine another to support that policy. Even if all are aggrieved, none feel that they can rely on the others for fidelity in a joint resistance; the strength of none is sufficient to resist alone, and each may reasonably think that it consults its own advantages most by bidding for the favour of the government against the rest". (Representative Government, pp. 393 - 394).

Take, for example, the presidential election in Nigeria in April 2007, which was adjudged by the overwhelming preponderance of well-informed opinion, both

local and international, to have been fatally flawed by corrupt practices and irregularities, such as deprived a government based on it of all legitimacy. And yet Nigerians were not united in the view that the election should be nullified by the court for this reason, a division evidenced by the fact that some leading personalities in the northern part of the country, actuated purely by tribal interests, pressurized the petitioners/appellants, General Buhari and Alhaji Atiku Abubakar, also from the North, to withdraw their appeals, then pending in the Supreme Court, against the decision of the Court of Appeal upholding the election.

Notwithstanding the emergence of some institutions of civil society, notably the press, trade unions, students unions, some professional associations, religious organisations, and, more recently, pro-democracy associations, they still remain few in number and weak in character as a checking force; moreover, the society itself is as yet to develop into a single cohesive body. In the light of this, it seems reasonable to say that the states in Africa have no civil societies, properly so-called, and consequently no citizens.

Several factors account for this, First, the society of the state in Africa is an entity newly brought into existence by colonialism; it is an entity different from the sum total of the primordial societies of the component ethnic or racial groups comprised in the state; as such, it is still in the process of developing its own dynamics and relations among its individual members. It follows that the state created in Africa by European colonialism pre-dated the newly emerging society. As Professor Sir Ralf Dahrendorf observes, in the advanced Western Democracies, civil society "was there first, and the state came later, by the grace of civil society, as it were ....On the other hand, countries which had to create civil society after the event were and are in trouble": op. cit., p. 97.

The notion of civil society is applicable only in relation to this new society and its institutions; the primordial societies of the component ethnic or racial groups and their institutions and associations do not come within the ambit of the notion. Thus, the clan and ethnic associations - the town unions, tribal associations, etc - which are even more numerous than the number of ethnic or racial groups in the state are outside the conception of civil society, notwithstanding that they individually may well possess the capacity to resist or challenge the government.

In Africa, therefore, it seems true to say with Michael Bratton that "the state projects upwards from its surroundings like a veritable Kilimanjaro, in large part because the open plains of domestic society appear to be thinly populated with alternative institutions. At first glance, African societies seem to possess few intermediate organizations to occupy the political space between the family (broadly defined by affective ties of blood, marriage, residence, clan and ethnicity) and the state. Those civic structures that do exist are usually small in scale and local in orientation. In this Lilliputian environment, even a weak state can seem to be strong." (Article in World Politics, 41(3), pp. 410 - 411). A

meaningful conception of civil society must limit it to only those social movements and civic organisations composed of persons drawn from various classes, ethnic groups or other social groups within the state, who associate together for the pursuit of their common interests.

Secondly, in the period before, during and after the colonial experience until the mid-1980's, the individual leaned on the family and the clan and ethnic associations as a buffer and protection against the state, thus more or less eliminating the need for civil society and its institutions. The individual's primary allegiance and loyalty were to these associations, which enabled them to acquire in Africa significance greater than they ever had in Europe, even in remote antiquity.

The individual's attachment to his kinship organisations inhibits his autonomy and individualism which are a condition for the growth of civil society. And the autonomy of society in relation to the state pre-supposes the autonomy and individualism of each member of society. The communalism of traditional African societies thus impedes the emergence of civil society. Sina Kawonise puts the point admirably thus:

"Admitted that such phenomena as increased urbanisation, the penetration of capitalism, the development of formal education, etc have increased the level of individualism in Africa, the truth remains that the vast majority of Africans who live in rural settings, who remain within the precinct of pre-capitalist mode of production, who are non-literate and who continue to be attached to traditionalism appreciate only marginally the virtue of individualism... The collectivism of Africa hardly permits the individualism that allows the rebellious spirit expression and that permits the type of secondary organizations that can effectively check autocracy beyond the formation of traditional and constitutional checks. A potential rebel is often reminded that whoever uses his head to break a coconut will not be alive to partake in the sharing." "Normative Impediments to Democratic Transition in Africa" in B. Caron et al (eds), Democratic Transition in Africa (1992), pp. 193 - 196.

3. Absence of an ethic or tradition of respect for public opinion on the part of the rulers

Public opinion is integral to Democracy defined as rule by the people. The place and role given to public opinion in the practice of democracy accords with and reflects the concept of the responsibility of the government to the people as a principle of democracy. The concept is used in four senses. It is used, first, in a general, wide sense to mean that government is subject to the authority and control of the people as the ultimate repository of sovereign power in the state and from whom governmental power is derived. In this general sense, the concept flows from the popular election of a person to a public office, which

subjects him to the authority and control of the people whose votes put him in office in virtue of which he exercises state power.

The concept is used in three other but narrower senses to mean (i) the responsiveness of rulers to the views, feelings and aspirations of the people as articulated in public opinion; (ii) the accountability or answerability of rulers which implies an obligation to account and answer for their use of state power and resources entrusted to them by the people; (iii) transparency and openness of government processes and actions which, as an accompaniment of accountability, requires that the rules governing those processes and actions are clear and known, and are consistently and uniformly applied; that changes in policies are made public and thrown open to public debate; that information about government measures or actions are readily accessible to the public.

Accountability is derived from three concepts; the concept of governmental power as a delegated power which creates, as between the people and the rulers, the relation of delegator and delegate, or less aptly, principal and agent, subjecting the latter to the authority and control of the former; the concept of government as a public trust from which flows the principle that those entrusted with its powers are subject to the obligations and restrictions implied by the institution of trusteeship, in particular the duty of honesty and fidelity, and the prohibition against using the position for personal benefit; and, lastly, the concept of government as a public service and of the position of the rulers and all others holding public offices as public servants bound by an obligation of service to the public as employer and paymaster. There are other aspects of accountability relating, e.g. to its rationale, sanctions, etc, which it is not proposed to examine here, as that will expand this discussion beyond the limit intended.

The aspect of the concept of the responsibility of government to the people which is more directly related to the role of public opinion in a democracy is that requiring government to be responsive to the views, feelings and aspirations of the people as expressed in public opinion. This aspect of the concept goes so far as to postulate public opinion as the determinant of government decisions and actions, since, as its advocates maintain, a responsible person is one whose "conduct responds to an outside determinant," per Carl J. Friedrich, Man and His Government (1963), p. 310. On this view of the concept, government should do nothing of which public opinion disapproves. This may be, and has indeed been, criticised as carrying the notion of responsibility too far.

The grounds for the criticism are that such a view of responsibility is both unrealistic and misconceived : unrealistic, because it attributes to the public a degree of ability, which it does not possess, to rationalise its wants in terms of detailed measures and of their conformance to technical requirements; it is misconceived because it is based on too narrow a view of the concept of good governance, which is not just to interpret and follow public opinion but also to lead it along more rational and desirable lines. It is argued that "where the

alternative lies between conducting the community along a popular path to disaster and trying to persuade it to adopt another and better one, the statesman has to remember his responsibility to lead, as well as to interpret, opinion", per H.R.G. Greaves, The British Constitution (1958), p. 92.

It is beyond our present concern to pursue further here the arguments for and against. But it remains true to say that in Nigeria, equally as in the rest of Africa, the needs, feelings and aspirations of the people, as manifested in public opinion, count for little in the thinking and actions of the government, the reason being that rulers can ride rough shod over the wishes and demands of the people as they please, they can neglect the people's welfare as much as they like, they can loot the nation's wealth and ruin its economy and still rig themselves back to power at the election against the votes of a majority of the electorate. Elections have thus lost all relevance and efficacy as a means of making government responsive to the wishes, feelings and aspirations of the people, as expressed in public opinion.

The absence of an ethic or tradition of respect for public opinion in Nigeria is well-attested by a recent vote by the Senate and a statement by its President, Senator David Mark, which prompts the question as to the type of system of government we are operating in the country - whether it is a democracy, truly so-called, or a dictatorship by popularly elected functionaries, such as existed during the eight-year dictatorship of Chief Olusegun Obasanjo as popularly elected President of Nigeria, which provides a sad precedent for such a contradiction in ideas. For, a popularly elected dictatorship is indeed a palpable contradiction in ideas.

The vote in question was that recently passed by the Senate declaring its confidence in Professor Maurice Iwu, Chairman of the Independent National Electoral Commission (INEC), and which was re-confirmed, albeit indirectly, a week or so later by the rejection of a motion by the Senate Minority Leader, Senator Olorunnimbe Mamora, seeking a repudiation of the vote of confidence. The vote of confidence is astonishing as being so flagrantly disdainful of public opinion in the country. It is contemptuous of public feelings that a Senate, elected by the people, should pass a vote of confidence in a public functionary roundly condemned by the country's judicial authorities, from the Supreme Court down to the election tribunals, the Nigeria Labour Congress (NLC), the Nigerian Bar Association (NBA), the civil society organizations and by the generality of Nigerians for the atrocious rape of democracy during the April 2007 general elections, a rape unparalleled in its atrociousness and brazenness in any previous elections in the country. Public opinion condemning Professor Iwu's role in that rape could not have expressed itself more clearly, more unequivocally and more unambiguously.

As was to be expected, the vote of confidence by the Senate emboldened Professor Maurice Iwu to mock at the public calls for his removal, rebuffing them

as "ignorant" and impudently bragging that no one could remove him nor would he resign. And so, he is still sitting tight securely in that office. This is happening in Nigeria's so-called democracy which is supposed to embody public opinion as one of its pillars and sanctions. Public opinion has thus been reduced to a toothless bull-dog. And we are all sitting around supinely watching as public opinion, as a sanction for democracy, is being so brazenly affronted and assaulted.

It is meaningless and hypocritical, if not disingenuous, to talk of electoral reforms while leaving Professor Maurice Iwu still in office as Chairman of INEC. It is for President Umaru Yar'Adua to take the initiative in this matter. As President and Chief Executive of the Federation, so designated by section 130(2) of the Constitution, and as the person in whom the power to appoint and remove the chairman and members of INEC is vested, he is the one to initiate the move for Iwu's removal, leaving it to the Senate to approve or not to approve his move by two-thirds majority vote of its members under section 157(1). If the Senate refuses to approve, the President would have abided by public opinion, and the fight will then be between the people and their elected agents, their elected "servant-leaders", in the Senate. That would be the real test for democracy in Nigeria.

Public opinion on the matter of electoral reforms goes beyond the removal of Professor Iwu. The public is demanding that the recommendations of the Electoral Reforms Committee (ERC), headed by the retired Chief Justice of Nigeria, Justice Uwais, should be implemented and not watered down. The public is understandably irked by the foot-dragging of the Yar'Adua Administration over the release of the report of the ERC and the implementation of its recommendations as well as by reports of divisions within the Federal Executive Council on these issues.

In this matter of electoral reforms, including the removal of Professor Iwu, which should be a necessary first step, President Umaru Yar'Adua should be guided more by public opinion than by the views of the Federal Executive Council (FEC). He should appreciate and constantly bear in mind that we are operating a presidential, and not a cabinet, system of government and that his ministers, individually and collectively as a council, are only instruments of his own creation meant to serve as a source of collective advice to assist him in the discharge of the executive powers of the Federation vested in him by section 5(1)(a) of the Constitution and in the exercise of which he has sole and undivided responsibility.

Public opinion is also scorned and affronted by what the Senate President, Senator David Mark, was reported in the Daily Independent newspaper of 6th March, 2009 to have said. He repudiated the widespread public opinion in the country calling for a review of the 1999 Constitution by the democratic process of a National Conference of the ethnic nationalities and by a Referendum of all the

people to ratify the outcome of the Conference, castigating those making such a call as "ignorant of the system" and insisting that "only the National Assembly can amend or review the Constitution." Those making the call for constitutional review by a process different from that of the National Assembly include PRONACO, The Patriots, many civil society organisations and a host of other groups and individuals, including the one and only one Nigerian Nobel Laureate in Literature, Professor Wole Soyinka. What can one say to that other than to marvel at the arrogance and temerity of power? The Senate President is, by his statement, pitting himself against the feelings and aspirations of the overwhelming majority of Nigerians, as unequivocally expressed in public opinion.

As a young country trying to democratize its society and system of governance, it is to the United States, the fountain-head and well-spring of democratic practice in modern time, that we must go for precedent and guidance on the role of public opinion in a democracy. In a widely acclaimed book, The Moral Foundations of the American Republic, 3rd edition (1986) edited by Robert Horwitz, which should be compulsory reading for the ruling elite in Nigeria, public opinion is described as:

"that invisible guardian of honour - that eagle eyed spy on human actions - that inexorable judge of men and manners - that arbiter, whom tears cannot appease, nor ingenuity soften - and from whose terrible decisions there is no appeal.....It became the resolving force not only of political truth but of all truth - from disputes among religious denominations to controversies over artistic taste. Nothing was more important in explaining and clarifying the democratization of the American mind than this conception of public opinion. In the end it became America's nineteenth-century popular substitute for the elitist intellectual leadership of the Revolutionary generation."

The rationale for this conception of public opinion and for its role as arbiter of right behaviour was that it was "the combined product of multitudes of minds thinking and reflecting independently, communicating their ideas in different ways, causing opinions to collide and blend with one another, to refine and correct themselves, leading toward 'the ultimate triumph of TRUTH.' Such a product, such a public opinion, could be trusted because it has so many sources, so many voices and minds, all interacting, that no individual or group could manipulate or dominate the whole." (emphasis supplied). Considering that public opinion may be, and often is, in the words of John Stuart Mill, the "opinion of a collective mediocrity", the acceptance of this rationale for its nature and role in America during the Revolution and in the decades following immediately thereafter "required an act of faith, a faith that was not much different from a belief in the beneficent workings of providence," but it was one of the significant by-products of the Revolution that had helped transform American society and politics.

A free press is indispensable to the formation and ascertainment of public opinion in a large country. An opinion privately held by the generality of the people does not become public opinion until it is ascertained and held out to be such. The press is the most effective medium for crystalising and publicising the views held by people on public affairs; indeed, public opinion can be said to be, to a considerable extent, the creation of the press. Nothing says Alexis de Tocqueville in his great classic, Democracy in America, (1835), ed. Richard Heffner (1956) p. 202, "can drop the same thought into a thousand minds at the same moment" and also represent it as the thought of all of them. What is carried in a newspaper, both as news and comments, is "like the voice of a great multitude," and commands belief and acceptance among large numbers of people because of the fascination and the hypnotic appeal of the printed word on the pages of a newspaper. "It speaks ex cathedra with a pontifical authority which imposes deference" - per Professor Lord James Bryce in his own great work, Modern Democracies, vol. 1 (1920), p. 116.

It causes political life to circulate throughout the country, enabling intercourse of ideas and opinions among people in different parts of it without ever coming into physical contact. It creates public opinion by rallying the interests of the community around certain principles. The press in a democracy is thus rightly regarded as "second only to the people" in terms of power and influence over the conduct of public affairs. It is also rightly regarded, says Alexis de Tocqueville again as "the constitutive element of liberty." But to be able to discharge its unique role properly and effectively, the press needs to be truly free, independent, upright, vigorous and courageous, and its members well-educated and informed.

An obsessive concern for TRUTH among Americans is combined with a similar concern for MORALITY, as reflected in public opinion. It is part of the American national character, the same book, The Moral Foundations of the American Republic, tells us, which "the Revolution helped to form and nurture, that Americans all the time judge the actions of their political actors by very high moral standards set by themselves, and are quick to criticize and condemn and to exact appropriate sanctions for such of them as are judged to be morally reprehensible." As it (the book) goes on to say:

"Americans are moral judgers, and severe judgers at that. More, we judge no one as severely as ourselves. That may not always have been the mass phenomenon that it is today, but elements of it have always been present in us.....So seriously do American take morality, so politically powerful are the principles of justice and equality, that no policy, domestic or foreign, political or economic or military, can be successful, can get support, can be sustained, can survive setbacks, that does not have a clear and acceptable moral content, visible and meaningful to the Congress, the press, and above all to the American people. No matter how adroitly scheming, calculating, and self-serving individuals or groups may be, unless their suggested policies can be clothed in fitting moral

garb, they will not have and hold for a sustained period the indispensable element for practical success - PUBLIC SUPPORT" (emphasis supplied).

4. Absence of the spirit of the laws, in particular, the spirit of liberty and democracy

The rule of law is universally acknowledged as necessary for the maintenance of liberty and democracy. It cannot, however, be effective as an active principle governing the actions of government and its agencies as well as those of private organisations and individuals unless the spirit and ethic of respect for it (otherwise referred to as the spirit of the laws) has permeated the entire society. The spirit of the laws embraces the habit or tradition of respect for the constitution, other laws and the institutions of the state on the part of both the rulers and the ruled.

The spirit of the laws implies a sense of civic responsibility enjoining the entire citizenry, rulers and the ruled alike, not to break or circumvent the law or act outside and against it, but to be governed by it and to conduct their affairs in accordance therewith. It implies also a positive obligation - for example, to vote at national, state or local government elections in order to ensure that only the right caliber of people get elected into public offices, to pay taxes, to prevent the commission of an offence or to report it to the law enforcement agencies after an offense has been committed.

But perhaps the most important aspect of the spirit of the laws from the standpoint of the maintenance of liberty and democracy is the spirit or habit of respect for the constitution embodying the supreme law of the land. A constitution cannot be adequately sanctioned by organized force alone. More important is the sanction of tradition that regards the constitution as something inviolable, something so fundamental in the life of the nation that respect for it should be regarded as almost a kind of religion, and any violation of it as a sacrilege. What this means is that the constitution should be treated as above the game of politics, and should not be tampered with in order to enhance the political fortunes of the rulers. In short, a constitution should command and enjoy sacrosanctity. It is no blasphemy to say this, since the Constitution of the United States does in fact enjoy something of that status. Among Americans it is worshipped and venerated almost as fervently as a religion, no doubt with occasional abuses for partisan advantage. That is part of the explanation for its longevity. It has now endured for more than 200 years, the longest surviving constitution in the world, and its continued endurance in perpetuity seems pretty well assured.

The absence of the spirit of the laws, of the habit of respect for the rule of law, in African countries is a significant index of the fact that they are yet to attain the status of a free society. African countries have taken over the material attributes and artifacts of the imported state system - legislative assemblies, legislated

laws, courts, armies, police, prisons, currency notes, coins, state ceremonial occasions, etc - but they are yet to imbibe and assimilate the spirit - the tradition of respect for human rights, for constituted authority, the habit of discipline, the ethic of public service, of public probity, accountability, loyalty, love of country, etc - which in Europe and the United States conditions the administration of the state, its powers, its organization of force, its laws, institutions and processes. The spirit of the laws and institutions of the state, unlike the laws and institutions themselves, is not an exportable commodity; it cannot be packaged and transported. Models of laws and institutions can be packaged and exported from one country to another, but their spirit cannot, because it has no form, no material existence capable of being packaged for export. Being only a moral force, it can only grow; it can only be generated from within the society itself, either by the natives themselves or under the influence of foreigners living amongst them. And so it is that, although liberty, democracy, justice, the rule of law and order are concepts enshrined in the constitutions of African countries, they have yet no reality as living or active principles governing the behaviour and actions of the rulers, non-governmental organizations and private individuals; they do not, and cannot, become such merely by reason of having been enshrined in the constitution. They are more a matter of the spirit, of the heart, resting not only on the formal existence of a constitution that enshrines them, but more on attitude, temper, disposition or a moral sense inculcated over time by precept, example, habit and tradition. "What habit, as the basis of moral action", writes Lord Bryce, "is to an individual during the brief term of his existence here, traditions are to a nation whose life extends over hundreds or thousands of years. In them dwells the moral continuity of its existence". Modern Democracies, vol. 1 (1920), p. 151.

That is what distinguishes human laws and institutions from technology. The latter has no spirit that governs and conditions its application; when it is transferred from one country to another, nothing more is needed for it to function well than a mastery of its operational manuals and mechanism, a conducive physical environment and proper maintenance. Not so with human laws and institutions; they never function as well in the importing country as they do in their country of origin unless the spirit conditioning or governing them there is also imbibed and assimilated.

5. Absence of an Ethic of Public Probity and Accountability in Africa, as manifested particularly in the rampancy of corruption

Because the state, being the creation of European colonialism, is foreign to Africa and has no roots in the life, tradition and culture of its peoples, African countries are yet to develop an ethic of probity and accountability in their dealings and relations with it. The attitude towards it is not one of identification, but rather of exploitation of the opportunities it offers for personal gain. Hence the unbridled corruption rampant amongst public office-holders in African countries, Nigeria being perhaps the most notorious case.

Corruption in African countries is not, as in the mature Western democracies, a mere aberration from the norm, confined to the fringes of the system; it is all-pervading in its incidence. It is a notorious fact of life, firmly rooted in the society. Although cases of corruption may be difficult to prove by conclusive evidence, the forms it takes are well known - the percentage on contract (sometimes the entire money voted for a project is taken out and shared without anything to show for it); the rake-off on land, business, supplies and so on purchased on behalf of government at grossly inflated prices or licenses issued or other patronages dispensed. But its most buccaneering form is the diversion into private pockets of payments or money receipts due to the state or, worse still, the embezzlement of money direct from the government treasury or bank. Its commonest and meanest form is bribery - the takings of money or other valuable things as a condition or inducement for the performance of an official act in favour of a person or for forbearing action.

Corruption is also manifested in other clearly visible ways: an expensive and extravagant life style; lavish ostentatious display of wealth; bulging bank accounts; large personal donations at private functions; ownership of private jets or fleet of expensive cars; palatial buildings and so on.

Its incidence is all-pervading. Its runs right through the entire body politic from top to bottom, from the head of government, the head of a ministry or departments down to the manager and messenger. It has penetrated every relations, every dealing and every activity of government. It has broken loose of all legal barriers and restraints and become completely buccaneering, a plunder brazenly perpetrated. Its magnitude in terms of the amount of money involved is simply colossal. Extending as it does over the entire area of public expenditure, the amount of money involved in it runs into billions, and represents a large proportion of revenue that would otherwise have been used for the benefit of the community.

Its consequences are disastrous, and consist not only in the huge loss and waste it inflicts on the nation, but also in the fact that official acts - whether it be the citing of projects, investment decisions, the choice of contractors, suppliers or agents or the granting of licenses are motivated or influenced less by considerations of the public interest and more by those of private or political gain. Corrupt motives have often led to inefficiency in the disbursement and management of public funds and public affairs generally. It has sometimes meant that money that would have been used in development along lines beneficial to the public is wasted in unprofitable, politically motivated enterprises or diverted into private coffers for electioneering or propaganda of the ruling parties or otherwise for the enrichment of their members and supporters. Impeding all development, it has cruelly impoverished the lives of the people, and is thus rightly considered a crime, treason, against them, not just against the state.

By far the most tragic consequence of corruption is its effect upon the attitudes and mentality of the people. It has created a widespread feeling of frustration, of disgust and cynicism, which has in its turn undermined enthusiasm for, and faith in, the state and patriotism. It has also left in its trail the terrible spectacle of public buildings burnt down as a cover-up for the embezzlement of public money or other types of fraud, which is a cynical manifestation of lack of patriotism.

The nature and the pervading incidence of corruption, its magnitude and tragic consequences, which are a concomitant of the absence of an ethic of public probity and accountability, have created a necessity to look for new sanctioning devices besides the traditional ones. Nigeria has been in the vanguard of this effort. Its transition Constitution of 1979, as re-enacted by its 1999 transition Constitution, has set a notable precedent in this regard, a precedent now gratifyingly followed, in modified form, by the transition constitutions of some other African countries since 1990. A code of conduct is established for public servants enforceable by constitutional machinery.

Without going into details, the Code forbids a public officer, inter alia, to (a) put himself in a position where his personal interests conflict with his public duties; (b) engage or participate, in the management or running of any private business, profession or trade; (c) take a bribe as an inducement for the discharge of his duties or ask for or accept any property or benefits of any kind for himself or any other person on account of anything done or omitted to be done in discharge of his duties; (d) do any arbitrary act in abuse of his office and which is prejudicial to the rights of any other person knowing that such as act is unlawful or contrary to government policy. It requires him to make a written declaration of all his properties, assets and liabilities and those of his unmarried children under the age of 18 years within three months after the code has come into force or immediately after taking office and thereafter at the end of every four years and at the end of his term of office.

It is provided that "any property or assets acquired by a public officer after any declaration (of assets) and which are not fairly attributable to income, gift, or loan approved by this Code, shall be deemed to have been acquired in breach of this Code unless the contrary is proved". By this provision, the onus normally laid on one who asserts something to prove it, is inverted. In cases of corruption, given its nature, enormity and the loss and economic adversity it inflicts on the people, it is right and proper that the excess assets should raise a presumption of guilt, thus throwing on to the person concerned the onus of proving his or her innocence.

Violation of any of the prohibitions or restrictions is made punishable by vacation of office, by disqualification from the holding of any public office for a period of ten years, and the forfeiture to the state of any property acquired corruptly or in abuse of office. The Code establishes a code of conduct bureau to receive

complaints about non-compliance and to receive declaration of assets, and a code of conduct tribunal to try and punish proven violations.

With a view also to ensuring accountability and transparency in the administration of government, an ombudsman or a public complaints commission is established in the transition constitutions of many African countries, charged specifically with carrying out investigation and submitting a report, at the instance of any complainant, whether a private person or a public body, concerning any administrative action of a public servant, agency or department of government, including in particular, administrative acts which are or appear to be (i) contrary to any law or regulation; (ii) mistaken in law or arbitrary in the ascertainment of facts; (iii) unreasonable, unfair, oppressive or inconsistent with the general functions of administrative organs; (iv) improper in motivation or based on irrelevant considerations; (v) unclear or inadequately explained; or (vi) otherwise objectionable.

Lamentably, these new constitutional sanctioning devices, like the traditional sanctions, have been sadly unavailing in ensuring probity, accountability and transparency, especially against absolutist military regimes. They have no more existence than as a beguiling rhetoric glibly and tirelessly mouthed but never practised. It is a mark of their utter ineffectiveness and irrelevancy that, while they remained in force in Nigeria throughout the period from 1979 to May 2007, the grossest cases of corruption and abuse of office by the rulers, both military and civilian, occurred during that period. The code was complemented by various ill-motivated attempts by successive military governments since 1966 to deal with the problem of corruption through a rash of decrees and other measures, all of which have failed to make even the slightest dent on the problem.

It is a cause of no less frustration and despair that, while the constitutional devices have again remained in force, corruption and abuse of office have continued more or less unabated under the new democratic dispensation inaugurated since 29 May, 1999, and that the promise of change from an inglorious past to a new down of accountability, of transparency and probity, has remained largely an unrealised, but hopefully not an unrealisable, dream. No development or progress can take place in an environment of buccaneering corruption - of corruption uncontrolled and unmitigated by any sense of obligation of accountability and transparency and probity on the part of the rulers and other government officials.

Karl Maier, in his thrilling book, with the telling, devastating title, This House Has Fallen: Midnight in Nigeria (2000), testifies that, despite the transition from military to civilian, democratic rule in May 1999, "corruption (remains) still the fastest way to getting anything done" - Preface, p. xxii.

The consequence of its unabated persistence, he says, is that Nigeria is "patently not a developing nation. It is under-developing. Its people are far worse off now

than they were thirty years ago." ibid p. xxi. Viewed against the background of Obasanjo's solemn pledge at his inauguration as President on 29th May, 1999 to rid the country of corruption, which he rightly described as "the greatest single bane of our society today," and to "stamp out malfeasance wherever it might lurk," (quoted from Maier, op. cit., p. 20) the continued and undiminished incidence of corruption in the country, manifesting an utter lack of respect and disdain for accountability, must rank as perhaps one of the greatest examples of promise and hope betrayed.

6. The contradiction of a state without civil order and the endemicity of civil disturbances and states of emergency

A state without civil order is yet another contradiction in ideas that characterizes the state in Africa. It is a palpable contradiction in ideas to call by the name "state", an organism that is not able to maintain its own security and safety nor peace and order among its citizens as it is to call by that name, a "state" without citizens and without a government. For, the maintenance of its own existence as well as the existence of its citizens in peace and security is the primary function of the state that gives meaning to the notion of the state. Hence the maxim, salus populi est suprema lex - the safety of the people is the supreme law, the supreme duty of the state. Thus, the combination of the two contradictions of "a state without citizens" (discussed earlier) and "a state without civil order" practically rubbishes the notion of the state in its application in Africa - both are rightly included among the indices of a "failed state".

Civil order has various dimensions which are manifested in the cultural, social, economic and political spheres of the affairs of a country. Its political dimension is perhaps the most important, and is the dimension focused on by Lee in his book, African Armies and Civil Order and by Samuel Huntington in his own book, Political Order in Changing Societies. Lee defines "civil order" as referring to a society with a firmly established convention of "respect for the limits of violence as an instrument of politics," a society characterised by a habit of ordered political competition and political succession, and by "a common language of politics", page 2. "Civil order'," he adds, "is the acceptance of certain norms within a broader definition of the state than that provided by the formal institutions of government." The term refers to a situation where political violence and civil disorders generally are limited and restrained by established conventions or other widely accepted rules of communal life.

Indisputably, the main cause of the endemic large-scale civil disorders in Africa is the large number of social groups pieced together in one state with the weak glue of colonialism, but who differ from each other, not only in language and other elements of culture, like tradition, occupation, etc, but also in character, attitude, habits, feelings, way of life and social conditions, to an extent that constitutes them different nations or peoples - "antagonistic, mutually antipathetic, utterly incompatible, and even bitterly hostile to each other." These differences are

magnified by the advent of colonialism and the changes following upon its advent in the social groups comprised in the state, notably the advent of other races and religions different from the indigenous ones, which has compounded relations immeasurably, as well as changes in the socio-economic conditions of the people.

Conflicts and violence are necessarily built into the social fabric of a state so structured, hence the endemic incidence in Africa of inter-ethnic feuds, e.g. between Buganda and Bunyoro in Uganda or between the Tutsi and Hutu in Burundi and Rwanda; violent confrontations between a tribe and the common government, e.g. between Buganda and the Uganda government; between the Tiv and the government of Northern Nigeria or between the Ga and the government of Ghana. In many cases, violent confrontation between a tribe and the common government controlled by another tribe take the form of secessions and civil wars, such as occurred in the Congo (Leopoldville), Chad, Nigeria, Angola, Mozambique, Sudan, Liberia, Congo (Brazzaville), Burundi, Rwanda, Uganda, Sierra Leone, Guinea-Bissau.

The advent in Africa of the foreign state system also resulted in "massive shifts of population" across the territory of each state from the traditional domain of one ethnic group to that of another in pursuit of newly created opportunities for industrial and commercial activities or other gainful occupations. The resultant population mix and the inter-ethnic competition which it generated often gives rise to strain, tension and conflict in the relations between the members of the migrant ethnic groups and those of the indigenous one, which from time to time spark off civil disorders, such as occurred in some States in Nigeria, e.g. Plateau State in 2004 and 2008.

The foreign state system also gave rise to conflicts between new social, economic and professional groups that sprang up in the wake of its advent e.g. between workers and employers, or to revolts or mutinies by professional soldiers against the government, of which there had been an occurrence in four countries, Tanganyika, Uganda, Kenya and Congo (Leopoldville); and military coup d'etat, of which there had been 85 occurrences involving 35 countries.

Changes in the socio-economic conditions of the people that came in the wake of the advent of the state, with the tensions and conflicts in society thereby unleashed, include, as a major element thereof, changes resulting from the process of transforming a backward, traditional society into a modern one, i.e. modernisation, as it is called, which has been defined as "the complex process of social and economic change caused by and manifested in the growth of new towns and cities, the spread of mass education, the extension of mass communication, and the process of industrialisation." The forces of modernization also include the cash economy, commodity production and new exchange mechanisms that brought different ethnic groups together in commercial

transactions, the emergence of a new rich class based on trade rather than on land etc.

The role of politics and the political elite in ethnic conflicts has also been an aggravating factor. It has taken the form of exploitation and manipulation of ethnic sentiments and loyalties by unscrupulous politicians to advance their selfish political interests. By bringing inter-ethnic rivalry and antagonism from the social, cultural and economic sphere to the political sphere, ethnic rivalry was intensified and turned into "a war in which all is legitimate that brings victory." Inter-ethnic rivalry "is no longer a question of excluding out group members from jobs and the enjoyment of various social services, or, repressing them, but of ruthlessly and inhumanly eliminating them in violent actions, including genocide" unleased in the process of the struggle for the control of the state and its resources, as witness events in Rwanda, Burundi, Somalia and Sudan. As earlier noted, divisions based on religion and more especially race have compounded matters immeasurably.

Such are the rampant incidence and causes of civil disorders in Africa but their consequences for constitutional democracy are of greater concern to us here. Civil disorders impinge on constitutional democracy in several ways. The most fatal way is when the disorder takes the form of a war. "A first force which works against constitutional government", writes Professor Sir Kenneth Wheare, "is war. In times of war or rumours of war, the government claims full freedom of action; it does not want to be bound by limitations..... Obviously government on these lines is opposed to the limited government which we call constitutional." (Modern Constitutions (1966), p. 138)).

Secession invariably leads to the establishment of a secessionist government in the seceding territory, and to military action to crush the rebellion. Quite often the secession is crushed, but only after a period (which may extend over some years) of illegal government in the secessionist area, and of war. Now constitutionalism presupposes legality; it is government according to law, but a rebel government is essentially a government in opposition to law, and is therefore anti-constitutionalism.

Civil disorder may invite a military coup which overthrows the constitution and the entire system of limitations on governmental powers established by the constitution. A military government established following such a coup is anti-constitutionalism both because its powers are not limited by a constitution as the supreme law of the land and because its existence and authority derive, not from such a constitution, but from the barrel of the gun; they rest on force or violence or the threat of it.

The least dangerous way in which civil disorder impinges on constitutional democracy is the assumption by government of authoritarian powers following an emergency declared in accordance with the provisions of the constitution.

Declarations of emergency under the constitution often follow in the wake of large-scale civil disorders, especially where they are accompanied by violence. The armed encounters between Buganda and the Uganda government of Milton Obote gave rise to the abolition of the Constitution and the seizure of absolute power by Obote, and to the declaration of an emergency over Buganda, later extended to the whole country. So also the violent activities of the Lumpa church in Zambia, the assassination of President Anwar Sadat of Egypt by Islamic fundamentalists and the ensuing shoot-outs between them and the government security forces in Cairo and various other parts of the country led to the proclamation of an emergency. Such too has been the case in many other African countries.

There is really nothing abnormal in this. Nearly all modern constitutions confer extraordinary powers, including power to curtail guaranteed human rights and to suspend democratic processes, in situations of emergency formally declared in accordance with the provisions of the constitution. Even the most constitutional of constitutional regimes finds it necessary to arm itself, under the constitution, with special powers to deal with an emergency. In all countries, it is recognised that constitutionalism has to be limited by the exigencies of an emergency, since an emergency implies a state of danger to public order and public safety, which cannot adequately be met within the framework of governmental limitations and restraints imposed by the constitution. There is a good justification for this in the time - honoured maxim, salus populi est suprema lex (the safety of the people is the supreme law). In situations of danger to public safety, it has been said, "men care more for order than for liberty" - per Professor Charles McIlwain, Constitutionalism and the Changing World (1939), p. 276

Accordingly, all constitutions which impose limitations upon government authorise the limitations to be over-stepped in times of emergency. For constitutionalism and the Rule of Law can no more forbid the exercise by government of extraordinary power in situations of imminent danger to public order and public safety than they can prevent their occurrence. The most they can do is to define in explicit terms in the constitution the kinds of situation to constitute an emergency and which must actually exist in an objective, factual sense to warrant the assumption of authoritarian powers, and either to vest in the legislative assembly the power to declare an emergency or to require a declaration made initially by the executive to be laid before it for its approval or disaffirmation within a prescribed time.

But emergency power can be accommodated with constitutionalism if emergency situations are conceived of as an ephemeral aberration occurring once in a long while, and provided that the extraordinary powers for dealing with them are not so sweeping as to destroy or suspend the restraints of constitutional democracy completely.

To a great extent, therefore, the authoritarianism of African governments since independence is the result of the endemic incidence of frequent, widespread violent disorders or other situations of imminent danger to public order or public security caused by factors and conditions brought about by colonialism. It is not a peculiarly African response. What African governments can rightly be denounced for is the tendency on their part to abuse and exploit such situations for their own aggrandizement.

First, an emergency is sometimes proclaimed and authoritarian measures adopted when the situation that actually exists in the country as an objective fact does not amount to a state of emergency within the intendment and spirit of the constitutional provision, as when in 1962 the federal parliament in Nigeria, invoking the open-ended provision in the Constitution, declared an emergency in the whole of Western Nigeria merely on the strength of fighting among the MPs within the chamber of the regional house of assembly, even although the entire region outside the assembly building was quiet and there was no attempt by the members to carry their brawl outside. A more brazen abuse of power was the declaration of an emergency by President Obasanjo in two States of the Federation of Nigeria, Plateau State in 2004 and Ondo State in 2005, when the situation stipulated in the Constitution as constituting a state of emergency had not arisen.

Secondly, an emergency regime is often continued in operation long after the situation giving rise to it has abated or been effectively contained. Thirdly, the amount or extent of interference with liberty, the rule of law and democracy often goes beyond what is reasonably necessary for dealing with the situation. Fourthly, the extensive, often arbitrary use made of preventive detention statutes by some African countries outside an emergency declared in accordance with the provisions of the constitution, e.g. Ghana's Preventive Detention Act 1958, is hardly supported or justified by reference to any clear, real and imminent danger to public order or public security; it stems more from the undue intolerance of opposition and a desire to suppress it in order to enhance the rulers' political position.

Fifthly, the abolition or attenuation of the protective constitutional or other legal provisions inherited at independence for restraining security powers or for safeguarding the interest of detained persons cannot be said to be reasonably necessary for maintaining or securing public order or public safety. There can be no justification for detaining a person for more than ten years without any opportunity of a review by an independent and impartial tribunal.

Sixthly, the resort to the authoritarianism of the one-party system is not supportable upon the proffered rationale that the warfare of the political struggle for the control of the state makes it necessary. The real motivation seems to be, to a large extent, at any rate, the ambition on the part of African rulers for personalized power and for an unlimited, indefinite rule. So also Africa's

development crisis, the struggle to regain the continent's capacity for development, is not a justification for the repression of civil and political rights by African governments on the false and untenable premise that the enjoyment of civil and political rights is incompatible with the struggle for economic development, that the realisation of economic and social rights is attainable only if civil and political rights are denied or suppressed. Whilst the implementation of economic and social rights impinge, to some extent, on civil and political rights, the impingement is not such as creates an incompatibility between them. It is all a matter of balancing. It is perhaps not unfair to say with Mathews that "the only correlation between economic development and human rights violation is that privileged classes have tended to perpetuate their rule by violating human rights in order to stay in power."

Seventh, military take-overs and the regime of military absolutism have no justifiable basis in the endemic incidence of situations of social unrest and violence in Africa; the real motivation for them is also the personal ambition for absolute political power on the part of military officers in Africa.

Lastly, there is the abuse involved in the African rulers' conception or rather misconception as to what "government" consists of for the purposes of state security. No doubt, the security of the government is an essential part of state security. But "government" for this purpose refers appropriately only to the system or form of government instituted by the constitution, together with its established institutions and processes; it does not extend to the incumbent government of the day, particularly as regards its continued stay in power and the continued tenure of office of its functionaries and of the ruling party.

7. Frequent take-overs of the state and its government and the overthrow or suspension of the constitution and democracy by the military

Governmental absolutism in Africa was largely a military phenomenon. From its first occurrence in Eqypt in 1952 and Sudan in 1958, military seizure of the state by means of a military coup d'etat has, as at January 2009, engulfed 34 out of the 53 states in Africa. The tally of military coups and take-overs as at this date (January 2009) stands at 85 (exclusive of publicly acknowledged attempted coups) viz Algeria (3 coups), Benin (6), Burkina Faso (6), Burundi (3), Central African Republic (3), Chad (4), Comoros (4), Congo-Brazzaville (1), Egypt (2), Equatorial Guinea (1), Ethiopia (2), The Gambia (1), Ghana (5), Guinea (2), Guinea Bissau (1), Lesotho (2), Liberia (1), Libya (1), Madagascar (2), Mali (4), Mauritania (6), Niger (1), Nigeria (6), Rwanda (1), Sao Tome (1 - shortlived), Seychelles (1), Sierra Leone (4), Somalia (1), Sudan (4), Togo (2), Uganda (5) and Zaire (now Democratic Republic of Congo) (1).

A military government brought into existence following a successful military coup d'etat is an absolute one. It derives neither its existence nor its powers from a constitution; no question therefore arises of any constitutional limitations upon its

powers. On the contrary, where constitution is established, either a brand new one or the old pre-existing constitution modified to suit the nature and purposes of a military government, it is subject to the absolute and supreme power of the military government. The military government is the source from which such a constitution derives its authority, and at whose sufferance it must therefore operate. This is the reverse of the position in a constitutional democracy where the government is the creation of, derives its powers from, and must thus operate subject to the limitations of, the constitution.

The subjection of a constitution to the absolute power and sufferance of a military government necessarily reduces it to nothing, and thus deprives it of all respect and legitimacy. And the longer the situation persists, the more the constitution is degraded in the eyes and estimation of the people. Worse still, the persistence of military rule for a prolonged period of time entrenches absolutism in the culture of the people and acclimatizes them to it. It is therefore saddening to reflect that Nigeria, the giant of Africa, has been under military rule for 28 years out of its 49 years as an independent state. The tragic products of military absolutism in Africa were the bloody reigns of terror mentioned earlier.

Besides the tyrannies, an absolutist one-man regime, both civilian and military, often gives rise to the privatisation of the state, which is a condition of things where the state is treated by the ruler as if it were his private estate - as if he owned it, with state affairs becoming practically indistinguishable from the strictly personal affairs of the ruler, with all institutions and powers of government being absorbed in him, and with impromptu decisions and actions based on his personal whims and caprices being substituted for regularised government decisions - taking procedures and processes.

What is more, state money and other property are treated as if they were his personally, to dispose of and be dealt with as he likes, with little or no restrictions and with no obligation of accountability - with scant regard indeed to laid-down financial regulations or budgetary controls, breeding in the process utter indiscipline in the expenditure of public funds and of course corruption.

Life President Macias Nguema as sole ruler of Equatorial Guinea kept the state treasury in notes stored in a building near his house; Field-Marshal Idi Amin, the brutal dictator of Uganda kept a huge sum of American dollars, money belonging to the state, in his house; Gen Sani Abacha, absolute military ruler of Nigeria, had a small central bank office set up in the presidential villa to facilitate personal dealings with public money; President Mobutu, autocratic sole ruler of Zaire, kept with him the cheque books of the state bank accounts, which he carried along whenever he travelled and issued on the spur of the moment as pleased his whims.

The privatisation of the state under a one-man rule is thus an abuse in an extreme degree of absolute power, and a perversion of the concept of the state

as a body of laws, not a body of men, as an organisation whose "activities are systematised, co-ordinated, predictable, machine-like and impersonal."

No further demonstration than what is said above is needed to show that the protection of the rights and freedoms of the individual, security for life and property, the needs of the people for social welfare services and amenities and for economic development generally were the chief casualties during the era of governmental absolutism.

8. Lingering Mass Illiteracy

In nearly all African countries today (2009), mass illiteracy still prevails, engulfing more than 50 percent of the population, 60 percent or more in some places. Now, the reality of popular consent in government definitely pre-supposes an educated electorate able to understand the nature of the responsibilities placed on the rulers and the powers invested in them for carrying out those responsibilities under the constitution of the modern complex state as well as the qualities which those responsibilities and powers call for in the rulers; to make an intelligent choice between the contestants for elective public offices, judged by the quality of their election campaign speeches and other information; to evaluate the programmes of competing political parties for conducting the complex affairs of the state; to follow the process of election itself with its sophisticated trappings of secret ballot, ballot papers, ballot boxes, etc.

The same goes, to the same or lesser extent, for the other political rights. Freedom of the press has no meaning for a person who can neither read nor write. Criticism by speech or by peaceful assembly or procession and even the freedom to organise in opposition to the government require ability to understand the issues at stake and the shortcomings of the government's handling of them. An illiterate person can understand and act only as concerns actions or inactions that affect him directly, and then mostly as directed by the educated class. The choice of a candidate or political party to vote for (or a political party to join) is also usually decided for him by the educated class, which exposes him to manipulation and exploitation by the latter; the initiative to form a political party is clearly beyond him. Nor can participation in the executive or legislature as elected member thereof be enjoyed by him, the possession of a certain level of education, often specifically prescribed in the constitution itself, being a condition for eligibility to contest election to those bodies.

In the light of what is said above, there is substantial element of truth in the point that popular consent in government is, in the context of Africa, "a facade" behind which the real rule is exercised by the elite. The mass illiteracy and ignorance presently prevailing in Africa today constitutes therefore perhaps the biggest single factor undermining the reality of popular consent in government. The eradication of illiteracy must thus be vigorously and relentlessly pursued through a programme of compulsory, universal and, if possible, free education at the

primary level, supported with adequate educational facilities at all levels, as well as a programme of, and vigorous campaign for, adult literacy.

It is also true, as Lord Bryce said, that "a democracy that has been taught only to read, and not also to reflect and judge, will not be the better for the ability to read". Literary education must therefore be accompanied by political education that teaches people about the political process, and seeks to impart to them the ability to think critically, and not to take a stand without considering the two sides to any matter in issue. Above all, education must go hand in hand with the involvement of the people in their own government at the local level in order that practice may vivify knowledge.

9. Mass poverty and the Structure of African societies

We may begin by noting the transformation of African society from the more or less undifferentiated, unstratified and classless mass (with some exceptions) of pre-colonial days to one which, by the time of independence, comprised three more or less distinct classes, viz

(i) the huge mass of very poor, subsistence, illiterate farmers, the rural peasantry, and their urban counterpart of similarly poor, underpaid, illiterate or semi-literate workers, the urban proletariat, accounting together for about 80 percent of the population;

(ii) a middle class of on-coming, prosperous traders, primary and secondary school teachers and middle cadre officials in government, university and business establishments, accounting for about 15 percent of the population; and

(iii) an upper class of very rich, top professionals, executives in government and business establishments, top merchants, industrialists and other top businessmen, university professors, legislative leaders, judges, bishops, etc, accounting for about 5 percent of the population.

It should be stated in parenthesis that the percentage figures used here may not be accurate but they seem approximate enough to demonstrate in vivid and concrete form the point under discussion.

Clearly, the class structure of the societies of Africa at independence, as described above, would tend to produce and to perpetuate elitist rule. The tendency would arise not from the mere existence of the two classes of the very poor and the very rich, but rather from the size or percentage of the population comprised within each of them relatively to that of the middle class as well as from the nature or character of the middle class itself. Where the two classes of the very poor and the very rich are a small minority vis-a-vis a middle class of neither-rich-nor-poor, then, the tendency towards rule by the elite may not arise. Thus American society is said basically to conduce to democratic government

because, although "enterprise and the love of wealth will produce a few massive fortunes, yet "the very poor will also be few in number and the immense neither-rich-nor-poor majority of the nation will always hold the balance between them." - Richard Heffner, Introduction to de Tocqueville's Democracy in America, pp. 17 - 19. Alexis de Tocqueville has put it perhaps more felicitously in his own words. Between the few very rich and the few very poor, he says, "stand an innumerable multitude of men almost alike, who, without being exactly either rich or poor" are able to secure "the balance of the fabric of society" at p. 264.

The class structure of the American society is thus radically different from that of African societies at independence. Given that, in Africa at independence, the very poor constitutes about 80 percent of the population, if not even more, the very rich about 5 percent and the middle class about 15 percent, and that the middle class is not exactly a middle class properly so-called because it is nearer the poverty than the affluence line, then, rule by the elite seems pretty well inevitable. The class structure of the African societies at the time of independence might therefore be said to have provided a clear recipe for dominance in government and politics by the elite, using their enormous wealth, their intellectual superiority and other advantages. In the prevailing conditions in Nigeria, in particular, the dominant influence of money in elections and in politics generally, only exceptionally can any one from the middle and lower classes stand a chance of getting elected to an executive or legislative office on his own steam alone, without the financial sponsorship of the wealthy elite class. What is needed to prevent the continuance and perpetuation of elitist rule and, accordingly, to enable popular consent in government to acquire greater reality is thus a middle class large enough to constitute at least 60 percent majority of the population, and prosperous enough as well as knowledgeable and enlightened enough to be called a bourgeois class in the true and proper sense of the term, a middle class able to act as a counterpoise against elite dominance and to serve as a force for equilibrium in the society. This needs of course to be accompanied by the eradication of illiteracy and ignorance among the lower classes to equip them to exercise the franchise intelligently.

The question, then, is whether a middle class of the type just indicated has emerged in Africa in the years since independence and, if not, what the prospects are of its emerging in the foreseeable future. Despite the remarkable economic growth recorded by some of the countries over these years, eg. Nigeria, the available data, scanty as they are, show that, in the 20 years from 1960-1980, the lower and middle classes' respective shares of the national income have significantly declined while the share of the top 5 percent of the population has witnessed a striking increase. The appalling widening of the disparity in incomes between the lower and middle classes on the one hand and the upper class on the other (as well as between the lower and middle classes) is attributable to a variety of factors-use of state power by the ruling elite to enrich themselves, their friends and associates; increased poverty due to economic recession/stagnation; low level of industrialisation and urbanisation; inadequate

income redistribution measures; unemployment, etc. From all indications, the trends seem to have continued to date. The position still remains as it was at independence, namely, that what is called the middle class in Africa is not really a middle class properly so-called. It has aptly been described as a kind of "buffer-zone", a transitional stage in the progressive emergence of a bourgeois class proper.

It is not only that the middle class share of the national income has not increased to a point to counter-balance the wealth of the upper class (the elite) and the political dominance secured to it by such wealth, but, more crucial perhaps, it is still far, far away from displacing the lower class as the class commanding the overwhelming majority of the population. Whilst certainly the middle class has witnessed a significant growth in numbers since independence, the overwhelming majority of the population still belongs to the lower class of the rural peasantry and the urban proletariat.

More discomforting perhaps, the future does not appear to hold any immediate prospect for a reversal of the current trends. Wayne Nafziger reports the Economic Commission for Africa (ECA) as forecasting for the period up to 2008:

"a nightmare of explosive population growth pressing on physical resources and social services. Maintaining past trends means degrading human dignity for the majority, with rural population surviving on intolerable toil, disastrous land scarcity, and a worsening urban crisis, with more shanty towns, congested roads, unemployed, beggars, crime, and misery alongside the few unashamedly demonstrating greater conspicuous consumption, shopping at national department stores filled with luxury imports. The consequences of extreme wealth and poverty would be social tensions and continued financial crises threatening national sovereignty." - Inequality in Africa (1988), p. 1

Yet, even assuming the emergence in the foreseeable future of a middle class commanding a majority of the population, and prosperous enough to counter-balance to some extent the wealth of the upper class, the kind of democracy that might result from that would be, not a popular but a bourgeois democracy; the state would then only have been transformed from an elitist to a bourgeois state, unless the emergence of such a middle class is accompanied by the eradication of illiteracy and ignorance among the lower classes to give reality to their consent in government through their votes at elections. But a popular democracy of this type is still far removed from a people's democracy or one controlled by the working and peasant classes, which is the sort of state the radical African Marxists aspire to. According to Claude Ake, even popular democracy (as distinct from a Marxist people's democracy) should involve the empowerment of the people in the sense of devolving on them "some real decision-making power over and above the formal consent of electoral choice"; this, he says, "will entail, among other things, a powerful legislature, decentralisation of power to local democratic formations, and considerable emphasis on the development of

institutions for the aggregation and articulation of interests." - Democracy and Development in Africa (1995), p. 132

10. Evils of rule by the elite from the standpoint of government for the people as an objective of Democracy - social democracy

In a world dominated by ambition and avarice for personal gain, Plato's self-denying, disinterested philosopher-ruler, imbued with a zeal for the welfare of society and with unalloyed sense of duty to it, is a rare creature indeed, rarer still in developing African countries. Elitist rule may be efficient in maintaining internal stability, external security and aesthetic values, but the material welfare of society is usually peripheral to its concerns.

The relegation or abandonment under an elitist regime of the public welfare as the purpose of government was perhaps nowhere better manifested than by the elitist colonial governments in Africa. Rule under the colonial system was exercised principally for the exploitation of the colonial people rather than for their social and economic advancement. The administration of government under the colonial system, at both the bureaucratic and political levels, was doubtless characterised by efficiency, yet all this efficiency was directed primarily towards the maintenance of law and order in the interest of the stability and effectiveness of colonial rule and the optimum exploitation of the colony for the benefit of the imperial country. The social and economic development of the colonial society entered into the calculation only peripherally.

The Africans selected on the basis of their elite credentials to participate, in subordinate capacities, in the administration of the government readily became "co-exploiters" with the white colonialists. "The pinches of colonial rule", Professor Ayandele has observed, "were felt by the masses from the hands of the letter-writer, the sanitary-inspector, the policeman, the `warrant chief', the court clerk, the interpreter, or even the white man's cook-steward and the tax gatherer. They were the veritable oppressors. In the apposite words of an administrative officer: `Give a native a pair of trousers and he at once begins to extort money from his people'". The Educated Elite in the Nigerian Society (1974), p. 61 The practice was continued by the later-day ruling elite who, altogether careless or disdainful of the interests of the masses, were enabled to achieve their dream of stepping into the privileged positions hitherto the whiteman's exclusive preserve. Thus did the ambition and the desire to exploit the people by means of official corruption in all its variegated forms become implanted in the mentality and psyche of the African ruling class. Corruption manifests a want of patriotism and of a sense of service to the people.

In fairness to the white colonial administrators, it must be pointed out that there is a significant difference between their own exploitation of the African peoples and exploitation by the African ruling elite. Exploitation by the former was not for their own self-enrichment but for the benefit of their home country, whereas

exploitation by the African ruling elite is for the enrichment of themselves, their friends and associates; the motive was patriotic in the one case, and corruptly selfish in the other.

Elitism in Africa is indeed so closely, if not inseparably, connected with plutocracy, which may be here defined as government of the wealthy by the wealthy for the wealthy. That is what elitism in Africa really is, a plutocracy. It is thus as nearly tainted with the evil influences of wealth in government as a plutocracy is. As in a plutocracy, elitism in Africa has enthroned money as the accepted measure of success in society, as a criterion of honour or worthiness, as the determinant of social values, indeed as the very object of existence. All relationships in society, in short, practically everything, have come to be measured in terms of money and money-related values. What Plato (427-347 B.C.) wrote nearly two and half millenia ago remains more tellingly true today than in his day. "In proportion as riches and rich men are honoured in the State", he wrote, "virtue and the virtuous are dishonoured ... Instead of loving contention and glory, men become lovers of trade and money; they honour and look up to the rich man". (The Republic, p. 196) The ruin of a system where fitness to rule is determined by money, he says, is the "insatiable desire of wealth and neglect of all other things for the sake of money-gathering". (ibid p. 206) Herein is epitomised the cardinal evil that elitism has wrought on Africa; the perversion or destruction of ethical values and their replacement with money-related ones: unbounded acquisitive individualism, selfishness and avarice; intemperate indulgence of pleasures (like sex and alcoholic consumption), luxuries (like expensive cars, palatial residences, parties, and other types of conspicuous consumption), and prestigious symbols (like chieftaincy titles and honorary degrees), self-glorification, vanity, ostentation and flamboyant displays.

One of the many sad consequences of the evil influence of money in the state in Africa is that higher education, which used to be the main criterion of elite status in society, now commands far less social recognition and admiration than wealth. The effect of this on civil servants is particularly sad. Service as a hardworking, honest civil servant has come to be viewed as unrewarding; to him, it now seems foolish to remain a poor, dutiful and honest civil servant when his political bosses are "busy openly amassing wealth unabashed by any code of conduct."

Under elitist rule in Africa, tribalism has been intensified rather than diminished. As has been said in respect of Nigeria, the ruling elite have shown, by their behaviour, that "tribalism is more natural with them, and that they would practice it, than the Pan-Nigerianism to which, they were paying merely lip service". (Ayandele, op. cit., p. 104) So weak and fragile is their sense of loyalty to the inherited state that it is easily overriden by their loyalty to the village, the clan and the tribe where the interests of both are in competition. In spite of appearances to the contrary, the African elite, particularly the ruling elite, are tribalistic, clannish and nepotic, in a much more eminent and dangerous degree than the unlettered masses, and they are so more for motives of personal advantage than for any

benefit it brings to their village, clan or tribe. Indeed tribalism is employed by the ruling elite as a cover for the exploitation of the masses, knowing that the latter would fall easily for it and readily give their support to the exploitative rule of the elite. Further, the ruling elite always find it expedient for the continued exploitation of the masses to incite them to animosity, hatred, antagonism and hostility against one another, thereby aggravating the cultural and other differences that already divide them.

Whilst the pervading incidence of violence which disgraces politics in Africa since independence cannot fairly be blamed entirely on the ruling elite, being largely an inheritance from colonialism, yet they have been all too prone to the temptation to resort to it as a "legitimate", ready-made instrument of political control; and whilst it was not they, but rather the white colonial administrators, who "introduced" violence into the transplanted state as an instrument of political control, yet the blame is squarely theirs for its use for the selfish purpose of advancing personal political interests, as distinct from the maintenance of the stability and effectiveness of the government and the continued subjugation and exploitation of colonised Africa, which were the purpose the white colonialists used it for. It may mitigate somewhat our censure of the African ruling elite in this matter to bear in mind that the ready resort to violence in the struggle for the control of the transplant state was in part because the stakes are incomparably higher and more alluring than they ever knew in the traditional, pre-colonial society.

Yet another evil of elitism in Africa is that, with but few exceptions, the ruling elite, as a class set apart in interests and outlook from the masses, particularly the grassroots, have shown themselves either incapable or unwilling to break free of their confining class interests in order to reach down to the masses, establish a proper rapport with them, and mobilise them effectively for common action in furtherance of the social and economic development of the country. Ensconced in the enjoyment of their wealth, influence and prestige, and unwilling to let go, the ruling elite find themselves inhibited or precluded to make the efforts called for. In the result, rulers and the ruled are set apart one from another in a disabling divorce that prevents or retards social and economic development.

Linked to the above is the inclination of elitist rule towards conservatism and the maintenance of the status quo as far as concerns inequality in the standards of living of the different classes in society. This follows from the fact that the concern of elitist rule, indeed its raison d'etre, is to maintain the continued exploitation of the masses to satisfy the selfish interest of the rulers; the preservation of the wealth, property, comforts and the privileged position of the ruling elite. The ideal of the welfare state, of social welfare services for the people, can only be pursued effectively by a truly representative government, i.e. by public servants who truly represent the aspirations of the masses for social welfare services and for an improvement in the quality of their lives, and who are fired by a zeal for the actualisation of those aspirations, not by an elite ruling

group for whom the mechanism of popular election is only a facade and a device for bestowing some measure of legitimacy on the exploitation of the masses for its own selfish ends. Needless to say, a self-serving servant, whether private or public servant, is a manifest contradiction of the term; a servant, truly so-called, is one who serves the interest of another.

Until popular elections in Africa are able to produce representatives not in name only, but true representatives of the interests and aspirations of the masses, and who are imbued with a zeal to actualise those aspirations, social democracy, that is to say, the removal of the mocking inequality in social conditions, cannot be achieved in Africa. Perhaps such representatives are more likely to be found from among the masses themselves, the lower and middle classes, than from a class outside of the masses, the elite class.

These well-attested evils of elitist rule or elite political leadership in Africa render untenable and unacceptable the suggestion that what Africa needs is "a re-invigorated elite", or that such a re-invigorated elite is "an essential pre-requisite for the democratic process" or for success in nation-building and the development project. Elitism needs rather to be eliminated, not re-invigorated, or at least its authority and influence should be substantially reduced. "The inherent elitism of the ruling classes," writes Nkrumah is his Class Struggle in Africa (1970) at page 35, "makes them contemptuous of the masses. Elitism is an enemy of .....the working class."

Elitism or rule by an elite group poses one of the most intractable problems for the decolonisation process in Africa because it impedes the process of democratising the society and government and legitimising the state, it consolidates the incidence of violence and exploitation as well as of illiteracy and poverty among the masses. The governing elite, perpetuating the system of privilege brought to Africa by European colonialism, constitutes a new form of colonialism and domination by Africans over fellow Africans. It needs therefore to be eradicated, not rejuvenated.

11. Illegitimacy of the state in Africa

State legitimacy, as here used, concerns the question of the moral basis of the state and its power. It involves the distinction between might or material strength and the moral right to wield it over others; the latter is what is known as authority. Authority refers to the moral basis of power, it is "the mother of power," (Finer, The Man on Horseback (1962), p. 19), serving therefore to sanctify and legitimate it. Power without authority, that is to say, power not based on, and not sanctified by, authority, is illegitimate, and its exercise over others is morally wrongful. The illegitimacy of the state in Africa is thus related to, though somewhat different from, the fact that the state and its ways have no root in the life and experience of the peoples of Africa.

Authority thus implies a moral relationship whereby society has come to recognise and accept that "a person or body of persons has the moral right to demand obedience," and society a corresponding moral duty to obey him or them. Power based on might or force alone does not confer legitimacy on government, or, in Rousseau's pithy and pointed words, "the strongest is never strong enough to be always the master unless he transforms might into right and obedience into duty." (The Social Contract, Book 1, Chap. 3). Might must be transformed into a moral right and obedience into a moral duty to legitimate government and the exercise of power by it.

As a moral force, authority or the moral right to exercise rule over others can only spring from society; it must rest on social acceptance or recognition of a title to rule derived from long continued tradition, convention or some widely accepted myth or belief, such as the belief or myth of the divine right of kings to rule because they were supposed to represent God's will on earth, (Hannah Arendt, On Revolution (1963), p. 156) or the sacredness of the person and authority of certain kings, or, to use examples from Africa, the belief or myth in African societies that the power of the traditional chief is derived from the ancestors whose spirit he incarnates or the belief or myth among Ethiopians that the royal house is descended from King Solomon and that its title to rule was divinely ordained by reason of Solomon being the chosen and annointed of God, as the sacred book, the Bible, tells us. A divinely ordained right to rule is pure myth, there is nothing like that, yet popular acceptance of or belief in it gives it reality as a moral basis for the king's title to rule. But if and when it ceases to be accepted or believed by the society, the moral authority derived from it also ceases. Tradition therefore holds the key to governmental legitimacy.

The title of the European colonisers to rule Africa had no such moral basis in tradition, convention or myth; it was grounded purely on conquest by force of arms, sheer might, or cession obtained by undue influence. Conquest does no doubt confer a right, but it is a legal, not a moral, right, while the moral right, equally as the legal right, that might have been derived from the treaties of cession was vitiated by the undue influence by which the consent of the ceding traditional African rulers was obtained, and by the fact that the latter could not have consented to what they did not understand. Thus, the state in Africa, as an entirely new geographical and political entity created by colonialism, was branded with illegitimacy by the circumstances of its origin. And given that the state did not exist before as one identifiable geographical and political entity, there could have been no pre-existing tradition, convention or myth common to all the diverse peoples comprised in it, upon which the European colonisers could later seek to ground their title. The enormous powers the colonial state wielded over its African subjects simply lacked a moral basis altogether; based, as it was, entirely on might or force, it was power illegitimately wielded. Nor was it legitimated by popular elections or other means of popular participation over a sufficiently long period of time.

So long as the state in Africa remained a colonial state, it and its powers continued to lack legitimacy, so that what was "transferred" to the African successors at independence was power devoid of a moral right to wield and exercise it. For the European imperialists could not at independence have transferred to their African successors any better title than they themselves possessed. The post-colonial state in Africa is therefore as illegitimate as its colonial precursor - "the bastard child of imperialism," as Karl Maier calls it (This House has Fallen (2000), p. 7). Or, as Ikechi Mgbeoji describes it in words no less pungent, "African states were in their conception, gestation, and birth alien and strange contraptions foisted on the continent by imperialist forces...Imbued with this intrinsic illegitimacy, it is fair to say that ab initia, African states were devoid of internal legitimacy." (Collective Insecurity : The Liberian Crisis, (2003), p. 14).

It was thus left to the African succeeding rulers to try to legitimate their inheritance. Regrettably, with a few exceptions, notably Kwame Nkrumah, the implications of the problem appeared not to have been regarded as a matter of serious concern. Remarkably too, Nkrumah alone had consciously tried to do something about it, albeit in his characteristically egoistic style. He tried to transfer to the state and the presidential office, the attitudes inculcated in the people by African tradition towards chiefly authority, to clothe the office in the garb and image of a chief in African traditional society, with all the authority and respect due by tradition to a chief. The president was thus projected as the "chief" of the new nation, and was publicly invested with chiefly attributes. Thus, when he attended public rallies in Ghana, Nkrumah used to assume the style of a chief. He sat upon a "chiefly throne under a resplendent umbrella, symbol of traditional rule," and he took "chiefly titles meaningful to all major tribal units in Ghana: Osagyefo, Katamanto, Kasapieko, Nufeno, etc." (H.L. Bretton, The Rise and Fall of Kwame Nkrumah (1966), p. 80). His opening of parliament was also done in chiefly style. His approach was "heralded by the beating of fantomforom (traditional drums). He was received by eight linguists representing the various Regions and each carrying a distinctive stick. A libation was poured and the President then entered the chamber to the sound of mmenson (the seven traditional horns)"(Bennion, The Constitutional Law of Ghana (1962), p. 110). Though this is explicable in part by Nkrumah's irredentist aspiration for the revival of the African cultural heritage, the political significance is obvious. It was intended to harness to the presidency the authority of tradition and the legitimacy which it confers. By aligning the presidency with the institution of chieftaincy in the public imagination, it is hoped to inspire public acceptance of the office and respect for its authority. The mysticism of religion in which the authority of the chief is sanctified was also sought to be transferred to the presidential office. Even the attribute of divinity, which also characterises some traditional chieftaincies, had been claimed for Nkrumah as president of Ghana.

What impact, if any, was made on the problem by Nkrumah's invocation of African tradition is not known. It is conceivable that an alien institution with no

root whatever in the life and experience of Africans may not be easily legitimated by clothing it in the garb and image of African tradition. No doubt, tradition must form the basis of any effort to legitimate the state and its powers, but it has to be tradition evolved anew in consonance with the character of the institution.

A conscious effort to evolve appropriate tradition must go hand in hand with other means of legitimation, viz popular participation in government through elections, referenda or plebiscites; social mobilisation aimed, among other things, at creating a public opinion that is politically conscious and alive; political education about the state and its institutions with a view to making them comprehensible to the people; a programme of social welfare services designed to make the state meaningful and relevant in the lives of the people; the development of country-wide associations and institutions that try to integrate people together for joint action in the pursuit of common political purposes and interests, such as professional and trade associations, labour unions, political parties, religious bodies, etc; inculcating among the people, an acceptance of the indivisibility and perpetuity of the state, acceptance of the equal interest of all in the state, the right of every citizen to equality of opportunities and equality before the law, a sense of allegiance to the state and attachment to its institutions, a sense of community and of a common destiny. By these means, regularly and uninterruptedly applied and sustained over a sufficiently long period of time, the peoples of Africa may, hopefully, come to recognise and accept the inherited post-colonial state and its instrumentalities as having the moral right to command, and society, the moral duty to obey their commands.

It is sad that the slow and tortuous process of legitimating the state by means of popular elections, referenda and plebiscites has been arrested or, at least, retarded by the frequent occurrence of prolonged military interregnum in most countries of Africa. Given that a military government is not popularly elected, but is rather an armed subjugation of the people, involving a seizure of the state by force of arm or threat of it, i.e. rule based on sheer might, military rule is devoid of the legitimating effect of popular elections, even when the elections are rigged. With the ban under military rule of elections, election campaigns, political rallies, public assemblies and processions on public issues, which are all part of the process of legitimating the state in the eyes of the people, it is as if the country was reverted again to its previous condition as a colonial state at the early stage of colonisation when government was administered by colonial officials without elections-Africa's second colonisation, as military rule may be called without too much impropriety.

The legitimacy of a government in power at any particular time raises a different but related issue from the legitimacy of the state conceived as government transmuted into a corporation with perpetual succession - the former concerns legitimacy of governance defined by its conformance with generally accepted standards of morality, humanity, equity, justice, the rule of law, respect for human

rights, democracy and ability to cater for the welfare of the citizenry. Legitimacy of governance encompasses many of the issues involved in 1 - 10 above.

The illegitimacy of the state in Africa is treated last after all the other ten issues because it is the ultimate factor relating to the foundation of Democracy. A state that lacks legitimacy in the eyes of the people certainly taints and diminishes the foundations of Democracy. It is a matter for argument whether a credible Democracy can stand upon the foundation of an illegitimate state.

PART B : WEAKNESS AND DEFICIENCY OF THE INSTITUTIONS OF

DEMOCRACY IN AFRICA

Three institutions of Democracy are here identified as the main institutions that fall for consideration under this aspect of the topic of this Lecture, viz the institution of free and fair elections; the machinery for the conduct of elections; and the machinery for the adjudication of election disputes.

(i) The institution of free and fair elections

The problem concerning the institution of free and fair elections is largely one of definition and application - the definition of what is required for an election to be fair and free; and application in practice by the courts and election tribunals of those requirements.

The two words "free" and "fair" in the phrase "free and fair elections" do not mean the same thing, although their meanings are inter-related and overlap in some respects. Taking first, the principle of fairness, it requires that:

i. There is equality between the voters, none being allowed to cast more than one vote (sections 13(2), 17(2) and 54(1) of the Electoral Act 2006) or to have greater weight attached to his vote;

ii. Participation by the candidates is on the basis of equality of treatment by the authorities, none being subjected to unfair restrictions or have "hurdles" put in his way or be accorded unfair advantage or be otherwise unfairly favoured in relation to others; in language currently in common use, the authorities must maintain a level playing field for all the candidates;

iii. Political parties are free to sponsor candidates and canvass for votes in a truly competitive sense and on the basis of equal treatment with other political parties;

iv. The territorial units of representation are demarcated as to be nearly equal in population as possible and so as not to favour same people against others (sections 72 and 113 of the Constitution);l

v. Those entrusted with the conduct of an election are not agents of, or are not subject to direction by, any of the contestants or the political parties sponsoring them (sections 153 - 158 of the Constitution; sections 29 & 30 of the Electoral Act 2006);

vi. The contest is in fact conducted impartially and fairly according to laid down rules binding on all, giving no unfair advantages to one candidate and his political party while imposing unfair restrictions on another.

vii. The result are based on, and truly reflect, the votes lawfully cast at the election by the voters and are free of falsification, inflation or other fraudulent manipulation of figures;

viii. The winner is determined by a majority or the highest number of such lawful votes.

The equal treatment of candidates and the political parties sponsoring them and of the voters or, in the hallowed language of the U.S. Constitution, "equal protection of the laws", may be said to be the criterion or hallmark of fairness in an election. The "equal protection" principle of the U.S. Constitution is enshrined in more specific and precise terms by section 42(1) of the Nigerian Constitution which provides as follows:

"A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such person -

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinion are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions" (emphasis supplied).

In this regard, section 42(1) above must be read together with section 17(1) & (2) of the same Constitution. It says: "The State social order is founded on ideals of Freedom, Equality and Justice" and that, "in furtherance of the social order, (a) every citizen shall have equality of rights, obligations and opportunities before the law" (emphasis supplied). And, a duty is laid by section 13 on "all authorities and persons exercising legislative, executive or judicial powers to .....apply the provisions." (emphasis supplied).

Regrettably, the ground of "unequal treatment" is not among the grounds prescribed in section 145(1) of the Electoral Act 2006 for questioning the validity of an election. Section 145(1) of the Act is thus clearly incompatible with the above-mentioned provisions of the Constitution, which are made applicable by section 239(1) of the Constitution vesting in the Court of Appeal jurisdiction to "hear and determine any question as to whether (a) any person has been validly elected to the office of President or Vice-President under this Constitution" (emphasis supplied). Section 285, applicable in the case of election to other offices questioned before the election tribunals, is in identical terms.

By the provisions in section 239(1) and 285, therefore, the legal validity of an election is determined by reference to the Constitution and, subject thereto, by reference to the Electoral Act. And the Constitution is to prevail in the event of an incompatibility between it and the Act. In the event of such a conflict, the court is under a duty to echo in its decision the nullity declared in section 1(3) of the Constitution against any law and, a fortiori, any executive/administrative act that is incompatible with the provisions of the Constitution, including any inconsistent act done in the conduct of an election, like placing hurdles in the way of a candidate which are not placed in the way of other candidates, particularly the candidate declared winner by the electoral body.

And yet, according to Niki Tobi JSC in his concurring judgment in Atiku Abubakar's Case "unequal treatment is not a ground for challenging an election in the Electoral Act 2006. The ground is 'exclusion.....The court should have examined the 1999 Constitution if counsel had raised any issue of conflict. He did not. He is correct in not so raising because there is no case of conflict" - at page 101. Counsel for the appellants did raise the point when they said in paragraph 5.01 of their Brief of Argument that "the validity of an election is not determined by reference to the Electoral Act alone, since the jurisdiction vested in the Court of Appeal by section 239(1) of the Constitution is "to hear and determine any question as to whether (a) any person has been validly elected to the office of President or Vice-President under this Constitution." It is the court, preferring the path of a perverse and narrow legalism, that failed to take up and examine the point.

Regrettably, the Supreme Court also failed to consider the further submission by Counsel for the petitioners/appellants in paragraph 5.11 of their Brief of Argument. Counsel had submitted as follows:

"Coming fresh, so to say, to the determination of this issue, with its hands untied by the doctrine of precedent, this Honourable Court, as the apex Court for the country, is respectfully urged to give effect to the principle of fairness, epitomized by the equality of treatment of candidates, as the principle governing the validity of election to an elective public office, and to hold, unfettered by the technicalities of the law of evidence and the rules of practice and procedure, that the hurdles placed on the way of the 1st Petitioner by the authorities, acting through the 4th

and 5th Respondents, deprived the 21st April 2007 presidential election of this fundamental and essential element of fairness and therefore rendered the said election null and void. The Court is respectfully requested to nullify the election and set aside the decision of the lower Court as being a re-enactment of what Eso JSC rightly decried 26 years ago in his dissenting judgment in Nwobodo v. Onoh (1984) 1 SCNCR 1 at page 73 as "the appointment of a Governor or President...by mere technicality and not by majority of votes."

Gratifyingly, the errors pointed out above in the decision of the majority were exposed in the dissenting judgment of Oguntade JSC which, hopefully, may establish the law on the matter in the future, however distant the future may be. The relevant parts of the judgment are as follows:

"In an election under a democratic system, all the political parties recognized under the law and their candidates must be treated equally and fairly. The public body organizing the election must ensure that all the political parties and their candidates are afforded equal opportunity to approach the electors with their party programmes. The public body must not show special favour or disfavour to any of the candidates. An election is like a bazaar where political candidates advertise their party programmes to electors and that is as it should be in a democracy. In the interpretation of a provision in the Electoral Act 2006, a court must be conscious of its duty to jealously guard the underlying principles of democratic governance as enshrined in our Constitution. His Lordship then quoted the provisions of sections 14(1), 17(1) and 2)(a) and 42(1) of the Constitution and continued

"The question is - Did the 1st appellant/petitioner receive equality of treatment with the other candidates in the election as guaranteed to him under the Constitution of Nigeria"

To this question, his Lordship gave an unequivocal negative answer, and then proceeded to order that "the Presidential Elections held in Nigeria on 21st April, 2007 be annulled and a new election conducted within 90 days from today". But, lamentably, his was a lone voice in the wilderness.

Coming next to the principle of free election, free election is the other underlying principle, "the inarticulate major premise", of the democratic system under the Electoral Act 2006 (see section 146(1)) and the Constitution. The principle of "free" election requires that an election should be free of corrupt practices and other electoral malpractices. Corrupt practices strike at the very root of free and fair election; they are irreconcilably antagonistic and hostile to an election in the sense required by democracy.

As used in section 145(1)(b) of the Electoral Act 2006, the term "corrupt practices" is derived from the word "corruption" which connotes, according to the definition of it in Black's Law Dictionary, 7th Edition, "(1) depravity, perversion or

taint; an impairment of integrity, virtue or moral principle. (2) The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others." In relation to an election, the term means, therefore, a perverse, dishonest, immoral, improper or illegal act or practice intended to influence the election in favour of a particular candidate sponsored by a particular political party.

Whilst it may be a crime, as in the case of the corrupt acts or practices made a crime by sections 131 and 137 of the Electoral Act 2006, it has a meaning wider than that, and embraces perverse, dishonest, immoral, improper or illegal acts or practices which, though not made a crime by statute, are intended to influence an election in favour of a particular candidate sponsored by a particular political party - an act may be illegal without being a crime. This is what makes corrupt practice at an election, whether or not it is made a crime by statute, so inimical to free election.

The character of corrupt practice at an election as something which, by its intrinsic nature, undermines the quality of an election as a free election, and therefore its credibility and integrity, is attested by the penalties attached to conviction for it by section 122(1) of the Electoral Act 2002, where corrupt practice is made a crime by statute. The subsection provided as follows (the provision is omitted from the 2006 Act):

"Any person who is convicted of an offence under this Part of this Act which amounts to corrupt practice or is convicted of aiding, abetting, counseling or procuring the commission of such offence shall, in addition to any other penalty, be disqualified during a period of four years from the date of his conviction from being -

a) registered as a voter or voting at any election; and

b) elected under this Act or if elected before his conviction, from retaining the office to which he was elected" (emphasis supplied).

Thus, under section 122(1) of the Electoral Act 2002 conviction for corrupt practice where it is made a crime by statute nullified the election of the person concerned, regardless of whether or not the corrupt practice substantially affected the result of the election. The gravity of the penalties under section 122(1) above is a statutory recognition of the nature of corrupt practice as a matter so fundamental to the principle of free, fair and credible election, so fundamental indeed that conviction for corrupt practice made a crime by statute nullified the election of a person convicted of it.

Corrupt practice must be regarded as a matter intrinsically "substantial" in nature by reason of the fact that it impairs the quality of an election as a free election and therefore its credibility and integrity. It follows, therefore that corrupt practice,

if shown to have occurred need not be proved to have substantially affected the result of the election under section 146(1) of the Electoral Act 2006. Being intrinsically substantial in nature, and because it strikes at the very root of free election and thereby undermines it integrity and credibility, corrupt practice, if proved to have occurred, is irrefutably presumed to have substantially affected the result of an election. This makes it necessary that, in interpreting and applying section 146(1) of the Electoral Act 2006, a distinction be made between non-compliances amounting to corrupt practice and those not amounting to corrupt practice. The distinction is implied by, and may be predicated on, section 145(1)(b) which, by providing that an election may be questioned on the ground that "the election was invalid by reason of corrupt practice, or non-compliance with the provisions of this Act", makes them separate and distinct grounds for questioning an election.

It is not, however, suggested that, being antagonistic to free, fair and credible election and being of a nature intrinsically substantial, a single, isolated incident of corrupt practice renders an election null and void. Its impact on the "result" of an election is the function of how massive and widespread its incidence is; in other words, corrupt practice, including non-compliance amounting to corrupt practice, is a ground for nullification if it is proved to have been fairly massive and widespread in its incidence, regardless of whether the "result" of the election is thereby substantially affected.

The question before the court for consideration is not as to whether corrupt practice, by it intrinsic nature, is antithetical or not to free election (its utter incompatibility with free election has the truth of an axiom), but as to the amount of it, in terms of the degree of perverseness of particular corrupt practices and their spatial incidence, that renders an election null and void. No doubt, the determination of the question leaves considerable discretion to the court, but, like all judicial discretion, it must be exercised, not by perverse legalism, but judiciously and with due regard to truth, justice and the Rule of Law.

The complaints of the petitioners were dismissed by the Court of Appeal on the ground that "most of them appear trivial in character" - i.e. non-substantial within the meaning of section 146(1). Nothing perhaps betrays more glaringly the predisposition of the Court of Appeal to use section 146(1) as a shield to protect infractions of the Act than its dismissal of the Petitioners' complaint about non-supply, under-supply and late supply of ballot papers and other electoral materials on the ground that such non-supply, under-supply or late supply is "a logistic problem and not a defect".

Admittedly, an act or omission to act which would otherwise be condemnable as a non-compliance or corrupt practice would not be so regarded if it is due to accidental or logistical reasons or other lawful excuse, but not when it is deliberate or willful, as the massive, widespread incidence of non-supply, under-supply and late supply of ballot papers and other electoral materials during the

April 2007 presidential election indisputably was. The character of such deliberate or wilful non-compliance as electoral malpractice or corrupt practice is attested by making it a criminal offence, punishable with 12 months imprisonment or N100,000 fine or both, for a polling officer to "fail to report promptly or to discharge his lawful duties at his polling station on an election day without lawful excuse" or for "any officer appointed for the purpose of the Act to act or omit to act, without lawful excuse, in breach of his official duty." (section 130, Electoral Act 2006). Such dereliction of duty by officers appointed for the purpose of the Act, if it occurred on a massive, widespread scale, as it did during the April 2007 presidential election, warrant nullification of the election, regardless of whether or not the "result" of the election is thereby substantially affected.

The secrecy of the ballot is a matter fundamental to the credibility and integrity of a democratic election; hence it is made mandatory by section 53(1) of the Electoral Act 2006 that "voting at an election under this Act shall be by open secret ballot" (emphasis supplied). But the requirement was not complied with for the most part due to failure by INEC to erect polling booths in most parts of the country, with the result that voters in those areas had to cast their votes in the full view of all those present at the polling station.

In recognition of the importance of the secrecy of the ballot, section 132(1) of the Electoral Act 2006 enjoins "every officer charged with the conduct of an election and his or her assistants....to maintain.....the secrecy of the voting", and makes it a criminal offence, punishable with 6 months imprisonment or N50,000 fine or both, for any person to "interfere with a voter casting his vote or by any other means obtain or attempt to obtain in a polling station information as to the candidate for whom a voter in that place is about to vote for or has voted for; or communicate at any time to any other person information obtained in a polling station as to the candidate whom a voter is about to vote or has voted for." The violation of the secrecy of the ballot by INEC had occurred in most parts of the country during the April 2007 presidential election, but the complaint about this obviously grievous infraction was also dismissed by, the Court of Appeal, as "trivial".

The petitioners/appellants, in their Brief of Argument, had invited the Supreme Court to hold that the occurrence, on a scale so massive and widespread, of non-compliances with the provisions of Act amounting to corrupt practice or other electoral malpractices, as had been established by evidence, rendered the presidential election null and void. The apex court had precluded itself from considering this submission in the Atiku Abubakar appeal because of the striking out of this and other claims except that of unlawful exclusion.

Niki Tobi JSC did, however, consider the ground of corrupt practices and the other alternative claims in the interest, as he said, of "the development of our jurisprudence of elections." His decision dismissing the claim, manifests, glaringly

again, an erroneous and perverse legalism, as attested by the grounds on which his decision is based.

First, according to him, corrupt practice under section 145(1)(b) of the Act is in every case, contrary to what is said above, a criminal offence. Agreeing with counsel that printing ballot papers without serial numbers is a corrupt practice, he concluded that, as a corrupt practice, it is a criminal offence - at page 116. There is no provision in the Electoral Act or in any other statute making it a criminal offence to print ballot papers without serial numbers or criminalising all corrupt practices at an election, as the term is used in section 145(1)(b) of the Electoral Act 2006. Only particular acts partaking of the nature of corrupt practice, such as those set out in sections 131 and 137 of the Act, but not corrupt practices in general, are made criminal offences. The corrupt practices complained of by the petitioners/appellants are not, for the greater part, criminal offence under the provision of the Electoral Act or any other statute.

Second, having categorised all corrupt practices under section 145(1)(b) of the Act as a criminal offence, he held that allegations of them in an election petition must, as with allegations of criminal offences generally, be proved by a petitioner beyond reasonable doubt, not on a balance of probability required in civil case. In his own words, "the law I know is that where a crime is alleged in an Election Petition, the petitioner must prove it beyond reasonable doubt....There are tons and torrents of allegations galore on corrupt practice" at page 146, but "I do not see where the appellants proved them" beyond reasonable doubt at page 116. Without such proof, the claim that the election was invalid by reason of corrupt practices must be, and was, dismissed.

The law relied upon for the proposition that "where a crime is alleged in an Election Petition, the petitioner must prove it beyond reasonable doubt" is section 138(1) of the Evidence Act, but the provision in the subsection is not in the general terms stated by the learned Justice of the Supreme Court. The provision applies only where "the commission of a crime by a party to any proceedings is directly in issue in any proceedings civil or criminal." The allegation of a crime in a civil proceeding must be in the nature of an accusation made, specifically and directly, not inferentially or indirectly, against a person who is a party to the civil proceeding. This is a pre-condition for the application of the provision in section 138(1) of the Evidence Act.

This pre-condition is the rationale and justification for the provision. The requirement of proof beyond reasonable doubt in a civil proceeding, just as in a criminal prosecution, is meant to protect a party in a civil proceeding against the consequences of an accusation of having committed a crime - the risk of criminal prosecution and punishment as well as the moral obloquy and social stigma attaching to such accusation. The rationale and justification do not apply where an allegation of crime in civil proceedings is made in terms so general that no party to the proceedings is exposed to such consequences. It smacks of a

narrow legalism to apply the provision in section 138(1) of the Evidence Act where the pre-condition and the rationale and justification for the requirement of proof beyond reasonable doubt in civil proceedings are not present.

Third, for NIki Tobi JSC, it was not enough that corrupt practices, even of a most perverse kind, had been proved to have occurred on a massive and widespread scale, they must, additionally, be proved to have substantially affected the result of the election. In his own words, "if there is evidence that the result of the election was not affected substantially, the Election Tribunal must, as a matter of law, dismiss the petition, despite all the non-compliance with the Electoral Act" (at p. 149), including non-compliance amounting to corrupt practice. "I do not," he said, "see evidence of proof that non-compliance substantially affected the result of the election" (at p. 147); accordingly, the claim of invalidity of the election on the ground of corrupt practices was dismissed. The "law" referred to in the quoted statement is section 146(1) of the Electoral Act 2006 which, as the appellants contended in their Brief of Argument, is inapplicable where the validity of an election is questioned on the ground of corrupt practices under section 145(1)(b) of the Act.

It smacks of perverse legalism, that corrupt practice, as something which, by its intrinsic nature, is so fundamentally antithetical to free election and which undermines its integrity and credibility, should, where it is proved to have occurred on a massive and widespread scale, additionally be required to be proved to have substantially affected the result of the election. The proof of its occurrence on such a scale makes the election null and void ab initio; as no election is, in law, deemed to have taken place, there can be no result or, putting it in more graphic language, there can be no result without an election. We would, in the circumstances, be putting the cart before the horse to talk of the "result" of the election when there was no election in the contemplation of the law or as far as the law is concerned.

(ii) The machinery for the conduct of elections

The massive rigging that marred the elections in Nigeria in 2003 and 2007 has created a widely felt concern and desire among the people for genuine electoral reforms, particularly as they relate to the process for the appointment and removal of the chairman and members of the Independent National Electoral Commission (INEC). The desire of the public is for a reform that will truly secure the independence of the Commission from control and direction by the government of the day.

The proposal by the Federal Government (FG) to enlarge the membership of INEC to include one member representing each of the six geographical zones, Labour, the Nigerian Bar Association (NBA), the media, the National Youth Council (NYC), civil society and women organisations is a desirable and laudable step in the right direction, which may enable the influence of these organisations

to be brought to bear on the work of INEC, provided that such members are freely chosen by those organisations for formal appointment by the President. Yet the enlargement of the Commission by the inclusion of such members does not necessarily secure, much less guarantee, its independence from control and direction by the President as the authority that appoints and may remove them.

The one member of the Commission the process of whose appointment and removal is crucial to its independence is the chairman. Afterall, INEC, as presently constituted, has twelve other members apart from the chairman, but scarcely anything is heard or known about the influence, if any, which they exert in the Commission. The chairman dominates the Commission and is its alter ego, partly by reason of the commanding authority and prestige inherent in the office of chairman, but more because he and he alone is clothed by law with the immense powers of the chief electoral officer of the country. It is the exercise of those powers that needs to be secured against control and direction by the President.

President Umaru Yar'Adua and his cabinet do not seem to appreciate why the independence of INEC from control and direction by the FG is a matter of such crucial importance in Nigeria to a degree far greater than in other African states, with the possible exception of South Africa. Nigeria is a federal state. It does great violence to the federal principle as to be almost subversive of it that a body appointed and removable by the FG and which is, therefore, subject to its control and direction should be responsible for the conduct of the election of the Governors and Houses of Assembly of the constituent States of the Federation. The subversive contradiction of such an arrangement, which is unknown in the United States and the other older Federations, ought to have struck President Umaru Yar'Adua and his cabinet in taking the position which they took on this issue, i.e. the retention of the existing discreditable arrangement of appointment by the President, which is the very thing that provoked such public indignation.

The 1960 and 1963 Constitutions had tried, rather inadequately, to address this contradiction by the provision that prescribed the membership of the electoral commission as consisting of a chief electoral commissioner and one person representing each Region of the Federation appointed by the Prime Minister in consultation with the Premier of a Region in the case of the member representing his Region - sections 45(2), (3), (4) & (9), 1960 Constitution; 50(2), (3), (4) & (9), 1963 Constitution. It is common knowledge how ineffective this provision proved in securing the independence of the Commission against control and direction by the FG. The representative of one of the Regions on the Commission protested vehemently against the manipulations of the Commission by FG, using its chairman, and resigned.

With this experience, the issue became a subject of intense debate in 1976 - 78 both in the Constitution Drafting Committee (CDC) and the Constituent Assembly. The idea that overwhelmingly conditioned the discussions and

decisions in both bodies was that the unity of the country would be better assured by concentrating so much powers at the centre. As a leading member of the two bodies, I was an arch protagonist of this view. But experience over the years since then has, regrettably, proved that view to be misguided.

In spite of the prevailing mood at the time to concentrate powers at the centre, the representation of each State on the Commission by a member nominated by the State Governor was nevertheless retained in the 1979 Constitution as a way to try and reconcile the autonomy of the State Governments with the arrangement of one common electoral commission to conduct the election of the political organs of both the Federal and State Governments : see para 6(a), Third Schedule. But the representation of the States on the Commission was done away with by the 1999 Constitution enacted by the military, which simply provides that the Commission shall consist of a chairman and twelve members appointed by the President (para 14(i), Third Schedule.

Certainly, if INEC is to continue to be responsible for the conduct of the election of the Governors and Houses of Assembly of the States, then, a new arrangement which secures its independence from control and direction by the FG is an absolute necessity conformably with the requirements of the federal principle. The retention of the existing arrangement whereby its chairman and members are appointed and removable by the President should be completely ruled out. The FG was able, through its power of control and direction over INEC, to manipulate, to the advantage of the political party controlling it (the PDP), the election of the Governors and Houses of Assembly of the States during the 2003 and 2007 elections. The FG's continued control over INEC and its use to manipulate and influence the election of the organs of the State Governments seem well guaranteed to spell the eventual collapse of the federal system and with it the dismembership of the Federation. There is just no alternative to the removal of that control in the interest of the preservation of the federal system. But if the FG's control over INEC is to remain, then, the conduct of the election of the Governors and Houses of Assembly of the States should be taken away from INEC. That should form a vital aspect in the scheme for the much-needed re-structuring of the entire federal system which the public has been clamouring for all these years.

There was another provision in the 1960 and 1963 Constitutions designed to check interference by the FG with the conduct of elections by the electoral commission. The provision stated that "in the exercise of its functions under this Constitution, the Electoral Commission.....shall not be subject to the direction or control of any other person or authority." The words "in the exercise of its functions under this Constitution" are italicized to emphasise that the purpose and concern of the provision was to free the Commission from control or direction in the conduct of elections.

The provision was removed in the 1979 and 1999 Constitutions and replaced by a new one totally irrelevant to the evil calling to be redressed. The new provision merely states that "in exercising its power to make appointments or to exercise disciplinary control over persons.....the Electoral Commission shall not be subject to the direction or control of any other authority or person"; sections 145(1), 1979; 158(1), 1999 Constitution. The removal of the old provision and its replacement by the new one must be one of the several changes unilaterally inserted into the 1979 Constitution by Obasanjo's absolutist Federal Military Government after the draft of it has been passed by the Constituent Assembly. Freed from the peremptory command of the old provision in the 1960 and 1963 Constitutions, the FG and the ruling PDP were thus able to subject the Commission, by manipulation of various kinds, to control or direction.

The FG rejected the ERC's recommendation to vest the appointment and removal of the members of INEC in the National Judicial Council (NJC) because, as it said, the doctrine of the separation of powers enshrined in the Constitution would be thereby violated. The reason thus proffered for the rejection misconceives the doctrine which does not exist or operate in a water-tight compartment of its own. The doctrine exists and operates as part of a system of "checks and balances", examples of which abound in the Constitution. Thus, to mention one example of common knowledge, the power of the President to appoint or remove certain designated public functionaries, including members of INEC, which is part of the executive power rested in him by section 5(1)(a) of the Constitution, is checked by the requirement of Senate's confirmation or approval. Another example, which has more bearing upon the point under discussion, is the provision in section 143(5) of the Constitution relating to the removal of the President or Vice-President by impeachment in the National Assembly; the provision authorizes the Chief Justice of Nigeria to appoint a panel to investigate allegations of gross misconduct against the President or Vice-President.

The decisive role of appointing the investigating panel is given to the Chief Justice by the Constitution because, as the head of the third arm of government conceived as a counterpoise to the two political arms, and as an impartial agent of the law enjoined by his oath of office to uphold the Constitution and other laws, he is expected to hold the scale even between the contending political forces or interests. These same considerations also strongly recommend the use of the NJC under the chairmanship of the Chief Justice for the appointment of members of INEC.

Surely, if the appointment by the Chief Justice of a panel to investigate allegations of misconduct against the President with a view to his removal by impeachment does not violate the doctrine of separation of powers, vesting the appointment of members of INEC in the NJC should not constitute a violation of the doctrine. In any case, the NJC is not a judicial body; it does not have judicial powers, and its membership includes persons who are no longer serving as judges and others who are not judges, serving or retired.

It should, however, be admitted that the conduct of general elections is a critical and sensitive political function which forms a vital aspect of the powers vested in the political organs of government, the President and the National Assembly, by sections 4 and 5 of the Constitution, and it seems politically unwise and impolitic not to involve them in some way in the appointment and removal of those entrusted with that function. In this connection, the South African approach to the problem may come in useful because it takes due cognisance of this aspect of the matter.

The South African approach, which has proved effective in practice in securing the independence of the country's electoral commission, has three components. The first component is concerned with the process of the appointment of members of the Commission, including its chairman. The process is spearheaded by a panel established by law under the chairmanship of the Chief Justice of the Constitutional Court, with one representative each of the Human Rights Commission, the Commission on Gender Equality and the Public Protector. The process begins with the panel calling for nominations by the public. The panel then draws up a short-list from the candidates nominated by the public and conducts a public interview of the short-listed candidates. The short-listing of candidates is required to meet "the principles of transparency and openness" and to have "due regard to a person's suitability, qualifications and experience."

After the interviews, a final short-list of not less than eight candidates is drawn up by the panel and submitted to a committee of the National Assembly, which in turn makes its own nominations to the National Assembly from the candidates short-listed by the panel. The National Assembly, by a resolution of a majority of its members, then recommends to the President, candidates on the committee's list from which to appoint members of the Commission, two of whom are to be designated Chairperson and Vice-Chairperson respectively but the President may not appoint as member a person who is not recommended by the National Assembly, or who has a "high party-political profile."

Second, the Commission is constituted and designated as an agency, not of the Executive, but of the National Assembly, to which it is made accountable and must report its activities and the performance of its functions at least once a year, which implies that its members owe their tenure of office to the Assembly.

Third, by the express injunction of the Constitution, "no person or organ of state may interfere with the functioning of the Commission". The members too are expressly enjoined to be impartial and to "exercise their powers and perform their functions without fear, favour or prejudice."

The South African precedent is indeed what largely informed the recommendation of the ERC on this point. What the Committee actually recommended, according to its Report, is not straight appointment by the NJC,

contrary to the reports in the newspapers. Its recommendation is that, as respects the chairman, the deputy chairman and the member representing each of the six geopolitical zones, the NJC should:

(i) advertise the positions, spelling out requisite qualifications;

(ii) receive applications (nominations) from the general public;

(iii) shortlist three persons for each position; and

(iv) send the nominations to the National Council of State to select one from the shortlist and forward to the Senate for confirmation.

As respects the members representing the designated organisations,

(i) each such organisation should send 3 nominees to the NJC for screening;

(ii) the NJC shall screen the nominations and make appropriate recommendations to the National Council of State which shall further screen and recommend one name for each category to the Senate for confirmation.

Except for reasons of personal self-aggrandisement and the selfish desire for power, the FG could have no good, genuine reason for rejecting these eminently reasonable and well-considered recommendations. His chairmanship of the National Council of State gives the President ample opportunity to participate fully in the appointment process. Not having good, genuine reason for rejecting the ERC recommendation, it resorted to the lame, untenable and implausible argument about violation of the doctrine of separation of powers as its reason for the rejection. The rejection is really baffling and astonishing. Perhaps, the President should be involved further in the process by making him the authority to formally appoint or remove the chairman and members of the commission after the process recommended by the ERC has been complied with.

Coming to the FG's decision to have the State Independent Electoral Commissions (SIECs) abolished, the decision prompts the question whether President Umaru Yar'Adua and his cabinet really mean well for Nigeria. The SIECs are afflicted by the same evils, caused by "the Nigerian factor", as afflict INEC, but no one has suggested that INEC should be abolished. The insidious and pernicious design of President Obasanjo during his eight-year dictatorship to take local government away from the State Governments and bring it under the control of the FG was vigorously and largely successfully resisted, and this new design, no less insidious and evil than President Obasanjo's, may be the last straw that breaks the camel's back. Not content with controlling the conduct of the election of the Governors and the Houses of Assembly of the States, the FG now wants, to control through INEC, the conduct of the election of local government councils throughout the country.

The control by the FG of the body responsible for conducting the election of not only the Governors and Houses of Assembly of the States, but also the local government councils has the potentiality of generating such discord and acrimony as may tear the country apart. The State Governments should be alerted about the evil of this new design and should rise up to its challenge.

Our concern at the present time should be to reduce the powers of the FG, not to increase them, as by abolishing the SIECs and by the take-over of their function by INEC. The past mistake of over-centralising powers in the FG should not be repeated. The lesson from our past experience shows that an over-strong FG increases the intensity of the competition for its control, with a consequent undermining of national unity and stability.

Lastly, President Yar'Adua and his cabinet appear not to appreciate the seriousness of the evil to which the ERC had tried to find an answer by its recommendation that elections should take place six months before the expiration of the incumbent's term of office and that election petitions should be concluded before the swearing-in of the person declared winner. It violates most grievously our sense of fairness and justice that a person, after being declared winner at an election, won probably by means of rigging, should be sworn-in and so enabled to fight an election petition brought against him, with public funds corruptly distributed among those involved in the trial of the petition in order to influence its outcome in his favour. That is something that should not be allowed to happen in any system based on justice and fair play.

The remedy proffered by the ERC will not of course avail against an incumbent running for a second term. The answer in his case lies in what The Patriots had suggested some years ago, namely, that a second term be done away with and be replaced by one, single term of , say, five years. A second term is fraught with other evils noted by The Patriots in that Statement.

(iii) The machinery for the adjudication of election cases

The two options for the adjudication of election cases that have been tried in Nigeria are adjudication by the ordinary courts and adjudication by specially constituted election tribunals with appeal from them to the Court of Appeal - in the case of a presidential election petition, the Court of Appeal acts as the adjudicatory tribunal with appeal to the Supreme Court. The demerits and evils of adjudication by the ordinary courts were examined in an extensive critique in my book, Nigeria's Second Experiment in Constitutional Democracy (1985), pages 432 - 468, following upon which the present arrangement of adjudication by specially constituted election tribunals, with appeals to the Court of Appeal - the Court of Appeal is the first instance adjudicatory tribunal in presidential election petitions, with appeals to the Supreme Court - was instituted.

The new arrangement has not brought the much hoped - for improvement. The election tribunals, the Court of Appeal and the Supreme Court cannot fairly be acquitted of blame for the persistence of election rigging in Nigeria. They may be said to have condoned it. For this, they must share with the politicians the blame for the evil. The opportunity was lamentably lost in the Atiku Abubakar and Muhammadu Buhari cases for the tribunals and the courts to make themselves a dynamic instrument of change in the fight against election rigging by an activist and innovative interpretation and application of the law.

Reading the judgment of Niki Tobi JSC in the two appeals, one cannot fail to be struck by his almost mechanical application of the rules of evidence and procedures. For him, they were like an article of faith, with a sacrosanctity approaching that accorded the Holy Books, the Bible and the Koran. "The crux of this appeal," he declared, "boils down to proof". He held all of the petitioners'/appellants' claims not to have been proved by evidence acceptable in his own view of the law, and accordingly dismissed them all.

Electoral reforms have, since the release of the Uwais Electoral Reforms Committee Report in March 2009, become an issue of intense public discourse in Nigeria. But what is said above shows that the election tribunals and the courts involved in election cases themselves also need to be reformed to rid them of their technicality - minded approach in election cases. The need for such reform is particularly imperative at the level of the Supreme Court as the apex court. It seems appropriate in this connection to recall the observations of Eso JSC in Att-Gen of Bendel State v. Att-Gen of the Federation (1981) 10 S.C.1:

"The jurisdiction conferred upon the Supreme Court in regard to the interpretation and adjudication of the Constitution is a special jurisdiction. The Court cannot justify its usefulness in regard to this peculiar jurisdiction by being inhibited with technicalities. Such inhibition will only serve to destroy the entire constitutional purpose of the court. It is not my intention to lay down that rules of court are to be completely wiped off. I accept that rules are not made for fun but made to be followed; however, in the exercise of its peculiar jurisdiction, that is, matters pertaining generally or specially to the interpretation of the Constitution, this court cannot afford to enter into or dwell in the realm of technicalities. It is important that the Supreme Court, more than any other Court in the land, should be seen to be substantially just than merely appearing to be so." See also his observations in Onoh v. Nwobodo.

I have, in my above-mentioned book, Nigeria's Second Experiment in Constitutional Democracy (pages 467 - 468), published twenty four years ago in 1985, proposed a change in the law that will leave the election court or tribunal free to decide according to the substantive merits of each case, unfettered by legal forms, including rules of pleadings and procedure, by strict rules of evidence, the doctrine of precedent or by other legal technicalities. This course is certainly not without precedent, and has been held not to deprive a tribunal of the

character of a court or its decisions the character of judicial decisions, inasmuch as its effect is not to exonerate the court from all rules of law: see Peacock v. Newton Marrickville and General Co-operative Building Society No. 4 Ltd (1943), 67 C.L.R.25; R. v. The Commonwealth Court of Conciliation and Arbitration, (The Tramways case) (1914) 18 C.L.R. 54; British Imperial Oil Co. Ltd. v. Fed Com of Taxation (1925), 35 C.L.R. 422, 438-40. It is unlike a direction that the court is to be guided by equity and good conscience only, and not to be bound by strict rules of law or equity; which has been held by the Judicial Committee of the Privy Council to deprive the court of the character of a court, because it amounts to an exoneration from all rules of law. Moses v. Parker: Ex parte Moses 1896, A.C. 245 (P.C.). (On the question whether a statutory direction that a tribunal is to decide according to equity and good conscience, or as it thinks just and equitable, amounts, by itself and without more, to exoneration from all rules of law, the Privy Council was sharply divided 3-2 in favour. United Engineering Workers' Union v. Deyanayagam 1967 3 W.L.R. 461 (P.C.).

The proposal above should be supplemented by amending section 1(2) of the Evidence Act to include among the list of proceedings exempted from the application of the Act, proceedings in election petition matters in or before any election petition Tribunal or Court.