

# DEMOCRACY IN NIGERIA

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On December 31, 1983, a military coup marked the end of Nigeria's second attempt to govern itself under a democratic constitution. In his maiden broadcast to the nation on January 2, 1984, the new head of state, General Mohammed Buhari cited the country's continuing economic ills as the leading cause for the coup; he also referred to the former civilian administration as "corrupt, inept and insensitive" and complained that the last elections held in the fall of 1983 were not free.<sup>1</sup> The new military regime was received by the populous with general rejoicing and the Nigerian press warmly welcomed the intrusion of the military into Nigeria's political evolution.<sup>2</sup>

Yet just months before the coup, the Western press and diplomats were dubbing the 1983 elections "a victory for democracy."<sup>3</sup> Nigeria, with an estimated population of 90,000,000, was the fourth largest multi-party democracy in the world, and one of the few countries in Africa where citizens had the right to vote for a choice of candidates, any of whom could have won.<sup>4</sup> Nigeria, whose 1979 Constitution was patterned after the American presidential system, was expected to be the showcase for an American style democracy in Africa and to provide an example for the rest of the continent. Nigerian President Shahu Shagari echoed these hopes in his post-election statement: "This was not a victory for me alone, but a victory. . . for democracy in Africa. The lesson is that if Nigeria can run a democratic system, there's no reason why other African countries should not."<sup>5</sup>

Nigeria was suffering from severe economic problems.<sup>6</sup> Oil accounted for eighty percent of the government's income and ninety-five percent of Nigeria's exports, and the slump in the world's oil market had pushed the country heavily into debt.<sup>7</sup> It was also well recognized that corruption flourished and added as much as thirty percent to an average contract in Nigeria<sup>8</sup> and that about forty percent of the country's revenues had been embezzled or diverted

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1. The Nigerian Standard, Jan. 2, 1984, at 1, col. 2.
2. The Punch, Jan. 2, 1984 (quoted in The Guardian, Apr. 8, 1984, at 9, col 2)
3. See, *A Victory for African Democracy*, NEWSWEEK, Aug. 22, 1983, at 30; *Surviving A Severe Test*, TIME, Aug. 22, 1983, at 36. Despite the fact that nearly a hundred people were killed in pre-election violence, the *New York Times* referred to the elections in a headline as "peacefully chaotic." N.Y. Times, Aug. 14, 1983, at E2, col. 3.
4. N.Y. Times, Aug. 2, 1983, at 6, col. 1.
5. *A Defeat for Democracy*, NEWSWEEK, Jan. 9, 1984, at 42.
6. *Nigeria: A Test for Democracy*, NEWSWEEK, Aug. 8, 1983, at 44; N.Y. Times, Aug. 22, 1983, at D1, col. 1; *Surviving a Severe Test*, TIME, Aug. 22, 1983, at 36; The Wall St. J., Aug. 12, 1983, at 24, col. 2.
7. The Wall St. J., Aug. 12, 1983, at 20, col. 2.
8. *Id.*

to pay inflated fees to contractors who then paid off corrupt politicians.<sup>9</sup> Nonetheless, the Western press portrayed President Shegari as being personally honest.<sup>10</sup>

President Shegari himself recognized these problems in his inaugural address to the nation on October 3, 1983.<sup>11</sup> He spoke of "reappraising and reordering" the country's priorities in light of the unfavorable economic situation and asked the state governments to exercise "proper discipline and prudence in their handling of state funds."<sup>12</sup> He also stressed that "all government functionaries, especially ministers, special advisors and top government officials, will be expected to demonstrate not only competence, resourcefulness and dedication but also an exemplary standard of probity and integrity."<sup>13</sup> Shegari termed Nigeria's four year experiment with the democratic process "an unqualified success."<sup>14</sup>

Just three months later, a disgraced Shegari and his government functionaries were in military detention. Regardless whether, as most Nigerians suspected, it was preemptorily staged by the more conservative senior members of the military to forestall a more radical coup planned by younger members of the military to have occurred in mid-January,<sup>15</sup> the coup effectively killed democracy for the immediate future in Nigeria.<sup>16</sup>

How did this come about? What went wrong? Can democracy work in Nigeria? More fundamentally, can Nigeria, or any other African country for that matter, live under a constitution—live under the rule of law? Or is strong-man rule the only way to govern Africa?

There is no answer at this time to these questions. What this paper will do is trace the development of constitutionalism and democracy in Nigeria to show the reader the background for Nigeria's current predicament. This past history hopefully will provide a better understanding of the current situation and the prospects for the future.

## I. BACKGROUND

Nigeria as such is a creation of the colonial powers and did not exist as an entity prior to 1914. Today Nigeria is Africa's most populous nation and covers a land area approximately the size of Texas and California combined. Nigeria stretches from tropical rain forests in the south to the savannahs and semi-deserts north in the Sudan. Until the oil boom in the mid-1970's, Nigeria

9. *Nigeria: A Test for Democracy*, NEWSWEEK, Aug. 8, 1983, at 44.

10. The Wall St. J., Aug 12, 1983, at 20, col. 2; *Surviving a Severe Test*, TIME, Aug. 22, 1983, at 36.

11. *New Nigerian*, Oct. 3, 1983, at 3, col 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. This speculation was also reported in *After the Velvet Glove Coup*, NEWSWEEK, Jan. 16, 1984, at 38.

16. Surprisingly, the reaction to the coup from other African capitals was negative. Zimbabwe's prime minister, Robert Mugabe, noted that a coup was not the most effective way to change a government and an editorial in a leading Kenyan newspaper described the coup as "uncalled for and ill considered." *Reported in New Nigerian*, Feb. 20, 1984, at 7 col. 1. The response of the United States State Department was "[t]he U.S. supports constitutional and representative government as essential to democracy in the human family and regrets the removal of Nigeria's government by unconstitutional means." *Id.*

was agriculturally self-sufficient. Although today the country depends largely on imports, it is still black Africa's richest nation.<sup>17</sup>

Nigeria is a country of contrasts. One is likely to see more Mercedes-Benzes in Nigeria than in North America or western Europe. At the same time beggars crowd the roadways and the markets looking for alms. Nigeria has poured much money into education. In 1976, the military launched a policy of universal primary education. Many universities have been built and many Nigerian students are sent abroad to study. Nonetheless, literacy today in Nigeria is only about twenty-five percent.<sup>18</sup>

Nigeria is a diverse nation. It has over 300 recognized ethnic groups and the number of languages spoken is over 350, not counting dialects. The official language of the country is English. Of the ethnic groups, the big three are the Igbo in the East, the Yoruba in the West, and the Hausa in the North. The 1963 census showed that about forty-seven percent of the population was Muslim, thirty-five percent Christian, and eighteen percent animist.<sup>19</sup> As a generalization, the North is predominantly Muslim and the South Christian.

Prior to the arrival of the English in the mid to late nineteenth century, Nigeria consisted of a number of very distinct and separate regions, each with its own cultural and political tradition.<sup>20</sup> In the East, where the Igbo tribe predominates, the land is criss-crossed by a number of rivers and swamps and is covered by dense rain forests. The people were politically decentralized and government was highly democratic. Systems varied from village to village, but government was informal and power rested with the elders of the village. No real attempt was made to distinguish politics and religion. Even in those areas which recognized chiefs or kings, the actual decisionmaking was done by councils.<sup>21</sup>

In the West, the Yoruba kingdoms were much more aristocratic.<sup>22</sup> However, kings were not chosen simply by birth but were selected by a council of lords, who also could dethrone the king if he lost favor. The council was also influential in making policy for the kingdom. Most of the Yoruba kingdoms were vassal states whose external affairs especially were subject to a superior authority. As in the East, politics and religion were closely linked. In the nineteenth century, the Yoruba states were rocked by constant warfare, so that most persons in the region welcomed the advent of European rule as it brought stability to a chaotic situation.<sup>23</sup>

The Kanuri region of northeastern Nigeria was the site of the old Bornu Empire. The Empire existed from the ninth to the twentieth centuries. The

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17. Much statistical information about Nigeria is contained in U.S. GOV'T PRINTING OFF., NIGERIA: A COUNTRY STUDY (4th ed. 1982) [hereinafter referred to as NIGERIA: A COUNTRY STUDY]. See, N.Y. Times, May 22, 1983, at 1, col. 3; The Wall St. J., Mar. 16, 1983, at 1, col. 1.

18. NIGERIA: A COUNTRY STUDY, *supra* note 17, at 130-33.

19. *Id.* at 123.

20. See e.g., A. BURNS, HISTORY OF NIGERIA (8th ed. 1972); M. CROWDER, THE STORY OF NIGERIA (4th ed. 1978); B. DAVIDSON, A HISTORY OF WEST AFRICA 1000 TO 1800 (1977); L. MAIR, AFRICAN KINGDOMS (1977).

21. See A. AFIGBO, THE WARRANT CHIEFS 1-36 (1972); DAVIDSON, *supra* note 20, at 115-17. For a fictionalized recreation of Igbo village life see C. ACHEBE, THINGS FALL APART (1958) and C. ACHEBE, ARROW OF GOD (1964).

22. A. ASIWAJU, WESTERN YORUBALAND UNDER EUROPEAN RULE 1889-1945 9-38 (1976); DAVIDSON, *supra* note 20, at 120-27.

23. ASIWAJU, *supra* note 22, at 9-38.

king, or mai, was first among the Kanuri nobility. He was required to listen to the council of leaders, which was the main decisionmaking body of the state. The state was governed according to the principles of Islamic law. A mai who deviated from the law would be regarded as having left the path of God. As such, the mai was heavily dependent on his Islamic legal advisors. The council of leaders acted as an appellate court and selected the new mai.<sup>24</sup>

The Hausa city-states in northwestern and North Central Nigeria were ruled by emirs with the aid of ministers. The emirs governed according to the principles of Islamic law. After the various city-states were consolidated under the Sokoto Caliphate in the early nineteenth century, the caliphs had the power to appoint the various emirs and the emirs looked to the caliph for guidance and advice on difficult issues. But the basic governmental structures continued much as before under the principles set down by Islamic law.<sup>25</sup>

Thus prior to the advent of European rule, it is impossible to identify a particular political model as being representative of Nigerian traditional government. What all systems had in common, however, was a check on the ruler. Nigerian tradition did not recognize an absolute despot. The ruler for the most part governed under laws promulgated with the advice of his council or interpreted by a body of religious experts. The ruler like everyone else operated under the law.

## II. COLONIALISM IN NIGERIA

### A. *British Acquisition of Sovereignty Over Nigeria*

The British acquired sovereignty over Nigeria fifty years after their arrival.<sup>26</sup> The stated cause for the penetration of Nigeria by Britain was to put a stop to the slave trade,<sup>27</sup> but commercial and trading reasons no doubt were the underlying causes.

Britain first appointed a consul for the Bights of Biafra and Benin in southeastern Nigeria in 1849. While the appointment of consul signifies no jurisdictional or territorial aspirations in itself, the consul did acquire jurisdiction over a number of administrative matters in the area. The consuls entered into agreements with the local chiefs to establish commercial courts, known as

24. STUDIES IN THE HISTORY OF PRE-COLONIAL BORNO 101-55 (Y. Usman & N. Alkali eds. 1983); DAVIDSON, *supra* note 20, at 103-04.

25. Ubah, *The Emirates and the Central Government: The Case of Kano-Sokoto Relations*, in STUDIES IN THE HISTORY OF THE SOKOTO CALIPHATE 296-319 (Y. Usman ed. 1979); DAVIDSON, *supra* note 20, at 108-09; Paden, *Aspects of Emirship in Kano*, in WEST AFRICAN CHIEFS 162-186 (M. Crowder & O. Ikime eds. 1970) [hereinafter cited as WEST AFRICAN CHIEFS].

26. The history of early English colonialism in Nigeria is chronicled in a number of books. *E.g.*, AFIGBO, *supra* note 21; ASIWAJU, *supra* note 22; BURNS, *supra* note 20; CROWDER, *supra* note 20; S. OKAFOR, *INDIRECT RULE* (1981).

27. Britain was a leading dealer in slaves in the seventeenth and eighteenth centuries. By the early nineteenth century, anti-slave sentiment and different commercial priorities brought Britain out as the leading advocate against slavery. Virtually all the treaties Britain signed with the African chiefs contained clauses suppressing the slave trade. Long before the advent of the Europeans, slavery was a major factor in the West African economies. The Yoruba and Benin kingdoms made substantial use of slaves and they grew rich and powerful as a result of the slave trade. The Hausa states and the Bornu empire engaged in a lucrative and powerful trans-Saharan slave trade. ASIWAJU, *supra* note 22, at 156-57; Johnson, *Periphery and Center—The Nineteenth Century Trade of Kano*, in STUDIES IN THE HISTORY OF KANO 134-35 (Barkindo ed. 1983); BURNS, *supra* note 20, at 65-77, 103-14; CROWDER, *supra* note 20, at 98-105. *Cf.* U. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 1-16 (1979).

courts of equity, and this informal court system, presided over by agents of the various commercial firms operating in the area, was formally recognized by an Order in Council of the British government in 1872.<sup>28</sup> By 1885 the British Consuls had succeeded in getting treaties with many of the "chiefs" in the eastern region putting them under British protection.<sup>29</sup>

The British acquired Lagos Island by treaty in 1861.<sup>30</sup> Britain gradually extended her protection over Yorubaland through treaties signed with local chiefs, and by 1904 these treaties were revised to give Britain full jurisdiction over the natives and non-natives alike in the area.

A third area, that consisted of the lands in the basin of the Niger and Benue rivers, was placed under the control the Royal Niger Company, chartered in 1886. The company quickly concluded treaties with the various tribes in the area, whereby the tribes ceded both their territories to the company and jurisdiction to handle native disputes. The company's charter was revoked in 1899. Its shareholders received full compensation, and the Niger territories were placed directly under British control.

The treaties used by Britain to acquire sovereignty over the tribes of Nigeria were almost certainly invalid. First, it is doubtful if many of the so-called "chiefs" actually had power to cede their lands to Britain. But even if they did, it is even more doubtful that they did so freely and knowingly.<sup>31</sup> Nonetheless, these treaties provided the legal basis for British assertion of sovereignty over Nigeria.

Of the various territories in Nigeria acquired by the British through treaties, only Lagos was acquired as a colony, where the crown had complete jurisdiction and the residents were British subjects.<sup>32</sup> All the other territories were acquired as protectorates, which meant that they were not formally part of the British domain. In a protectorate, the crown assumed control over the tribe's external affairs. Although the various territories continued to be designated as colonies or protectorates throughout the colonial period, the crown exercised control over the protectorates much the same as it exercised control over the colonies.<sup>33</sup>

In 1900, the British reorganized the eastern territories, those in the oil rivers region of southeastern Nigeria and those formerly held by the Royal Niger Company south of Idah, into the Protectorate of Southern Nigeria. It also organized the territories north of Idah into the Protectorate of Northern Nigeria and appointed Sir Frederick Lugard to be the high commissioner of that area. In 1906, the Protectorate of Southern Nigeria and the colony of Lagos were amalgamated into one administrative unit. This arrangement continued until 1914, when the entity now known as Nigeria was created and the country was placed under a central authority.

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28. Extracts from the Orders in Council of Feb. 21, 1872, are reprinted in BURNS, *supra* note 20, at 321 app. E.

29. 1885 was the year of the Berlin Conference, where the European powers carved up Africa among themselves. Due to her penetration of the area, Britain was assigned the lands which today comprise Nigeria. See UMOZURIKE, *supra* note 27, at 24-26.

30. The Lagos Treaty is reprinted in BURNS, *supra* note 20, at 319 app. D.

31. See B. NWABUEZE, A CONSTITUTIONAL HISTORY OF NIGERIA 1-10 (1982); UMOZURIKE, *supra* note 27, at 37-50.

32. NWABUEZE, *supra* note 31, at 11, 14.

33. See NWABUEZE, *supra* note 31, at 11-19; UMOZURIKE, *supra* note 27, at 46-48.

## B. *Indirect Rule*

When Britain acquired sovereignty over the colony of Lagos and the various protectorates in Nigeria, she clearly had the power to abrogate the existing legal order.<sup>34</sup> Parliament had power to legislate directly over the colony of Lagos. It did not exercise direct power over the protectorates but could direct the crown to extend parliamentary enactments to them through orders in council.<sup>35</sup> However, Parliament generally left the crown free to exercise control over both the colony and the protectorates. The crown normally delegated authority to the governor to rule in its behalf.<sup>36</sup>

Despite the fact that it clearly had power to do so,<sup>37</sup> the British government never abrogated completely the existing legal and political structures already existing in Nigeria. Indeed, when Sir Frederick Lugard became the high commissioner for the Northern Protectorate in 1900, he expressly made use of indigenous governmental structures to rule the area.<sup>38</sup> Traditional rulers, who now received a stipend from the crown, exercised the administrative functions in their local areas. The British collected taxes and then turned the revenues over to the emirs to run the government. The major restrictions on the emirs were that they could not maintain troops to fight wars and that they could no longer engage in the slave trade. Although primarily prompted by considerations of efficiency and cost, the stated policy of indirect rule was to allow the "natives" to evolve their traditions of government.<sup>39</sup> However, all too often, rather than promoting the evolution toward a more democratic self-governance, indirect rule actually served to entrench the power of the conservative traditional rulers who now had the British army to back them up.<sup>40</sup>

With the unification of Nigeria in 1914, Sir Frederick Lugard, now the governor of a consolidated Nigeria, decided to extend indirect rule to the rest of Nigeria. Lugard mistrusted the educated, Westernized African, and he saw indirect rule as being more representative of native interests and traditions.<sup>41</sup> Indirect rule was extended to Yorubaland without too much disruption because the Yorubas had a traditional hierarchical political structure. However, the system was absolutely foreign to the eastern tribes which had no leaders akin to the emirs in the North or the obas in the West. As a result the British had to locate men to act as "traditional rulers." Many of these "traditional rulers" were arbitrarily chosen by the government, although some were chosen after consultation with the people.<sup>42</sup> The position of these chiefs was incompatible with the traditions of the people, as was the introduction of direct taxation as it existed in the North.<sup>43</sup> Ultimately, the incompatibility of the system with traditional institutions led to the Women's Riot in 1929 and the

34. See *Vajesingji Joravarsingji v. Secretary of State for India*, 51 Indian App. 357 (P.C. 1924); NWABUEZE, *supra* note 31, at 19-20.

35. NWABUEZE, *supra* note 31, at 30.

36. *Id.* at 32-36.

37. *But see Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662, 672, where the Privy Council rejected the claim that the governor, acting alone, had the power to remove chiefs contrary to customary law.

38. OKAFOR, *supra* note 26, at 37-41; NWABUEZE, *supra* note 31, at 21.

39. C. TEMPLE, *NATIVE RACES AND THEIR RULERS* 30 (1968); OKAFOR, *supra* note 26, at 40.

40. OKAFOR, *supra* note 26, at 41; CROWDER, *supra* note 20, at 211.

41. OKAFOR, *supra* note 26, at 54-55.

42. AFIGBO, *supra* note 21, at 60-61; C. ACHEBE, *ARROW OF GOD*, *supra* note 21.

43. AFIGBO, *supra* note 21, at 145-51, 227-31.

abandonment of the system in eastern Nigeria.<sup>44</sup> However, the native authorities continued to administer local government in the North until 1976, when they were abolished by the military government.<sup>45</sup>

The system of indirect rule has had serious consequences for modern Nigeria. Indirect rule tended to emphasize local and regional differences, and as a result Nigerians never developed a feeling of national unity and consciousness.<sup>46</sup> Unlike the French, who pursued a policy of centralization, the British deliberately pursued a policy of regionalization.<sup>47</sup> Indirect rule fostered disparate development in Nigeria. The South, especially the eastern region, readily adopted Western education and its citizens began to predominate in the civil service. The North, which continued to be governed by the traditional rulers, did not encourage Western education or development. These disparities lead to mistrust and antagonism between the North and the South especially in the years immediately following independence—the North fearing domination by the more educated South, and the South resenting the political domination of a numerically more populous North whose people it considered to be less qualified for leadership.<sup>48</sup> These antagonisms found tragic expression in the events surrounding the military coup of 1966 and the bloody civil war which followed.<sup>49</sup>

### C. *Democratic Institutions*

Colonial rule is the antithesis of democracy—it is rule enforced on a people from the outside and in no way can be said to be derived from the consent of the governed in the democratic ideal. Nonetheless, colonial power was not unchecked and the British did develop constitutions in Nigeria that in form resembled those of a democratic government.

After Lagos was acquired as a crown colony in 1861, a legislative and an executive council were set up.<sup>50</sup> The purpose of the executive council was to set policy for the colony. It was made up of senior administrative officials and did not have any African members. The legislative council consisted of both official and unofficial members. The official members were again senior ad-

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44. *Id.* at 237-48.

45. Oyediran & Gboyega, *Local Government and Administration*, in NIGERIAN GOVERNMENT AND POLITICS UNDER MILITARY RULE 169-91 (Oyediran ed. 1979) [hereinafter cited as Oyediran].

46. B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 81-85 (1973) [hereinafter cited as NWABUEZE, EMERGENT STATES].

47. ASIWAGJU, *supra* note 22, at 84-89.

48. NWABUEZE, EMERGENT STATES, *supra* note 46, at 85-89. Chief Awolowo, a Yoruba political leader who was tried for treason in 1963, in his defense testimony described Southern Resentment to the political domination by the North, which he characterized as "feudal and autocratic; at best oligarchic and authoritarian; and completely antithetic to the liberal traditions in the Western Region and the egalitarian beliefs of Eastern Nigeria." L. JAKANDE, THE TRIAL OF OBAFEMI AWOLOWO 172 (1966). He believed "that the Northern Region [constituted] a gradual but sure brake on the fast-moving South, a lack of incentive to the Northerners to accelerate the pace of their progress in order to catch up with their Southern colleagues, and a dead-weight on the country as a whole." *Id.* at 172-73.

49. Oyediran, *Background to Military Rule*, in Oyediran, *supra* note 45, at 1-24; Muhamnadu & Harma, *The Civil War*, in Oyediran, *supra* note 45, at 25-29. Captain Ben Gbulie recounts resentment over the advancement of less qualified northerners in the Nigerian Army prior to the 1966 coup. B. GBULIE, NIGERIA'S FIVE MAJORS 9-13 (1981); see also O. ACHIKE, GROUNDWORK OF MILITARY LAW AND MILITARY RULE IN NIGERIA 15-20 (1980), for a discussion on quotas in the Nigerian army.

50. OKAFOR, *supra* note 26, at 18-24; NWABUEZE, *supra* note 31, at 37.

ministrative officials. The unofficial members represented various interests in the colony. They were appointed by the crown. The first African was appointed to the legislative council in 1872.<sup>51</sup> The legislative council was presided over by the governor and decisions were reached through a majority vote. However, real power resided in the governor. No bill passed by the council could be implemented without the approval of the governor and the crown, and no bill could affect the external relations of the colony. Nonetheless, the councils were not without significance. Above all they signified that the governor's discretion was checked by the advice and consent of his counselors.<sup>52</sup>

Originally the Southern Protectorate had no executive or legislative council.<sup>53</sup> The governor ruled on his sole discretion. However, in 1906, when the Southern Protectorate was amalgamated with the colony of Lagos, the legislative council in Lagos was empowered to make laws for the protectorate also.<sup>54</sup> The government increased the unofficial membership of the legislative council by two because of pressure for increased African representation.<sup>55</sup> No similar institutions were introduced in the Northern Protectorate. All legislative and executive functions were lodged in the high commissioner.<sup>56</sup>

With the consolidation of Nigeria in 1912, the colony and the protectorates were merged into a single governmental unit with Sir Frederick Lugard as governor. Lagos retained its legislative council but its powers were confined exclusively to the colony. In part because of his distrust for Westernized Africans, Lugard rejected the idea of a legislative council for the whole country. Instead he set up the Nigerian Council—seventeen of whose members were government officials and the remaining thirteen were unofficial members. Four of the unofficial members were selected by the governor from among the commercial and mining firms; three were selected respectively by the Chamber of Commerce for Lagos and Calabar and the Chamber of Mines; and six were African leaders appointed by the governor. The council had no real function beyond that of discussion. Resolutions passed by the council had no legal authority and did not need to be implemented by the governor.<sup>57</sup> The council was primarily used to inform the traditional rulers of the government's policies so they could be transmitted back to the people.<sup>58</sup>

The Nigerian Council was abolished in 1922, when Sir Hugh Clifford succeeded Lugard as governor.<sup>59</sup> The policy favoring separation of the regions was furthered under his regime.<sup>60</sup> The Clifford Constitution created a new legislative council, but the North essentially was excluded from it. The governor legislated directly in that area.<sup>61</sup> Thus the council had application only for Lagos and the Southern provinces. Again no law passed by the council

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51. OKAFOR, *supra* note 26, at 19.

52. NWABUEZE, *supra* note 31, at 39.

53. OKAFOR, *supra* note 26, at 24-37.

54. NWABUEZE, *supra* note 31, at 37.

55. OKAFOR, *supra* note 26, at 33-37.

56. OKAFOR, *supra* note 26, at 37-41; NWABUEZE, *supra* note 31, at 36.

57. NWABUEZE, *supra* note 31, at 38-39.

58. OKAFOR, *supra* note 26, at 42-59; BURNS, *supra* note 20, at 220-21.

59. CROWDER, *supra* note 20, at 209-10.

60. OKAFOR, *supra* note 26, at 83.

61. NWABUEZE, *supra* note 31, at 39. Under the Clifford Constitution a legislative council was supposedly established for the entire country. However, the jurisdiction of the council was restricted

was effective until approved by the governor and the crown. The council was expanded to forty-six members—fourteen of whom were unofficial.<sup>62</sup> The major innovation of the Clifford Constitution was to introduce the electoral process to Nigeria. Three of the unofficial members were elected by the adult males of Lagos who had incomes exceeding 100 pounds. One member was likewise elected from Calabar.<sup>63</sup> The Clifford Constitution gave rise to the first political parties in Nigeria which had the effect of encouraging movement towards eventual self-governance.<sup>64</sup>

Demands for greater self-governance became more vocal after the Second World War. The Richards Constitution of 1946, which went into effect on January 1, 1947, evidenced a slight relaxation of colonial control, but the constitution prompted much criticism because it was adopted without local consultation.<sup>65</sup> The constitution furthered the policy of regionalism by breaking up the country into separate administrative units—creating Northern, Eastern, and Western Regions. But it also established a legislative council for the entire country.<sup>66</sup> The unofficial members in the legislative council were now numerically dominant. Of these, four members continued to be directly elected by the citizens of Lagos and Calabar<sup>67</sup> and the rest were either indirectly elected through the regional assemblies or nominated by the governor.<sup>68</sup> Because the council consisted of a majority of unofficial members, it could no longer be counted on to act in accordance with the governor's wishes; therefore, it was provided that in the event the council refused to enact a law requested by the governor, he could enact it himself simply by certifying that it was necessary "in the public order, public faith or good government."<sup>69</sup>

Each region was also given a house of assembly, composed of members of the existing native authorities.<sup>70</sup> Unlike the other regions, the North was given a second chamber known as the House of Chiefs.<sup>71</sup> Again the regional councils had no real authority. They provided a way by which the British could be informed of the local public opinion. The regional councils possessed no legislative powers, although before legislation was placed before the central legislature it was placed before the regional councils for their advice, which was not binding on the central legislature.<sup>72</sup> For the first time in Nigerian colonial history, Africans occupied a majority of the seats in both the central and regional legislatures; however, due to the fact that the governor could continue to certify laws he felt necessary in the public interest, it was clear that ultimate power still resided in him.<sup>73</sup>

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to the Southern provinces, including Lagos. It did not legislate over the Northern provinces; only the governor was empowered to legislate over the North.

62. CROWDER, *supra* note 20, at 210.

63. *Id.*

64. OKAFOR, *supra* note 26, at 96-100; BURNS, *supra* note 20, at 243; CROWDER, *supra* note 20, at 210-11.

65. OKAFOR, *supra* note 26, at 151-60; CROWDER, *supra* note 20, at 224-26.

66. Nigeria (Legislative Council) Order in Council § 4 (1946). For an overview of the Richards Constitution, see generally NWABUEZE, *supra* note 31, at 42-46.

67. Nigeria (Legislative Council) Order in Council § 9.

68. *Id.* at §§ 7 & 8.

69. *Id.* at § 26.

70. *Id.* at §§ 33-35.

71. *Id.* at § 33.

72. *Id.* at § 53.

73. NWABUEZE, *supra* note 31, at 43-45.

The Macpherson Constitution of 1951 was aimed at overcoming some of the objections to the Richards Constitution. It was enacted only after two years of negotiations with local leaders.<sup>74</sup> Under it, elected majorities now existed in both the central and the regional legislatures through a combination of both direct and indirect elections.<sup>75</sup> In addition, the regional assemblies now had legislative powers in specified areas of local concern.<sup>76</sup> The central legislature consisted of 148 members, half of whom came from the North.<sup>77</sup> Executive councils were set up for the central government and in each of the regions to advise the governor on policy.<sup>78</sup> A majority of each council's members were drawn from the elected members of the legislature.<sup>79</sup> Nevertheless, political agitation for independence continued under the Macpherson Constitution.<sup>80</sup>

The last colonial constitution was the Littleton Constitution of 1954. It was drafted as a result of conferences attended by Nigerians in London from July 30 to August 22, 1953 and in Lagos in January 1954.<sup>81</sup> A principal innovation of the 1954 constitution was the appending of legislative lists that specified the exclusive and concurrent legislative powers of the federal government as against the reserved powers of the states.<sup>82</sup> Another innovation was the appointment by the governor of a premier for each of the three regions.<sup>83</sup> In 1957, the constitution was further amended to provide for the appointment of a prime minister for the central government.<sup>84</sup>

Admittedly each of the colonial constitutions introduced progressively more democratic elements into the governing process. Unofficial members gradually came to predominate over official members in the various councils. Elected members came to predominate over non-elected members. But not all officials were directly elected and a complicated series of electoral colleges were established to purify the electoral process.<sup>85</sup> While the governor's discretion was somewhat checked by the various legislative and executive councils, it was clear right up to the end that ultimate power rested in him and he could act independently when he felt the need to do so.<sup>86</sup> By the end of colonialism in 1960, it could be accurately stated that while the British introduced some of

74. OKAFOR, *supra* note 26, at 160-66; CROWDER, *supra* note 20, at 227-31.

75. NWABUEZE, *supra* note 31, at 46.

76. Nigeria (Legislative Council) Order in Council § 91 (1951). Both the Northern and Western Regions now had bicameral legislatures—a House of Assembly and a House of Chiefs. The federal legislature and the legislature of the Eastern Region continued to be unicameral; *see generally* NWABUEZE, *supra* note 31, at 46-48.

77. OKAFOR, *supra* note 26, at 167; CROWDER, *supra* note 20, at 231.

78. Nigeria (Legislative Council) Order in Council §§ 124 & 145 (1951). The governor was obliged to act on the advice of the legislative council subject to certain exceptions. He could act against their advice if he thought it was expedient "in the interests of public order, public faith and good government." NWABUEZE, *supra* note 31, at 49, 51.

79. NWABUEZE, *supra* note 31, at 49-50.

80. OKAFOR, *supra* note 26, at 170-73; CROWDER, *supra* note 20, at 234-35.

81. OKAFOR, *supra* note 26, at 170-73.

82. Nigeria Constitution Order in Council (legislative lists) (1954).

83. Nigeria Constitutional Order in Council (1954); NWABUEZE, *supra* note 31, at 55. The premier was to be the leader of the majority party in the legislature and he could not be removed by the governor unless it appeared he no longer commanded the confidence of the majority. Instructions to the Regional Governors (1954).

84. Amendment Order S.I.-1957/1530; NWABUEZE, *supra* note 31, at 55.

85. NWABUEZE, *supra* note 31, at 46-48, 52-54.

86. *Id.* at 49-52, 54-59.

the forms of democracy, the substance of power still resided in the crown and its representative, the governor.

#### D. *The Judiciary*

As already noted, the first courts established by the British were the courts of equity in the Niger Delta states.<sup>87</sup> The purpose of these courts was to settle disputes between European traders. Although Africans sat on the courts with the Europeans, the courts were primarily a British institution. The courts enforced a flexible law and performed various administrative and legislative functions. After 1885, the courts of equity were abolished in favor of so-called "governing councils," which more closely represented British commercial interests.<sup>88</sup>

The Royal Niger Company also established courts in the areas under its jurisdiction. These courts exercised general jurisdiction over both Europeans and Africans.<sup>89</sup>

The British did not move to suppress all native institutions and this was especially true as regards law. Disputes between Africans especially in the areas of family and inheritance law continued to be settled by traditional forms.<sup>90</sup> So-called "native courts" were established in southern Nigeria with both judicial and legislative functions.<sup>91</sup> After the amalgamation in 1906, these native courts were subject to the appellate supervision of the Supreme Court.<sup>92</sup> This veneer of "legalism" was largely ineffectual and was ended in 1914.<sup>93</sup> Lugard continued the old emir's courts in the North,<sup>94</sup> but also established provincial courts which applied common law to matters affecting the public order. Provincial courts were later established in the Southern Protectorate in 1914. Most other disputes remained, however, within the jurisdiction of the native courts, whose decisions now were subject to "administrative review" by the district commissioner.<sup>95</sup>

Customary law continues to govern many issues concerning marriage, family, and inheritance today—the Muslim areas of the North dispensing the Sharia of the Maliki School and other areas applying the unwritten laws of each separate ethnic group.<sup>96</sup> Sharia and customary courts are both recognized in the 1979 Constitution.<sup>97</sup>

A supreme court was established to administer the English common law in the colony of Lagos in 1863.<sup>98</sup> In 1900, the British established a supreme court to administer English common law in the Southern Protectorate.<sup>99</sup> With the amalgamation of the two areas in 1906, one supreme court was es-

87. Order in Council of Feb. 21, 1872; BURNS, *supra* note 20, at 140-47; O. ADEWOYE, *THE JUDICIAL SYSTEM IN SOUTHERN NIGERIA 1854-1954* 33-38 (1977).

88. ADEWOYE, *supra* note 87, at 38-39.

89. *Id.* at 38.

90. See A. OBILADE, *THE NIGERIAN LEGAL SYSTEM* 20 (1979).

91. ADEWOYE, *supra* note 87, at 40-41; AFIGBO, *supra* note 21, at 97.

92. ADEWOYE, *supra* note 87, at 41; AFIGBO, *supra* note 21, at 101-02.

93. AFIGBO, *supra* note 21, at 106; OBILADE, *supra* note 90, at 28.

94. These courts continued virtually unchanged until 1959. Paden, *supra* note 25, at 168.

95. AFIGBO, *supra* note 21, at 130-33; OBILADE, *supra* note 90, at 26-29.

96. OBILADE, *supra* note 90, at 83-110.

97. CONST. FED. REP. NIG. §§ 6, 223, 224, 240-49 (1979).

98. Sup. Ct. Ordinance No. 11 (1863); OBILADE, *supra* note 90, at 18.

99. OBILADE, *supra* note 90, at 22-24; ADEWOYE, *supra* note 87, at 19.

tablished with original and appellate jurisdiction throughout the area.<sup>100</sup>

Lord Lugard set out to reform the judicial system in 1912. He was especially concerned about the corruption which flourished in the courts,<sup>101</sup> the problems created by poorly trained and highly paid lawyers,<sup>102</sup> and the fact that the lawyers and courts posed a potential threat to the undisputed authority of the colonial administration.<sup>103</sup> One of Lugard's first moves was to curtail the jurisdiction of the Supreme Court back to Lagos and a few commercial areas where Europeans wanted the protection of independent common law courts.<sup>104</sup> In place of the Supreme Court, he established provincial courts presided over by political officers who administered a combination of common law, equity, and native law. Lawyers were prohibited from appearing in the provincial courts. There was no appeal in criminal cases and appeals were allowed in civil cases only with the consent of the governor. The presiding officers were not trained in the law and performed both judicial and administrative functions. Non-natives did not have to appear before these tribunals.<sup>105</sup>

The provincial courts were not popular and were finally abolished by judicial reform in 1933.<sup>106</sup> This reform established magistrate's courts and a high court in each region. Lawyers were permitted to appear in all but the native courts. Also under the 1933 reform, the Supreme Court was linked to the West African Court of Appeal, an arrangement which continued until 1954.

Further legislation in 1943 abolished the high courts and gave the Supreme Court jurisdiction over all civil and criminal cases throughout the country.<sup>107</sup> Under the 1954 Constitution, high courts were established in each of the three regions and the judges were appointed by the regional governors.<sup>108</sup> The Supreme Court had jurisdiction over appeals in the entire federation.<sup>109</sup>

Despite the fears of Lugard and others that the courts, posed a threat to colonial authority,<sup>110</sup> the courts in Nigeria during the colonial era actually functioned hand in hand with the rest of the government. Judges were members of the British civil service who generally shared the values of the colonial government.<sup>111</sup> At least theoretically the courts did have the power to place themselves between the rights of individuals and arbitrary acts of government officials. In the celebrated case of *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*,<sup>112</sup> the Privy Council told the Supreme Court

100. OBILADE, *supra* note 90, at 24-25.

101. ADEWOYE, *supra* note 87, at 74-77.

102. *Id.* at 114-15, 119-20, 141.

103. *Id.* at 120-21, 142.

104. Sup. Ct. Ordinance No. 6 (1914); ADEWOYE, *supra* note 87, at 138.

105. ADEWOYE, *supra* note 87, at 138-40, 152-54.

106. Protectorates Cts. Ordinance (1933); ADEWOYE, *supra* note 87, at 229-30; OBILADE, *supra* note 90, at 29-32.

107. Sup. Ct. Ordinance (1943); ADEWOYE, *supra* note 87, at 241-43; OBILADE, *supra* note 90, at 32-33.

108. ADEWOYE, *supra* note 87, at 243-46; OBILADE, *supra* note 90, at 33.

109. OBILADE, *supra* note 90, at 33.

110. ADEWOYE, *supra* note 87, at 119-20, 142.

111. ADEWOYE, *supra* note 87, at 254-57.

112. [1931] A.C. 662.

that it had power to review the actions of the colonial governor to see that he acted in accordance with the law and traditional notions of British justice. But this power seems to have gone largely unexercised.<sup>113</sup>

### E. *Individual Rights*

Ultimately, any modern society must be judged by how it protects individual rights and liberties. British colonialism in Nigeria gets mixed reviews on this score.

One of the chief functions of any government is to protect the lives and dignity of its subjects. Britain must be credited with the elimination of slavery and the slave trade in Nigeria, which, at least in the North, had continued up to the twentieth century.<sup>114</sup> The colonial masters also abolished such abominable native practices as human sacrifice and the killing of twins.<sup>115</sup> They also refused to enforce customary laws which were contrary to public policy and were not in accordance with "natural justice, equity and good conscience."<sup>116</sup> This standard for assessing the validity of customary law still continues today.<sup>117</sup> Particularly in the Western Region, European rule brought stability and ended intra- and inter-tribal warfare.<sup>118</sup> A major contribution was also the introduction of Western education to Nigeria.<sup>119</sup> The effect of these reforms on the daily lives of persons should not be underestimated.

We have also seen that the British did establish at least the forms of a democratic legislature. When the first elections were introduced under the Constitution of 1922, the franchise was limited to adult males who had resided in the district for twelve months and had a gross annual income of 100 pounds.<sup>120</sup> Under the 1946 Constitution this income requirement was reduced to fifty pounds.<sup>121</sup> The 1951 Constitution extended the franchise to anyone who paid taxes; women were allowed to vote, but not in the Northern Region.<sup>122</sup> In 1958, the franchise was made universal, except for women in the North.<sup>123</sup>

Color prejudice was prevalent during the colonial era.<sup>124</sup> Cities were separated into "native" and "settler" areas.<sup>125</sup> The colonial civil service was also manned primarily by expatriates, and different job classifications and pay scales existed for native workers.<sup>126</sup> In the early colonial period, the British also made some use of forced labor particularly for portage and the con-

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113. ADEWOYE, *supra* note 87, at 261-67.

114. *See supra* note 27.

115. ASIWAJU, *supra* note 22, at 212; AFIGBO, *supra* note 21, at 73, 82, 253; CROWDER, *supra* note 20, at 116, 129, 164.

116. OBILADE, *supra* note 90, at 109.

117. *Id.* at 20, 109.

118. ASIWAJU, *supra* note 22, at 39.

119. *Id.* at 231-51; CROWDER, *supra* note 20, at 195.

120. Legislative Council Order art. XX (1922); NWABUEZE, *supra* note 31, at 40.

121. NWABUEZE, *supra* note 31, at 43.

122. NWABUEZE, *supra* note 31, at 47-48.

123. *Id.* at 54.

124. *See* F. OMU, *PRESS AND POLITICS IN NIGERIA 1880-1937*, at 155-60 (1978).

125. OKAFOR, *supra* note 26, at 60.

126. N. AKPAN, *EPITAPH TO INDIRECT RULE* 28 (1977); BURNS, *supra* note 20, at 285-90; Osoba, *The Development of Trade Unionism in Nigeria*, in *TOPICS ON NIGERIAN ECONOMIC AND SOCIAL HISTORY* 192 (Akinjogun & Osoba eds. 1980).

struction of roads, railroads and telegraph lines.<sup>127</sup>

With the introduction of the franchise in Southern Nigeria in 1922, political parties were allowed to form.<sup>128</sup> Also a relatively free press was allowed to develop during the colonial era, although the same freedoms enjoyed in England were not necessarily enjoyed in Nigeria.<sup>129</sup> Common law libel actions served to restrain the press, and the payment of fines in libel actions was a major expenditure for newspaper publishers.<sup>130</sup>

In 1903, an ordinance was passed in Lagos requiring all newspapers to be registered and to post a bond in the sum of 250 pounds together with sureties to guarantee that the newspaper would pay penalties in the event of its conviction for printing or publishing any blasphemous or seditious or other libel.<sup>131</sup> In 1909, the government passed a seditious offenses ordinance which made it a crime to publish any statement bringing or attempting to bring the government into hatred or contempt or which incited or tried to incite dissatisfaction, disloyalty or feelings of enmity towards the government or different classes of the population in southern Nigeria.<sup>132</sup> During the quarter century following its passage, there were three prosecutions under this statute.<sup>133</sup>

Perhaps the most celebrated trial involving seditious libel was that of Herbert Macaulay, the political leader, in the so-called Gunpowder Plot of 1928. Macaulay's newspaper had published a rumor that there was a plot to assassinate the deposed and banished Eleko who had contested his removal all the way up to the Privy Council.<sup>134</sup> Macaulay was convicted and sentenced to six months in prison.<sup>135</sup> Despite such happenings, it has been asserted that by the time independence was granted in 1960, the Nigerian press was "probably the greatest and most developed press in Africa."<sup>136</sup>

One of the final acts of the colonial government prior to independence was to bequeath to Nigeria a Bill of Rights.<sup>137</sup> The Bill of Rights was recommended by the Minorities Commission appointed in 1957 to study the problems of minority tribes in the three regions. Rather than recommending the creation of new states to diffuse the political power of the "Big Three" tribes and allow for more minority representation, the commission suggested the inclusion of a bill of rights into the constitution. The Bill of Rights did not solve the problems of the minority tribes,<sup>138</sup> but it has formed the model for the protection of individual rights in all subsequent constitutions.<sup>139</sup>

The Bill of Rights was patterned after the European Convention on

127. ASIWAJU, *supra* note 22, at 116.

128. OMU, *supra* note 124, at 227-36.

129. *Id.* at 12-13.

130. *Id.* at 79-80.

131. *Id.* at 180 (citing Newspaper Ordinance No. 10 (Nig. 1903), reenacted as Ordinance No. 40 (1917)).

132. OMU, *supra* note 124, at 185, 187.

133. *Id.* at 188.

134. *Id.* at 195-96; *see supra* notes 112 & 113 and accompanying text.

135. OMU, *supra* note 124, at 196.

136. *Id.* at 246.

137. Sixth Schedule, inserted into Nigerian (Constitution) Order in Council 1954 (1959).

138. R. ANIFOWOSE, VIOLENCE AND POLITICS IN NIGERIA: THE TIV AND YORUBA EXPERIENCE 52-55 (1982); Oyediran, *Background to Military Rule*, in Oyediran, *supra* note 45, at 11-12.

139. CONST. FED'N REP. NIG. ch. IV (1979); CONST. FED'N NIG. ch. III (1963); CONST. FED'N NIG. ch. III (1960).

Human Rights. It included negative prohibitions against the unlawful deprivation of human life,<sup>140</sup> against torture and inhuman or degrading punishment and treatment,<sup>141</sup> against slavery and forced labor,<sup>142</sup> and against the deprivation of personal liberty.<sup>143</sup> It also had provisions guaranteeing the right to a fair hearing,<sup>144</sup> the rights of privacy and family life,<sup>145</sup> freedom of conscience,<sup>146</sup> freedom of expression,<sup>147</sup> peaceful assembly and associations,<sup>148</sup> and movement,<sup>149</sup> and freedom from discrimination on the basis of "community, tribe, place of origin, or political opinion."<sup>150</sup>

Unlike the American Bill of Rights, most of the freedoms contained in the Nigerian Bill of Rights were given qualifiedly. A number of freedoms were expressly limited by the provision that the section shall not "invalidate any law that is reasonably justifiable in a democratic society in the interest of defense, public safety, public order, public morality, or public health."<sup>151</sup>

The Nigerian Bill of Rights more specifically defines rights than the American Bill of Rights but the number of exceptions makes the document appear to be more of a qualification rather than an affirmation of the human rights defined therein. Because the Bill of Rights was not appended to the Nigerian Constitution until 1959, it had no real impact on the colonial situation. The impact of the establishment of these rights was not tested until after independence.

#### F. *The Colonial Legacy*

Colonialism left a mixed legacy. It was colonialism that created the entity known as Nigeria. Yet the British could never decide whether they were governing one country or three. The British did not establish common institutions or implant a sense of allegiance to the entity known as Nigeria. While the South was quick to adopt Western modes, the North remained largely a federal society. Membership in a tribe or a local community was more important than one's status as a Nigerian. Ultimately, as in the case of the United States, it took a bloody civil war before people began thinking of themselves first as Nigerians rather than as Igbos or Hausas. Britain left the people of

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140. NIG. BILL OF RTS. § 1 (1959).

141. *Id.* at § 2.

142. *Id.* at § 3.

143. *Id.* at § 4.

144. *Id.* at § 5.

145. *Id.* at § 6.

146. *Id.* at § 7.

147. *Id.* at § 8.

148. *Id.* at § 9.

149. *Id.* at § 10.

150. *Id.* at § 11. Section 11 reads more restrictively than the European Convention which prohibits discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." A prohibition against sex discrimination was not included in the Nigerian Constitution until 1979. The absence of a prohibition against racial discrimination in the Nigerian Bill of Rights might be explained by the fact that it was enacted by the colonial rulers who were not likely to repudiate the advantages they enjoyed on the basis of race. But why the prohibition has not been incorporated with post-independence constitutions is less easy to explain, especially when Nigeria has been one of the leaders against racism in the international community.

151. *Id.* at §§ 6(2)(a), 7(4)(a), 8(2)(a), 9(2)(a), 10(2)(a).

Nigeria with neither a common culture nor a common goal.<sup>152</sup>

Although Britain gradually introduced some democratic elements into the governing structure, she never truly allowed Nigerians to develop a sense of self-reliance. At the same time she was supposedly encouraging democracy, Britain was strengthening the position of the more feudalistic local rulers. While Nigerians were allowed to debate and make recommendations in the various legislative counsels that were from time to time established, ultimate power and responsibility rested with the colonial governors and their expatriate staffs. Power and responsibility flowed down from above rather than up from the people. Unlike the colonial experience in America, where the colonies were largely self-governing and sought independence only when Britain tried to exert more colonial control over them, the colonial experience in Nigeria was the history of strong external control which was suddenly relaxed in the period between World War II and the granting of independence in 1960. Nigerians were thus never allowed to develop a sense of responsibility for their own actions. Ultimately a strong man would tell them what direction the country would take. It could be said today that Nigerians are still looking for that strong man who will lead them into a glorious future.

The fact that Nigerians felt no stake or responsibility in the governing process probably accounts for many of the complaints about corruption and bribery during the colonial area.<sup>153</sup> No one had any real commitment to the government. Government service was only a means to enhance one's social and financial position.

Thus, the values upon which the success of a democratic society depends—a sense of community, a sense of social or civic responsibility, a sense of service—were never truly fostered during the colonial era.

### III. THE FIRST REPUBLIC: 1960-66

#### A. *Parliamentary Democracy*

When independence came in 1960, it left unaffected the position of the queen as head of the Nigerian state.<sup>154</sup> From 1960-1963, the queen of England reigned as the queen of Nigeria; however, her status was purely nominal and she ruled only with the advice of the Nigerian government.<sup>155</sup> The queen's representative in Nigeria was the governor-general.<sup>156</sup> On October 1, 1963, the monarchy was abolished and replaced by a republican government. The queen was replaced by a president<sup>157</sup> who held office for five years<sup>158</sup> and was elected by the legislature.<sup>159</sup> He could be removed for misconduct only on petition, investigation, and vote by two-thirds of the Parliament.<sup>160</sup> The con-

152. Cf. F. FANON, *THE WRETCHED OF THE EARTH* 74 (1967).

153. AFIGBO, *supra* note 21, at 190-91, 284-85; ADEWOYE, *supra* note 87, at 74-77, 179-82; Cohen, *The Kingship in Bornu*, in *WEST AFRICAN CHIEFS*, *supra* note 25, at 199. For fictionalized accounts of corruption during the colonial era see C. ACHEBE, *NO LONGER AT EASE* (1960); J. CARY, *MISTER JOHNSON* (1939).

154. See *CONST. FED'N NIG.* §§ 33, 36, 78.

155. *Id.*

156. *Id.* at § 78(2).

157. *CONST. FED'N NIG.* § 34 (1963).

158. *Id.* at § 36.

159. *Id.* at § 35(2).

160. *Id.* at § 38(4).

stitution specifically named Nmandi Azikiwe as the first president of the Republic.<sup>161</sup> The president was the formal head of state and the commander-in-chief of the armed forces.<sup>162</sup> The regional governors were appointed by the president on the advice of the regional premiers. They could be removed on the advice of the premiers by the president.<sup>163</sup>

Both the 1960 and 1963 Constitutions were patterned on the 1954 Constitution. The 1960 Constitution was promulgated by an order in council of the British government;<sup>164</sup> the 1963 Constitution was promulgated by the Nigerian Parliament.<sup>165</sup> Apart from the change from a monarchy to a republic, the 1960 and 1963 Constitutions were almost identical.

The 1960 and 1963 Constitutions embodied a modified form of parliamentary democracy. Under the 1954 Constitution, there was only one house in the central legislature. The 1960 Constitution created a bicameral legislature—a House consisting of 312 members and a Senate of 56.<sup>166</sup> This bicameral structure was retained in the 1963 Constitution.<sup>167</sup> Each state was separately represented in the Senate and the senators were selected by a joint meeting of the houses of the regional legislatures from among persons nominated by the governor.<sup>168</sup> Members of the House were elected from single member districts.<sup>169</sup> Bills had to be passed by both houses of the legislature and signed by the president.<sup>170</sup> Money bills had to originate with the House.<sup>171</sup> Similar to the British Constitution, provisions were provided that if the Senate did not act in a timely manner on a bill passed by the House and it was repassed by the House in the next session, it could be presented to the president for his signature.<sup>172</sup> In the case of a money bill, if the Senate did not act within one month, it could be presented to the president.<sup>173</sup> Like the 1954 Constitution, the 1960 and 1963 Constitutions defined the exclusive and concurrent federal powers in legislative lists appended to the constitution.

Although the governor-general, and later the president, was the head of state, the real executive power was vested in the prime minister, and, in the states, in the premiers.<sup>174</sup> Unlike the British Constitution, the Nigerian Constitution attempted to spell out specifically the relative powers of the head of the state and the prime minister. Despite this attempt, disputes arose over the allocation of power. There was confusion, for example, as to whether the

161. *Id.* at § 157.

162. *Id.* at § 34.

163. *See* CONST. W. NIG. § 1 (1963) and corresponding sections for the other regions.

164. Nigeria (Constitution) Order in Council (1960).

165. NWABUEZE, *supra* note 31, at 76-79.

166. CONST. FED'N NIG. §§ 37, 38 (1960).

167. CONST. FED'N NIG. §§ 42, 43 (1963) (twelve additional senators were added in 1963 as a result of the creation of the Midwestern Region).

168. CONST. FED'N NIG. § 37(1)(a) (1960); CONST. FED'N NIG. § 42(1)(a) (1963). For convenience the word president is used in the text to refer to the chief executive official, which is the term used in the 1963 Constitution. However it should be noted that the term governor-general was the actual designation used in the 1960 Constitution.

169. CONST. FED'N NIG. § 46 (1960); CONST. FED'N NIG. § 52(1).

170. CONST. FED'N NIG. § 57(1) (1960); CONST. FED'N NIG. § 62(1) (1963).

171. CONST. FED'N NIG. § 57(2) (1960); CONST. FED'N NIG. § 62(2) (1963).

172. CONST. FED'N NIG. § 59(2) (1960); CONST. FED'N NIG. § 64(2) (1963).

173. CONST. FED'N NIG. § 59(1) (1960); CONST. FED'N NIG. § 64(1) (1963).

174. NWABUEZE, EMERGENT STATES, *supra* note 46, at 55-56; *See* CONST. FED'N NIG. § 81 (1960); CONST. FED'N NIG. § 87 (1963).

president or the prime minister was in actual command of the armed forces.<sup>175</sup> This conflict reached its logical conclusion following the 1964 election, when the government ceased to operate for several days because the president refused to appoint Sir Abubakar Tafawa Balewa as prime minister.<sup>176</sup>

Perhaps the most dramatic confrontation between a governor and a premier occurred in the Western Region. Section 33(10)(a) of the 1960 Constitution of the Western Region provided that "the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of the majority of the members of the House of Assembly. . . ."<sup>177</sup> Thirty six members of the assembly wrote to the governor that the premier, Chief S. L. Akintola, no longer had the support of a majority in the legislature due to an internal split of the dominant political party, the Action Group. The governor thereupon removed the premier.

Akintola filed a lawsuit contesting his removal.<sup>178</sup> He argued that under British practice, at least since 1834, the queen could not remove a prime minister without a vote of Parliament. The Nigerian Supreme Court and the Privy Council each interpreted the Nigerian Constitution differently.

The Nigerian Supreme Court held that the removal was improper. The Court said that Section 33(10) must be read in the light of British conventions and other relevant sections of the constitution.<sup>179</sup> The Court held that the premier's popularity could only be tested on the floor of the House and that the House could only speak through its votes and not through extraneous communications.

The Privy Council, on the other hand, ruled that the Nigerian Constitution stood on its own and that the literal meaning of Section 33(10)(a) must control.<sup>180</sup> The words "it shall appear to him" implied that the governor could use his judgment based upon whatever materials he chose to rely on to determine if the premier had lost the support of the legislature.<sup>181</sup>

However, the decision of the Supreme Court prevailed ultimately because the 1963 Constitution deleted the portions of the 1960 Constitution which authorized the removal of the prime minister or premiers by the president or governors.<sup>182</sup>

The executive arm of the government operated through a Council of Ministers which formulated policy subject to the control of the legislature.<sup>183</sup> The ministers were members of the legislature.<sup>184</sup> The power of the prime minister was crucial to the operation of the council. He controlled the appointment and dismissal of the ministers.<sup>185</sup> He had the authority to call a new election if

175. NWABUEZE, EMERGENT STATES, *supra* note 46, at 60-61.

176. *Id.* at 58-60; Oyediran, *Background to Military Rule*, in Oyediran, *supra* note 45, at 19; ANIFOWOSE, *supra* note 138, at 61-64.

177. CONST. W. REGION NIG. § 33(10)(a) (1960); *see also* CONST. FED'N NIG. § 81(10)(a) (1960) (applicable provision on the federal level).

178. *Akintola v. Aderemi*, 1 All Nig. L. Rep. 442 (1962).

179. *Id.* at 452.

180. *Adegbenro v. Akintola*, 1 All Nig. L. Rep. 465 (P.C. 1962).

181. *Id.* at 475.

182. *See* CONST. FED'N NIG. § 87(10) (1963); *cf.* CONST. FED'N NIG. § 81(10) (1960).

183. CONST. FED'N NIG. § 82 (1960); CONST. FED'N NIG. § 89 (1963).

184. CONST. FED'N NIG. § 81(6), (7) (1960); CONST. FED'N NIG. § 87(6), (7) (1963).

185. CONST. FED'N NIG. § 81(4), (10)(b) (1960); CONST. FED'N NIG. § 87(4), (10) (1963). Under

he felt he was losing his grip on the legislature.<sup>186</sup> The threat of a new election was, of course, a powerful means to get the members of the legislature to support the policies of the prime minister. The ministers' responsibilities to Parliament were both individual and collective.<sup>187</sup> The legislature could criticize or censure any minister whose conduct it disapproved, and it could remove any minister by a vote of no confidence.<sup>188</sup>

An independent elections commission supervised elections.<sup>189</sup> An independent public service commission controlled the appointment, promotion or dismissal of civil service officers or members of the Nigerian police force.<sup>190</sup>

## B. *Federalism*

The 1960 and 1963 Constitutions continued the basic federal structure outlined in the 1954 Constitution. Each region had its own assembly, governor, executive council, premier, civil service, and court system independent from the federal government. However, unlike the United States, where one of the primary responsibilities of state and local governments is the maintenance of a local police force, Nigeria created a central police force under the federal government.<sup>191</sup>

The 1960 Constitution continued the three regions embodied in the 1954 Constitution—the Eastern, Western and Northern Regions.<sup>192</sup> A Minorities Commission had been appointed in 1958 under the colonial government to study the status of minority tribes in the three regions. Despite the fact that there was much agitation among minority tribes for the creation of new states, that was not one of the recommendations of the commission. In fact, Britain threatened that the creation of new states would effectively delay the granting of independence.<sup>193</sup> However, agitation for the creation of new states continued, and in 1963, a fourth state—the Midwestern Region—was created.<sup>194</sup> The final solution to the creation of new states, however, had to await the advent of military rule.

The 1960 and 1963 Constitutions continued the practice begun in the 1954 Constitution of appending legislative lists outlining the exclusive and concurrent powers of the federal government.<sup>195</sup> However, these constitutions

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these provisions the president could not appoint or dismiss any ministers unless acting in accordance with the advice of the prime minister.

186. CONST. FED'N NIG. § 63(4) (1960); CONST. FED'N NIG. § 68(4) (1963). The president was required to dissolve the Parliament upon the recommendation of the prime minister provided the dissolution is in the interest of the country.

187. CONST. FED'N NIG. § 83 (1960); CONST. FED'N NIG. § 90 (1963); *see generally* NWABUEZE, *supra* note 31, at 110-112.

188. NWABUEZE, *supra* note 31, at 111.

189. CONST. FED'N NIG. § 45 (1960); CONST. FED'N NIG. § 50 (1963).

190. CONST. FED'N NIG. § 140 (1960); CONST. FED'N NIG. § 146 (1963).

191. CONST. FED'N NIG. § 98 (1960); CONST. FED'N NIG. § 105 (1963); NWABUEZE, *supra* note 31, at 131-32.

192. NWABUEZE, *supra* note 31, at 134-35. Lagos had itself been organized as a separate federal territory since 1954.

193. CROWDER, *supra* note 20, at 244; NWABUEZE, *supra* note 31, at 135, 151; ANIFOWOSE, *supra* note 138, at 52; Oyediran, *supra* note 45, at 10-12.

194. NWABUEZE, *supra* note 31, at 136.

195. The Nigerian Supreme Court, similar to the United States Supreme Court, worked out a theory that states did not intrude into the federal domain when they passed incidental police ordinances "for the peace, order and good government of the region." *Akwule v. The Queen*, [1963] L.

did grant extraordinary powers to the central government to take over directly the functions of the states.<sup>196</sup> Both constitutions prohibited the regions from seceding from the union and prohibited them from exercising their powers so as to hinder or prejudice the exercise of the executive power of the federation or to endanger the existence of the federal government.<sup>197</sup> The federal government could, by resolution of two-thirds of each house, declare that a region was contravening these prohibitions and legislate directly over that region to the extent necessary to limit the violation in that region. It was provided that the actions taken by the federal government had to be proportionate to the offense and the courts could presumably inquire into this.<sup>198</sup>

Also, in time of war or public emergency recognized by a two-thirds vote in each house or when democratic institutions were threatened by subversion as recognized by a two-thirds vote in each house, a state of emergency could be declared and the federal government could take such direct action as it considered necessary to maintain peace, order, and good government in the states.<sup>199</sup> Whether a state of emergency existed was clearly a political question not to be reviewed by the judiciary; however, the Nigerian Supreme Court did hold that when emergency measures were applied directly to affect the rights of individuals, the courts could inquire into the particular application to see if the restrictions were "reasonably justifiable in a democratic society."<sup>200</sup>

The emergency provisions were invoked by the federal government following an outburst of violence in the House of Assembly of the Western Region after the attempted ouster of Akintola as premier in 1962. The federal government appointed a federal administrator to run the Western government. This situation lasted for six months. This declaration of emergency was criticized as an improper partisan measure used to discredit the Action Group, the dominant party in the Western Region, and to facilitate the return of Akintola to power.<sup>201</sup>

### C. *The Judiciary*

Under the 1960 Constitution, judges, except for the chief justice, were appointed by the governor-general, or, in the state by the governors, on the advice of a judicial service commission.<sup>202</sup> The Federal Judicial Service Commission consisted of the chief justice of the federation and of each region, the chairman of the Public Service Commission, and one additional member appointed by the governor-general with the advice of the prime minister.<sup>203</sup> This was changed in 1963 when the power to appoint was vested in the president or

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Rep. N. Nig. 105 (state prosecution of bank officer for criminal breach of trust did not intrude on exclusive federal power over banking). However, a state law that was found to be inconsistent with a federal law was void. *Chiroma Giremabe v. Bornu Native Auth.* [1961] All Nig. L. Rep. 469.

196. NWABUEZE, *supra* note 31, at 142-44. Similar provisions are contained in CONST. FED. REP. NIG. §§ 11 & 265 (1979).

197. CONST. FED'N NIG. § 80 (1960); CONST. FED'N NIG. § 86 (1963).

198. CONST. FED'N NIG. § 66 (1960); CONST. FED'N NIG. § 71 (1963); NWABUEZE, *supra* note 31, at 143.

199. CONST. FED'N NIG. § 65 (1960); CONST. FED'N NIG. § 70 (1963).

200. *Williams v. Majekodunmi* (No. 3), 1 All Nig. L. Rep. 412, 413 (1962).

201. ANIFOWOSE, *supra* note 138, at 57-59; CROWDER, *supra* note 20, at 262-64.

202. CONST. FED'N NIG. § 105(2) (1960). The chief justice was appointed in accordance with the advice of the prime minister. *Id.* at § 105(1).

203. *Id.* at § 120(1).

the governors, respectively, who acted on the advice of the prime minister or premier.<sup>204</sup> The abolition of the Judicial Service Commission was severely criticized<sup>205</sup> and the commission was reactivated under the 1979 Constitution, except that the chief justice was appointed by the president in his discretion subject to confirmation by majority in the Senate.<sup>206</sup>

Judges were to hold office until they attained a retirement age prescribed by Parliament.<sup>207</sup> Under the 1963 Constitution, a judge could be removed by the president on a vote of two-thirds of both houses of the assembly finding him unable to discharge his duties or finding him guilty of misbehavior.<sup>208</sup> Under the 1960 Constitution, the allegations were first investigated by the Judicial Service Commission and the governor-general who then referred the recommendation to the Privy Council.<sup>209</sup>

The 1963 Constitution thus contained fewer provisions insuring a separate and independent judiciary than the 1960 Constitution.<sup>210</sup> Neither Constitution contained a separate provision, as did the 1979 Constitution, vesting the judicial power in the courts<sup>211</sup> or prohibiting the legislature from divesting the courts of jurisdiction to review the constitutionality of legislation.<sup>212</sup>

Like the United States, there existed federal and state courts. However, unlike the United States, the two court systems were not kept rigidly separated. No distinction was made between federal and state cases and the Supreme Court of the federation had jurisdiction to review all cases coming to it on appeal from the state or federal courts whether or not they involved questions of federal law.<sup>213</sup>

#### D. Fundamental Rights

Both the 1960 and the 1963 Constitutions retained the fundamental rights provisions adopted in 1958.<sup>214</sup> The constitutions further explicitly provided that a person whose fundamental rights had been contravened in any state could apply to a high court in that state for redress.<sup>215</sup> However, infringements on fundamental rights were not uncommon during the First Republic and it could be said that judicial opinions tended to focus on the qualification of, rather than on the affirmation of, fundamental rights.<sup>216</sup>

Freedom of speech and the press were subjected to governmental curtail-

204. CONST. FED'N NIG. § 112 (1963).

205. Kasunmu, *The Supreme Court of Nigeria: An Examination of its Composition and Functions*, in THE SUPREME COURT OF NIGERIA 1-14 (A. Kasunmu ed. 1977) [hereinafter cited as Kasunmu]; NWABUEZE, *supra* note 31, at 113.

206. CONST. FED. REP. NIG. § 211(1) (1979).

207. CONST. FED'N NIG. § 106(1) (1960); CONST. FED'N NIG. § 113(1) (1963). Under § 255(1) of the 1979 Constitution, the retirement age for judges was set at 65.

208. CONST. FED'N NIG. § 113(2) (1963).

209. CONST. FED'N NIG. § 106(3) (1960).

210. See NWABUEZE, *supra* note 31, at 112-16.

211. CONST. FED. REP. NIG. § 6(1) (1979).

212. *Id.* at § 4(8).

213. CONST. FED'N NIG. § 110 (1960); CONST. FED'N NIG. § 117 (1963). See OBILADE, *supra* note 90, at 115, 170-76.

214. CONST. FED'N NIG. ch. III (1960); CONST. FED'N NIG. ch. III (1963).

215. CONST. FED'N NIG. § 31 (1960); CONST. FED'N NIG. § 32 (1963). A similar provision is also contained in CONST. FED. REP. NIG. § 42(1) (1979).

216. Jegebe, *The Supreme Court's Attitude Towards Some Aspects of Individual Freedom and Rights to Property*, in Kasunmu, *supra* note 204, at 107-32.

ment. A minority member of the House of Representatives, Chike Obe, was convicted under a colonial statute passed in 1942, making it unlawful to publish any seditious statement with a seditious intent.<sup>217</sup> A "seditious intention" was defined as an intention:

(a) to bring into hatred or contempt or to excite dissatisfaction against the person of Her Majesty, her heirs or successors, or the person of the Governor-General or the Governor of a Region, or the Government or Constitution of the United Kingdom, or of Nigeria, or of any region thereof, as by an established or against the administration of justice in Nigeria; or

(b) to excite Her Majesty's subjects or inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or

(c) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Nigeria; or

(d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.<sup>218</sup>

Chike Obe was convicted of distributing a pamphlet containing the following exhortation:

Down with the enemies of the people, the exploiters of the weak and oppressors of the poor! . . . The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians.<sup>219</sup>

Chike Obe argued that the publication was protected by the free speech and press provisions contained in the Bill of Rights. However, unmindful that Nigeria was no longer a colony but an independent democracy, the Supreme Court affirmed the conviction.<sup>220</sup> The opinion of Chief Justice Ademola stated that the statute made it illegal to use words which express an intent to cause ill feelings against the government.<sup>221</sup> Justice Ademola emphasized that a statement is not seditious if it only points out errors or defects in the government. But a statement could be unlawful even though it did not incite the public to violence: "What is not permitted is to criticize the government in a malignant manner . . . , for such attacks by their nature tend to affect the public peace."<sup>222</sup>

In 1962, Parliament passed an official secrets act making it an offense to transmit any matter designated by the government as "classified."<sup>223</sup>

Perhaps the most controversial law passed during the First Republic relating to free speech was the Newspaper (Amendment) Act of 1964.<sup>224</sup> This act, *inter alia*, prohibited any person from publishing in any newspaper a statement, rumor or report, knowing or having reason to believe that the state-

217. 2 L. NIG., CRIM. CODE ch. 42, § 51(1)(c) (1958).

218. *Id.* at § 50(2).

219. Director of Pub. Prosecutions v. Chike Obe, 1 All Nig. L. Rep. 186, 188 (1961).

220. *Id.* at 186.

221. *Id.* at 193-94.

222. *Id.* at 194; 2 L. NIG., CRIM. CODE § 51(1)(c) would almost certainly be declared unconstitutional on its face in the United States because it does not narrowly prohibit conduct or advocacy "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

223. Official Secrets Act, No. 29 § 1 (1962).

224. Newspaper (Amendments) Act, No. V (1964).

ment, rumor or report was false.<sup>225</sup> The law provided that it was no defense for the person to assert that he did not know or did not have reason to know that the statement was false unless he proved that prior to publication he took reasonable measures to verify the accuracy of the statement.<sup>226</sup> However, the law was apparently never enforced directly against any journalist.<sup>227</sup>

During the period between the general election of 1964 and the coup of January 1966, a number of local governments passed laws banning designated newspapers because of their criticism of the local governments.<sup>228</sup> One of the first acts of the military following the 1966 coup was to invalidate these restrictions and to allow the free distribution of newspapers throughout the country.<sup>229</sup>

The presumption that a law which infringes on a fundamental right is invalid was not applied by the courts in Nigeria. For instance, in sustaining a law preventing children under sixteen from taking part in political activities, a judge on the High Court of the Northern Region declared that he was guided by the following principles:

(1) There is a presumption that the Legislature has acted constitutionally and that the laws which they have passed are necessary and reasonably justifiable;

(2) a restriction upon a fundamental human right must before it may be considered reasonably justifiable:

(a) be necessary in the interest (in the present case) of public morals or public order; and

(b) must not be excessive or out of proportion to the object which it is sought to achieve.

I would add that it seems to me that the presumption in favor of constitutionality throws the burden of proof on the person who alleges that the Legislature has infringed a fundamental human right.<sup>230</sup>

In 1962, Parliament utilized its emergency powers under Section 65 of the constitution and appointed an administrator to govern the Western Region following the disturbances in the wake of the dismissal of Akintola as premier. The administrator issued an order restricting certain individuals from traveling further than three miles from their homes. A lawyer affected by this order challenged its constitutionality as improperly infringing on his freedom of movement.<sup>231</sup> The Supreme Court indicated that the question whether an emergency existed was for the legislature to determine and held that the legislature could properly delegate to an administrator power to pass subsidiary orders to effect the purposes of the primary enactment. The Court empha-

225. *Id.* at § 4(1).

226. *Id.* at § 4(2).

227. The Democrat Weekly, May 6, 1984 at 5, col. 1. However, it has been argued that the act chilled speech sufficiently so as to prevent the press from effectively covering improprieties in the 1964 election. NWABUEZE, EMERGENT STATES, *supra* note 46, at 151-52.

228. T. ELIAS, NIGERIAN PRESS LAW 133 (1969). It should be noted that most newspapers were either owned or financed by various governments or political parties. NWABUEZE, EMERGENT STATES, *supra* note 46, at 152.

229. The Circulation of Newspapers Decree No. 2 (1966).

230. Cheranci v. Cheranci, [1960] L. Rep. N. Reg. Fed'n Nig. 24, 29. Just the opposite prevails in the United States. A law which restricts fundamental rights is presumed to be invalid and the burden is upon the government to justify the law based on compelling necessity. *See e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

231. Chief F.R.A. Williams v. Majekodunmi, 1 All Nig. L. Rep. 412 (1962).

sized, however, that it could review the application of the laws to an individual case to see if fundamental rights have been infringed beyond what is "reasonably justifiable in a democratic society."<sup>232</sup> The Court noted that if fundamental rights are invaded, "it must be only to the extent that is essential for the sake of some recognized public interest, and may not be farther."<sup>233</sup> The Court found that there was nothing in the evidence "from which it can be fairly inferred that it was reasonably justifiable to restrict the plaintiff's freedom of residence and movement."<sup>234</sup>

Other abuses could be catalogued. Between January 1961 and December 1962 public meetings and processions were banned in Lagos, and after 1962, most meetings were banned in the Western Region.<sup>235</sup> In 1962, three men were convicted for writing articles about political corruption in the Western Region.<sup>236</sup> Also in July 1963, the government proposed a modification of the constitution to allow the preventive detention of persons. This proposal was finally shelved due to vigorous denunciations by the press and the bar association.<sup>237</sup>

### E. *The Failure of the First Republic*

The First Republic ended with the military coup of January 15, 1966.<sup>238</sup> The actual causes of the failure of the First Republic are varied and complex. Certainly one cause was the structural deficiencies in the constitution itself. The offices of a nominal president and a powerful prime minister caused divided loyalties and created unnecessary friction. The historical factors that produced the division in Britain simply did not exist in Nigeria.<sup>239</sup>

Another cause was the failure of any political party to rise above regional or tribal interests. The political system thus did nothing to unite the country and break down regional and tribal differences. The National Congress of Nigeria and Cameroons (NCNC), headed by Azikiwe, was largely Igbo dominated and was centered in the Eastern Region. The Action Group (AG), headed by Awolowo, was Yoruba dominated and was centered in the Western Region. The Northern People's Congress (NPC), headed by Amadu Bello, was Hausa dominated and was centered in the Northern Region. During the 1964 federal elections, the various political parties openly resorted to regional and tribal sentiments to discredit their opponents.<sup>240</sup>

Another cause for instability was the failure of the government to come to grips with the problem of creating new states to diffuse the power of the dominant tribes and to meet the demands of the minorities in the regions.

Finally, there was the factor of corruption and maladministration. Public officials all too often looked upon their offices as a means for personal enrich-

232. *Id.* at 426.

233. *Id.*

234. *Id.* at 430.

235. NWABUEZE, EMERGENT STATES, *supra* note 46, at 153.

236. *Id.* at 151.

237. *Id.* at 153.

238. *Id.* at xii, 219.

239. *Id.* at 56-57.

240. O. BALOGUN, THE TRAGIC YEARS: NIGERIA IN CRISES 1966-70 20 (1973).

ment rather than as a means of public service.<sup>241</sup>

One or more of these factors was present in each of the political events which eventually led to the toppling of the First Republic. The first such event was the emergency declared in the Western Region following the dismissal of Akintola as premier in 1962. Following closely upon this crisis was the treason trial of the popular political leader in the Western Region, Obafemi Awolowo. Awolowo was convicted and sentenced to ten years imprisonment together with about twenty other members of his political circle for conspiring to overthrow the government.<sup>242</sup> The trial was looked upon by Awolowo's supporters as politically motivated, and he was later pardoned by the military after it came into power.

Also in 1962 a census controversy occurred which again created much antagonism between the regions. At stake was the political control of the country.<sup>243</sup> The 1952-53 census had given the population of the North superiority and hence the North got 174 of the 312 seats in the House of Representatives. The South expected the balance to shift in its favor in 1962. The initial figures supported the South but the final count gave the North an edge of four million. The Eastern Region filed a lawsuit to restrain the federal government from using these figures to reapportion the legislature because of irregularities and inflation, but the Supreme Court rejected this application on grounds of standing.<sup>244</sup>

Irregularities in the 1964 federal election resulted in President Azikiwe's refusal to appoint Balewa prime minister. For three days the country was without a government while the parties groped for a compromise. Although a compromise was reached, the underlying causes of the crisis were left to fester.<sup>245</sup> The 1964 federal election, however, proved to be tame when compared to the election in the Western Region in 1965. Despite a complete breakdown in law and order, the election process was allowed to continue. Serious rioting occurred on election day and the disputed results produced further violence.<sup>246</sup> Unlike the lesser disturbances which occurred in 1962, this time the federal government refused to declare an emergency. This violence produced the immediate stimulus for the 1966 military coup.<sup>247</sup>

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241. GBULIE, *supra* note 49, at 8. Cf. FANON, *supra* note 152, at 133-35. For a fictionalized treatment of corruption in the first republic see C. ACHEBE, *A MAN OF THE PEOPLE* (1966).

242. For an account of the trial and its surrounding events see generally L. JAKANDE, *THE TRIAL OF OBAFEMI AWOLOWO* (1966).

243. See Oyediran, *supra* note 45, at 15-17; CROWDER, *supra* note 20, at 264-65; ANIFOWOSE, *supra* note 138, at 60-61.

244. Attorney Gen. of E. Region v. Attorney Gen. of the Fed'n, 1 All Nig. L. Rep. 224 (1964). The Court noted that

even if it is true that acceptance of incorrect census figures by the responsible authority and by both houses of Parliament would mean fewer members would be elected to the House of Representatives by constituencies in any of the territories than would be if correct figures were adopted, we cannot hold that any legal right vested in the territory would be affected.

*Id.* at 224. (Emphasis added).

245. ANIFOWOSE, *supra* note 138, at 63-64; Oyediran, *supra* note 45, at 17-20.

246. CROWDER, *supra* note 20, at 267-68; Oyediran, *supra* note 45, at 20-22. See generally ANIFOWOSE, *supra* note 138, at 201-80.

247. See GBULIE, *supra* note 49, at 6-7; Oyediran, *supra* note 45, at 24.

#### IV. MILITARY RULE: 1966-1979

##### A. *An Outline of Events*

The civilian government in 1966 was not in good health. Corruption, violence, regional and ethnic conflicts all had undermined the state. Whether these problems could have been solved through the democratic process is impossible to state because on January 15, 1966, a military coup overthrew the civilian government.<sup>248</sup> The nation remained under military rule until 1979.

On January 15, 1966, a group of young army officers, most of whom were Igbo, tried to take over the government in Lagos, Ibadan and Kaduna. Their efforts were only partially successful. Many leading political figures were killed. President Azikiwe was in London for medical treatment but the prime minister and the premiers of the Western Northern Regions were killed—along with a number of top army officers. The premier of the East escaped assassination largely because Archbishop Makarios of Cyprus was visiting there. Major General John Aguiyi Ironsi, an Igbo from the East, escaped assassination and made his way to the cabinet to confer with the politicians on how the younger officers could be stopped. The politicians as usual could not agree on who should replace the prime minister and Ironsi eventually persuaded them that only the military under his leadership could bring order out of the existing chaos. The acting president then went on radio and announced that the government was being handed over to the military. Ironsi followed him on the air to announce that the federal and regional governments were suspended and that military governors were appointed in the four regions. The day-to-day administration of the country was to be in the hands of the civil service. He also announced that the violence in the Western Region would be suppressed and that a new constitution would be prepared for eventual return to civilian rule.<sup>249</sup>

The military coup was regarded in some quarters as an Igbo plot to take over the government.<sup>250</sup> It did not escape notice that most of those killed were Northerners.<sup>251</sup> Ironsi surrounded himself with Igbo advisors and pursued policies aimed at abolishing the federal structure of the country. On July 29, 1966, a second coup took place in which Ironsi and the military governor of the West were killed.<sup>252</sup> This time the coup leaders were Northerners. A young Christian from the North, general Yakubu Gowon, eventually was selected as the head of state. His appointment was opposed, largely on personal grounds, by General Odumegwu Ojukwu, the military governor of the East.

The early years of the Gowon administration were consumed by the Civil War over the Biafran secession. However, after 1969, the government embarked on a series of mammoth projects intended to build up the country economically. These projects ultimately produced tragic consequences for the civilian regime of the Second Republic when the price of oil collapsed and the issues of waste and mismanagement were brought to the forefront.

248. For accounts of the various coups see, e.g., BALOGUN, *supra* note 240; J. DE ST. JORRE, *THE NIGERIAN CIVIL WAR* (1972); GBULIE, *supra* note 49; Oyediran, *supra* note 45.

249. Oyediran, *supra* note 45.

250. *Id.* at 27, 238.

251. *Id.*

252. *Id.* at 28-29.

Gowon was removed by a coup in 1975.<sup>253</sup> He had announced the indefinite postponement of a return to civilian rule and his regime was plagued with charges of corruption. The new leader, Brigadier Murtala Mohammed, announced a four-year, five-stage program to return the country to civil rule.<sup>254</sup> To accomplish this goal, he appointed a committee to draft a new constitution. Murtala Mohammed also embarked upon a program to purge the civil service of all corrupt and incompetent personnel. Over 10,000 civil servants were removed, with profound effects on the management of the country.

In February, 1966, Murtala Mohammed was killed in an unsuccessful coup and his deputy, General Olusegun Obasanjo, took over.<sup>255</sup> Obasanjo continued the policies implemented by Murtala Mohammed and returned the country to civilian rule in 1979 as promised.<sup>256</sup>

### B. *Military Rule and the Rule of Law*

The questions which faced Nigeria in 1966 were unprecedented. A civilian government had handed power over to the military. What was the legality of this act and what was the legal status of the new regime and of the 1963 Constitution? In his initial radio broadcast, Ironsi had indicated that the new military government was an interim government and that eventually the country would be returned to civilian rule.

On January 17, 1966, the military government issued Decree No. 1. This decree recognized the continued application of the 1963 Constitution; however, it suspended or modified important parts of it. In general, the decree suspended those parts of the constitution concerning the executive and legislative branches of the federal and regional governments. It continued the basic provisions concerning citizenship, the judiciary, human rights, the police, and federal and state funds and services. Disputes were bound to arise between these provisions in the constitution and other decrees promulgated by the military government. Underlying these disputes was the legitimacy of the new regime—a question the courts eventually were required to pass upon.<sup>257</sup>

The first case to come before the Supreme Court that concerned the nature of the new government involved a man convicted of treason against the military government.<sup>258</sup> The Court simply noted:

Following the events of mid-January, 1966, the former civilian government of Nigeria handed over power to the military authorities, and the government of Nigeria became the Federal Military Government.<sup>259</sup>

The Court made no attempt to explain how, under the 1963 Constitution, a civilian government could simply hand over the state to the military.

In the second case, *Adamolekun v. The Council of the University of Ibadan*,<sup>260</sup> the question involved a conflict between an edict promulgated by the

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253. *Id.* at 243.

254. J. AKANDE, INTRODUCTION TO THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1979, general introduction (1979).

255. *Id.*

256. NWABUEZE, *supra* note 31, at 253-268.

257. NWABUEZE, *supra* note 31, at 161-78; Ojo, *Public Law, the Military Government and the Supreme Court*, in Kasunmu, *supra* note 205, at 90-106; ACHIKE, *supra* note 49, at 99-131.

258. Issae J.A. Boro v. The Republic, [1967] Nig. Monthly L. Rep. 163.

259. *Id.* at 166.

260. [1968] Nig. Monthly L. Rep. 253.

military governor of Western Nigeria and Decree No. 1 of 1966 and the provisions of the 1963 Constitution saved by Decree No. 1. The state argued that even if the edict did conflict with the Constitution as retained by Decree No. 1, the Court had no jurisdiction to declare the edict void because section six of Decree No. 1 provided that "no question as to the validity of any other Decree or Edict shall be entertained by any court of law in Nigeria."<sup>261</sup> The Court, however, ruled that:

Reading the Decree as a whole we are not in doubt that Section 6 does not preclude the courts from inquiring into any inconsistency that may arise, but merely bars the courts from questioning the validity of the making of a decree or edict on the ground that there is no valid legislative authority to make one. In other words, the Court is not inquiring into whether the Military Governor of a Region could legislate by edict, but only whether Section 35 of the Edict is inconsistent with the constitution of the Federation.<sup>262</sup>

The case in effect only decided an issue of federalism: what happens when an edict issued by a state governor conflicts with a decree issued by the federal government? The Court of course decided that the federal law was supreme over the state law. The decision therefore left open the more basic question: what happens if a federal decree is inconsistent with the federal constitution?

The Court attempted to answer this question in *Lakanmi v. Attorney General (West)*,<sup>263</sup> and in doing so examined the legal basis for military rule. *Lakanmi* arose in the Western State in a dispute over whether an edict was in conflict with a decree promulgated by the federal government. *Lakanmi* and his daughter were accused pursuant to Edict No. 5 of 1967, issued by the Western State Military Governor, with having received certain properties and moneys corruptly during the Republican regime.

The edict set up a tribunal which promptly ordered the *Lakanmi*'s not to dispose of or use their properties or bank accounts. The edict also provided that no court had jurisdiction over any matter involving the edict. The state high court dismissed *Lakanmi*'s application for a writ of certiorari, holding that the edict was not *ultra vires* and that it could not be challenged in a court of law. *Lakanmi* appealed to the Western State Court of Appeal, but while that appeal was pending, the federal military government issued three new decrees. These decrees validated Edict No. 5. One of the decrees, No. 45, also prohibited any court of law from inquiring into matters covered by the decree and expressly abated all suits pending on the date of the decree. The court of appeals dismissed the case on the basis of Decree No. 45, but the Supreme Court reversed.

The Supreme Court considered first the nature of the military takeover. Did the military coup overthrow the existing legal order or did it leave the existing legal order intact except in so far as it had to be modified in order to effect military rule?

The attorney general argued that the military acquired power by means of a revolution which swept away the 1963 Constitution except to the extent that the military chose to recognize and implement it. Under this argument, a military decree was supreme.

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261. Decree No. 1 (Constitutional Suspension and Modification) § 6 (1966).

262. [1968] Nig. Monthly L. Rep. at 260.

263. 1 Univ. Ife L. Rep. 201 (1971).

The Court rejected this argument and held that the powers of the military were derived from the 1963 Constitution. The military thus was not superior to that document. But how could military rule be legal under the 1963 Constitution which made no provision for turning the government over to the military? The Court held that, although not explicit, it is implicit that every government may take such actions as are properly justified by the doctrine of necessity to preserve peace and good order. Under this doctrine, the civilians, having no alternative, properly turned the government over to the military as an "interim" measure to protect "lives and property and maintain law and order."<sup>264</sup> The implication was that when the necessity ended the government would be returned back to civilian rule. Those portions of the constitution dealing with the executive and legislative branches were thus "necessarily" suspended but otherwise the constitution remained supreme.<sup>265</sup>

Critics of the decision have argued that the decision is unsound and that the conditions needed to invoke the doctrine of necessity were not present. Nonetheless, the decision represented a valiant attempt by the Court to reconcile military rule with the rule of law. The military rulers were not above the law and were required to respect the basic rights and freedom of the Nigerian people as enunciated in the 1963 Constitution. The decision also served to remind the country that military rule was abnormal and that when the necessity ended, the country should be returned to civilian rule.

The Court also decided that in any constitutional dispute the courts remained the final arbiters. On the facts presented, the Court found that the edict deprived the appellants of their properties without a judicial hearing in violation of the doctrine of separation of powers. Although the military had taken over the executive and legislative powers of the federation, the judicial power remained in the courts and only the courts could declare someone guilty of corruption and order the confiscation of his property. Decree No. 45 was thus an illegal attempt to prevent the courts from performing a necessary judicial function.<sup>266</sup>

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264. *Id.* at 217. The Court relied upon a holding of the Supreme Court of Cyprus which validated a law passed by parliament which created a supreme court composed only of Greeks. The law violated the constitution, which required a quota of Turkish judges on the court, but the Turkish members had seceded from the court and Parliament. The court noted that the government's hands were tied: either it did nothing or it violated the constitution. The first course would result in a paralysis of the judiciary, so "in these exceptional circumstances it was the duty of the Government through its legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of justice." *Id.* at 218 (quoting Attorney-Gen. for the Republic v. Mustafa Ibrahim of Kyrenia, 3 Sup. Ct. Cyprus 1 (1964)).

The Nigerian Supreme Court found inapplicable the decisions in the Pakistan case of *State v. Dosso*, 2 Pak. Sup. Ct. Rep. 180 (1958), and the Ugandan case of *Uganda v. Comm'r of Prisons*, [1966] E. Afr. L. Rep. 514, both of which found the military coups in those countries to be revolutionary, which abrogated the old constitutions and laws.

265. CONST. FED. REP. NIG. § 1(2) (1979), unlike the 1963 Constitution, provided expressly that: The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

Section 1(2), however, did not as a matter of fact prevent the coup of December 31, 1983, and Decree No. 1 (1984) expressly suspends that section.

266. CONST. FED. REP. NIG. § 4(8) (1979) expressly provided that:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the courts of law and judicial tribunals established by law; and accordingly, the National As-

The military's response to the decision was quick and decisive. The military rulers promulgated Decree No. 28 of 1970, which declared that the military coup of January 15, 1966, and the subsequent coup on July 29, 1966, were revolutions which effectively abrogated the whole pre-existing legal order and which were not within the contemplation of the 1963 Constitution. The decree also declared that any decision of any court of law, whether made before or after the decree which purported to invalidate any decree or edict (in so far as the edict is not inconsistent with the decree) is null and void. The decree as such did not oust the courts of jurisdiction, but the provision that judicial decisions which challenged a decree were null and void made any judicial exercise of jurisdiction fruitless.<sup>267</sup> Decree No. 28 ended any further challenges to military decrees on the ground of their inconsistency with the 1963 Constitution.

### C. *The Federal Structure*

The military necessarily functions through a unified chain of command. It could therefore be expected that military rule would have many of the same command characteristics. Indeed, Decree No. 1 (The Constitution Suspension Decree) of 1966 placed broad powers in the federal military government. Section 3(1) provided that:

The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.

The military governors of the regions were precluded under section 3(2) from making any laws: (a) with respect to any matter in the Exclusive Legislative List of the 1963 Constitution; and (b) with respect to any matter on the concurrent legislative list unless they received prior consent of the Federal Military Government. Thus, while Decree No. 1 recognized a federal structure in name, it was clear that broad powers rested with the central government.

On February 21, 1966, General Ironsi announced that he would appoint a study group to decide if the country should have a unitary or a federal form of government.<sup>268</sup> However, before the study group ever got to work, on May 24, 1966, Ironsi published Decree No. 34, which stated that Nigeria would cease to be a federation and would in the future be known simply as the Republic of Nigeria. For administrative purposes, the former regions became provinces directly under the control of the central government. The civil service was also completely nationalized.

Actually Decree No. 34 only made explicit what was implicit in military rule, but the public reaction was deadly, especially in the North, which looked upon the decree as further evidence of an Igbo plot to control the country. On May 29 and 30, anti-Igbo riots occurred in the North. These events were

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sembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

This provision was suspended by Decree No. 1 of 1984.

267. *E.g.*, *Adejumo v. H.E. Col. Mobolaji Johnson*, Military Governor of Lagos State, 5 *Judg. Sup. Ct. Nig.* 101 (1974).

268. For a discussion of Ironsi's ill-fated unitary government plans see *DE. ST. JORRE*, *supra* note 248, at 49-64; *BALOGUN*, *supra* note 240, at 25-28; *Gboyega*, *The Making of the Nigerian Constitution*, in *Oyediran*, *supra* note 45, at 235-42.

precipitating causes of the coup of July 29, 1966 which resulted in Gowon's becoming the head of state.

One of Gowon's first acts as head of state was to repeal Decree No. 34 and reinstate the quasi-federal scheme which existed under Decree No. 1.<sup>269</sup> Gowon also appointed a committee to study whether the country should be governed as a federation with a strong central government, a federation with a weak central government, a confederation, or some entirely new arrangement. It is significant that Gowon never suggested a unitary state. When the committee first convened, the delegates from the East and North favored a federation formed from a larger number of new states. When the committee next convened, all delegates, except those from the East, favored the mid-West's proposal. However, other events prevented the committee from ever making a final recommendation.

On January 4 and 5, 1967, the Supreme Military Council met in Aburi, Ghana to try to iron out the differences between General Ojukwu, the eastern commander, and General Gowon.<sup>270</sup> Ojukwu and Gowon finally reached a compromise which, if implemented, would have turned the country into a *de facto* confederation. Under the plan, the central government could not act without the concurrence of *all* the regional governors. The details of implementing the plan were to be devised by the civil servants back in Lagos. The reaction in Lagos was negative and the civil servants proposed a number of modifications. The compromise, as thus modified, was promulgated on March 10, 1967, as Decree No. 8. However, Decree No. 8 did not satisfy Ojukwu and the East eventually proclaimed itself independent. Finally on May 27, 1967, Gowon repealed Decree No. 8, which seemed to satisfy no one, and reinstated Decree No. 1 for the third time.<sup>271</sup>

On May 27, 1967, Gowon managed to diffuse some sympathy for the Biafran cause by creating twelve states instead of the former four.<sup>272</sup> This satisfied the demands of the minority tribes in the North and caused the minority tribes in the East, who now had their own states, to be disinclined to support Igbo-dominated Biafra.<sup>273</sup> Finally, in 1976, the number of states was increased to nineteen.

#### D. *The Biafran Secession*

Numerous factors contributed to the Biafran War. Nigeria, since its founding in 1914, was regionally divided and each tribe or region mistrusted the others. The military coup of January 1966 was viewed as an Igbo plot to dominate the country. Indeed, at the time of the second coup in July 1966, there was a real possibility of secession in the North.<sup>274</sup> However, because the Northerners were dominant in the coup, it was the Igbos who then felt the pressure to secede.

Many Igbos feared genocide. After Ironsi proclaimed a unitary government, on May 28 through May 30, there were anti-Igbo riots in Kano and

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269. Decree No. 59 (The Constitution Suspension and Modification Decree No. 6) (1966).

270. DE ST. JORRE, *supra* note 248, at 91-98; BALOGUN, *supra* note 240, at 58-61.

271. Decree No. 13 (The Constitution Repeal and Restoration Decree) (1967).

272. Decree No. 14 (States Creation and Transitional Provisions Decree) (1967).

273. BALOGUN, *supra* note 240, at 77.

274. *Id.* at 46.

Kaduna in the North where many Igbos lost their lives.<sup>275</sup> Worse violence erupted in September. Igbos were killed and mutilated in all the cities of the North.<sup>276</sup> As a result of these disturbances, there was a general exodus of Igbos from the North and West back to the East, and in October, Ojukwu ordered all non-Easterners out of that region.<sup>277</sup>

Further pressure for secession came from Ojukwu's personal animosity towards Gowon and the failures of the Aburi Conference.<sup>278</sup> Finally, on May 30, 1967, the Republic of Biafra was formally proclaimed. A bloody civil war followed which claimed the lives of between half a million and a million Nigerians.<sup>279</sup>

The Biafran secession was illegal under the 1963 Constitution,<sup>280</sup> and, as after the American Civil War, numerous disputes developed over the legal implications of actions taken in the East during the war.<sup>281</sup> As a practical matter, the crushing of the rebellion was important to all of Africa. It established that the colonial boundaries, and not tribal or religious boundaries, would continue to serve as political divisions.

One might ask whether Biafra evidenced a constitutional framework which would have been an improvement over that of the federation. Because of wartime conditions during the whole of Biafra's existence, one cannot say for certain what type of government would have emerged eventually, but there is no real evidence that the government in Biafra constituted an improvement over the federation. Like the federation, Biafra was governed by military rule and there was no firm promise that after the war democracy would be established.<sup>282</sup> In fact, because of his large ego and quick intelligence, Ojukwu might well have emerged as the head of a personal dictatorship. Like the federation, Biafra had numerous ethnic minorities who claimed their own right of self-determination. Their demands would no doubt have been frustrated by a Biafran victory.<sup>283</sup> Also, corruption prevailed in the East much as it prevailed in the rest of the federation.<sup>284</sup>

Near the end of the war, on June 1, 1969, Ojukwu published the *Aheara*

275. *Id.* at 27; DE ST. JORRE, *supra* note 248, at 58-59.

276. DE ST. JORRE, *supra* note 248, at 84-86.

277. *Id.* at 87.

278. DE ST. JORRE, *supra* note 248, at 91-98; BALOGUN, *supra* note 240 at 58-61.

279. DE ST. JORRE, *supra* note 248, at 412.

280. Nwabueze identifies three reasons why secession violated the 1963 Constitution:

- 1) The 1963 Constitution contained a supremacy clause which prevented any region from acting inconsistent with it;
- 2) No state had the power to unilaterally destroy the federation;
- 3) No state had the power to usurp the powers of the federal government.

NWABUEZE, *supra* note 31, at 180-81.

281. *See e.g.*, Okwuosa v. Okwuosa, 2 Judg. Sup. Ct. Nig. 13 (1974) (Supreme Court could not hear an appeal from the "High Court of Biafra" because the court was created by an illegal regime); Uttah v. Independence Brewery Ltd., 2 Judg. Sup. Ct. Nig. 7 (1974) (Court could hear appeal from Umuahia High Court because the suit was commenced prior to the declaration of secession. However, proceedings which took place in the court during the secession were a nullity). *See generally*, NWABUEZE, *supra* note 31, at 181-201; ACHIKE, *supra* note 49, at 138-47; NWABUEZE, EMERGENT STATES, *supra* note 46, at 227-89.

282. BALOGUN, *supra* note 240, at 121.

283. DE ST. JORRE, *supra* note 248, at 116-18; E. AMADI, SUNSET IN BIAFRA (1973).

284. DE ST. JORRE, *supra* note 248, at 385. For a fictionalized account see, E. IROH, THE TOADS OF WAR (1979).

*Declaration*,<sup>285</sup> which dealt with individual freedoms and social rights. The document was a confused statement of social objectives which seems to have been aimed primarily at galvanizing world support for Biafra.<sup>286</sup> Nonetheless, there is little question that the Igbo masses supported the Biafran cause with great enthusiasm.<sup>287</sup>

After the war, General Gowon established a tone of reconciliation by granting "a general amnesty for those misled into rebellion" and proclaiming all Nigerians to be "equal citizens in a united country."<sup>288</sup> The memory of the war lives on in Nigeria, but unlike the South following the American Civil War, today the bitterness seems to have disappeared and all Nigerians appear to be committed to building one united Nigeria.

#### E. *Government Structures Under the Military*

Pursuant to Decree No. 1 of 1956, the legislative and executive provisions of the 1963 Constitution were suspended. However, the provisions establishing the judiciary remained operative.

The federal military government legislated by decrees, which, pursuant to Decree No. 28 of 1970, were superior to any other law including the 1963 Constitution. No court could inquire into the constitutionality of any decree.

In the states, all legislative powers were lodged in the governors.<sup>289</sup> Similar to the situation which prevailed in the North under the Lugard Constitution, the governor had no duty to consult his executive council or anyone else before promulgating an edict.

On the federal level, there existed a theoretical separation of powers. The legislative power resided in the Supreme Military Council. This council was established by Decree No. 1 of 1966 and consisted of the head of the federal military government and the heads of the various service branches. No civilian sat on the council.<sup>290</sup> The decree did not specifically enumerate the powers of the council, but it was clearly the supreme legislative organ of the country. The only legal requirement for a valid decree was that it be signed by the head of the federal military government.<sup>291</sup>

The executive authority resided in the head of the federal military government, and he could exercise his powers either directly or through persons designated by him.<sup>292</sup> Like the colonial governors, he presided over the Supreme Military Council and the Executive Council.

The Executive Council started out as a purely advisory body.<sup>293</sup> However, in 1975, the council was charged with the responsibility for determining and executing the general policies set forth by the Supreme Military Council.<sup>294</sup> Military personnel dominated the Executive Council, although there

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285. BALOGUN, *supra* note 240, at 121-22; DE ST. JORRE, *supra* note 248, at 385-87.

286. BALOGUN, *supra* note 240, at 121-122; DE ST. JORRE, *supra* note 248, at 385-87.

287. DE ST. JORRE, *supra* note 248, at 376.

288. Gowon's speech is reprinted in BALOGUN, *supra* note 240, at 110-112. For a fictionalized account of the amnesty see, E. IROH, *THE SIREN IN THE NIGHT* (1982).

289. Decree No. 1 (Constitutional Suspension and Modification) § 3(2) & (3) (1966).

290. *Id.* at § 8.

291. *Id.* at § 5(1).

292. *Id.* at § 7(1).

293. *Id.* at §§ 7(1) & 9(1).

294. Decree No. 32 (Constitution-Basic Provisions) § 10 (1975).

were a few civilians appointed to it. The executive councils of the states, which exercised similar functions, were largely composed of civilians.

A third council on the federal level after 1975 was the National Council of States.<sup>295</sup> The head of the federal military government presided over the National Council of States, which was composed of heads of various service branches and the governors of the states. This council mainly set forth policy guidelines on financial, economic, and social matters that affected the states.

The backbone of the government was the bureaucracy, which continued to function much as it did during the civilian regime. Each ministry was headed by a commissioner (formerly called ministers).<sup>296</sup>

The judiciary was left virtually unchanged by the coup. The chief justice was appointed and dismissed solely in the discretion of the head of the federal military government.<sup>297</sup> All other judges were appointed by the Supreme Military Council on the advice of a newly activated Advisory Judicial Committee.<sup>298</sup> The Supreme Court suffered a serious setback as a result of the promulgation of Decree No. 28 of 1970, but overall the judiciary seems to have operated on a reasonably independent basis during the military period.<sup>299</sup>

One of the most important contributions of the military to the governmental structure of Nigeria was in the area of local government.<sup>300</sup> In 1914, Lugard set up native authorities to carry on the functions of local government. This system remained in the North until the advent of military rule. In the South, the native authorities were scrapped in the 1950's for democratically elected local governments. The native authority system in the North operated with reasonable efficiency but was controlled by the traditional rulers and was criticized as undemocratic. In the South, the local governments did not function well because of their small sizes, the overlapping of function among different authorities, and the presence of corruption. In September 1976, the military government promulgated a number of edicts with the intent of reforming local government. These edicts created democratically elected local governmental councils with sufficient power over a large enough area to insure their efficiency. These reforms were codified in the 1979 Constitution.<sup>301</sup>

#### F. *Individual Rights*

Military rule is clearly not democratic. It is essentially authoritarian. Power flows from the top and not up from the people. By its very nature, a

295. *Id.* at §§ 6(4) & 9.

296. NWABUEZE, *supra* note 31, at 230-31.

297. Decree No. 5 (Constitution Amendment Decree) § 1(a) (1972).

298. Decree No. 1, § 11 (1966); Decree No. 5, § 1(a) (1972).

299. Ojo, *Public Law, the Military Government and the Supreme Court*, in Kasunmu, *supra* note 204, at 90; ACHIKE, *supra* note 49, at 180-85; see NWABUEZE, *supra* note 31, at 209-17.

300. See generally Oyediran & Gboyega, *Local Government and Administration*, in Oyediran, *supra* note 45, at 169-91.

301. CONST. FED. REP. NIG. § 7 (1979). Decisions in the courts have strictly interpreted the requirement of popularly elected local government councils and have invalidated attempts by states to alter their composition. See *e.g.*, Alhaji Sultan Prince Adeniji-Adele v. Lagos State, 3 Nig. Con. L. Rep. 698 (High Ct. Lagos 1982); Senator Victor Akan v. Attorney Gen., 3 Nig. Con. L. Rep. 881 (High Ct. Cross Rivers 1982); Governor of Kaduna State v. House of Assembly, 3 Nig. Con. L. Rep. 635 (High Ct. Kaduna 1982); Balogun v. Attorney Gen. of Lagos State, 2 Nig. Con. L. Rep. 589 (High Ct. Lagos 1982).

military regime rules by force and admits to no opposition.<sup>302</sup>

Theoretically no right was secure during military rule as the government provided that no court could declare a decree invalid because of its infringement upon a fundamental right.<sup>303</sup> Specific decrees ordered the arrest and detention of persons or forfeiture of their assets.<sup>304</sup> These decrees violated the fundamental right to a judicial hearing.<sup>305</sup>

The federal military government was scrupulously fair in religious matters and as a result Christian missionaries expanded their activities in the Northern Region where they had been banned by the colonial government and discouraged by northern politicians during the First Republic.<sup>306</sup>

One of the earliest measures of the military government was to lift the ban on newspapers imposed by many of the civilian governments during the First Republic and to make it a criminal offense for anyone to prevent or restrict the sale or distribution of newspapers.<sup>307</sup> However, by June 1966, the Supreme Military Council had promulgated Decree No. 44 which made it an offense for anyone to provoke a breach of the peace by a defamatory or offensive publication.<sup>308</sup>

Gowon himself in an interview specifically stated that Nigeria had a free press, but shortly after that interview, he promulgated Decree No. 17 of 1967 which gave the head of the military government power to prohibit the circulation of any newspaper he felt was detrimental to the interest of the federation or any state.<sup>309</sup>

Perhaps the most celebrated free press issue arose in the so-called Amakiri Affair.<sup>310</sup> A newspaper reporter was arrested by a governor and was beaten and had his head shaved with a dull knife. A high court awarded Amakiri a total of 10,000 naira for the beating, detention, and pain inflicted upon him.

In 1978, the military government announced its intention to create a news council to supervise and control news reporting. However, because of opposition from the press and public, the decree was never implemented.<sup>311</sup>

Decree No. 73 (Electoral) of 1977 set up procedures for voting and the registration of political parties in connection with the turnover of the government to civilians. The ban on political activities was finally lifted on September 21, 1978, and the populous was allowed to organize itself in preparation for the return to democratic rule.<sup>312</sup>

302. NWABUEZE, *supra* note 31, at 231-32. Following the 1983 coup, a member of the Supreme Court Military Council commented: "The present administration is military and we are not pretending to be running a democratic government." *Daily Times*, June 21, 1984, at 21, col. 7.

303. Decree No. 28 (Supremacy and Enforcement of Powers Decree) (1970).

304. *See e.g.*, Decree No. 3 (Detention of Persons Decree) (1966); Decree No. 4 (The Suppression of Disorder Decree) (1966); Decree No. 45 (The Forfeiture of Assets, etc. (Validation) Decree) (1968). For an outline of these edicts and decrees see, NWABUEZE, *supra* note 31, at 209-17.

305. *Lakanmi v. Attorney Gen.*(West), 1 Univ. Ife L. Rep. 201 (1971).

306. R. HICKEY, *A HISTORY OF THE CATHOLIC CHURCH IN NORTHERN NIGERIA*, 39-44 (1981).

307. Decree No. 2 (The Circulation of Newspapers Decree) (1966).

308. Decree No. 44 (The Defamatory and Offensive Publications Decree) (1966).

309. Decree No. 17 (Newspapers-Prohibition of Circulation Decree) (1967).

310. Jakande, *The Press and Military Rule*, in Oyediran, *supra* note 45, at 110-23.

311. *See O. ODETOLA, MILITARY REGIMES AND DEVELOPMENT A COMPARATIVE ANALYSIS IN AFRICAN SOCIETIES* 154 (1982).

312. Yahaya, *The Struggle for Power in Nigeria 1966-79*, in Oyediran, *supra* note 45, at 269.

### G. *An Assessment of Military Rule: 1966-1979*

Despite the fact that at least since the mid-1970's there had been popular agitation for a return to civilian rule, most Nigerians today seem to look back to the first military era as a golden age, and it is clearly this nostalgia which was responsible for the warm greeting given to the military when it assumed power following the December 31, 1983 coup.

The military government did have its positive aspects. Despite the many coups and attempted coups, at least following the Biafran War, the country experienced a period of relative stability and economic prosperity. The government worked, and it yielded at least the minimal services expected. Gowon's policies following the Biafran War tended to bring Nigerians together into one nation and to minimize tribal and regional differences. It was the military that created nineteen new states, something the British and the civilian politicians were either unwilling or unable to accomplish. Despite abuses, human rights were protected at least as well as they had been under the civilian regime. The military's reform of local government established democratic representation on that level and severely undercut powers formerly exercised by the traditional rulers. Reforms in the area of land ownership also had a permanent effect on the nation.<sup>313</sup> Perhaps the most important aspect of the military regime was that it did not view itself as a permanent government and eventually relinquished power to democratically elected officials.

However, looked at from the standpoint of representative government, military rule was a throw back to the colonial era where power emanated from above and rule was through non-elected governors and various advisory councils.<sup>314</sup> Popular sentiment was generally not allowed to intrude into the decisionmaking process, and on occasion, as when General Ironsi attempted to put the country under a unitary government, this had disastrous consequences.<sup>315</sup> An unpopular government could be replaced only by a successful coup.

Military rule also established a precedent for the intervention of the mili-

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313. Land Use Decree (1978), incorporated into CONST. FED. REP. NIG. § 274(5)(d) (1979). The decree simplified and unified the complicated forms of land ownership which formerly existed in Nigeria and allowed the government systematically to control the best use of land and prevent unjustified speculation and enrichment. All land was vested in the governors of the states in trust for the use and benefit of all Nigerians. The 1978 Decree abolished private freehold ownership of land, free of any government obligation to pay compensation. Thus a former individual owner now has only a right of occupancy on the land. The government can revoke this right of occupancy if the land is needed for a public purpose, but this revocation is subject to the payment of compensation. However, the 1978 Decree divested the Court of jurisdiction to inquire into the amount of compensation owed to occupiers of land upon its compulsory taking by the government. The vagueness of the act, together with the virtually unlimited powers of the government to appropriate and transfer land for any purpose and the prohibition against judicial inquiry into the amount of compensation owed to occupiers of land, CONST. FED. REP. NIG. § 47(2) (1979), leave considerable leeway for abuse—especially in a country where corruption and individual aggrandizement generally prevail. B. NWABUEZE, *THE PRESIDENTIAL CONSTITUTION OF NIGERIA* 523-24 (1982); *See generally*, *THE LAND USE ACT—REPORT OF A NATIONAL WORKSHOP* (J. OMOTOLA ed. 1982).

314. From a separation of powers standpoint there was a fusion of the executive and legislative functions. *See*, E. NORDLINGER, *SOLDIERS IN POLITICS: MILITARY COUPS AND GOVERNMENTS* 119 (1977).

315. *Id.* at 119. However, especially during the Muhammed and Obasanjo regimes, a large number of civilians did sit in the federal cabinet. ODETOLA, *supra* note 311, at 148.

tary in political affairs. Despite the fact that the military itself inserted a clause in the 1979 Constitution which outlawed military intervention,<sup>316</sup> that did not prevent certain military officers from overthrowing the civilian regime on December 31, 1983, because they deemed the regime to be corrupt and ineffective in dealing with the nation's economic ills. The lesson appears to be that once having intervened, the military will continue to be at least a gray eminence behind any government in the foreseeable future.<sup>317</sup>

Charges of corruption continued during the military era.<sup>318</sup> At most, one could say that because of the streamlining of government under the military, there were simply fewer pockets to line.

The Nigerian economy flourished during the 1970's, but this was due more to the international oil market rather than to any policies of the military itself.<sup>319</sup> In fact the large scale building projects started by the military, including the construction of a new capital city, and the emphasis on industrialization at the expense of agriculture laid the groundwork for the economic woes which were to plague and lead to the downfall of the Second Republic.

## V. THE SECOND REPUBLIC: 1979-83

### A. *Adopting the 1979 Constitution*

After Murtala Mohammed's successful coup in 1975, he promised to return the country to civilian rule in 1979.<sup>320</sup> In September 1975, a constitutional drafting committee, consisting of forty-nine members, was assembled. This committee sought the assistance of a number of knowledgeable individuals. The military government gave the committee free reign but did specify the following criteria to be met by the new constitution:

- 1) That political parties be established on truly national grounds and their number limited;
- 2) That an executive presidential system of government be established where the president and vice-president have clearly defined powers and are accountable to the people;
- 3) That an independent judiciary be guaranteed by such means as a Judicial Service Commission to aid in the selection of judges;
- 4) That the government have such corrective institutions as a Corrupt Practices Tribunal and a Public Complaints Bureau; and
- 5) That there be a limitation on the number of new states that could be created.<sup>321</sup>

The committee turned over a draft of the new constitution to the Supreme Military Council on September 24, 1976. A constituent assembly, consisting of 228 members drawn from the local government councils was then assem-

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316. See CONST. FED. REP. NIG. § 1(2) (1979).

317. Former President Azikewe, in a speech at the University of Lagos in 1972, advocated a combined military-civilian government to replace military rule at least for a period of five years. Underlying this recommendation was the realization that the military had become politicized and that this fact must be given practical recognition. Adekson, *Dilemma of Military Disengagement*, in Oyediran, *supra* note 45, at 231; NORDLINGER, *supra* note 314, at 207.

318. NORDLINGER, *supra* note 314, at 127; ODETOLA, *supra* note 311, at 32, 34.

319. NORDLINGER, *supra* note 314, at 199; ODETOLA, *supra* note 311, at 100.

320. The constitutional drafting process is described in Gboyega, *The Making of the Nigerian Constitution*, in Oyediran, *supra* note 45, at 235, 258; AKANDE, *supra* note 254; Read, *The New Constitution of Nigeria, 1979: "The Washington Model?"* 23 J. AFR. L. 131 (1979).

321. Oyediran, *supra* note 45, at 245-46.

bled to debate the draft. Public debates and discussions also took place throughout the country. Perhaps the topic which caused the greatest debate concerned the Sharia Court of Appeal. Many persons wanted a separate federal court, consisting of Muslim judges, to hear appeals from the state Sharia courts. Others objected to the proposal on grounds of separations of church and state and because the Islamic ban on women judges ran counter to the constitutional guarantee of sexual equality. The debate of course had serious underlying political implications. A compromise was finally reached where there would be a single federal court of appeal which would have jurisdiction to hear appeals from all state courts. When an appeal came from a state Sharia court, a panel would be constituted of not less than three appellate judges learned in Islamic law.<sup>322</sup>

The constitution was never submitted to the people for direct ratification.<sup>323</sup> The constitution itself withdrew from the courts any power to question the competency of the military to enact the new constitution or otherwise to question its legitimacy.<sup>324</sup>

The ban on political parties was lifted on September 21, 1978 and within weeks numerous political coalitions were formed. Under the Electoral Decree of 1977,<sup>325</sup> political parties had to register with the Federal Election Commission and file assurances that the party was truly national and did not discriminate on the basis of region, religion, ethnic origin, or sex. Five parties were finally accepted for official recognition, each headed by a politician prominent in the First Republic. The 1979 election was conducted peacefully. In order to insure that the president would have a broad backing, the 1979 Constitution required the president to receive at least twenty-five percent of the vote in at least two-thirds of the states.<sup>326</sup> Of the five candidates running for president, Shehu Shagari, the candidate of the National Party of Nigeria (NPN), received 5.7 million votes compared to the 4.9 million received by his closest opponent, Chief Awolowo.<sup>327</sup> But, while Shagari received more than a quarter of the votes cast in twelve of the nineteen states, he received only twenty percent of the vote cast in the thirteenth state.<sup>328</sup>

The Federal Elections Commission ruled that the constitution was satisfied if he received twenty-five percent of the vote in twelve and two-thirds of the states; therefore, because Shagari polled twenty five percent of two-thirds of the vote in the thirteenth state, he was the winner. This ruling was upheld by the Supreme Court.<sup>329</sup>

## B. *The Presidential System of Separation of Powers*

One of the main criticisms of the First Republic was the absence of a

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322. CONST. FED. REP. NIG. § 226(a) (1979).

323. Decree No. 25 (Enactment) (1978).

324. CONST. FED. REP. NIG. § 6(6)(d) (1979).

325. Decree No. 73 (1977).

326. CONST. FED. REP. NIG. § 126(2)(b) (1979).

327. NIGERIA ELECTS '83: A HABARI SPECIAL REPORT 7(1982) [hereinafter cited as NIGERIA ELECTS '83].

328. *Id.*

329. *Awolowo v. Shagari*, Judg. Sup. Ct. Nig. 62/1979 (Sept. 26, 1979). Extract published in *Cases, Supreme Court of Nigeria*, 13 J. AFR. L. 175, 177 (1979).

strong independent executive.<sup>330</sup> Based upon this experience, the military scrapped the idea of a parliamentary democracy and instead specified that the Second Republic would have a presidential system modeled along the lines of the United States Constitution.<sup>331</sup> The 1979 Constitution therefore vested the executive power in the president, to be exercised by him directly through his vice-president and his ministers.<sup>332</sup> The president was given a definite term of office of four years<sup>333</sup> and could only be elected twice to that office.<sup>334</sup>

The president or vice-president could be removed from office by impeachment.<sup>335</sup> Under this process, one-third of the general assembly could present the president of the Senate with a notice of specified allegations accusing the officer of gross misconduct as defined by section 132(11) of the constitution. If within fourteen days each house resolved that the matter should be investigated, a committee of seven persons who were not members of the public service, or the legislature, or a political party would be appointed by the president of the Senate, with the approval of the Senate, to investigate the charges. If the committee found the officer to be innocent, that ended the inquiry. If the committee found the officer to be guilty, he could be removed from office by two-thirds vote of each house. The Constitution further precluded judicial review of this process.<sup>336</sup> A similar provision was adopted for the removal of state governors, and two state officials were actually removed by impeachment during the four year period that the 1979 Constitution was in force for what would appear to be largely political reasons.<sup>337</sup>

The president had power to appoint ministers of the government, subject to confirmation by the Senate.<sup>338</sup> Consistent with the objective of promoting national unity, at least one minister had to be appointed from each state.<sup>339</sup> Although not specifically provided, the president had power to remove ministers. The constitution also established nine executive agencies, the members of which were appointed by the president and most required Senate approval.<sup>340</sup>

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330. See generally, NWABUEZE, EMERGENT STATES, *supra* note 46, at 55-59.

331. See *supra* note 321 and accompanying text.

332. CONST. FED. REP. NIG. § 5(1)(a) (1979).

333. *Id.* at § 127(2).

334. *Id.* at § 128(1)(b).

335. *Id.* at § 132. The president could also be removed by the Executive Council of the Federation if a medical panel certified that he was "suffering from such infirmity of body or mind as renders him permanently incapable of discharging the functions of his office. . . ." *Id.* at § 133.

336. *Id.* at § 132(10).

337. *Id.* at § 170. The Governor of Kaduna State was impeached on a number of allegations that he acted in excess of powers conferred upon him by the constitution and the State Assembly. The Deputy Governor of Kano State was impeached for his failure to carry out the functions of his office. Both officials belonged to political parties which lacked strength in the legislature. See I. IBINEDION, IMPEACHMENT UNDER THE NIGERIAN CONSTITUTION (1983). An attempt to review the process of impeachment by the Governor of Kaduna State was rejected by the courts. *Balarabe Musa v. Anta Hamza*, 3 Nig. Con. L. Rep. 229 (Kaduna Fed. Ct. App 1982). In a separate suit filed by the deputy governor the court ruled that the term of his predecessor had ended upon the legislature's final vote of his impeachment and that plaintiff was required to take the oath of office as governor of the state. *Abba Musa Rime v. Alhaji Abubakar Dan Musa*, 3 Nig. Con. L. Rep. 469 (Kaduna High Ct. 1982).

338. CONST. FED. REP. NIG. § 135(1) & (2) (1979). Difficulties developed under this provision because the president refused and the constitution did not specifically require him to turn over to the Senate the portfolio of nominees so that their qualifications could be ascertained. AKANDE, *supra* note 253, at §§ 135 & 136.

339. CONST. FED. REP. NIG. § 135(3) (1979).

340. *Id.* at §§ 140 & 141. The question was raised on *Adesanya v. President of the Republic*, 2 Nig. Con. L. Rep. 358 (1981), of whether a senator could challenge the appointment and subsequent

The members held office for five years.<sup>341</sup>

As in the United States, the National Assembly was bicameral.<sup>342</sup> The Senate consisted of five senators from each state.<sup>343</sup> The House had 450 members elected from single member districts apportioned on the basis of population.<sup>344</sup> Moreover, as in previous constitutions, legislative powers were contained in separate lists appended to the constitution. A separate provision also provided that no treaty could have the force of law except to the extent it had been implemented by the National Assembly.<sup>345</sup> Separate provisions also

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confirmation of the Chairman of the Federal Electoral Commission because the appointee was also the chief judge of Bendel State. The Supreme Court denied the suit on the ground that the senator lacked standing because he suffered no injury to his own civil rights as he had been allowed to debate freely and exercise his vote on the confirmation proceedings. In the course of his discussion on standing, Chief Justice Fatayi-Williams made the following observation:

I take significant cognisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumor-mongering is the pastime of the market place and the construction sites. To deny and member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of Law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process.

The framers of our 1979 Constitution had all these factors in mind by providing for the many checks and balances which appear therein. In fact, a close scrutiny of its very detailed provisions will convince anyone that reliance on the decisions, whether British, Canadian, Australian, or American, given in a different social and political context, will only lead to restrictive rules of *locus standi* which, in the interest of the need for total compliance with the provisions of our Constitution, I find it difficult to accept or countenance. As a matter of fact, what can be discerned from the cases to which we are referred and, indeed, to other cases, is this. The Canadian Supreme Court now takes a liberal view of *locus standi*, so do the Australian High Court and the Court of Appeal in England presided over by Lord Denning. The House of Lords, on the other hand, takes a more restrictive view. Of course, England does not have a written Constitution.

In view of the scantiness of the language of the American Constitution when compared with ours, and the great opportunities thereby offered to use the American courts for expounding the intentions of the founding fathers through its interpretation one is not surprised that the American courts were so inundated with legal proceedings that access to court had to be restricted through the use of rules, formulated by the courts themselves, as to the *locus standi* of a plaintiff.

In the Nigerian context, it is better to allow a party to go to courts and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the *free-for-all in the media* as to which law is constitutional and which law is not! In any case, our courts have inherent powers to deal with vexatious litigants or frivolous claims. To re-echo the words of Learned Hand, of we are to keep our democracy, there must be one commandment—thou shall not ration justice.

2 Nig. Con. L. Rep. at 373.

341. CONST. FED. REP. NIG. § 142(c) (1979).

342. *Id.* at § 4(1) (1979). In *Bendel State v. The Federation* 3 Nig. Con. L. Rep. 1 (1982), the House and Senate passed separate revenue allocation bills. Pursuant to § 55 of the constitution, a joint committee was convened to resolve the differences. The committee reached a compromise and, without resubmitting the matter to the National Assembly, submitted the bill directly to the president, who signed it into law. Several states challenged the law in that it was never passed by both Houses of the National Assembly as required by § 54 of the constitution. The Supreme Court upheld the standing of the states to sue on the ground that they had a stake as to their legal share of the revenue and rejected the political question objection on the ground that the courts were the proper agency to see that the provisions of the constitution were obeyed. The Court held that no bill could become law until adopted by both houses of the assembly. *Cf.* *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

343. CONST. FED. REP. NIG. § 44 (1979).

344. *Id.* at §§ 45 & 66.

345. *Id.* at § 12.

established the civil service,<sup>346</sup> the police,<sup>347</sup> and the armed services.<sup>348</sup>

New to the 1979 Constitution was a Code of Conduct for public officers.<sup>349</sup> The code specifically prohibited certain conflicts of interest, gifts, and loans, foreign bank accounts, and other abuses. Officers were required to make periodic declarations of their assets, and a Code of Conduct Bureau and Tribunal were established to implement the Code. An officer found guilty by the tribunal could be required to vacate his office, and the tribunal could disqualify him from office for up to ten years and seize any asset he had improperly acquired.

The independence of the judiciary was assured through appointments on the recommendation of a Federal Judicial Service Commission.<sup>350</sup> Judges held office until they were sixty-five years old<sup>351</sup> and could be removed only for misconduct on the advice of the commission.<sup>352</sup> The jurisdiction of the courts to declare acts of the legislature unconstitutional was protected by section 4(8), which prevented the legislature from ousting the courts of their jurisdiction.<sup>353</sup>

### C. *The Federal Structure*

The 1979 Constitution provided the governing structure for the states as well as for the federal government. State legislative powers were vested in a unicameral House of Assembly.<sup>354</sup> The constitution also incorporated the local government reforms instituted by the military in 1976.<sup>355</sup> In doing so, it specified certain minimum functions for local government councils<sup>356</sup> and obliged the states to further provide for their establishment, structure, composition, finance, and functions.<sup>357</sup>

Reflecting the military regime's approach to federalism, the 1979 Constitution strongly favored the federal government over the states. The list of exclusive federal legislative powers was increased to sixty-six items compared to the forty-three items listed in the 1963 Constitution. The federal government was also given a list of some thirty items on which it could act concurrently with the states. Similar to the necessary and proper clause in the United States Constitution,<sup>358</sup> the Nigerian listing of powers included the power to legislate on "any matter incidental or supplementary to any matter

346. *Id.* at §§ 140 & 156.

347. *Id.* at § 194.

348. *Id.* at § 197.

349. *Id.* at sched. 5.

350. *Id.* at § 211(2) (Sup. Ct.), § 218(2) (Fed. Ct. App.), § 229(1) (Fed. High Ct.), § 235(2) (State High Ct.).

351. *Id.* at § 255.

352. *Id.* at § 256. Although judicial officers are specifically covered by the Code of Conduct (sched. 5, pt. II 5), the specificity of the provisions concerning removal of judges under § 256 would seem to preclude their removal by the Code of Conduct Tribunal.

353. CONST. FED. REP. NIG. § 4(8) (1979). *See supra* note 266.

354. CONST. FED. REP. NIG. § 4(6).

355. *See supra* note 301.

356. CONST. FED. REP. NIG. § 7 & sched. 4.

357. *Id.* at § 7(1). *See also* Balogun v. Attorney Gen. of Lagos State, 2 Nig. Con. L. Rep. 589 (Ikeja High Ct. 1981).

358. U.S. CONST. art. 1, § 8, cl. 18. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

mentioned elsewhere in this list."<sup>359</sup> Residual matters not limited or prohibited by the constitution were left to the states.<sup>360</sup> However, in addition to the powers enumerated in section four and the legislative lists, section 1(1) allowed the National Assembly to "make laws for the federation or any part thereof with respect to the maintenance and securing public safety and public order and providing, maintaining and securing of such supplies and services as may be designated by the National Assembly as essential supplies and services." Pursuant to this grant it is hard to imagine any subject upon which the federal government was not competent to legislate.<sup>361</sup>

One of the major innovations of the 1979 Constitution was in the area of revenue allocation.<sup>362</sup> Under the First Republic, there was a disparity in the revenues available to the different regions based upon their different taxable resources. The military shifted the collections of revenue to the federal government with a comparable increase in the federal role in providing such basic services as education. The states depended largely on handouts from the federal government.

Under the 1979 Constitution, only the federal government could levy customs and excise duties, stamp duties, and income, profits, and capital gains taxes.<sup>363</sup> Section 150 provided that taxes on capital gains, incomes or profits of persons other than companies, and documents or transactions subject to stamp duties were to be distributed among the states on the basis of derivation. All other revenues, including the substantial revenues from mineral rents and mining royalties received by the federal government, would be paid into a "Federation Account."<sup>364</sup> The funds in this account would be distributed to the federal, state, and local governments as prescribed by the National Assembly.<sup>365</sup> States could impose other taxes and provide for their collection by local government councils.<sup>366</sup>

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359. CONST. FED. REP. NIG. sched. 2, pt. I, item 67. In *Balogun*, 2 Nig. Con. L. Rep. at 649, the court noted:

Speaking generally the Legislative power given to each Legislative body under the Constitution is plenary in its quality. The purpose of enumeration is to name a subject for the purpose of assigning it to that power. The names and/or descriptions employed are usually the briefest kind. It is true that certain powers do involve a description amounting almost to a formal definition. Nonetheless what the Constitution does in section 4 is by apt words of designation or general description, mark out the outlines of powers granted to the National Assembly or to the House of Assembly of a State, but it does not undertake, with the precision and detail of a Code of Laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Furthermore a Legislative power with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the Legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental, and this is so whether or not the Constitution expressly so provides.

360. *Balogun*, 2 Nig. Con. L. Rep. at 650.

361. *But cf.* *Ogun State v. The Federation*, 3 Nig. Con. L. Rep. 166 (1982), where the Supreme Court held that neither the National Assembly nor the president had the constitutional power to regulate or interfere with a state governor's exercise of his executive functions by imposing on him a duty or obligation to enforce laws passed by the National Assembly. The law in the United States would appear to be the opposite. See *FERC v. Mississippi*, 456 U.S. 742 (1982).

362. See generally Oyediran & Olagunju, *The Military and the Politics of Revenue Allocation*, in Oyediran, *supra* note 45, at 192-211; Read, *supra* note 320, at 131, 140-41, 154-55.

363. CONST. FED. REP. NIG. sched. 2, pt. I, items 15, 57, 58 (1979).

364. *Id.* at § 149(1).

365. *Id.* at § 149(2).

366. *Id.* at sched. 2, pt. II, item D.

### D. *Individual Rights*

The 1979 Constitution readopted, and in some cases made more specific, the fundamental rights first incorporated into the Nigerian Constitution in 1959.<sup>367</sup> The constitution also protected the right of any person who alleged that any of the provisions of the fundamental rights chapter 'has been, is being or is likely to be contravened' to seek judicial review.<sup>368</sup> However, like earlier constitutions, the 1979 Constitution also permitted the legislature to contravene certain rights when "reasonably justifiable in a democratic society" and during a "period of emergency."<sup>369</sup>

New to the constitution was chapter II, outlining the fundamental objectives and directive principles of state policy.<sup>370</sup> This chapter was derived from the Indian Constitution.<sup>371</sup> The chapter outlined various political,<sup>372</sup> economic,<sup>373</sup> and social<sup>374</sup> objectives. The state was obliged among other things to ensure equal and adequate educational opportunities at all levels,<sup>375</sup> to combat racism on the international level,<sup>376</sup> and to protect and enhance Nigerian culture.<sup>377</sup> The chapter also provided that the press and mass media should be free to uphold these objectives and to "uphold the responsibility and accountability of the Government to the people."<sup>378</sup> The national ethic was described as "Discipline, Self-reliance and Patriotism."<sup>379</sup> The fundamental objectives were not justifiable, and no court could declare any law invalid because it did not conform to chapter II.<sup>380</sup> Furthermore, no provision of chapter II nor legislation implementing chapter II could override or inhibit any of the fundamental rights provided in chapter IV.<sup>381</sup>

Most of the major human rights abuses in the Second Republic seem to have occurred as a result of attempts by the majority political parties to stifle their political opposition. In a country where riches and honors flow to the party in power, the temptation to retain power by crushing one's opponents become overwhelming. Fortunately, in many of these instances the judiciary seems to have become more comfortable with its role as a check between the government and the rights of the individual.

367. *Id.* at ch. IV.

368. *Id.* at § 42(1).

369. *Id.* at § 41(1) & (2). The chapter also allowed restrictions to be placed on fundamental rights in times of emergency. *Id.* at § 41(2).

370. *Id.* at ch. II. See generally, Okere, *Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution*, 32 INT'L & COMP. L.Q. 214 (1983).

371. Archbishop Okogie v. Attorney Gen. of Lagos State, 2 Nig. Con. L. Rep. 337, 350 (Fed. Ct. App. Lagos 1981). See INDIA CONST. pt. IV (1949); D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 132-40 (8th ed. 1980).

372. CONST. FED. REP. NIG. § 15 (1979). The objective was to create a sense of national unity and loyalty.

373. *Id.* at § 16. A balance was sought between state ownership and a free economy.

374. *Id.* at § 17. The social order was founded on freedom, equality, and justice.

375. *Id.* at § 18.

376. *Id.* at § 19.

377. *Id.* at § 20.

378. *Id.* at § 21.

379. *Id.* at § 22.

380. *Id.* at § 6(6)(C). However, chapter II could be helpful as a guide to the courts when interpreting the policy objectives of legislative enactments and other provisions of the constitution. See Okogie, 2 Nig. Con. L. Rep. at 350.

381. Okogie, 2 Nig. Con. L. Rep. at 351.

Perhaps the most celebrated case to arise during the Second Republic involved an attempt by the federal government to deport an opposition party member in Borno State.<sup>382</sup> Shugaba Abduvahaman Darman, a member of the Great Nigeria People's Party (GNPP), was the majority leader in the Borno State House of Assembly. Darman had been born in Nigeria in 1931 and possessed a Nigerian passport. His mother had also been born in Nigeria, but his father had been born in Chad. At 6:00 A.M. on January 24, 1980, immigration officials came to his home and took him away. He was transported across the border into Chad, a country with which he had no personal connections. He later crossed the border to the Cameroons and eventually found his way back to Nigeria. Darman sued the president and various ministers in the High Court of Borno alleging a conspiracy to deny him his civil rights. The court ruled that he was a citizen of Nigeria and could not be expelled from the country and that the deportation order was void and violated his fundamental rights and personal liberty, privacy and freedom to move freely in Nigeria. The court ordered that his passport be returned to him. Finding that the deportation was planned by the NPN to get rid of a political rival, the court awarded Darman 350,000 naira in compensatory and exemplary damages (approximately \$275,000). The appellate court later reduced the award to 50,000 naira (approximately \$38,000).

The courts also upheld the claim of a newsman that he was privileged from testifying before a Senate investigating committee.<sup>383</sup> A reporter wrote an editorial on corruption and influence peddling in the legislature, and a committee was convened by the Senate to investigate the matter. The High Court of Lagos noted:

It is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification or disclosure? . . . .

Is there any doubt in anybody's mind, that the 49 wisemen who formulated the Constitution of the Country were conscious of the unsavory consequences attendant on any attempt to deafen the public by preventing or hindering the free flow of information, news and/or ideas from them. This perhaps explains the reason why the provision of Section 36(1) gives freedom of expression subject only to the laws of the Country as to libel, slander, injurious falsehood, etc. Even where such a matter arises it would be a matter for a court of law to determine and not the legislature.<sup>384</sup>

In another freedom of speech matter, Chief Arthur Nwankwo was convicted of sedition<sup>385</sup> for publishing a book critical of the governor of Anambra State. The trial court sentenced him to twelve months imprisonment with hard labor, banned the publication of the book and warned persons who had purchased it to surrender their copies at the nearest police station. A unani-

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382. Shugaba Abdulrahman Darman v. Minister of Internal Affairs, 2 Nig. Con. L. Rep. 459 (Maiguerri High Ct. 1981), *aff'd* 3 Nig. Con. L. Rep. 915 (Kaduna Fed. Ct. App. 1982).

383. Momoh v. Senate of the Nat'l Assembly, 1 Nig. Con. L. Rep. 105 (Lagos High Ct. 1981). In Olushola Oyegbemi v. Attorney Gen., 3 Nig. Con. L. Rep. 895 (Ikeja High Ct. 1981), the court ruled that the police cannot compel the press to disclose the source of its information.

384. 1 Nig. Con. L. Rep. 113 (1981). *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972).

385. *See supra* note 216.

mous court of appeals reversed the conviction. The justices were of the view that the law of sedition, which was passed during the colonial era and used in 1961 to convict Chike Obi,<sup>386</sup> derogated the freedom of speech guaranteed in the 1979 Constitution.<sup>387</sup>

The 1979 Constitution specifically provided that no person, other than the state or federal government or any other person authorized by the president, could own, establish or operate a television or radio station.<sup>388</sup> As a result of this arrangement, it often seemed that the National Television Authority operated primarily as a propoganda organ of the NPN and that the state networks promulgated the views of the party in control of the state. A television newscaster in Anambra State walked out in the middle of a newscast. He announced to the audience, "I am sorry. I cannot with my conscience continue to read this news full of falsehood. I hereby resign my appointment with immediate effect."<sup>389</sup> Confusion reigned for five minutes, until someone from the station took over and apologized to the viewers.<sup>390</sup>

Perhaps the action of the government which caused the most suffering, was the quit order issued on January 17, 1983, requiring all illegal aliens staying and working in Nigeria to leave the country in a fortnight.<sup>391</sup> The order affected about three million citizens of neighboring African states who had come illegally into Nigeria because of better employment opportunities. These persons were generally forced to leave their possessions behind and for a period the highways and roads were clogged with persons forced to return to their home countries. While there was criticism of the order in the international community, there was no question that the action was legal under both Nigerian and international law.<sup>392</sup>

On March 21, 1980, the government of Lagos State issued a circular letter to the effect that because the state provided free education at all levels and in order to provide equal educational opportunities to all children, all private primary and secondary schools would be abolished as of September 1, 1980. A suit challenging this action was filed in the high court by the Catholic Archbishop, several proprietors, and the parents of children attending private schools.<sup>393</sup> Citing the United States' cases of *Pierce v. Society of Sisters*<sup>394</sup> and *Meyer v. Nebraska*<sup>395</sup> the court found that the action would be

an infringement of the fundamental right of the parents to restrict them to a

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386. See *supra* note 219.

387. Chief Arthur Nwankwo v. The State, FCA/E/111/83 (Enugu Fed. Ct. App. July 27, 1983) reprinted in A. NWANKWO, JUSTICE 160 (1983).

388. CONST. FED. REP. NIG. § 36(2) (1979).

389. Chi. Tribune, July 31, 1983, at 6, col. 3.

390. Id. at col. 4.

391. N.Y. Times, Feb. 3, 1983, at A1, col. 3.

392. R. CHHANGANI, ILLEGAL ALIENS UNDER NIGERIAN LAW 59-86 (1983); Note, *The Nigerian Expulsion Order*, 21 COLUM. J. TRANSNAT'L L. 641 (1983). The problem of dealing with illegal aliens has continued to plague Nigeria, especially as a result of the deteriorating economic and political conditions in such neighboring countries as Chad and Ghana. The current military government repatriated some 12,000 illegal aliens between January 1, 1984 and April 29, 1984. The New Nigerian, Apr. 29, 1984, at 1, col. 1. In June, some 1,000 illegal aliens were arrested in Maidurguri. The Guardian, June 26, 1984, at 3, col. 1.

393. Archbishop Okogie v. Attorney Gen. Lagos State, 1 Nig. Con. L. Rep. 218, *aff'd* 2 Nig. Con. L. Rep. 337 (Lagos Fed. Ct. App. 1981).

394. 268 U.S. 510 (1925).

395. 262 U.S. 390 (1923).

particular type of school to which to send their children for the dissemination of ideas, and also it [would] be an infringement of the fundamental right of the children to confine them to particular institutions to which they receive such ideas.<sup>396</sup>

The court also held it violated the right of the proprietors to engage in economic activities outside the major sectors of the economy.<sup>397</sup> The court noted that chapter IV of the constitution "should be broadly and generously interpreted in order to give full recognition and effect to those fundamental rights and freedoms,"<sup>398</sup> and that

while it is conceded that section 36(3) of the constitution permits the imposition of reasonable restrictions on the exercise of the rights to freedom of expression, it is difficult to conceive of a reasonable restriction that would be justifiable in a democratic society in refusing to allow private primary schools to operate in Lagos State.<sup>399</sup>

The plaintiffs did not challenge the right of the states to regulate and supervise private educational institutions, and the High Court of Owerri subsequently held that a private university could be required to comply with state laws setting forth nondiscriminatory criteria for the establishment of universities.<sup>400</sup>

In 1980, the market women of Lagos State filed an action against the Board of Customs and Excises and its director challenging the action of customs officials who, aided by police officers and soldiers, entered their shops, carried away their goods, and, when the women protested, beat them with horsewhips, and used tear gas on them.<sup>401</sup> The court issued a declaratory judgment that the officials lacked probable cause for the seizures and violated the plaintiffs rights to be treated with respect and dignity and not to be subject to any inhuman or degrading punishment. The court held, however, that the doctrine of sovereign immunity prevented the women from collecting damages from the board and that the head of a department was not liable in damages for the acts of his subordinates. The court struck the claim for damages so that the plaintiffs could pursue that remedy directly against those responsible for the violation.

### E. *The Failure of the Second Republic*

On paper there is no reason why the Second Republic should have failed. The Constitution provided for a strong executive, who was required to have more than mere regional support. The Constitution also provided sufficient checks and balances to insure that no branch became all powerful. Political parties were expected to rise above mere regional interests, and at least the NPN made a determined effort to insure that representatives of all areas of the country held top party posts.<sup>402</sup> The Code of Conduct for public officials was aimed at preventing the corruption and influence peddling that had tradition-

396. 1 Nig. Con. L. Rep. at 232.

397. *Id.*

398. *Id.* at 230.

399. *Id.* at 231.

400. Attorney Gen. Imo State v. Dr. Basil Nnanna Ukaegbu, 2 Nig. Con. L. Rep. 568 (Owerri High Ct. 1981).

401. Alhaja Abibatu Mogaji v. Board of Customs & Excise, 3 Nig. Con. L. Rep. 552 (Lagos High Ct. 1981).

402. NIGERIA ELECTS '83, *supra* note 327, at 30; Yahaya, *The Struggle for Power in Nigeria 1966-79*, in Oyediran, *supra* note 45, at 273-74.

ally plagued Nigerian government. Nonetheless, unprecedented corruption characterized the Second Republic<sup>403</sup> and the government seemed either unwilling or unable to deal with it or with the country's deteriorating economic situation.<sup>404</sup>

The Second Republic was frequently criticized as being too costly.<sup>405</sup> The 1983 elections alone were claimed to have cost the country more than two billion naira. Nonetheless, the high cost of government could have been lessened. The states and federal government built homes and provided cars for legislators and ministers. The numbers of ministers and advisors was enormous. Even the size of the legislature could have been reduced. Each state had five senators, compared to two in the United States, and the House consisted of 450 members, compared to 435 in the United States.

The failures of the Second Republic can more properly be attributed to the national psyche rather than to the structure of government itself.<sup>406</sup> The winner-take-all attitude, the tendency to put private interests ahead of the national interest, the refusal to compromise and to respect the loyal opposition, all impeded the ability of the government to do its job.<sup>407</sup> It could also be noted that many of the major presidential candidates and party leaders were the same tired, old politicians who had contributed to the failure of the First Republic. These problems were reflected in the 1983 elections. At least 49 persons were killed in Ondo and Oyo states as a result of rioting over sus-

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403. For instance, the *New Nigerian* reported on the return of pilgrims from Mecca to the Kano Airport and arrangements made to clear them through customs. The report concluded that: "As a result of the shady business, it was gathered that the customs department did not realize a single kobo as customs duty although men and women of the department went home with swollen pockets." *New Nigerian*, Sept. 21, 1983, at 21, col. 2. On September 27, the *New Nigerian* reported that:

Two airport correspondents were beaten upon on Thursday by customs men and the Nigerian Aviation officials at the Hajj terminal of the Murtala Muhammed airport. . . . The customs men reportedly told the journalists that they had come to publish their 'usual nonsense' pointing out that the reporters had no business at the Hajj terminal because they were not part of the 'money-making syndicate' at the airport. *New Nigerian*, Sept. 27, 1983, at 28, col. 3.

After the military coup, the military announced that it had found some 15 million naira in "liquid cash" in the homes of eight former politicians and office holders. Some 3.4 million naira was found in the home of the former governor of Kano State, and more than 1 million naira was found in the home of the former governor of Imo State. *Daily Times*, Jan. 21, 1984, at 1, col. 5.

404. The country continued to expend money to build the new capital city at Abuja. The total cost was estimated at 9.27 billion naira. *How Abuja Measures Up*, W. AFR., 1066 (May 21, 1984). The capital is still years from completion.

405. *The High Cost of Democracy*, W. AFR., 257 (Feb. 6, 1984).

406. One member of the Constituent Assembly, when debating the 1979 Constitution, purportedly observed: "The real problem in our country is the sheer contempt for democracy and our inability to accept democratic decisions. It is this intolerance that mostly constitutes the bane of our society, and consequently strains Nigerian unity." Gboyega, *The Making of the Nigerian Constitution*, in Oyediran, *supra* note 45, at 258.

407. C. ACHEBE, *THE TROUBLE WITH NIGERIA* (1983).

Efforts were made by Shagari to build up a "government of national unity." Shortly after first assuming office, Shagari called for a "working accord" with all the registered parties. Only one party responded, the NNP, and Shagari appointed some NNP persons to important ministries, but the relationship eventually soured. NIGERIA ELECTS '83, *supra* note 327, at 9-12. In 1981, Shagari pardoned former head of state, General Yakubu Gowon, who was exiled in England, and in 1982, he pardoned ex-Biafran leader Odumegwu Ojukwu, who was in exile in the Ivory Coast. He also awarded his most bitter critic, Awolowo, the nation's highest award of "Guard Commander of the Federal Republic" at the country's twenty-second anniversary celebration. Whether these moves were to foster integration or were simply politically inspired to stifle opposition, they evinced rare statesmanship by African standards.

pendent vote fraud,<sup>408</sup> and numerous suits were filed in the courts contesting the validity of the elections.<sup>409</sup> The elections left a bad taste in the mouths of many Nigerians. Most importantly, the precedent for military intervention had been established in 1966, and the simple expedient of staging a coup and setting up a strong man to solve the nation's problems seems to have had more appeal than trying to work out Nigeria's problems through more cumbersome democratic procedures.<sup>410</sup>

## VI. THE SECOND COMING OF THE MILITARY

### A. *The Structure of Government*

The military assumed control of the Nigerian government in a bloodless coup on December 31, 1983. In his first broadcast to the nation on January 2, 1984, General Buhari announced the suspension of the 1979 Constitution.<sup>411</sup> Subsequently, on February 9, 1984, the military published Decree No. 1, made retroactive to December 31, 1983, which specified those provisions of the 1979 Constitution which were suspended or modified and those which would have continuing effect.<sup>412</sup> The decree established a government along the lines of the first military government.<sup>413</sup> The federal government was given general powers "to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever."<sup>414</sup> The federal executive power was vested in the Head of the Federal Military Government, who was to exercise power in consultation with the Supreme Military Council.<sup>415</sup>

408. Chi. Tribune, Aug. 19, 1983, at 8, col. 3.

409. See e.g., Daily Times, Sept. 24, 1983, at 1, col. 1, & 32, cols. 1 & 4; New Nigerian, Sept. 27, 1983, at 1, col. 2; New Nigerian, Oct. 1, 1983, at 32, col. 3.

410. In an address to the World Press on January 5, 1984, the new head of state, General Buhari, stated:

The Nigerian Armed forces fulfilled their promise to end thirteen years of military rule in 1979 when they voluntarily handed over the reigns of power to the civilians. The essentials of good government as seen by the people of the country were contained in the provisions of the suspended 1979 Constitution, particularly Chapter II thereof, which relates to the Fundamental Objectives and Directives of State Policy.

However, the Nigerian people watched hopelessly while over the succeeding 4 year period of the first term of the defunct administration most of the Governments of the Federation failed to provide even the minimum of good government.

When the Executive branch of the Government failed, the people expected relief from the legislative branch which was invested with the power within the checks and balances in the Constitution to insure that the Executive provided good Government. The legislators, however, were in no position to check the drift of the executive since where they were not actual collaborators, they were preoccupied with other things of no benefit to the people whom they represented.

Thus in the midst of their intolerable suffering and the general deterioration in the standard of living which worsened as time rolled by, the people could only look forward to a change in their circumstances by the installation through the mechanism of the ballot box of a Government with a more purposeful and responsible leadership.

The conduct of the 1983 elections dashed that hope since as I said before on another occasion, that election could be anything but free and fair.

Daily Times, Jan. 7, 1983, at 12, col. 2.

411. The Nigerian Standard, Jan. 2, 1984, at 2, col. 1.

412. Decree No. 1— Constitution (Suspension and Modification) Decree (1984).

413. See *supra* text pt. IV E.

414. Decree No. 1, § 2(1) (1984).

415. *Id.* at § 6(1).

Decrees were made effective when signed by the Head of the Military Government, and edicts, when signed by the state military governors.<sup>416</sup> The validity of decrees or edicts could not be questioned in any court of law.<sup>417</sup> In addition to the Supreme Military Council, the Decree created a National Council of States and a Federal Executive Council.<sup>418</sup> Each state had an Executive Council.<sup>419</sup> The powers of these councils were similar to their counterparts in the First Military Regime.<sup>420</sup> The Supreme Military Council appointed the governors for each of the nineteen states, created eighteen federal ministers, and limited the number of states ministries that could be created to nine.<sup>421</sup>

Unlike the First Military Regime,<sup>422</sup> the Military personnel who took over in 1984 never once referred to the new government as being transitional, nor did they promise an eventual return to a democratic government. Given the express prohibition in the 1979 Constitution against coups,<sup>423</sup> it would be difficult for anyone to argue that the military derived its power from that document.<sup>424</sup> The military clearly assumed power through revolutionary means and thus appeared to be free to organize the country along such lines as it could get away with without prompting a counter-coup.

### B. *Individual Rights*

Decree No. 1 of 1984 left in place the Fundamental Objectives and Directive Principles of States Policy contained in Chapter II and most of the provisions of the Fundamental Rights contained in Chapter IV of the 1979 Constitution. Nonetheless, these rights were not secure in the event the military decided to modify or eliminate them in any particular decree or edict.<sup>425</sup>

Decree No. 2, promulgated on February 9, 1984, granted the military power to detain for indefinite periods of time persons thought to be concerned in acts prejudicial to state security.<sup>426</sup> No suit could be brought against any person acting pursuant to that decree.

Decree No. 3 set up special military tribunals to investigate and try the former politicians who corruptly enriched themselves or by abuse of office contributed to the economic adversity of the Federal Republic.<sup>427</sup> Persons found guilty could be imprisoned for a term of not less than 21 years.<sup>428</sup> Tribunals consisted of five persons: the chairman was to be a member of the

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416. *Id.* at §§ 3(1) &(2).

417. *Id.* at § 5. This was reaffirmed in Decree No. 13 (Supremacy and Enforcement of Powers) § 1(2)(b)(i) (1984).

418. Decree No. 1 at § 7 (1984).

419. *Id.* at § 8.

420. *See supra* text pt. IV E.

421. Daily Times, Jan. 5, 1984, at 1, col. 1.

422. *See supra* text pt. IV B.

423. CONST. FED. REP. NIG. § 1(2) (1979). Section 1(2) provides that "Nigeria shall not be governed, nor shall any person or persons take control of the Government. . . except in accordance with the provisions of this Constitution."

424. *Cf., Lakanmi*, 1 Univ. Ife L. Rep. 201. *See supra* notes 263-64 and accompanying text.

425. Decree No. 1 § 5 (1984).

426. Decree No.2—State Security (Detention of Persons) Decree (1984). In mid-February, the chief of staff announced that some 280 persons were in detention throughout the country. 280 *Detained*, W. AFR 411 (Feb. 20, 1984). In mid-January the number had been 462. Daily Times, Jan. 21, 1984, at 1, col. 5.

427. Decree No. 3—Recovery of Public Property (Special Military Tribunals) Decree (1984).

428. *Id.* at § 11(1)(a).

armed forces, three members were to be officers of the armed forces, and the fifth member was to be a judge who could assist the tribunal in determining questions of law.<sup>429</sup> The burden of persuasion was placed upon the defendant,<sup>430</sup> and no appeal was allowed.<sup>431</sup> The military later announced that the proceedings of the tribunals would be conducted *in camera*.<sup>432</sup> These procedures were criticized for providing less protection to accused persons than was accorded to those accused by the military following the 1966 coup.<sup>433</sup> A suit filed in the high court by three former governors attacking the decree was dismissed for lack of jurisdiction.<sup>434</sup> In a historic move, the Nigerian Bar Association voted to boycott the tribunals due to their military composition and secrecy.<sup>435</sup>

Other decrees established special tribunals to try persons accused of committing robberies,<sup>436</sup> currency violations,<sup>437</sup> and various other crimes such as drug smuggling and illegally importing or exporting certain commodities.<sup>438</sup>

In a speech on January 5, 1984, General Buhari appealed to the press to report the activities of the federal military government with accuracy. He noted that "we cannot stop you from publishing, but please anything you publish about us let it be accurate."<sup>439</sup> However, on January 21, Chief of Staff Brigadier Tunde Idiagbon, warned that the press was not living up to its duty to disseminate correct information and to give positive guidance to the nation.<sup>440</sup> At a press conference in February, General Buhari lashed out at the press and said that he was going to "tamper" with the press freedoms enshrined in the 1979 Constitution. He referred with anger to the articles in the press which claimed that 2.8 million naira were missing in the oil ministry while he headed that agency in the late 1970's.<sup>441</sup>

429. *Id.* at § 5(2).

430. *Id.* at § 6(3). An accused was entitled to counsel of his choice for his defense. *Id.* at § 7(3).

431. *Id.* at § 12(6).

432. See Daily Times, May 16, 1984, at 2, col. 3; *The Trials Begin*, W. AFR. 1056 (May 21, 1984).

433. The Sunday Concord, Apr. 8, 1984, at 3, col. 1; National Concord, Apr. 13, 1984, at 5, col. 1.

434. New Nigerian, May 29, 1984, at 1, col. 5.

435. The Nigerian Standard, May 7, 1984, at 12, col. 2; *The Trials Begin*, W. AFR. 1056 (May 21, 1984).

436. Decree No. 5—Robbery and Firearms (Special Provisions) Decree (1984). A person convicted of robbery received a sentence of not less than 21 years. A person who committed an armed robbery could be sentenced to death.

437. Decree No. 7—Exchange Control (Antis-Sabotage) Decree (1984).

438. Decree No. 20 (Miscellaneous Offenses)(1984). A 59 year old businesswoman from New Jersey was detained and held in prison some five months before the decree was promulgated. She was later charged on grounds of illegally exporting petroleum products. Under the charges she could be brought to trial before military tribunal, which had the power to impose a penalty of death. N.Y. Times, Dec. 2, 1984, at 6, col. 1. It was subsequently reported that the woman's family in New York received phone calls from a Nigerian major offering her release if \$1.5 million was deposited in a London bank. N.Y. Times, Jan. 28, 1985, at 5, col. 1. Finally on February 27, 1985, she was acquitted by the military tribunal and allowed to return to the United States. N.Y. Times, Feb. 28, 1984, at 4, col. 3.

439. New Nigerian, Jan. 5, 1984, at 1, col. 2.

440. Daily Times, Jan. 21, 1984, at 1, col. 3.

441. Nat'l Concord, Feb. 16, 1984, at 1, col. 1. Articles had also appeared in various newspapers which disclosed the value of Buhari's residence and other financial interests.

On February 2, 1984, the High Court in Lagos had banned the novel, W. SOYINKA, *THE MAN DIED* (1973). The book was found to have libeled a commissioner in the former military government. Nat'l Concord, Feb. 2, 1984, at 9, col. 5.

The ax fell on March 29, 1984 with the promulgation of Decree No. 4.<sup>442</sup> The decree punished any person who published "any message, rumour, statement, or report which is false in any material particular or which brings or is calculated to bring the Federal Military Government or the Government of a State or a public officer to ridicule or disrepute."<sup>443</sup> The burden of proving a statement to be true was placed on the defendant.<sup>444</sup> Offenses were to be tried by a special tribunal, the chairman of which would be a judge and the three other members were to be officers of the armed forces not below the rank of a major.<sup>445</sup> A person convicted under the decree could be imprisoned for up to four years and a corporation could be fined not less than 10,000 naira and the equipment used to commit the offense could be forfeited to the federal military government.<sup>446</sup> Judicial review was prohibited.<sup>447</sup>

On June 2, 1984, the *Guardian*, a newspaper published in Lagos, and two of its reporters were summoned to appear before the tribunal established pursuant to Decree No. 4. The reporters were alleged to have published false information about certain embassy assignments about to be made by the federal military government.<sup>448</sup> The reporters were detained and the tribunal ruled that it had no power to release them on bail.<sup>449</sup> Counsel for the defense argued that the decree required that the statement had to be both untrue *and* bring the government or officer to ridicule and disrepute. But the tribunal ruled that the decree created two separate offenses. A person could be punished either if he published an untrue statement *or* if he published a true statement which brought the government into ridicule or disrepute.<sup>450</sup> The paper and reporters were later convicted on one of the three charges alleged against them. The *Guardian* had reported that eleven missions were to be closed, that eight military chiefs had been tipped as ambassadors, and that Haruna was to replace Hannanuya as envoy to the United Kingdom. The tribunal found only the third statement to be inaccurate, but it sentenced the reporters to one year each in prison and fined the *Guardian* 50,000 naira.<sup>451</sup> Attempts to get the courts to declare Decree No. 4 invalid failed.<sup>452</sup> The convictions were widely denounced in the press.<sup>453</sup> Since the convictions, other journalists have been similarly detained by the military.<sup>454</sup>

442. Decree No. 4—Public Officers (Protection Against False Accusation) Decree (1984).

443. *Id.* at § 1.

444. *Id.* at § 3(1).

445. *Id.* at § 3(4).

446. *Id.* at § 8(1) & (3).

447. *Id.* at § 8(4).

448. *The Guardian*, June 6, 1984, at 2, col. 3.

449. *Id.* at 1, col. 3. The chairman of the tribunal also asked the press to please not refer to the tribunal as a "Press Gag Tribunal."

450. *The Guardian*, June 16, 1984, at 1, col. 1.

451. *New Nigerian*, July 5, 1984, at 1, col. 2; *Tribunal Convicts Journalists*, W. AFR. 1415 (July 9, 1984).

452. *The Nigerian Standard*, June 11, 1984, at 1, col. 2; *The Guardian*, July 28, 1984, at 16, col. 1.

453. *See e.g.*, *Nat'l Concord*, July 9, 1984, at 1, col. 5.

454. *See N.Y. Times*, Dec. 21, 1984, at 3, col. 1. On June 25, 1984, the *Daily Times* reported the arrest of one of its photographers who photographed a military band that was playing at a privately owned university in Imo state. *Daily Times*, June 25, 1984, at 32, col. 4. Two days later the paper reported that the photographer had been set free. *Daily Times*, June 27, 1984, at 32, col. 1.

In late June, 1984, the information minister hinted that the government might establish a press council consisting of press and government representatives to encourage responsible journalism. *The Guardian*, June 21, 1984, at 9, col. 1.

These early measures taken by the military do not bode well for individual liberties in Nigeria.

### C. *The Future of Military Rule in Nigeria*

The end of military rule in Nigeria does not appear to be in sight. The future of the present military regime largely depends upon how it handles the nation's severe economic problems. At least in the early months the new regime acted cautiously.<sup>455</sup> On the surface, it appeared to represent the same conservative, moneyed interests that had been represented by the ruling NPN party in the Second Republic. The regime resisted pressure from Western bankers and the International Monetary Fund to devalue the naira. At the same time, it continued to cultivate good relations with the Western democracies.<sup>456</sup>

In April 1984, the federal military government announced that all currency would have to be exchanged for new currency. The change was to catch those persons who had stacked away huge amounts of currency to avoid detection by government investigators tracking down stolen money. The exchange was to be accomplished in a twelve day period. The exchange was bungled. Whether intentionally or not, the government failed to print sufficient amounts of new currency and for at least a month large segments of the economy were at a standstill while people stood in line all day at banks that limited withdrawals to as little as fifty naira.<sup>457</sup>

In a book published on the eve of the coup, Nigerian novelist Chinua Achebe commented that "Indiscipline pervades our life so completely today that one may be justified in calling it the condition *par excellence* of contemporary Nigerian society."<sup>458</sup> Consequently, one of the first acts of the federal military government was to declare a "War Against Indiscipline." The war was fought through newspaper articles, posters, and WAI buttons. Whether the war can change the national character is yet to be seen, but Nigerians did start to queue up at airports and in offices, something not typical up to that time in Nigeria.

Reports continue to circulate about further coups and attempted coups by more radical officers impatient with the progress being made by the government. Any benefits from the December 31, 1983 coup have not yet leaked down to the poorer members of Nigerian society. This has prompted some persons to speculate how genuine the coup really was. Nonetheless, from a legal standpoint, the break with the Second Republic was clean cut, and the government is once again in the hands of men who are not bound by formal legal restrictions in making their way.

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455. See *Buhari's 100 Hard Days*, NEW AFR., Apr. 1984, at 48-49.

456. Nigeria's relations with Great Britain were somewhat strained as a result of the so-called Dikko affair. Dikko had been the former minister of transport, and he escaped to England after the coup. The military accused Dikko of absconding with billions of naira. An abortive attempt to kidnap Dikko from England, and bring him back to Nigeria drugged and packed in a crate was foiled by British police. The Federal Military Government denied participation in the kidnapping, but the event chilled British-Nigerian relations for a time. *The Dikko Affair*, AFR. NOW, Aug. 1984, at 11-17.

457. *Times Int'l*, May 28, 1984, at 11, col. 1.

458. ACHEBE, *supra* note 407, at 27.

## VIII. CONCLUSION

Is there a future for democracy in Nigeria?

Shortly after the coup, a former governor during the Murtala/Obasanjo era advised the federal military government to draw up a timetable for a handover of power to civilians. He argued that "if the military becomes a permanent feature in Nigeria, it would be preparing the ground for continuing cycle of periodic chaos and bloodshed."<sup>459</sup> There is no immediate indication that the military will take that advice.

In an interview in January 1984, the former head of state, retired General Obasanjo expressed disappointment with the failure of the Second Republic, which he had hoped to be permanent and lasting. He acknowledged that "we all probably have to accept that the military will be a major factor to reckon with in the political life of this country." He added:

I have come to the conclusion, painfully though, that democracy as it is understood in the West is not what we can toy with now. It is something we cannot afford.

I believe we have to look at our society and devise for ourselves a system that has everybody chipping in to participate in one form or another.<sup>460</sup>

How that participation can be achieved is uncertain. Former President Azikiwe's suggestion in 1972 for a combined military-civilian government has little historical precedent.<sup>461</sup>

Nigeria does have many problems: caring for a rapidly expanding population; bridging the deep divisions in its society; adjusting to a technological world when large segments of its population are still illiterate; and providing such basic services as electricity and an efficient postal and communications system. But Nigerians should not become disillusioned. Nigerian independence was achieved only twenty-five years ago. The country has survived a bloody civil war and numerous changes of government. Nigerians must continue to work to establish a society where the basic worth and dignity of each individual is respected, where men and women are free to enjoy the fundamental rights of free speech, freedom of religion, and freedom to choose how they will live their lives and raise their families. A society where at least the basic human needs of food, shelter, clothing, and medical care are available to all. It is hard to imagine that these ends can ultimately be achieved through strong-man rule. Indeed, in this age when governmental policies touch virtually every aspect of the individual's life, justice demands that the people have some input into decisionmaking. Of all the countries in black Africa, Nigeria has the best prospects for a bright future.<sup>462</sup> These prospects will be enhanced if some way can be found to allow all Nigerians the opportunity to participate in the political life of that nation through the democratic process.<sup>463</sup>

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459. The Democrat Weekly, Feb. 19, 1984, at 2, col. 3.

460. The Guardian, Jan. 19, 1984, at 12, col. 1.

461. See *supra* note 283. Professor Larry Diamond had recently made a similar proposal. He recommends that in a future civilian government the Code of Conduct Bureau, the Federal and State Electoral Commissions, the Police Service Commissions, the Judicial Service Commissions, and the National Population Commission be removed from the direct or indirect control of elected officials and entrusted to the supervision of the military. Diamond, *Nigeria in Search for Democracy*, 62 FOREIGN AFF. 905 (1984).

462. D. LAMB, *THE AFRICANS* (1982).

463. An editorial in the National Concord observed:

## POSTSCRIPT

On August 27, 1985, a military coup overthrew Head of State General Mohammed Buhari. The new Head of State, General Ibrahim Babangida, the former army chief of staff, had participated in the 1983 coup which overthrew the Shagari government and installed General Buhari, so initial indications did not evidence a radical shift in leadership or in policy. The major reason given for the coup was the failure of Buhari to correct Nigeria's ailing economy.<sup>464</sup> In the first official announcement of the coup, General Joshua Dongonyaro accused Buhari of being "too rigid and uncompromising in his attitude to issues of national significance."<sup>465</sup> General Dongonyaro also announced the release of journalists who had been arrested because the government wished to "uphold human rights."<sup>466</sup> This latter statement on protecting human rights should, however, be considered with General Buhari's similar statement when he assumed office that he would respect the basic freedoms of all citizens.<sup>467</sup> On July 25, 1985, General Buhari had announced that there could be no talk of elections, whether under civilian or military administration, until the country was on a strong economic footing.<sup>468</sup> No deviation from this course has been indicated.

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[T]he real tragedy of the Second Republic politics did not lie primarily in the corruption and inefficiency of the government process, gross and intolerable as they were. Rather it lay in the fact that Nigerians lost, in the collapse of the Second Republic, another chance to realize their considerable potentials as a freedom loving people.

Nigerians are democratic in a very basic sense. If given a choice, they would instinctively opt for democracy. Indeed, so strong is their preference for the democratic norm that even under military rule, Nigerians would want an active say in how they are governed; to criticize their government anyway they want. . . .

The economic disaster now staring us in the face is not nearly as dangerous as the alarming rate at which knowledgeable and supposedly responsible Nigerians tend to sneer at the mere mention of democracy these days.

Despite, or even because of, the unfortunate events of their recent history, Nigerians ought to reaffirm their faith in democracy. Indeed, if they ever needed to keep faith with it, there could be no better time to do so than now.

Democracy is its own justification. In the sense that it represents the universal striving for the greater control over the conditions of man's existence, democracy is a goal towards which human societies struggle, consciously, directly or indirectly. Tears there may be none for the Second Republic. But the death of democracy, even paper democracy as ours undoubtedly was, deserves to be mourned.

Nat'l Concord, Jan. 18, 1984, at 3, col. 1.

464. N.Y Times, Aug. 28, 1985, at 1, col. 4.

465. Chi. Tribune, Aug. 28, 1985, at 8, col. 1.

466. *Id.*

467. Daily Times, Jan. 7, 1984, at 24, col. 3.

468. New Nigerian, Jul. 25, 1985, at 1, col. 3