

CHAPTER 4

Regional Case Study: Nigeria

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4.1 Introduction

In the post-colonial period, constitutional democracies emerged as the form of government in Africa. As seen from chapter three, this system is based on the metaphorical social contract theory of state formation in which legitimate state authority is derived from the consent of the governed. The theory (as discussed in chapter three) posits that man in his natural state decides to voluntarily and wilfully give up his rights in the natural state to a common ‘authority’. This is based on an implied agreement by the people within a specific location to form a nation with social, legal and political structures, and to maintain a social order. Against the background of the earlier discussion on the scope and critical analyses of this theory, the application of the social contract theory in Nigeria will be explored in this chapter. This will be done in relation to the ‘consent’ or otherwise of Nigerians to the system of constitutional democracy existing in the country. How this ‘consent’ plays out in the behaviour of the people and the state to the rule of law within the nation, is the question at the core of the following discussion.

The next section will start with a brief historical background of Nigeria, in particular the system of government and the rule of law under colonial rule and under military regimes, with special reference to the different constitutions that Nigeria has had. This is followed by section three which will discuss the 1999 Constitution that is currently in force, against the backdrop of the social contract and Kelsenian theories. Section four will seek to examine the structure of the Nigerian legal system and the place of the rule of law within that structure. The following two sections (five and six) will investigate the impact of global and internal realities on the rule of law and democracy in Nigeria, followed by the conclusion in section seven.

4.2 Historical Background of Nigeria

Nigeria is easily characterised as the ‘most-populous’ country on the African continent. It is a country with a history of political and social instability. It is a country that is fractured and polarised along ethnic, religious and political lines.

This gave rise to a civil war in 1967, when the Igbo ethnic group made an unsuccessful attempt at secession.¹ Ethnic and religious solidarities have since solidified and continued, with the incessant outbreak of conflict on these grounds in certain areas of the country, resulting in tensions being felt all over the country.²

Nigeria is situated on the west coast of Africa, on the shores of the Gulf of Guinea. It lies between the parallels of 4° and 14° north, and is thus entirely within the tropics.³ It is bounded on the south by the sea, on the west and north by the Republics of Benin and Niger respectively,⁴ and on the east by the Republics of Cameroon and Chad. Nigeria attained independence on the 1st of October 1960, having been formerly colonised by the British.⁵ Various historic events and outside influences contributed to shape Nigerian history. Interaction with the colonial powers is an example of such an event which had a profound influence on the shaping of Africa as a whole. This is no less so in the case of Nigeria. An understanding of these influences is essential to gaining full understanding of Nigerian peoples, politics and society.

Naturally, the history of the Nigerian peoples predates that of colonial rule and presents a fragmented picture, due to the various traditions and cultures indigenous to the country. There are three regionally dominant groups in Nigeria; the Hausa's in the north, the Yoruba's in the west and the Igbo's in the east. Other groups include the Fulani, Kanuri (both in the northern parts), the Ibibio, Edo, Tiv and Nupe.⁶ These and all of the over 250 ethnic groups fall into the three dominant groups mentioned.

As indicated in chapter two of this thesis, indigenous African societies were categorised into two main types of societies: the centralised and non-centralised

¹ The civil war, also referred to as the Biafra Civil War of 1967, came about when the predominantly Igbo dominated Eastern part of Nigeria attempted to secede, and declared itself the 'Federal Republic of Biafra'.

² It is worthy to note that many times, these solidarities are capitalised on by the political class for political gains. The riots and wave of killings that continue to break out in Jos, Plateau state, are no longer regarded as purely religious conflicts.

³ Burns A (1978) *History of Nigeria* 16.

⁴ These are former French territories which became independent in 1960. The Republic of Benin was formerly called Dahomey.

⁵ Burns (1978) 16.

⁶ Falola T *et al* (1989) *History of Nigeria: Nigeria before 1840 AD* 17.

societies. This was also the case in Nigeria. By 1800 AD, centralised societies had developed in different parts of the region known as Nigeria.⁷ To the north were the great Islamic kingdoms of Kanem-Borno, Kano, and Katsina. Others were the Igala, Nupe, and Ebira kingdoms, amongst others.⁸ To the west and south were the kingdoms of Ife, Oyo and Benin, amongst others.⁹ These centralised societies had varying degrees of development and political organisation.

There were also the non-centralised societies in Nigeria. These were unified and they had relatively restricted social-political structures with which they ordered their lives. They include groups such as the Igbo in the east, and the Isoko and Urhobo groups in the south.¹⁰ These societies and peoples continued to exist separately and independently until they were grouped together to form the country of Nigeria by order of the colonial British government.

As stated earlier, a number of influences have worked over the years to shape Nigeria and its peoples; and the impact of these are still being felt today. For the purpose of examining the rule of law in Nigeria, the following merit special attention:

- a) The Spread of Islam
- b) The Slave Trade
- c) Colonial Rule

- a) The spread of Islam through Africa had a great influence on Nigeria as we know it today. Islam spread to the northern territory of Nigeria around 1800 after the Berlin West Conference, and trickled down to the south west. The creation of the Sokoto caliphate in Holy Jihad¹¹ and its consolidation in the nineteenth century also worked greatly to extend

⁷ See, generally, chapters 4 and 5 of Falola (1989).

⁸ Falola (1989) 37.

⁹ Falola, (1989) 57.

¹⁰ Falola (1989) 85.

¹¹ The Sokoto Caliphate is a loose confederation of emirates (small kingdoms in northern Nigeria) that recognise the historical leadership of Usman Dan Fodio, as the 'commander of the faithful'. It was founded in the 1800's through holy war (Jihad) and wielded great power in sub-Saharan Africa prior to the European colonisation. It still exists in Nigeria at present, and still carries a lot of power, though not as much as it did in times prior to colonisation.

Islam within Nigeria, especially northern Nigeria.¹² Courts administering Islamic law were created in the north as Islamic law became the governing law in that region; however Islam did not make as much inroads in other parts of Nigeria, especially in the west or southern parts. These areas experienced a sharper influence of British missionaries during colonial rule.¹³ Northern and southern regions of Nigeria have historically had their differences. This is partly due to the fact that they are in fact different nations who were forced to live together by the British act of amalgamation in 1914, and partly due to the fact that the forces that influenced them were different. Ecologically, the difference is in the fact that the northern states are savannah, whilst the southern states are mangrove.¹⁴

- b) A second important factor that had a profound influence on Nigeria was the slave trade across both the Sahara Desert and the Atlantic Ocean.¹⁵ Called the transatlantic slave trade, it was reputed to have been started by the Portuguese around 1471. By 1472, Portuguese vessels had made inroads to the Bight of Benin, where they found safe anchorages between Lagos and the Cameroons.¹⁶ The Portuguese established a monopoly of trade with the West African cities along their route, until the early sixteenth century when the Dutch took over both the trade and the Portuguese trading stations on the coast.¹⁷ Around the mid-sixteenth century, in 1553, French and particularly British traders emerged and took over the trade.¹⁸ Britain eventually became the dominant slave trader in the eighteenth century.¹⁹

¹² Federal Research Division, Library of Congress Country Studies: *Nigeria*, available at <http://memory.loc.gov/frd/cs/ngtoc.html#top> (accessed in May 2008).

¹³ Library of Congress, *ibid.*

¹⁴ Library of Congress, *ibid.*

¹⁵ Library of Congress, *ibid.*

¹⁶ Burns (1978) 66.

¹⁷ The Dutch captured the Portuguese fort at Elmina, Gold Coast in 1637 which ultimately led to the Portuguese surrendering all their property in the Gold Coast to the Dutch.

¹⁸ Burns (1978) 67.

¹⁹ Library of Congress; generally Burns (1978) 73 -77.

Slave trade accounted for the migration of about 3.5 million people from Nigeria to the Americas, between 1650s and 1860s.²⁰ A steady stream of slaves flowed north across the Sahara for a millennium, ending only at the beginning of the twentieth century. Slave trade was not limited to non-African destinations, but was equally widespread within Nigeria, and caused distortions in the social framework of the country. It has been said, for example, that the Sokoto Caliphate exceeded any other modern nation, except perhaps the United States, in the number of slaves it had then.²¹ Slave owning was common amongst the Igbo, Yoruba, and many other ethnic groups also (living in what would later become known as Nigeria), whereby the chiefs and rulers of those communities, and even the wealthier members took on slaves for themselves and their households. It should be noted here that the ultimate aim of any form of slave trade (whether internal or external) was to provide slave labour for farms, plantations, households and whatever other form of labour that was required.

Slave trading was likewise common amongst local communities and ethnic groups. Villages and communities went to war very often with their neighbouring villages, hoping to take the people of the other village as slaves upon victory. This interesting point, namely that slave trade existed on the West African coast before the first European arrived there, has also been noted by Burns.²² He however notes that slave trade expanded

‘owing to the enormous demand caused by the establishment of plantations in the New World (Americas), and the greater facilities provided by fire-arms for the slave-raiding chiefs. The trade increased by leaps and bounds under European management’.²³

²⁰ Library of Congress.

²¹ Banwo A ‘Slavery, Commerce and Production in the Sokoto Caliphate of West Africa’ (2008) 51(1) *ASR* 140.

²² Burns (1978) 71.

²³ *ibid.*

The great amount of cruelty and indignity that accompanied the trade gave rise to various pressure groups in Europe, agitating for the abolishment of slave trade.²⁴ These efforts paid off, when in 1802, the Danish Government declared slave trade illegal. This was closely followed by the British Government in 1807, and other European Governments.²⁵ This abolition also extended to the colonies of these countries. The immediate impact of the abolition was not felt in West Africa, as merchants devised other illicit ways of continuing slave trade for almost another century.²⁶ The island of Lagos (known referred to as Lagos Island, within the larger Lagos state) specifically, became a booming slave port. In a bid to stop the trade at the source, the British government, in a campaign to substitute slave trade with trade in other commodities, became more and more involved in the affairs of the interior of the region of Lagos Island. Eventually, Lagos was annexed by the British in 1861 (thus began what is referred to as the colonisation of Nigeria). By the end of the 19th century, Britain began an aggressive military expansion in the region, with the result being that a protectorate was declared over northern Nigeria in 1900.²⁷

- c) The third occurrence that has influenced and continues to influence Nigeria is colonial rule. As indicated above, Nigeria was under colonial rule of the British during late 19th century and early 20th century. The occupation of Nigeria by the British was achieved gradually and resulted in the British exercising control over most of the region known as Nigeria today. Colonialism itself brought into the country a third system of law in addition to the already existing systems of native law and customs, and Islam. This third system is known as the common law, together with its system of administration of justice. Legal pluralism as found in Nigeria was further compounded by the methods adopted by the colonial

²⁴ At the forefront was the Society for the Abolition of the Slave Trade, formed in 1787.

²⁵ Burns (1978) 77; the British Act of 1807 prohibited any slaves being carried in a British ship or landed in a British colony, as from 1 March 1808.

²⁶ The thinking at this time was that if the demand for slaves was suppressed, the trade would stop. However, this proved to be wrong, and it was realised that slave trade would illicitly continue until it was attacked at the source.

²⁷ Geographic Map, *History of Nigeria*, available at <http://www.iss.co.za/af/profiles/Nigeria/Politics.html> (accessed on 28 May 2008).

administration. These methods that will be discussed below, had to do with the parallel court systems allowed at the lower levels (inferior courts) and the dominant courts of common law adopted at the higher levels (superior courts).²⁸ In administering Nigeria, the colonial administrators had two separate dependencies; northern and southern Nigeria, which were referred to as protectorates. As stated above, the northern and southern protectorates were merged into a single territory in 1914.²⁹

The Nigerian colonial era was a relatively brief period of about six decades in average, but the change it unleashed on the country and the continent in general, was so extensive that the full impact is still being felt in present times. The consequential friction that resulted between ways introduced by colonial rule and the old, indigenous way of life continues to reverberate throughout the country.

Trade in African products boomed under colonialism and led to distorted and unsustainable economic growth (which has since collapsed). In Nigeria, trade was in cocoa products and palm oil, amongst others. Another important area of impact is the imposition of ‘foreign’ laws as discussed in chapter two. These laws did not reflect the values, beliefs and thinking of the indigenous people, and they were imposed because they were felt to be of a superior nature, to the detriment of existing laws within the communities, which were regarded as primitive by the settlers.³⁰

4.2.1 System of government under colonial rule

The advent of British interest in this region now known as Nigeria resulted in the proclamation of British protectorates. Changes were introduced into existing structures, in an effort to secure control over the area. Nigeria, like many other African countries, is a creation of European rule, having been so named after the

²⁸ Oba AA, ‘The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction’ (2004) 52 *ALJ* 859–900 at 861.

²⁹ Geographic Map.

³⁰ Library Congress.

river Niger by British settlers. The boundaries were arbitrarily mapped out at the Berlin West conference of 1885. Nigeria as a country is a collection of over 250 very distinct and independent ethnic groups of widely varying cultures, traditions and modes of political organisation.

The modern history of Nigeria dates from the completion of the British conquest³¹ in 1903 and the amalgamation of northern and southern Nigeria into the Colony and Protectorates of Nigeria in 1914.³² As a country, 'Nigeria' came into existence in 1914, when the northern and southern protectorates of Nigeria were merged by the British administration.³³ Before 1900, there existed three separate independent territories (all under British control) in the country.³⁴ These were the Niger Coast Protectorate (created in 1891), the Colony of Lagos (ceded to Britain in 1861), and the Territory of the Royal Niger Company (the equivalent of northern Nigeria). These were all ruled by different officials.³⁵ An important point to note about the Royal Niger Company is that it was a trading company chartered by the British government in 1886, and granted broad concessionary rights to carry out trade within the territory covered by the Niger Coast Protectorate.³⁶

In 1906, preceding the amalgamation of the northern and southern protectorates of Nigeria, the Colony and Protectorate of Lagos was fused with the Colony and Protectorate of Southern Nigeria, and known as the Colony and Protectorate of Southern Nigeria. This was later merged with the colony and protectorate of Northern Nigeria. It is necessary to note that whilst the 1914 amalgamation of

³¹ British jurisdiction over the Nigerian territories originally emanated mainly from treaties of cession by the various chiefs and heads of the different kingdoms and societies. Of course, as indicated in the historical chapter, many of the chiefs probably did not have full knowledge of the import and implications of the documents they had agreed to with the Europeans.

³² Nwaubani E 'Constitution-Making and The Nigerian Identity, 1914 – 1960' in Oyebadé A (ed) (2002) *The Transformation of Nigeria: Essays in Honour of Toyin Falola* 75-76. This amalgamation was by the British government, and Lord Frederick Lugard was thereafter appointed the Governor-General of Nigeria.

³³ By Order in Council dated November 1913 which came into force in January 1914. This merger was purely to further the administrative and economic interests of the British. There was the need to build a railway line from the north through to the coastal areas in the south, in order to ease the transportation of goods they traded in, in addition, the south was relatively richer than the north, and amalgamation made it easier to use the resources from the south to develop the whole country.

³⁴ Falola T et al (1991) *History of Nigeria 3: Nigeria in the twentieth century* 4.

³⁵ Falola (1991) 5.

³⁶ *Ibid.*

these protectorates was for administrative and economic reasons,³⁷ it did not result in the unification of the Nigerian peoples, as the socio-political particularism of Southern and Northern Nigeria was maintained.³⁸ Two groups of provinces were created out of the region Nigeria; the northern and southern group of provinces. These were run separately, and the differences and peculiarities of the peoples were preserved.³⁹ There was thus no attempt to unify the peoples under a Nigerian nation. This could be seen as the genesis of the ethnic and regional solidarities that exists till date in Nigeria. The author, Falola, remarks, however, that even though the amalgamation might not have been well effected, this does not justify the failure of the Nigerian leaders and peoples on their own to build a united nation.⁴⁰

This structure of separation of the regions (provinces) continued under successive Governor-Generals, and became entrenched without any attempt at unifying the people. Regionalism became the system in practice, and was introduced in the 1947 Constitution. The colonial government introduced a federal structure later in 1954, based on three regions: eastern, western and northern. It is said that the idea behind this was to reconcile the regional and religious tensions that were mounting between the different regional, ethnic and religious divides.⁴¹ Federalism as a system of governance is often championed in ethnically diverse countries in the hope that it would foster greater political participation and reduce inequality amongst diverse populations.⁴² This view was also shared by those involved in the negotiations for Nigeria's independence. One of such people was Chief Obafemi Awolowo, who is quoted as saying in the early 1940's:

‘[F]rom our study of the constitutional evolution of all the countries of the world, two things stand out quite clearly and prominently. First, in any country where there are divergences of language and of nationality,

³⁷ Oyebade (2002) 76.

³⁸ See Chapter 9 of Tamuno T (1972) *The Evolution of the Nigerian State: The Southern Phase, 1898 – 1914*. He gives a more wide-ranging critique.

³⁹ *Ibid.*

⁴⁰ Falola (1991) 9.

⁴¹ Geographic Map.

⁴² International Crisis Group Africa Report No 119, dated 25th October 2006, *Nigeria's Faltering Federal Experiment*, available at http://www.chr.up.ac.za/indigenous/documents/Nigeria/Report/Nigerias_faltering_federal_experiment.pdf (accessed on 20 June 2009).

particularly of language, a unitary constitution is always a source of bitterness and hostility on the part of linguistic or national minority groups. On the other hand, as soon as a federal constitution is introduced in which each linguistic or national group is recognised and accorded regional autonomy, any bitterness and hostility against the constitutional arrangements as such disappear ...⁴³

The task of addressing conflicting demands for ethnic/regional self-government and central government by the various political groups compelled the British in 1954 to introduce a federal structure. A federal government with substantial regional autonomy was introduced, with specific powers being allotted to the federal government. These powers included the police force, defence, banking, custom duties and many others. Powers were also allotted to the regions, including healthcare, agriculture, education and economic development.⁴⁴ The Federation of Nigeria achieved independence on 1st October 1960 with Dr Nnamdi Azikiwe appointed as the Governor-General (succeeding Sir James Robertson).⁴⁵

Even after the attainment of independence, ethnic and regional rivalries continued to threaten the unity of the federation. It has been said that factionalism and the desire for autonomy within the system is what inspired the formation of various political groupings and political alliances.⁴⁶ At the time the federation of Nigeria became self-governing in 1954, the leaders of the call for independence were stalwarts from the different regions, who had distinguished themselves in the pan-African struggle. Amongst such were Dr. Nnamdi Azikiwe and Herbert Macaulay of the National Council for Nigeria and Cameroons (NCNC), a party dominated by those from the eastern region (the Igbos), Obafemi Awolowo of the western based Action Group (AG)(the Yorubas), and Sirs Ahmadu Bello and Abubakar Tafawa Balewa of the Northern Peoples Congress (NPC) (the

⁴³ Obafemi Awolowo *Thoughts on Nigerian Constitution*, quoted by Sagay Itse 'Nigeria, Federalism, the Constitution and Resource Control' in Ikein AA *et al* (ed) (2008) *Oil, Democracy and The Promise of True Federalism in Nigeria* 357; Sagay also quotes Sir Ahmadu Bello, then Premier of the northern region, as also supporting this view in the 1953 debate on the motion for independence.

⁴⁴ See the 1960 Constitution of the Federal Republic of Nigeria.

⁴⁵ Burns (1978) 261.

⁴⁶ *Ibid.*

Hausa's).⁴⁷ These were visionary leaders who knew what they wanted and fought for it. They had put the interest of the nation before theirs. Unfortunately, since independence in 1960, Nigeria has gone through a period of defective leadership, and has had rulers instead, who have repeatedly tinkered with the federal structure to suit their own motives. The resultant effect of these actions is that it has promoted ethnic and regional interests rather than national interests.⁴⁸

The ethnic and regional contentions were not helped by the fact that the initial government of the Federation, headed by Sir Tafawa Balewa,⁴⁹ was unable to achieve much in the area of unification. Citizens felt allegiance to and identified with their separate and immediate ethnic groups rather than to the country. Different instances of conflicts as a result of these sentiments led to feelings of alienation, and the perception that some ethnic groups were being marginalised, whilst others were reaping the dividends of freedom more than others. Feelings of alienation in many instances led to factionalism within the parties or regions, due to the fact that people within the regions were sometimes seen to be in cahoots with those from outside the ethnic group or belonging to other ethnic groups.⁵⁰ All of these, coupled with concerns at the growing economic disparities in the Nigerian society and the then already visible signs of corruption in public life, led to a general strike in 1964, and the consequential coup and instability that besieged the country.⁵¹

4.2.2 Developments relating to Nigeria's constitutional system

As already stated above, the main bequest of the British was not only the carving out or creation of a state called Nigeria, but also the common law and its system

⁴⁷ Geographic Map.

⁴⁸ Crisis Group Report No 119.

⁴⁹ The Prime Minister of Nigeria in 1960 and Head of Government.

⁵⁰ Conflicts in the early 1960s' within the AG (Action Group) party attest to this. After the exclusion of the AG party from power at the federal level in 1959, an attempt at re-aligning the party gave rise to great conflict and disorder, which led to a six month state of emergency being imposed on the West. Also, the Tiv in Benue, Plateau state, who were aggrieved that their demands for autonomy since 1960 had been repeatedly denied, attacked members of the NPC in 1994, assaulting them and destroying their offices and property. This insurgency was quickly curbed by the federal army.

⁵¹ Geographic Map.

of governance. When the British government introduced federalism and a constitutional government as the best way of accommodating the demands of different ethnic groups and regions in Nigeria, they probably envisaged the smooth running of the country. Little did they realise that colonialism had led to deep-seated ethnic, regional and even religious alignments within the country which hindered the functioning of the federal and constitutional systems of government in Nigeria. In its history, Nigeria has had a number of constitutions passed into law in a bid to address these problems. This despite the fact that the phenomenon of a “constitution” - a written document that embodies or serves as a grundnorm (foundation) from which the rules and regulations in a country stem – was in itself strange to Nigeria and Africa generally.

The colonial legacy of Nigeria includes the following constitutions:

- the Constitution of the Colony and Protectorate of Nigeria 1914;
- the 1922 Clifford Constitution;
- the 1946 Richards Constitution (which were virtually imposed on the country by the colonial government);⁵²
- the 1951 MacPherson; and the
- 1954 Lyttleton Constitutions.⁵³

The 1914, 1922, and 1946 Constitutions were all direct impositions of the colonial government with no input from the indigenous society. The 1951 and 1954 Constitutions were the first indications of the move to federalism after the amalgamation of the northern and southern protectorates in 1914. The drafting of these constitutions were more consultative, as the members of the society were involved.⁵⁴ The 1951 Constitution was drafted after consultations with people at all levels of the country; villages, settlements, communities, divisions, and regions within the country. These series of consultations were said to reveal the peculiar fact that Nigerians desired a situation where the regions would have

⁵² Nwabueze B.O (1982) *A Constitutional History of Nigeria* 38-46; Metz HC (1991) (ed) *Nigeria: A Country Study* Library of Congress, available at <http://countrystudies.us/nigeria/67.htm> (accessed on 30 March 2010).

⁵³ These constitutions were each named after the colonial governor who formulated them.

⁵⁴ Burns (1978) 251.

greater autonomy and political space.⁵⁵ It established a House of Representatives, as central legislature, which was made up of regional representative members.⁵⁶

The 1954 Lyttleton Constitution established the Federation of Nigeria, to consist of the three regions of the North, East and West; and the Federal Territory of Lagos.⁵⁷ These regions had authority in their internal administration and policy, whilst the central government was responsible for foreign affairs and relationships amongst the regions.⁵⁸ This Constitution provided a basis for the 1960 independence Constitution.⁵⁹ It gave the regions considerable powers, as they had concurrent jurisdiction with the central government (also called Federal government) over issues like higher education, the judiciary, the police and many others. The regions were also responsible for residual matters dealing with their own socio-economic policies and they were able to strive towards self-government at their own pace.⁶⁰ The independence Constitution, whilst conferring independence on Nigeria, still preserved the role of the Queen as sovereign over Nigeria, even though she was only now acting through Nigerian officials.⁶¹

The move and demand for independence in Nigeria was championed by nationalists who felt that the federal structure was the best suited for Nigeria's diverse peoples. In July 1960, the United Kingdom Parliament passed the Independence Act for Nigeria.⁶² On the 12th of September 1960, the Queen approved The Nigerian (Constitution) Order in Council, which set up the Federation of Nigeria to consist of Northern Nigeria, Western Nigeria, Eastern Nigeria and the Federal Territory of Lagos.⁶³ This order set up the 1960 Nigerian Constitution, which followed the federal structure already existing under the 1954

⁵⁵ Crisis Group Report No 119.

⁵⁶ These members were appointed from the three regions that had been identified, namely the north, west and the east.

⁵⁷ Burns (1978) 252.

⁵⁸ Crises Group Report No 119.

⁵⁹ The Constitution of the Federation of Nigeria, 1960.

⁶⁰ Crisis Group Report No 119.

⁶¹ Nwabueze (1982) 75. Appeals from Nigerian courts also lay to Her Majesty, as the sovereign. This appellate jurisdiction was exercised for the Queen by the Judicial Committee of the Privy Council, established by the Judicial Committee Act of 1833.

⁶² Burns (1978) 257.

⁶³ *Ibid.* this Order set up the 1960 Nigerian Constitution, which gave a broad framework.

Constitution. It granted extensive powers, along with revenue allocation to the regions (later known as States), thus effectively making them autonomous entities.⁶⁴ It also maintained the central government with limited powers.

In 1963, Nigeria became a Republic,⁶⁵ and the 1963 Republican Constitution reflected the power sharing and revenue allocation formula of the previous constitution, and it also guaranteed the regions considerable powers.⁶⁶ However, the already existing deep ethnic differences and the fact that the regions were divided along ethnic lines, gave rise to challenges regarding the functioning of the federation. This was to become more pronounced in subsequent constitutions.

As stated earlier, the initial post-independence government of the country, led by Sir Abubakar Tafawa Balewa, was unable to advance the unification of the country. The north continued to be perceived by the other regions as being in control of the whole country and enjoying the benefits of that control. This view was further reinforced by the size of the northern region, which was almost double that of both the east and west put together. The dominant position of the north was regarded as unjustifiable and a means of dominating the federal government. Thus, by 1964, inter-ethnic struggles ensued amongst the three major ethnic groups of Hausa, Igbo and Yoruba, at the federal level, whilst the minority ethnic groups remained marginalised.⁶⁷ Falola has observed that the 1964 federal elections revealed the fragility of the Republic of Nigeria. Dogged by bitterness and violence in the regions, the elections were also blatantly rigged and compromised.⁶⁸

Another problem that prevailed was the failure on the part of the government to properly deal with the growing corruption in the public sector. All organs of government displayed this failure, and the weakness that existed in the political

⁶⁴ Ikein (2008) 359.

⁶⁵ By this, the Queen ceased to be the sovereign of Nigeria, and her functions and powers devolved on the president of the republic and on the governors of the different regions. Also Her Majesty's jurisdiction in appeals from Nigerian courts was abolished.

⁶⁶ Sections 1, 2 and 3 of the Constitution of the Federal Republic of Nigeria, 1963, established the country as a federation and a republic by the name the Federal Republic of Nigeria. It consisted of four regions and a Federal Territory.

⁶⁷ Crisis Group Report No 119.

⁶⁸ Falola (1991) 107.

structure of the new Nigeria. This is because the culture of nepotism invaded the public sector and consequently other sectors of the country. Those in the public sector displayed an unfortunate propensity to personal gains instead of service delivery.⁶⁹ As illustrated in chapter 2, people were being employed or favoured for contracts based on who they knew, what region of the country they came from and who their ‘godfather’ was.⁷⁰ Given the lack of leadership from those in authority, these ills continued unabated in the country.⁷¹ The ‘breaking of the camel’s back’ came with the elections into the regional assembly in October 1965. This was marked by massive rigging which gave way to violence in the west. In 1966, the military in a purported bid to restore some sanity into the politic, took over the government by coup d’etat, thus marking the end of the first republic.⁷²

4.2.3 Military regimes

The military’s involvement in Nigeria’s politics has had a lasting influence on the Nigerian political structure and on the development of the rule of law in the country. The problems of the 1st republic set the stage for the first military takeover of government on January 15, 1966. This culminated in the establishment of military rule headed by Major-General Aguyi-Ironsi, who reversed the federal process and imposed a unitary system of government through the promulgation of Decree No 34 of 1966, titled, The Constitution (Suspension and Modification) (No 5) Decree of 1966.⁷³ As the case of subsequent military takeovers in the country, the justification by the Aguyi-Ironsi led military government for the coup d’état was the lack of legitimacy of the civilian government in the country due to its inability to deal with the issues of

⁶⁹ *Ibid.*

⁷⁰ This term became associated in Nigerian politics with whoever a person had as a protector, sponsor, someone who was well connected and able to open doors for a particular person.

⁷¹ Jarmon C (1988) *Nigeria: Reorganisation and Development since the Mid-Twentieth Century* 52-57.

⁷² Falola (1991) 107. The first republic means the first period of civilian rule experienced by the country, there were subsequently other republics.

⁷³ Falola (1991) 123-124. The imposition of unitary rule was carried out despite opposition from different quarters, even the military governors of the time. The nationalist stalwarts, in the persons of Dr Nnamdi Azikiwe and Chief Obafemi Awolowo, had also as far back as 1943 advocated against a unitary government due to the different peculiarities within the regions.

corruption, nepotism and ethnicity.⁷⁴ Again, due to the deep divisions already existing along ethnic lines in the country, this coup was perceived, especially by the north, as one that was carried out to promote and ensure Igbo domination from the eastern part of the country where Major General Aguyi-Ironsi originated from.

The perception of the promotion of Igbo domination was buttressed by different versions of the account of the coup, which indicated that there seemed to have been a deliberate elimination of senior politicians and military personnel from the north and southern regions of the country, with the Prime Minister, Sir Abubakar Tafawa Balewa (a northerner), also falling victim.⁷⁵ Also, the Aguyi-Ironsi led government appeared to have surrounded itself with majority members of the Igbo ethnic group.⁷⁶

A very violent counter-coup, costing many lives, was carried out by northern military officers in July that same year. Many Igbos living and working in the north were killed, and this was reciprocated in the east by the Igbos themselves, who killed many northerners, resulting in a high number of casualties. Lieutenant Colonel Yakubu Gowon, who was then the most senior surviving officer of the northern region, came to power in the July 1966 coup as the head of the Federal Military Government of Nigeria. He immediately reinstated federalism by the promulgation of Decree No 59, titled Constitution (Suspension and Modification) (No 9) Decree of 1966.⁷⁷ Unfortunately, his military government was also not able to correct the already prevalent wrongs and ills in the society. The factionalism and ethnicity which was now ingrained in the society had spilled over into the armed forces, where it was more pronounced, resulting in discontent and dissension in the military. Social, political and ethnic discord turned into violent conflict and bloodshed, and Nigeria became a nation divided against itself. All of these spilled over and culminated in the outbreak of violence as was seen in the civil war of 1967.⁷⁸

⁷⁴ Jarmon (1988) 58.

⁷⁵ See generally Udoma U (1994) *History and the Law of the Constitution of Nigeria* 225-229 at 227; Falola (1991) 121-125; Falola (1991) 122.

⁷⁶ Udoma (1994) 237.

⁷⁷ Udoma (1994) 242.

⁷⁸ Jarmon (1988) 60.

The outbreak of the 1967 civil war in Nigeria was due to an attempted secession by the eastern region of Nigeria. On the 30th of May 1967, the eastern region, led by Lieutenant-Colonel C.O Ojukwu, the Military Governor of the region, declared itself an independent country, called the Republic of Biafra. The reaction of the Federal Military Government of Nigeria was to declare war on the region, in defence of the territorial integrity of Nigeria and her unity.⁷⁹ The ‘Biafran’ military, which comprised of the officers from the eastern region, entered into combat against the Nigerian armed forces, resulting in the Nigerian civil war. The civil war lasted from May 1967 to January 1970, and reportedly cost between 50,000 and 2,000,000 lives.⁸⁰

After the civil war, a succession of military regimes ruled in Nigeria.⁸¹ The first acts usually carried out by these military regimes after a coup, was the passing of a decree to the effect of either suspending, or limiting the reach of the constitution, or undermining the federal structure of the country.⁸² Through such decrees, military governments completely violated the concept of both federalism and constitutionalism in Nigeria, and moved more towards being a dictatorial unitary government.⁸³ An increasing number of powers were given to the central government whilst the powers at the regional and state levels were gradually diminished. This was done to suit the military regimes, which by their very nature, were all about power and control. Existing states in the country were further sub-divided and more states were created, under the guise of assuaging

⁷⁹ Udoma (1994) 59.

⁸⁰ Crisis Group Report No 119, *supra*.

⁸¹ General Gowon continued from 1970 to July 1975; Brigadier Muritala Mohammed’s regime from July 1975 to February 1976; General Obasanjo’s regime from February 1976 to October 1979; Major General Muhammadu Buhari’s regime from December 1983 to August 1985; General Ibrahim Babangida’s regime from August 1985 to August 1993; and General Abacha’s regime from November 1993 to June 1998.

⁸² An example of this is the contents of sections 3 and 4 of Decree No 1 of 1966. It states as follows:

3. The Federal Military government shall have the powers to make laws for the peace, order and good government of Nigeria or any part thereof, with respect to any matter whatsoever.
4. The Military Governor of a Region:
 - (a) shall not have power to make laws in respect of any matter included in the Exclusive Legislative List; and
 - (b) except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List.

⁸³ Rothberg RI (2004) *Crafting the New Nigeria* 92-93.

the clamouring of the different ethnic groups, giving them autonomy, and also bringing government closer to the people.⁸⁴

However, the created states were starved of funds as revenue allocation to the states was continuously reduced.⁸⁵ It has been suggested that the underlying purpose of this proliferation of states and cut in revenue allocation was aimed at diluting regional and ethnic power; at limiting any secessionist tendencies amongst the people, and empowering the central government. This ploy achieved a minimal level of success. For example, the Ijaws⁸⁶ of the Niger-Delta region, which were spread across five states as a result of the bifurcation of existing states and the creation of more and more states, were still able to remain loosely connected and to mobilise across state lines in their struggle for greater resource control.⁸⁷

The creation of states and concurrent cut in the revenue accruing to the states had an adverse effect on the federal structure on which Nigeria was hinged, as Nigeria was gradually diminished to a 'Federal Republic' only on paper. The created states were weak and handicapped, not able to deliver in terms of infrastructure development, social amenities provision, poverty alleviation, and meeting the needs of its peoples. This led to further discontent amongst the citizenry. The discontent arose from the unrealised and frustrated expectations of the citizenry that the creation of more states would translate to development, better standards of living and increased opportunities for them.⁸⁸ They had felt that if the states were smaller units, the separate state governments would be able to focus their resources and efforts on development within the smaller units.

In the military, the civil war had very negative effects. It had done nothing to curb the ethnic and tribal tendencies within the military; instead, it further entrenched these tendencies. Falola opines that vices of corruption, greed, gross indiscipline, professional carelessness and others had become rampant in the

⁸⁴ *Ibid.*

⁸⁵ Crisis Group report *supra*; states were subdivided from 12 in 1967, to 19 in 1976, to 21 in 1987, to 30 in 1991, and 36 in 1996.

⁸⁶ Arguably the fourth largest ethnic group in Nigeria.

⁸⁷ Crisis Group Report No 119.

⁸⁸ See generally Udoma (1994) 244-246; 249.

armed forces.⁸⁹ This state of affairs, he states, made it impossible for the army to play the role of correcting the ills and wrongs of the politicians. For example, General Gowon, in his broadcast in 1970, gave a transition timetable that indicated that the military government would hand over power to a democratically elected government in 1976. However, by 1974 he changed this date of return to civil rule without any indication of when this would take place.⁹⁰ This action was viewed by the populace as an attempt by the military to perpetuate itself in power.⁹¹ The failure on the part of the Gowon-led military regime to keep to its transition timetable led to the next coup d'état in 1975.

With the coup d'état in July 1975, General Murtala Mohammed took over power and immediately 'set out' to reverse some of the ills and problems with the previous regime. In October of the same year, a decade after the commencement of military rule, General Murtala Mohammed appointed a Constitution Drafting Committee (CDC) to redraft the Nigerian Constitution. This was in response to the view amongst many that the prevailing 1963 constitution allowed for intense rivalry between the regions and states, and also that the parliamentary system had failed to provide the strong central leadership that was needed.⁹²

General Mohammed was not able to see the process of drafting a new constitution through, as he was assassinated on the 13th of February 1976 in an abortive coup attempt.⁹³ His Chief of Staff, General Olusegun Obasanjo, was sworn in as the Head of State, and continued with the process of constitutional review. A draft of the new constitution was produced and debated at a popularly elected Constituent Assembly.⁹⁴ However, the military government (which had retained the right to amend and nullify sections of the draft constitution before passing it into law), added seventeen amendments to the draft and passed it into law. The effect of this was that a document, vastly different to the draft produced and deliberated on at the Constituent Assembly, was passed into law as the Constitution of the Federal Republic of Nigeria 1979. This Constitution negated

⁸⁹ Falola (1991) 144.

⁹⁰ *Ibid*; Udoma (1994) 260-261.

⁹¹ Udoma (1994) 262.

⁹² Crisis Group Report No 119.

⁹³ Udoma (1994) 309.

⁹⁴ Consisting of elected representatives of the population.

the federal nature of the country, and gave even more powers to the federal government at the expense of the states.⁹⁵ It also jettisoned the parliamentary system of governance (a bequeathal of the colonial government) for the presidential system of governance, as this was thought to be a better suited system for Nigeria.⁹⁶

A civilian government was elected on the basis of the 1979 Constitution, and this heralded the second republic in Nigeria. Alhaji Shehu Shagari came into power as the first civilian president of Nigeria in the second republic. He hailed from the north, and continued in the line of his predecessors by not doing enough to de-tribalise or de-ethnicise Nigerians. During his presidency, lawlessness, nepotism, tribalism, corruption in public places and lack of accountability continued unabated.⁹⁷ The elected politicians displayed wanton disregard for the provisions of the Constitution; they abused their power and carried on with their squandering, corruption and embezzlement, ignoring the expectations of the people.⁹⁸ Unfortunately, there was a chronic lack of effective leadership and control at the very top to curb the excesses in government.⁹⁹ Consequently, all these vices seeped into every area of public and even private life. Law enforcement gradually became a thing of the past as necessary sanctions that attached to crimes and breaches of the law were not imposed. This resulted in a drastic increase in crimes.

Every area of life became caught up in the web of ills to the detriment of the nation and the citizens. The educational system, health care, public infrastructure and others all fell victim and collapsed under the weight of corruption, fraud and embezzlement in the public and private sectors of the economy.¹⁰⁰ The factionalism that prevailed in the country continued unabated as the allegiance to ethnic group gradually began to take dominance over allegiance to the nation.¹⁰¹ This situation persisted up until August 1983, when the country went to the polls

⁹⁵ Crisis Group report No 119.

⁹⁶ See Nwabueze (1982) 256-268 for the reasons he adduces for this change in system of governance.

⁹⁷ Falola (1991) 177.

⁹⁸ *Ibid.*

⁹⁹ Falola (1991) 176.

¹⁰⁰ See, generally, Falola (1991) 176-179.

¹⁰¹ Crisis Group report No 119.

to elect another democratic government. This election was, as usual, fraught with rigging; thuggery; politically induced violence, fraud and many irregularities.¹⁰² The elections were conducted in stages¹⁰³ and ended up being too costly, complex and unwieldy.¹⁰⁴ The outcome of the rigged elections was that the incumbent party and president, together with the discredited politicians, were re-elected and re-appointed. This precipitated a coup d'état at the end of December 1983, in which the military one again took over power.

Just like the other coups, the justification given by the military for its action was the widespread corruption and maladministration in government.¹⁰⁵ The military presented itself as having taken over power to 'clean up the economic mess and save the country...'.¹⁰⁶ Military rule in Nigeria continued from 1983 up until 1999, with different regimes taking over power as indicated below. During this period, the federal system of government was subjected to further abuse and subjugated to the unitary system that best suited the generals.¹⁰⁷ The military government that took over from President Shagari was headed by General Muhammadu Buhari. It lasted till August 1985, when another coup d'état brought General Ibrahim Babangida to power. His regime lasted from 1985 to 1993. These periods of military rule saw corruption becoming endemic in the country, and it was institutionalised as a way of life for Nigerians.¹⁰⁸

During the regime of General Babangida, another process of constitution review was started as it was felt that the 1979 Constitution did not express or reflect the wishes and needs of the people. This process and that of the transition to civil rule moved along until elections were conducted in 1993 to elect a democratic government.¹⁰⁹ Hopes were high and expectations were rife, as Nigerians felt that the military would keep to its word to hand over power to a civilian government. It was felt that there was some credibility in the actions of the military. This encouraged people to turn out in large numbers to vote for the

¹⁰² See generally, Hart C, *The Nigerian Elections of 1983 (1993)* 63(3) *JIAI* 397-418.

¹⁰³ Presidential elections; governorship elections and legislative elections.

¹⁰⁴ Hart (1993) 63(3) *JIAI* 416.

¹⁰⁵ Hart (1993) 63(3) *JIAI* 416.

¹⁰⁶ Speech of General Buhari, in his broadcast to the nation, quoted in Falola (1991) 180.

¹⁰⁷ Crisis Group report No 119.

¹⁰⁸ Crisis Group report No 119.

¹⁰⁹ See generally Lewis PM, 'Nigeria: Elections in a Fragile Regime' (2003) 14(3) *Journal of Democracy* 131- 144.

candidates of their choice in the 1993 elections. The 1993 elections were adjudged by both local and international observers as one of the freest and fairest elections in the history of the country.¹¹⁰ The transition was initially viewed with scepticism by the populace, but as the elections were conducted, people felt that the return to civil rule was inevitable. Unfortunately, General Babangida did not allow the results of the elections to be fully released, before announcing an annulment of the results due to ‘irregularities’.¹¹¹ This annulment was announced after the military saw from the results already released, that the candidate of ‘their choice’ was not going to win. Though General Babangida declared that the annulment was in the national interest, Obadare, after a critical review, enunciates what he describes as ‘a more convincing explanation’.¹¹² This being the fact that the ‘northern choice’ candidate was in all likelihood not going to win the elections. The annulment precipitated a lot of violent demonstrations and protests and almost led to the disintegration of the country. It resulted in General Babangida having to step down as the Head of State of the country, and handing over the reins of government.¹¹³ This effectively aborted the process of the review of the 1979 Constitution which had commenced under his tenure.

Another coup d’état in November 1993 saw the toppling of the interim national government, and the taking over of power by a military government headed by General Sani Abacha. His despotic and tyrannous regime lasted until his death in June 1998. He quelled any dissenting voice with unlawful arrest and detention, violence and the use of force. He and his cronies looted the wealth of the nation in no small quantities.¹¹⁴ The process of constitution revision that had been started by General Babangida’s government was concluded by General Abdusalami Abubakar, who came into power after General Sani Abacha’s death.

¹¹⁰ See, generally, Lewis (2003) 326; Ihonvbere JO, ‘Organised Labour and the Struggle for Democracy in Africa’ (1997) 40(3) *ASR* 89; Reno W, ‘Crisis and No (Reform) in Nigeria’s Politics’ (1999) 42(1) *ASR* 105.

¹¹¹ *Ibid.* The 1993 Presidential elections were annulled by the General Babangida in a broadcast on the 23rd of June 1993.

¹¹² Obadare E, ‘Democratic Transition and Political Violence in Nigeria’ (1999) 24(1) *Africa Development* 210-213.

¹¹³ Crisis Group report No 119, *supra*. On 26 August 1993, General Babangida announced that he was stepping aside as Head of State, and handed over power Ernest Shonekan, who he appointed as head of an interim national government.

¹¹⁴ For a short summary of the regime of Sani Abacha, see Lewis P. ‘Nigeria’s Economy: Opportunity and Challenge’ (1999) 27(1) *Issue: A Journal of Opinion* 50-51.

He facilitated the transition program and the 1999 elections, and handed over power to a civilian government in May 1999, headed by retired General Olusegun Obasanjo.¹¹⁵ The reviewed 1979 Constitution was then hurriedly promulgated as the 1999 Constitution of the Federal Republic of Nigeria (otherwise referred to as the 1999 Constitution of Nigeria) shortly before the departure from power of General Abubakar on the 5th of May 1999.¹¹⁶

The 1999 Constitution, which is currently in force, is not perfect and does not meet with the yearnings and aspirations of the people. As with previous constitutions, the constitutional review process that yielded it was not consultative, representative or even reflective of the demographics of the nation. It has been generally criticised for maintaining the legacy of military meddling, lack of public consultation (and thus lack of legitimacy and moral authority), and moving towards centralism or a unitary government by the reduction of state and local power, instead of reinforcing federalism.¹¹⁷ As one commentator summed it all up in 2006, '[T]he 1999 [C]onstitution subverts the federal principle in its overt empowerment of the centre, leaving the states prostrate and atrophied in terms of power relations and control of resources'.¹¹⁸ The 1999 Constitution has also been condemned as a fraudulent document, in that it is not a document produced by the people of Nigeria, as its preamble claims. The preamble states as follows:

'We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved... to provide for a constitution for the purpose of promoting the good governance and welfare of all persons in our country ... do hereby make, enact and give to ourselves the following constitution' (own emphasis).

¹¹⁵ Gen Olusegun Obasanjo (rtd) was the military ruler of Nigeria from 1976 to 1979 when he handed over power to a civilian government. He had succeeded General Murtala Mohammed who was assassinated in Feb 1976.

¹¹⁶ Crisis Group Report No 119; the promulgation was by virtue of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999, and was done a few days before the departure of General Abubakar from power.

¹¹⁷ Crisis Group Report No 119.

¹¹⁸ Mr. Sylvester Odion-Akhaine, Executive Director of the Centre for Constitutionalism and Demilitarisation (CENCOD), one of the many NGO's operating within the country, quoted in Crisis Group Report No 119.

Several commentators have indicated that at no time did the ‘people’ of Nigeria agree by themselves or through their elected representatives to the document.¹¹⁹ This chapter will later return to the issue of the legitimacy (or otherwise) of the 1999 Constitution and other preceding constitutions.

President Olusegun Obasanjo emerged as the fourth civilian president of the Federal Republic of Nigeria on the 29th May 1999, and continued till May 2007, serving two terms. After sixteen years of military rule, Nigerians were happy to usher in a civilian regime in the hopes that the atrocities and injustices of the military regime would be corrected. High hopes of real nation building, development and growth accompanied President Obasanjo’s ascension to presidency. This came on the heel of his being released from a 3-year prison detention on an allegation of coup-plotting against the then government of General Sani Abacha. In the 2003 elections, he was re-elected for another four year term which he served until 2007, when his attempts at imposing a third term were thwarted.¹²⁰ This is discussed later in this chapter. In 2007, President Umaru Yar’Adua (now deceased) was elected civilian president of Nigeria.

President Yar’Adua served as the president of Nigeria from 2007 to the 6th of May 2010, when he died after a prolonged illness. The illness had affected his effectiveness in office, especially during the last months of his presidency. As a result of this, the Vice-President, Mr Goodluck Jonathan, was elevated to the position of ‘Acting President’ in February 2010 by parliament.¹²¹ On the 6th of May 2010, President Yar Adua died and Mr Jonathan was immediately sworn in

¹¹⁹ Late FRA Williams SAN (Senior Advocate of Nigeria), a foremost constitutional lawyer and one of the great jurists of his time, indicated as far back as June 1999 (a month after the 1999 constitution came into force), at a gathering to discuss the constitution, that the 1999 constitution was a forged document, a fraud, due to the fact that the preamble lied about the ‘people of Nigeria’ having been involved in the process. He rather classified it as an imposition on the people of Nigeria by the military regime of General Abubakar. This view was echoed by others, see Ogowewo TI, ‘Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria’s Democracy’ (2000) 44(2) *JAL* 135; Statement released by the Campaign for Democracy quoted in ‘Whither the 1999 Constitution?’ by Bakoji S in *PostExpress* 23 May 1999.

¹²⁰ There was great opposition to President Obasanjo’s third term plan; this opposition was from both within his party (the ruling party), and from opposition parties. The general public sentiment was vehemently against this third term agenda.

¹²¹ This was based on separate resolutions passed by the two bodies of parliament, the Senate and the House of Assembly. See ‘Jonathan is Acting President’, available at http://234next.com/csp/cms/sites/Next/Home/5524744-146/jonathan_is_acting_president__.csp (accessed on 29 May 2010).

as the substantive president of the country. He is expected to conclude the tenure of the late president which ends in 2011.¹²²

The above paragraphs provide a brief historical picture of governance and its problems in Nigeria from the colonial times. The problems are not peculiar to a civilian or military regime, and did not end with the change to civil rule in 1999. Since the return to civil rule in 1999, there has been a slow and tedious mending process going on, although there are still many problems to contend against. One of the major problems is that of bringing legitimacy to the government and changing the way Nigerians perceive their country and their leaders.

It is necessary to note here that the issue of bringing legitimacy to government has always been of great concern and interest to the people right from the inception of the country. The many attempts that have been made to review the constitutions of Nigeria are evident of a desire and clamour by Nigerians for something legal and written that would be the basis and an encapsulation of the goals and aspirations of the people. It is also the evidence of a desire for constitutional democracy and the enthronement of the rule of law, underlined by the knowledge that the effective operation of the state on these principles is the only thing that would ensure that the needs and desire of the people are met. Unfortunately, the actualisation of these desires has been stultified many times by the elite (both the military and political elite) who use their positions to influence the content of the constitution in their favour.

In the case of President Obasanjo, under the cover of heeding the many calls for a national conference to discuss issues and problems under the 1999 Constitution, his government in 2005 set up a committee to consult with all groups and regions of Nigeria, in an attempt to determine the desires of the people with respect to the politics in the country and the amendments to the 1999 Constitution. The committee consulted widely and drew up a comprehensive report for the oversight committee, the Joint Constitution Review Committee (JCRC).

¹²² See 'Jonathan Becomes Nigeria's President', available at http://234next.com/csp/cms/sites/Next/Home/5565071-146/jonathan_becomes_nigerias_president__.csp (accessed on 29 May 2010).

There were two points of contention in the deliberations of the JCRC. One of the sticking points was on the issue of resource allocation to the states. States from the south-south region did not get the 25 percent derivation they demanded, and they walked out.¹²³ The other issue related to the increase of the tenure of the president from four years to six years, with possible re-election.¹²⁴ This would have given President Obasanjo the opportunity to contest for a third term in office after his second term.¹²⁵ These issues raised a lot of concern and opposition in the national assembly, and eventually the bill proposing the amendment of the Constitution was completely rejected by the national assembly and not passed into law.¹²⁶ This meant that even the necessary and needed amendments to the 1999 Constitution had been defeated along with the third term provisions, because the whole bill was defeated. It was a case of throwing the baby out with the bath water. The effect of this is that the 1999 Constitution was not amended.

4.3 Critical Analysis of the 1999 Constitution and preceding constitutions in line with the Social Contract Theory and its Requirements

As stated in the previous section, the 1999 Constitution is an imposition by the government of General Abubakar. This he did a few days before he handed over power to the civilian government of President Obasanjo.¹²⁷ It has been labelled a

¹²³ Twenty five percent derivation means that percentage of the national revenue of the country in a year. Due to the now unitary nature of government, states were not in control of their resources and revenue, and had to be given a percentage of whatever was derived from the country's resources generally. In this case, the South-South region states are those producing crude oil, and they felt entitled to 25 percent of the national revenue.

¹²⁴ Section 135 of the 1999 Constitution clearly provides for a tenure of four years for any person elected as president under the constitution, and section 137 clearly disqualifies any person who has been elected to such office at any two previous elections, effectively limiting the terms of office to two terms.

¹²⁵ By the 1999 constitution, President Obasanjo was no longer qualified to contest for re-election, as he had served two terms already under the 1999 constitution. If the constitution had been amended, however, with a provision extending the term of office to six years, and providing for a re-election, he would have been qualified to remain the president for another 12 years.

¹²⁶ For a detailed recount of the events that surrounded the Obasanjo third term agenda, see Fombad C & Inegbedion NA 'Presidential Term Limits and Their Impact on Constitutionalism in Africa' in Fombad C & Murray C (ed) (2010) *Fostering Constitutionalism in Africa*, available online at http://www.pulp.up.ac.za/pdf/2010_09/2010_09.pdf at 9-12.

¹²⁷ The 1999 Constitution was only enacted into law a few days before the inauguration of the new civilian regime through Decreed No 24 of 5 May 1999. The new regime commenced on the 29th of May 1999.

fraudulent document due to the fact that it is not a document fashioned by the people of Nigeria or their representatives. It is rather an imposed document.¹²⁸ This anomaly in itself opposes the very nature of a constitution, which is the supreme law of the land, a document reflecting the obligations and responsibilities of its people. Such document would automatically command the loyalty, respect and confidence of the people, because it would be an act of the people.¹²⁹ As stated by Ihonvbere:

‘... a constitution should also serve as a basis for controlling state power and involving the people in the political process, and *should clearly articulate the aspirations of all communities and individuals in society*’.¹³⁰

He further explains that the making of constitutions must be popular, inclusive, participatory and democratic, and the constitution itself must be a document which the people can understand, claim ownership to and use in defence of the democratic state.¹³¹ The Canadian Supreme Court, in a 1985 decision has lucidly described this as follows:

‘[T]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.’¹³²

The constitution-making process and the extent to which it is democratic and legitimate through the use of available openings, and institutions that are embedded in society, are the cardinal ingredients of constitutionalism.¹³³

¹²⁸ ‘Constitution Review in Nigeria: Enriching the debate process’, available at http://www.peoplesconstitutionng.org/constitutional_history_of_nigeria.htm (accessed on 23 July 2010).

¹²⁹ Nwabueze BO (1982: 1) *The Presidential Constitution of Nigeria* 4.

¹³⁰ Ihonvbere JO, ‘How to make an undemocratic constitution: the Nigerian example’ (2000) 21(2) *TWQ* 343-366 at 343 (own emphasis).

¹³¹ Ihonvbere (2000) 21(2) *TWQ* 343 at 344. The author laid out the extensive consultations and public participation that is necessary in order to make a constitution that is owned by the people (see 347-348).

¹³² *Re Manitoba Language Rights case* (1985) 1 RCS 721 at 745.

¹³³ Omotola JO, ‘Democracy and Constitutionalism in Nigeria under the Fourth Republic, 1999 – 2007’ (2008) 2(2) *Africana* 1- 29 at 6.

As was indicated above, many scholars and political commentators have argued that the 1999 Constitution does not qualify as a document which the people of Nigeria have drawn up.¹³⁴ The process through which it was made was an imposition by the military government in power at that time. The Provisional Ruling Council (PRC)¹³⁵ of the then Abubakar military regime embarked on the making of the 1999 Constitution by hand picking a 25-member Constitution Debate Committee (CDC) in December 1998.¹³⁶ The committee was tasked with the responsibility of co-ordinating the debate over the new constitution. It had barely two months to do its work in a country of about 120 million people. Only 450 people made written submissions to this committee, and they were not in any way representative of the Nigerian people. This negated the principle of extensive consultation with the people which is required for a constitution.¹³⁷ The way and manner the committee carried out its duties was totally devoid of encouraging the participation of all facets of the Nigerian people.¹³⁸ Also, the PRC retained the power to approve ‘with amendments’ whatever recommendations were made by the committee.

A further sign of the undemocratic nature of the constitution-making process of 1999 is the remark credited to General Abubakar on receiving the report from the committee, in which he declared that ‘the report would assist the PRC in taking a final decision on the forthcoming constitution.’¹³⁹ This indicated that the PRC felt it had the final say in the contents of the Constitution.¹⁴⁰ The report of the

¹³⁴ Femi Falana, a notable constitutional law expert was quoted in one of the daily newspapers, The Guardian Newspaper of 19 April 1999, as asking ‘but on a serious note, who are these chaps in the PRC (Provisional Ruling Council)? When did they get the mandate of the Nigerian people to give us a constitution? That will not be said to be a constitution of the Nigerian people.’ Also Alhaji Balarabe Musa, a notable politician from the north, is quoted as having said, ‘it is a political mistake to call the document they are handing over a constitution. This is because it has nothing to do with the will of the people of Nigeria. It was done based on the way the military wants it, it is only a guideline and therefore the civilians should regard it as such. Available at

http://pdfserve.informaworld.com/481262_751308860_713701020.pdf (accessed on 8 April 2010).

¹³⁵ Equivalent of the council of ministers in a democratic regime.

¹³⁶ Ogowewo (2000) 41(2) JAL 135 at 144.

¹³⁷ Okonmah PD, ‘Perspectives on human rights violations in Nigeria’ 1998 ALAQ 11.

¹³⁸ Ihonvbere (2000) 21(2) TWQ 343 at 350.

¹³⁹ ‘Constitutional Debate Committee recommends adoption of 1979 Constitution’ *PostExpress*, 1 January 1999, quoted in Ogowewo (2000) 41(2) JAL 135 at 144.

¹⁴⁰ This is further evident in the preamble to the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999 which reads *inter alia*:

committee itself was never discussed or made public; instead it was treated as a secret, personal document for the members of the military elite (the PRC).

Notwithstanding the undemocratic process that saw the making of the 1999 Constitution, it would have been in a better standing if it had in fact reflected the recommendation of the CDC. The CDC had recommended that the 1979 Constitution be retained with amendments in order to bring it up-to-date with the developments in the country at that time.¹⁴¹ This included that fact that since the coming into effect of the 1979 Constitution which recognised 19 states in country,¹⁴² 17 more states had been created, bringing the total number of states to 36. The recommendation of the CDC should have resulted in an amendment to the 1979 Constitution. The PRC instead decided to promulgate an entirely new constitution (mostly with provisions of the 1979 Constitution with a few additions).¹⁴³

One of the most important additions evident is section 308 of the 1999 Constitution. This section provides blanket immunity from civil or criminal prosecution for the President, Vice-President, Governors and Deputy Governors, during their period of office.¹⁴⁴ This section was not contained in the recommendations of the CDC to the PRC, but was inserted by the PRC.¹⁴⁵

‘whereas the Provisional Ruling Council has *approved the report subject to such amendments as are deemed necessary* in the public interest and for the purpose of promoting the security, welfare and good governance and fostering the unity and progress of the people of Nigeria ... ’
(own emphasis).

¹⁴¹ *PostExpress* quoted in Ogowewo (2000) 41(2) *JAL* 135 at 144.

¹⁴² Section 3 provides for 19 states in the Federal Republic of Nigeria.

¹⁴³ Ogowewo (2000) 41(2) *JAL* 135 at 145.

¹⁴⁴ Section 308(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section –

- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued;
Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

The making of the 1999 Constitution is a replication of the way that other constitutions that the country has had from independence, have been made. As a colonial creation and a protectorate of the British, Nigeria had its constitutional developments largely shaped and driven by colonial interests. This meant that its constitutions were drafted by the colonial authorities of the time through a highly exclusionary process characteristic of the pre-independence constitutions.¹⁴⁶

The Constitutions of 1914, 1922, 1946, and 1954 were handed down by the colonial authorities and imposed on the society, creating severe crises of ownership and legitimacy for those Constitutions. They also vested a veto power in the Governor (Governor-General, as they later became known), who was an official of the British colonial government.¹⁴⁷ Even the 1946 Macpherson Constitution which involved consultations with various groups across the country fell short of being regarded as the people's constitution as the Governor-General still retained his power of veto.¹⁴⁸

It has been noted that the 1960 independence Constitution bequeathed by the colonial government,¹⁴⁹ like the pre-independence constitutions, could also not be described as an act of the people of Nigeria, as it was not made through a referendum or through a constituent assembly of elected representatives.¹⁵⁰ The colonial government had continued with its tradition of drafting and passing down laws that it thought appropriate to serve its own interests. As pointed out by Prof Nwabueze, 'the independence constitution was the product of a final exercise of the [suzerain] power by the departing colonial authority' (own

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to 'period of office' is a reference to the period during which the person holding such office is required to perform the functions of the office.

¹⁴⁵ Ogowewo (2000) 41(2) JAL 135 at 146.

¹⁴⁶ Omotola (2008) 2(2) *Africana* 1- 29 at 6, where he quoted Osipitan T *An Authochthonous Constitution for Nigeria: Myth or Reality* (the text of an Inaugural Lecture at the University of Lagos), 24 November 2004.

¹⁴⁷ Omotola (2008) 2(2) *Africana* 1 at 7.

¹⁴⁸ Omotola (2008) 2(2) *Africana* 1 at 7.

¹⁴⁹ By an Act of the Parliament of the United Kingdom, titled the Independence Act.

¹⁵⁰ Ogowewo (2000) 41(2) JAL 135 at 138.

emphasis).¹⁵¹ This was not peculiar to Nigeria, as it has been noted by Asian author, Go J:

‘... [T]he independence constitutions of Asia and Africa were little else than imitations of Western constitutions. More specifically, they appear to have been dysfunctional duplications of the constitutions of the former imperial master.’¹⁵²

Both the 1979 and 1999 Constitutions as bequeathals of the military governments, also do not really reflect the wishes of Nigerians, and therefore are documents deprived of legitimacy.

4.3.1 Further problems with 1999 Constitution

The result of the faulty nature of these constitutions is evident in the many problems of the 1999 Constitution, some of which have been pointed out by different authors.¹⁵³ The phrasing of the preamble of the 1999 Constitution is one of the problems that have been discussed above. The fact of the matter is that the preamble cannot, by using the phrase, ‘We the people of Nigeria’, claim to be representative of the wishes of the people of Nigeria. Ihovbere has referred to this preamble as ‘pretentious and hardly an attempt to capture the dreams and sacrifices made by many Nigerians to maintain the unity and sovereignty of the country.’¹⁵⁴ He further refers to the different cases of unrests and in-fighting amongst the ethnic groups and nationalities that was ongoing at the time the 1999 Constitution with its preamble was signed into law.

Another problem that has been pointed out is that of the fact that the 1999 Constitution, by its provisions, is more unitary than federal in nature, as it ‘consolidates existing relations of power in favour of the central government’.¹⁵⁵

¹⁵¹ Nwabueze BO (1982) *The Presidential Constitution of Nigeria* 6.

¹⁵² Go J, ‘Modeling the State: Postcolonial Constitutions in Asia and Africa’ (2002) 39(4) *SAS* 559, in which the author gives a full examination of independence constitutions and the way and manner in which the colonial (imperialist) government always made sure that it planted a system modelled upon their home countries’ system.

¹⁵³ See Ogowewo (2000) 41(2) *JAL* 135 and Ihovbere (2000) 21(2) *TWQ* 343 at 344.

¹⁵⁴ Ihovbere (2000) 21(2) *TWQ* 343 at 352.

¹⁵⁵ Ihovbere (2000) 21(2) *TWQ* 343 at 361.

This means that even though the structure is meant to be one in which the regions are independent but also loosely tied together, in reality, it is a case of the federal government having control. Part 1 of schedule 2 to the 1999 Constitution provides for the Exclusive Legislative List. This lists the areas over which the Federal Government has exclusive powers to make laws. Under the Exclusive Legislative List 68 items are listed, from arms and ammunitions to wireless transmission.¹⁵⁶ This Part 1 does not in any way authorise or give local or state governments any type of jurisdiction. Part 2 of the same schedule 2 lists the Concurrent Legislative List as matters over which both the Federal and State governments may have concurrent powers to make laws.¹⁵⁷ However, as noted above by Ihonvbere, even here the central government has the final say over issues, as the National Assembly is declared the superior power whose laws will prevail in the event of a conflict arising.¹⁵⁸

These issues raised go to buttress the point that the 1999 Constitution of the Federal Republic of Nigeria is not reflective of the wishes of the people; was not arrived at as a result of a consultative process, and does not in any way indicate the will of the people. Attempts have been made to have this constitution declared invalid by the courts. Particularly of note is the 2004 case by ten lawyers before a Federal High Court in Abuja, seeking as part of its prayers, a declaration by the court that the 1999 Constitution was invalid on the grounds that the Constitution was not made by Nigerians and was therefore illegitimate.¹⁵⁹ The honourable Court at the end of hearings denied the prayer to invalidate the 1999 Constitution, citing *inter alia*, that it did not have the powers to invalidate a constitution which created the court itself.¹⁶⁰

¹⁵⁶ Schedule 2 part 1 of the 1999 Constitution of the Federal Republic of Nigeria.

¹⁵⁷ Schedule 2 part 2 of the 1999 Constitution of the Federal Republic of Nigeria.

¹⁵⁸ Ihonvbere (2000) 21(2) *TWQ* 343 at 361.

¹⁵⁹ They contended that it was the people who could draft a constitution for themselves through a uniformed process and not the government. They further noted that Decree 24 of 1999 (which brought the 1999 Constitution into being) could not be deemed to be a constitution of the people of Nigeria until it was freely initiated, formed, written, published or enacted by the people in its original character without the influence, effect or tampering of a military dictatorship.

¹⁶⁰ Unreported case, available at [allafrica website](http://allafrica.com/stories/200810100682.html), available at <http://allafrica.com/stories/200810100682.html> (accessed on 13 June 2010).

4.3.2 Can Nigerian Constitutions be regarded as manifestations of a social contract theory?

From the above, it is apparent that Nigeria's pre- and post-independence constitutions, all of which have either been colonial government imposed, or military-government imposed, have not been the results of public consultative and public participatory processes. Instead, they have been imposed from above, first by the colonial government and later by the politicians and the military. This is in great contradiction to the tenets of the social contract theory, which is founded on the people (the members of society), being sovereign, and willingly and freely giving up their will and inherent rights to an indentified person(s), or authority, consenting to be governed by such person or authority. As indicated in chapter 3, the social contract theory is regarded in this work as the basis and the blue print for the system of constitutional and democratic government, and rule of law that is adopted in mostly all countries in Africa presently.

In present day terms, the indentified person(s), or authority of the social contract theory, is usually provided for in the constitution, which embodies the contract that the society has entered into. This is why the process of constitution-making is very important because it adds legitimacy to the document. When there has been participation by the people in the process, the people 'own' the document and they view it as their creation. There is legitimacy attached to the process. Whoever gets into power and positions as a result of the constitutional process is seen and viewed by the citizens as 'their' own elected official. The government created as a result of the process is seen as one that is placed there by the people. They therefore accord it with their allegiance and their support, their obedience and compliance with the policies of the government. This allegiance, support and obedience will not have to be coerced, but rather will be freely given.

This view had been echoed by Omotola when he says

'many African countries have experienced constitutional instability since independence because constitutions have lacked moral authority, ... for democracy and constitutionalism to be mutually reinforcing, the constitution-making/review process should be democratic, allowing various interest groups adequate space to participate in the process in an

open and transparent fashion. This gives room for the ownership of the project by the people, a feat that legitimizes the exercise. It is only when the constitution is rooted in society that it commands people's respect and loyalty, making the implementation less problematic and vice versa.¹⁶¹

That fact that Nigeria's past and present constitutions have not been representative of the people but rather of the elite (be they colonial authority, politicians or military government) makes them devoid of legitimacy. In a situation where the people do not see the constitution as 'their' own document, and thus do not uphold its provisions willingly (in cases where they do uphold its provisions it is due to the fear of sanctions, rather than an inherent acknowledgement of its binding nature), it becomes difficult to maintain the rule of law. In talking about the rule of law, the questions that immediately come to mind are, "the rule of which law? Which law is being sought to be upheld? The one in which the society had no say but which was imposed on it?"

Nigeria's constitutional history as depicted above shows that it is in gross deficit with regard to the virtues that promote legitimacy of the constitution. This partly explains the crisis of governance that the country has been plagued by ever since its independence. It is reflected in the alarming rate at which citizens at all levels violate the laws of the land.¹⁶²

In order to further explain the effect of the deficit of the constitution-making process (legitimacy), and the validity of Nigeria's constitutions (legality); Kelsen's theory of law would be employed here, as the idea of sovereignty residing in the people within a society has been copiously dealt with by Kelsen in his theory of law.

4.3.3 Implications of Kelsen's theory on the rule of law in Nigeria

As indicated in chapter three, various attempts have been made to locate the *grundnorm* in areas of the society and state (such as the judiciary, the legislature

¹⁶¹ Omotola (2008) 2(2) *Africana* 1 at 6.

¹⁶² Omotola (2008) 2(2) *Africana* 1 at 6.

and others).¹⁶³ One such attempt is that of Etudaiye, in which he refers to the distinction between sovereignty and supremacy. Quoting Kelsen amongst others, he analyses that sovereignty belongs to the people, from whom government through the constitution derives its power and authority (in line with Section 14(2) of the 1999 Constitution¹⁶⁴), whilst the constitution in itself is supreme.¹⁶⁵ He then attempts to locate the *grundnorm* in the preamble to the 1999 Constitution.¹⁶⁶ This states as follows: ‘We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God ... dedicated to the promotion of ...’

Ogwurike has sought to refute the idea of the constitution as the basic norm, and has however gone further to suggest that in English speaking African countries, ‘the constitution is merely functional and not ordained’, as it cannot find its own definition within the legal order itself. Its efficacy and retention are subject to the common will of the people, or the acts of their acclaimed and popular leadership.¹⁶⁷ It is the assent of the people, from which a sovereign or the political leader derives his power and or authority.¹⁶⁸ In congruence with the social contract theory therefore, Kelsen believes that it is in the ‘people’ that sovereignty reside. The authority and power of the state and its officials derives from the legitimate act of the people granting that authority.¹⁶⁹

In the Nigerian situation, in view of the problems with the different constitutions that have been enumerated above, can we say that ‘the people’ in whom sovereignty reside have indeed granted the power and authority to rule/lead to the

¹⁶³ Etudaiye ME ‘The Pure Theory of Law and the Fragile New Democracies of the Developing World’ (2007) 33(2) *CLB* 218 at 227-242 provides a brief expose of this.

¹⁶⁴ Section 14(2) provides as follows:

‘It is hereby, accordingly declared that:

- (a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;
- (b) the security and welfare of the people shall be the primary purpose of the government; and
- (c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution’.

¹⁶⁵ Etudaiye (2007) 33(2) *CLB* 218 at 227 -242.

¹⁶⁶ Etudaiye (2007) 33(2) *CLB* 218 at 238.

¹⁶⁷ Ogwurike C (1979) *Concept of Law in English Speaking Africa* 112.

¹⁶⁸ Ogwurike (1979) 112-113.

¹⁶⁹ *Ibid.*

political and military governments that have ruled Nigeria thus? As argued above, this is not the case, and the resultant effect is the ‘apathy’ experienced in the people who continue to have governments imposed on them. This is done either by the force of the military (as in the case of military governments), or by the force of rigging elections (in the case of civilian governments). This apathy results from a lack of interest in the operation of the constitution, a document which they have not consented to or agreed to be bound by.

The faulty and ‘elitist’ constitution-making processes that the country operates (whereby the will of the people is not represented or reflected), can arguably be said to have led to democratic and legitimacy deficiencies. Democracy, which implies in simplistic terms, ‘rule of the people, by the people, and for the people’, means that for the people to repose confidence in the governance structures, they must see their representatives working within the structures, and making laws that are in their interest.

In the event of a revolution or a coup d’état, however, Kelsen’s theory of efficacy seems to contradict this line of reasoning. He defines a revolution widely as an occurrence in which the legal order of a community is nullified and replaced by a new order in an illegitimate way. ‘Illegitimate’ implies that it is a way not prescribed by the first order.¹⁷⁰ To him, a successful revolution creates a new legal order which derives merely from the fact of its success, the success having been established by a new *grundnorm* which replaces the old.¹⁷¹ The nature of the revolution is irrelevant in this context, as long as the legal order in force is overthrown and replaced by another in a way in which the former legal order has not anticipated.¹⁷² This is a successful revolution, which could also include a coup d’état.¹⁷³

Further, he posits that even as such occurrence legally creates a new legal order, this order becomes efficacious and legitimate when the people whom it seeks to bind, behave in such a manner that reflects their belief that it is binding on

¹⁷⁰ Kelsen H (1961) *General Theory of Law and State*.

¹⁷¹ Ogwurike (1979) 111.

¹⁷² Kelsen explains that it is irrelevant whether the revolution is effected through a violent uprising, or through a movement emanating from the mass of the people, or through the actions of those in government.

¹⁷³ Udoma (1994) 293.

them.¹⁷⁴ That is, if the people then, after the revolution, begin to behave in conformity with the new order,

‘if the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then the order is considered as a valid order’.¹⁷⁵

He continues that it is according to the new legal order (with its own basic norm) that the behaviour of individuals is interpreted as legal or illegal.¹⁷⁶ Thus he continues that if the people, members of a society comply with the laws imposed by the new order, obey them and live by them, they accord efficacy to the new legal order.

However, the question remains to be asked, what if the ‘compliance’ or ‘obedience’ is due to the fear of sanctions, fear of military force and power, or fear of reprisals for non compliance? Can we in such situations validly say that the compliance of the people has accorded efficacy to the new legal order? Kelsen is of the view that the efficacy of the new legal order is solidified once there is behaviour in conformity with it by the people. This is regardless of the way in which the conformity is achieved. He says that ‘[i]t is irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through the actions of those in government positions’.¹⁷⁷ Thus, in his view, it is irrelevant if the conformity of the people is achieved through the use of force or power, or through the fear of sanctions. As long as there is conformity by the people to the new order, this accords legitimacy to such order.

This view has been reiterated further that military regimes in Nigeria place the country in a realm where power takes ascendancy over law to a degree where it becomes impossible to disregard the actual factors of power and obedience in determining legal validity itself.¹⁷⁸ Thus, by Kelsen’s pure theory of law, the

¹⁷⁴ Kelsen (1961) 220.

¹⁷⁵ *Ibid.*

¹⁷⁶ Udoma (1994) 295.

¹⁷⁷ Kelsen (1961) 117.

¹⁷⁸ Ojo A ‘The Search for a Grundnorm in Nigeria: The Lakanmi Case’ (1971) 20(1) *ICLQ* 117-136 at 133.

instances of successful coup d'états that have been witnessed in Nigeria are, legally speaking, valid and legitimate governments.

It is suggested here that even if past governments have been legal and 'legitimate', this does not rectify or remove the deficit that has been underlying the Nigerian law making system and its constitutions. The fact that the people have been repeatedly excluded from the fashioning of 'constitutions', and that the legal system that the country operates is itself based on elements of foreign law (like in other African countries), makes it problematic for the citizenry to take ownership of the running of their country, its democracy, constitution and legal systems. This idea will be explored next in the discussion on the Nigerian legal system and its components.

4.4 Mechanism for the rule of law in Nigeria: The Nigerian Legal System

In analysing the legal system of Nigeria, this section provides an overview of the nature of the legal system. The outcome will assist to assess whether there is a relationship between problems pertaining to the rule of law in Nigeria and the imposition of a foreign legal system and to identify specific problems. The Nigerian legal system has adopted English law as the over-arching system as a result of its colonial history with Britain. The English legal system is known as the common law system. As indicated above, the Nigerian legal system is of a plural nature, comprising common law, indigenous law and Islamic law. The Nigerian state itself is steeped in pluralism comprising ethnic pluralism (composed of over 250 ethnic groups); religious pluralism (with Islam, Christianity, and different traditional belief systems as dominant religious systems); and particularly legal pluralism (with the common law, indigenous laws, and Islamic law).¹⁷⁹

Thus, in order to examine the rule of law in Nigeria, it would be necessary to seek out the rule of law mechanism as contained within the common law system and the indigenous law systems; and to examine the way and manner in which

¹⁷⁹ Oba AA, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction' (2004) 52 *ALJ* 859-900 at 859.

the legal system (in this case) makes provision for these different systems within it. These are factors in varying degrees which affect the functioning of the rule of law within English speaking African countries.

4.4.1 Nigerian law and the common law system, and provisions for the rule of law

By independence, the status of English law in Nigeria had been entrenched. There had been incorporation of English law into Nigeria during the colonial years. The court systems had been created in such a way that English common law and doctrines of equity had already been received into the Nigerian legal system, and were being used initially in matters between Europeans, or matters in which one of the parties was a European. These laws were gradually extended to govern indigenous people also, and eventually the whole nation.¹⁸⁰ The way in which English law was transferred and imposed on Africa has been extensively dealt with in chapter two. This imposition on Nigerian law did a lot to change the nature and development of the law (which would probably have developed from the indigenous law system, with different results, if the English law had not been present). Whilst it had some aspects which were positive, it is felt that it had a generally negative impact on the previously uniquely African law of the country.

The 1960 Constitution, the first post-colonial constitution, did not expressly provide for any arrangement with regards to the status of common (English) law. Despite being silent on this matter, some sections within it raised issues reflecting the control and influence that the British system still had on the new Nigerian legal system. Section 33 of the 1960 Independence Constitution, for example, provided for the office of the Governor-General, who was an appointee of Her Majesty, and who would represent her Majesty and hold office at her Majesty's pleasure.¹⁸¹ The Governor-General was the most senior officer of the new

¹⁸⁰ Seidman RB, 'Law and Development: A General Model' (1972) 6(2) *Law & Soc'y Review* 311-342 at 313.

¹⁸¹ Section 33(1) provides as follows:

There shall be a Governor-General and Commander-in-Chief of the Federation, who shall be appointed by Her Majesty and shall hold office during Her

Nigerian state, and such control by the colonial government implied that the political power was not yet fully in the hands of the Nigerian people.

Section 114 of the same Constitution provides for appeals from the decisions of the Federal Supreme Court (the highest court in the land at that time) to be made to her Majesty in Council, either as of right, or with leave of the Federal Supreme Court. This translated to the fact that her Majesty in Council was the highest judicial authority in the country at the time. Thus, her Majesty in Council was able, through the use of the prerogative of appeals, to further influence the law as existed in Nigeria, as judgements of the courts could be overturned, amended or upheld on appeal, based on the reasoning of the Queen and the English system.

For purposes of this discussion, the meaning of the term 'common law' needs to be clarified. The term 'common law' generally means the law of England that has been developed and practised over the years; that has now been received and is applicable in Africa and especially in Nigeria. Although the way in which common law forms part of the law in Africa has been documented extensively in chapter two, a brief discussion of the situation in Nigeria would be made here.

English law was introduced into the Colony of Lagos in 1863. In 1914, when the Northern and Southern regions were amalgamated to form one Nigeria, English law automatically extended to the rest of the country. English law received in Nigeria consists of the doctrines of equity; the statutes of General Application in force in England on the 1st of January 1900; statutes and subsidiary legislation on specified matters; and English laws made before 1st October 1960, and extended by application to Nigeria.¹⁸²

Specifically, the common law of England means the law developed by the old common law courts of England, in particular the Kings Bench, the Court of Common Pleas and the Court of Exchequer. Traditionally, the judges in these courts, through their court decisions (that were aimed at enforcing the customs of

Majesty's pleasure and who shall be Her Majesty's representative in the Federation.

- (2) The Prime Minister shall consult the Premier of each Region before tendering any advice to Her Majesty for the purposes of this section.

¹⁸² Ewelukwa (2004) *Introduction to Nigerian Press Law* 45; see also Mwalimu (2005) *The Nigerian Legal System Vol 1 Public Law* 22-23.

the people) developed this system. The systematic application of these laws by the judges led to the laws becoming formalised, rigid and technical, and ultimately led to injustices being meted out to the people.¹⁸³ Common law did not consider the ‘particular circumstances of a person or of a crime’; it meted out judgement according to its prescription. An attempt to ameliorate these injustices led to the development of equity by the Court of Chancery.¹⁸⁴

Equity focuses on the conscience of the parties involved in a matter. It attempts to go beyond the law, to mete out fairness, justice and right dealing to the parties. This body of rules (principles or maxims) were developed and administered initially by the Court of Chancery in England, before they were extended in their application to other courts. Thus common law and equity were administered together; they however remained two separate systems of rules.¹⁸⁵ In the event of a conflict between the rules of equity and common law, the rules of equity will prevail.¹⁸⁶ As Nigeria adopted the English common law, this is also the case in Nigeria. Some of the maxims of equity include; ‘*equity acts impersonam*’; ‘*equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium)*’; ‘*equity does not act in vain*’; ‘*equity aids the vigilant and not the indolent*’, and ‘*equity looks at the intent rather than the form*’. These rules of equity are also being enforced in Nigerian cases. In *National Insurance Corporation of Nigeria v Power and Industry Engineering Company Ltd*,¹⁸⁷ Justice Aniagolu of the Supreme Court held *inter alia*, that,

‘... equity as we all know inclines itself to conscience, reason and good faith and implies a system disposed to a just regulation and mutual rights and duties of men in a civilised society. It does not envisage sharp practice and undue advantage of a situation and a refusal to honour reciprocal liability arising therefore’.¹⁸⁸

It has been argued that the doctrine and principle of equity was used by the colonial government as a facilitative agency for change and transformation in

¹⁸³ Olong AM (2007) *The Nigerian Legal System* 13

¹⁸⁴ Olong (2007) 13.

¹⁸⁵ Olong (2007) 14.

¹⁸⁶ See Supreme Court of Judicature Acts 1873 and 1875.

¹⁸⁷ 1986 *NWLR* 1.

¹⁸⁸ 1986 *NWLR* 5.

West Africa, resulting in profound social, economic and political change and consequences for the people of Africa.¹⁸⁹ This resulted in fundamental changes to the nature and function of African customary law.¹⁹⁰ For example, as we will see below, the use by the colonial courts of certain equitable principles, resulted in the fragmentation of customary communal ownership (which was the fundamental basis of land holding under indigenous law systems), and the promotion of individualised ownership by preferring the individual's interests to the communal title of the group.¹⁹¹

4.4.2 Encroachment on the indigenous Nigerian law (customary law)

Indigenous African law, also referred to as customary law or traditional law, refers to the unwritten law that existed in Africa before the arrival of the Europeans. It may be defined as those rules of conduct which the persons living in a particular locality have come to recognise as governing them in their relationships between one another; themselves and things; and themselves and the community. It is the rules of law existing and binding on the particular community to which they apply.¹⁹² These laws could be in a modified form in present day, as customary law is not static and changes and develops with time. Customary law has also been defined as the sum total of social norms sanctioned between members of the community and another.¹⁹³ Thus, in Nigeria, customary law is the organic or living law of the indigenous people, regulating their lives and transactions. It is still very much in practise, though in different forms due to development and urbanisation as indicated above. Like most other African countries, it is evident in practices of the people relating to marriage, succession, funeral rites, and so many others. It has been developed through usage or practice of the people, and by common adoption, acquiescence, long and unvarying habit, it has become compulsory and has acquired the force of a law

¹⁸⁹ Akuffo K, 'Equity in colonial West Africa: A Paradigm of Juridical Dislocation' (2006) 50(2) *JAL* 132-144 at 136.

¹⁹⁰ Akuffo (2006) 50(2) *JAL* 140.

¹⁹¹ Akuffo (2006) 50(2) *JAL* 141. He details through cases how it was that the colonial courts converted community based property rights into individual rights by enforcing the alienation of communal or family land by contract or other forms of agreement.

¹⁹² Kolajo AA (2000) *Customary Law in Nigeria through the Cases* 1.

¹⁹³ Olong (2007) 44.

with respect to the place or the subject matter to which it relates.¹⁹⁴ In the 1963 case of *Alfa and Omega v Arepo*,¹⁹⁵ the court defined customary law as

‘ancient rules of law binding on a particular community and which rules change with the times and the rapid development of social and economic conditions’.¹⁹⁶

Customary law as we know it existed and thrived in Africa before Europeans came to the continent, but the Europeans did not recognise this system as law, due its unwritten nature, and due to the fact that its principles were greatly contrary to the European principles of law. With the emergence of Nigeria as a nation in 1914 (after the amalgamation of the northern and southern protectorates), the adoption by the British of the indirect rule system of government lent credence and recognition to the use and application of customary law in Nigeria. This was as long as ‘the rule sought to be enforced was not repugnant to natural justice, equity and good conscience or compatible with the law for the time being in force’.¹⁹⁷ In the northern parts of Nigeria, customary law was defined to include Islamic law by the Northern Nigeria Native Courts Law.¹⁹⁸ Thus, the religious law of the Muslim faith is considered as part of customary law in these parts.

As indicated above, economic interests formed the main purpose of colonisation. The large number of Europeans (especially British) present in Africa at the beginning of colonial rule inevitably led to the introduction of major elements of the English law to the continent. It has been pointed out in the previous chapters that the incursion of the Europeans, the influence of capitalism and the influence of communism (to a lesser extent), changed the pre-capitalist indigenous modes of production in Africa from being the sole mode of production. This impact was particularly seen in West Africa, where as a result

¹⁹⁴ Kolajo (2000) 2.

¹⁹⁵ 1963 *WNL* 95.

¹⁹⁶ *Ibid.*

¹⁹⁷ The Supreme Court Ordinance No 6 of 1914. This indicates that as far back as 1914, control of the indigenous law and a gradual imposition of English law began to emerge.

¹⁹⁸ Section 2 of the Northern Nigeria Native Courts Law of 1956.

of the needs of the colonial economy, there was a total subordination of the local indigenous economy to the needs of the colonial production.¹⁹⁹

With this situation thus, there was the need to provide an appropriate and adequate legal framework to support the new capitalist production pattern and the colonialists themselves, who were the implementers of the new system in Africa. Also, the fact that Nigeria was a British protectorate meant that the British parliament had unrestricted powers to legislate for a colony as part of Her Majesty's dominions.²⁰⁰ Some of these laws were made by 'Order in Council', which happened to be a means by which the operation of imperial statutes were extended to a protectorate.²⁰¹

This led to the reception of foreign laws and rules into West Africa, particularly Nigeria. Local statutes were passed into law to legalise the incorporation of English law.²⁰² This was mostly done either by way of the reception of the current English statute on a particular topic,²⁰³ or by way of a general application of unspecified English statutes, provided they answer to a specified definition,²⁰⁴ for example, in Ghana, by virtue of the Supreme Court Ordinance of the Gold Coast of 1876, and in Nigeria, by virtue of the Supreme Court Ordinance of 1914, stated above.²⁰⁵ These statutes integrated English law in its entirety into the legal

¹⁹⁹ Akuffo (2006) 50(2) JAL 137.

²⁰⁰ Ezejiofor G, 'The Federation of Nigeria' in Allot A (ed) (1970) *Judicial and Legal Systems in Nigeria* 82.

²⁰¹ For example, the Nigeria and Cameroons (Imperial Statutes Extension) Order in Council which extended the following statutes to Nigeria: the British Law Ascertainment Act of 1859; the Foreign Law Ascertainment Act of 1861 and many others. Also the Nigerian (Tribunal & Inquiry) Order in Council 1956; the Colonial Air Navigation Order 1953; the Carriage by Air (Non-International Carriage) Order of 1953.

²⁰² This was done by way of the reception of the current English statute on a particular topic.

²⁰³ An example of which was section 4 of the Regional Courts (Federal Jurisdiction) Act of 1958 [chapter 177] which legislated that the English Matrimonial Causes Act 1965 was applicable to issues concerning marriage under English law. It stated thus that

'[t]he jurisdiction of the High Court of a Region in a relation to*matrimonial causes* shall, subject to the provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the Court *in conformity with the law and practice for the time being in force in England*' (own emphasis).

²⁰⁴ For example, section 45 of the Law (Miscellaneous Provisions) Act, which provides as follows:

(1) Subject to the provisions of this section, and except so far as other provisions is made by any Federal Law ... the *statutes of general application that were in force in England* on the 1st day of January 1900, *shall be in force in Lagos* and in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, *shall be in force in elsewhere in the Federation* (own emphasis).

²⁰⁵ Akuffo (2006) 50(2) JAL 138.

systems of these countries, by providing that ‘the common law, doctrines of equity and statutes of general application in force in England on the 1st of January 1900, shall be in force in Nigeria’.²⁰⁶ This was amended by section 45 of the Law (Miscellaneous Provisions) Act of 1964 which now made the application of the common law of England and doctrines of equity in Nigeria subject to the provisions of any other federal law.²⁰⁷

The received statutes also contained in different variations the requirements to test the validity of any customary or local rule. These are called ‘repugnancy’ clauses, to the effect that indigenous laws and customs of the country would be enforced only if they were not ‘repugnant to natural justice, equity and good conscience and not incompatible either directly or by implication with any law for the time being in force’.²⁰⁸ This gave the Supreme Court the jurisdiction to observe and enforce the observance of indigenous laws and custom only if they were not repugnant to natural justice, equity and good conscience and not incompatible with any existing law of the time.²⁰⁹

The issue that arose from these repugnancy clauses was the question of the standards against which the principles of ‘natural justice’, ‘equity’ and ‘good conscience’ were to be measured. This issue came up before the courts on a number of occasions, and attempts have been made to substantially clarify it, aided by some of the decisions of the courts in cases related to customary law, as will be referred to below.

The repugnancy clause was applied by the courts to many laws and scenarios relating to customary law. This went a long way to change the nature, structure and substance of customary law in Nigeria. From the decided cases examined below, it will become clear that there have been attempts to garner the meaning of the repugnancy clause. It has been interpreted to mean various things, amongst which is, ‘fair and just or conscionable’. Thus, a rule of customary law

²⁰⁶ Supreme Court Ordinance of Nigeria 1914.

²⁰⁷ Section 45 of the Law (Miscellaneous Provisions) Act of 1964.

²⁰⁸ Section 20 of the Supreme Court Ordinance, 1914.

²⁰⁹ Also replicated in various laws in the receiving countries and at various levels. See section 33 of the Magistrate Courts Ordinance; section 17 of the Supreme Court Ordinance, Chapters 122 and 211 of the Laws of Nigeria, 1948; and section 26(1) High Court of Lagos State Chapter 52 of 1973.

which is seemingly ‘unjust, unfair or unconscionable’ is deemed to be repugnant to natural justice, equity and good conscience, and thus void. Initially, the trend was to interpret the clause to mean a rejection of any custom that is ‘uncivilised’ or that did not conform to the standard of behaviour acceptable in communities which have reached an advanced stage in social development, like the European communities.²¹⁰

Lord Wright in the case of *Laoye v Oyetunde*²¹¹ viewed the repugnancy clause as being intended to invalidate ‘barbarous’ (uncivilised) customs. He closely followed the view of Lord Atkin in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*.²¹² This line of reasoning had been faulted in an earlier decision, to the effect that a custom does not fail the repugnancy test merely because it does not conform to the English standard of behaviour or any other standard of behaviour acceptable in civilised communities. This was in the case of *Lewis v Bankole*,²¹³ in which the full bench of the Supreme Court rejected this view, and confirmed that lack of conformity to ‘civilised’ standards of behaviour, does not make a custom repugnant.²¹⁴ However, if a custom is such that it will warrant injustice or undue hardship on one or more of the parties, it would be viewed as being repugnant.²¹⁵ It should be noted that the interpretation and application of the repugnancy clause to the indigenous laws and customs did not always abide by this rule. This was because in some cases, the judges and court officials presiding over a matter were Europeans and colonialists, and thus there was nothing familiar to them in the customs and legal structures they met in Nigeria. Thus, anything that was not familiar, and that did not conform to the English or eurocentric standards was considered repugnant.

In the case of *Edet v Essien*,²¹⁶ dowry (lobola) had been paid on a woman, by one Essien, while the woman was still a child. When she was of age, another Edet paid dowry on her, married her and she bore him two children. Essien then claimed the children as his, in the absence of the dowry he paid being returned to

²¹⁰ Olong (2007) 49.

²¹¹ 1944 A.C 170.

²¹² 1931 A.C 662 at 673; Okany MC (1984) *The Role of Customary Courts in Nigeria* 46.

²¹³ (1908) 1 NLR 81.

²¹⁴ See also *Dawodu v Danmole* (1958) 3 FSC 46.

²¹⁵ *Ibid.*

²¹⁶ (1932) 11 NLR 47.

him. The basis of his claim in customary law was to the effect that she could not contract ‘another legal marriage’ until his dowry was returned to him, thus he was entitled to any children born by the woman until the dowry was refunded to him. This constituted a valid claim under customary law. The court, however, invoked the repugnancy clause and held the rule of customary law to be repugnant to natural justice, equity and good conscience.²¹⁷ The same has been held of customs based on the concept of slavery in the case of *Re Effiong Okon Attah*.²¹⁸ In the relatively recent case of *Mojekwu v Mojekwu*,²¹⁹ the court held that any custom which discriminates against women or girls in the distribution of the property of the late father is repugnant to natural justice, equity and good conscience.²²⁰

Burns²²¹ dealt with the issue of the repugnancy clause in relation to Muhammadan law, which has effect in the northern parts of the country where the bulk of the people follow Islam. The Muhammadan law or Islamic law (as it is now called) is composed of the sayings, practices and decisions of the prophet as collected individually by the ‘companions’. Even where Muhammadan law is not in force, and considering that there is no written native law of any kind, immemorial custom gives the force of law to the rules which govern the lives of the people in their dealings with one another.²²² The received laws also impacted on these laws immensely. Burns listed the ‘cruel system of trial by ordeal’ and the ‘persecution of reputed witches’ which are no longer permitted by virtue of the imposition of English laws, which found them to be repugnant.²²³

²¹⁷ The court held that it was contrary to natural justice, equity and good conscience to allow the appellant to claim the children of another man merely because the other man had deprived the appellant of his wife without paying dowry on her.

²¹⁸ 1930 (10) Nigerian Law Reports; quoted by Yakubu JA ‘Colonialism, Customary Law and Post-Colonial State in Africa: The case of Nigeria’, paper presented at the 10th CODESRIA General Assembly, available at

http://www.codesria.org/Archives/ga10/Abstracts%20GA%201-5/colonialism_Yakubu.htm
(accessed on 3 August 2009)

²¹⁹ 1997 NWLR 592.

²²⁰ This also measures against international human rights standards that have been set in a number of the human rights treaties that have been passed.

²²¹ Burns A (1978) *History of Nigeria* 278.

²²² Burns (1978) 278-279.

²²³ Burns (1978) 279. It should be noted that these practises existed and still exist in some parts in the west, where ‘witches’ are burned at the stakes.

The second half of the repugnancy clause states that a rule of custom will not be applied if it is incompatible with any law for the time being in force or with any written law. The court in *Rotibi v Savage*²²⁴ limited the application of this test to local statutory laws only and not the received laws of general application.²²⁵ A contemporary provision is found in the Evidence Act²²⁶ which provides for the public policy test, that any law called upon to adjudicate shall not be enforced if it is contrary to public policy (public good or morality). Thus, any law which corrupts public morals will be inconsistent with public policy and unenforceable.²²⁷

The repugnancy clause and its effects on customary law in Nigeria has been criticised for the fact that it is neither right nor valid to use external tests from different backgrounds as a fulcrum to validate other people's customs and laws.²²⁸

The place of received English laws in Nigeria has changed with time. The work of the Nigerian Law Reform Commission in 1987 focused on the need to repeal or review the pre-1900 English statutes in force in Nigeria.²²⁹ This was said to be due to the fact that they were now obsolete in England and no longer current law. The issues the commission considered were whether the English statutes should be repealed, re-enacted or merely amended.²³⁰ It should be noted that this was a belated attempt to remove/revise the foreign elements in the legal system. It was belated in the sense that it was happening 27 years after independence, when the laws and elements were already entrenched within the system. The Commission made proposals and recommendations for the enactment in Nigeria of certain of

²²⁴ 1944 (17) NLRs 77; a case involving a debt of nine years, owed to the plaintiff by the defendant. The defendant sought the limitation of statute regarding the loan. It was held that since they were both natives of Nigeria, and since under law and custom there was no period of limitation in an action for recovery of debt, the defendant could not succeed in the plea of limitation of statute.

²²⁵ The court held that the phrase, 'any law for the time being in force' in the concerned Protectorate Courts Ordinance of 1933, had reference only to local enactments.

²²⁶ Section 14(3) of the Evidence Act, Chapter E14 Laws of the Federation of Nigeria 2004.

²²⁷ *Olong* (2007) 51.

²²⁸ *Ibid.*

²²⁹ 1987 Report of the Nigerian Law Reform Commission titled, 'Report of the Review of Pre-1900 English Statutes in force in Nigeria', Vol. 1 & 2, available at http://www.nlrc.gov.ng/publications/EnglishStatuesinForceinNIG_Volumel_00001.pdf (accessed on 14 April 2010).

²³⁰ *Ibid.*, 45-46.

the statutes which were still currently relevant, subject to certain modifications in order to bring them in line with the prevailing norms of the Nigerian society.²³¹ This resulted in the enactment of some new laws, such as the Insurance (Miscellaneous Provisions) Act CAP 183 Laws of the Federation of Nigeria 1990; section 12 of the Labour Act CAP 198 Laws of the Federation of Nigeria, 1990 and others.²³²

4.4.3 Effects of the reception of English law on customary law

The above section has touched on some of the effects of the reception and the enforcement of English law over indigenous law on the law in Nigeria. These effects are quite pronounced and have left an indelible mark on the Nigerian legal system. The impact and long term consequences of the introduction of foreign laws, English law in this case, into the existing indigenous legal systems are still being felt.

One of the reasons for such impact is that in the colonial and early courts, those who staffed and manned the structures of the imposed legal system (courts, administrative offices, etc), were either colonialists or western-trained Nigerian administrators or lawyers. Therefore in their interpretation of the law, they favoured the western notions and values in which they had been trained.²³³ The absence of strict precedents to follow in such novel situations also gave them a lot of leeway in interpreting their notions of repugnancy, good conscience and natural justice in accordance with English values in which they were trained. This resulted in an unhindered transplantation of English law into Africa²³⁴ which ended up having an adverse effect on the indigenous systems of the country. Some of those effects are as follows:

1. Cases that showed up in Nigerian jurisprudence during the early years of colonial presence illustrated how the courts were used as a tool through which

²³¹ *Ibid*, 288.

²³² Nigerian Law Reform Commission, available at <http://www.nlrc.gov.ng/projects.php?id=1> (accessed on 14 April 2010).

²³³ Ogwurike (1979) 174.

²³⁴ Akuffo (2006) 139.

equitable principles were applied to alter existing custom and practice.²³⁵ In the cases of *Lewis v Bankole*,²³⁶ *Akpan Awo v Cookey Gam*,²³⁷ *Fiscian v Nelson*,²³⁸ the courts invoked equitable principles in overriding and setting aside rules of customary law of property. In the *Lewis* and *Cookey Gam* cases, the equitable maxim, ‘*delay defeats equity*’ and the doctrine of laches were used to set aside a strict customary law rule that adverse possession of land, for however long and under whatever circumstances, could never mature into proper title, and that the original owners could recover possession at any stage. Here the reasoning of the court was to the effect that

‘it would be wholly *inequitable* to deprive the defendants of property of which they had held undisputed possession, and in respect of which they had collected rents for a long term of years with the knowledge and acquiescence of those disputing their title (the real owners), even if it were as clear as it is upon the evidence, doubtful that they entered into possession, contrary to native law’.²³⁹

It is noteworthy to reiterate here that customary law applied only among the indigenes. In any instance where one of the Europeans or settlers were involved the option had always been to apply English law instead.

These cases were the foundation for changing the nature of customary law relating to land ownership in Nigeria. They are indicative of the decisive role played by equity in fundamentally transforming the nature and function of customary law in Nigeria. This is so because communal ownership had always been the main basis of land holding under indigenous law systems, and individual ownership was foreign to native ideas. As stated by Elias, ‘... ownership of land in the accepted English sense is unknown. Land is held under community ownership, and not as a rule, by the individual as such’.²⁴⁰ Land belonged to the village or the community, the village or the family, but never to the individual.

²³⁵ Akuffo (2006) 140.

²³⁶ (1908) 1 NLR 81; cited above.

²³⁷ (1913) 2 NLR 100.

²³⁸ (1946) 12 WACA 21.

²³⁹ (1913) 2 NLR 100 at 101.

²⁴⁰ Elias TO (1971) *Nigerian Land Law* 7.

As seen from the above, the equitable interventions and superimposition of English law values and principles seen in a plethora of cases (examples of which we have cited above), has resulted in the fragmentation of customary communal ownership and the promotion of individualised ownership, by raising and accepting the individual's interest and claim over and above that of the title of the group.²⁴¹

2. Another impact that can be highlighted is the way the introduction of the English system further compounded the plural nature of the Nigerian legal system. As indicated at the beginning of this chapter, a part of the Nigerian legal system consists of varied and multiple rules derived from cultures and traditions of the local communities. This part is customary law. Another part consists of common law rules, doctrines of equity and statutes made by local legislators at various times, and yet another part consists of Islamic law.²⁴² These systems of law have from a very early date in the history of administration of justice in Nigeria been administered by two parallel, but distinct systems of court,²⁴³ one indigenous and the other statutory. However, over time there has been fusion of these two and they can be both adduced in courts.²⁴⁴ Chapter VII of the 1999 Constitution now makes provision for two tiers of courts, federal and state courts.²⁴⁵

As indicated earlier, the structure of the courts under the colonial government, and even immediately after, was such that it was made of up the Magistrate Court, the Supreme Court (later reorganised and renamed the High Court), the West African Court of Appeal and the judicial Committee of the Privy Council. However, with the abolition of the West African Court of Appeal, and with the

²⁴¹ Akuffo (2006) 141.

²⁴² The colonial administration construed Islamic law and indigenous laws as one and the same and in many of their administrative decisions and methods they introduced and implemented this way of thinking.

²⁴³ Okany (1984) 201.

²⁴⁴ Even though the onus of proof of customary law is higher, and more difficult to prove in a court, as the person who adduces the existence of such law must then get oral or expert testimony to support it.

²⁴⁵ Sections 230 to 296 of 1999 Constitution of the Federal Republic of Nigeria.

abolition of appeals from Nigeria to the Privy Council, the system now consists of federal courts and state courts.²⁴⁶

The federal courts are the Supreme Court; the Federal Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory; the Sharia Court of Appeal of the Federal Capital Territory, and the Customary Court of Appeal of the Federal Capital Territory. The state courts are made up of the High Court of a State; the Sharia Court of Appeal of a State (in the northern states); and the Customary Court of Appeal of a State (in the southern states). There was initially only one Sharia Court of Appeal for the north, but the creation of more states necessitated the creation of a Sharia Court of Appeal for each of the northern states.²⁴⁷

The existence of this pluralism within the Nigerian legal system as a whole has led to confusion in some cases. Pluralism has been a source of difficulty, confusion and often injustice all through the history of Nigerian jurisprudence. One of the difficulties encountered is the problem that the legal practitioner encounters in deciding which of the two systems of courts has jurisdiction over a matter, in order to know which court to approach.²⁴⁸ For example, in certain parts of northern Nigeria, where the ‘mode of life’ test was applied for the determination of which court had jurisdiction, problems arose when the native courts/alkali was held to have jurisdiction over a legal practitioner based in the east, who had only gone to the north for a visit.²⁴⁹

All of these effects illustrate how the rule of law in Nigeria has developed in the past and the impact of the different influences (colonial law/English law) on the law in Nigeria. These impacts continue to be felt and continue to reverberate on the rule of law in the country. However, apart from the influences that have resulted from the country’s colonial past, there are also other influences (forces) that have had and continue to have an impact on the place and effectiveness of the rule of law in current times. Thus, whilst noting the effects of the past

²⁴⁶ *Ibid.* Sections 230 to 284 provide for the establishment and jurisdiction of federal and state courts.

²⁴⁷ Okany (1984) 202.

²⁴⁸ Okany (1984) 205.

²⁴⁹ Okany (1984) 206.

influences, the next section will turn to some of these forces and examine how much of influence they continue to have on the rule of law in Nigeria.

4.5 Impact of Oil, Globalisation and Democracy on Nigeria

Nigeria has gone through a long period of instability in terms of governance and government policies, as discussed earlier. This situation was untenable, as government policies changed daily. The country has also experienced different problems in the period since independence ranging from civil unrest, political instability, border disputes, corruption and even poor governance. These issues have plagued and dominated the discourse in Nigeria, with the attendant hope of finding solutions to these myriad of problems. Of particular interest is the effect that governance by military regimes during the years of the ‘oil boom’ has had on the rule of law; and the silent acquiescence by the international community with the atrocities committed by these military regimes.²⁵⁰ These will be examined next.

4.5.1 Oil and its impact on Nigeria

The growth and development of the nation’s economy, and even its politics and law have come to be built around crude oil. Nigeria’s economy is largely dependent on the oil sector, which currently supplies about 95 percent of the country’s foreign exchange earnings.²⁵¹ An important factor to consider in examining the Nigerian state and its trajectory over the years is the effect and impact of crude oil on the economy, politics and rule of law in the nation. The oil boom experienced in Nigeria should be examined against the background of the struggle for resource control in the oil producing regions, the military in power, the activities of the oil sector, and the huge revenues from oil. All these factors had a decisive impact on the nation and on the rule of law.

²⁵⁰ Whaley J ‘Oil in Nigeria - Curse or Blessing?’ Geo-Expro Website, available at http://www.geoexpro.com/country_profile/nigeria/, (accessed on 24 June 2009).

²⁵¹ ‘Oil and Gas in Nigeria – An Overview’, available at <http://www.mbendi.com/indy/oilg/af/ng/p0005.htm> (accessed on 22 April 2010).

The initial discovery of crude oil in Nigeria was in 1956 in Oloibiri, in the Niger Delta region of Nigeria. Production in huge numbers commenced between the 1960's and 1970's.²⁵² Prior to the discovery of oil, Nigeria's economy largely depended on the production and export of agricultural products. Cocoa and palm oil (from palm kernel) were being produced and exported in huge quantities from the western part of the country, and groundnut was being exported from the northern part of the country.²⁵³ Nigeria was one of the three largest exporters of cocoa and one of the world's leading producers of palm oil, palm kernel as well as groundnut.²⁵⁴ However, with the discovery and focus on crude oil, Nigeria's cocoa production has dwindled to count for about 5 percent of the total cocoa beans produced in the world in 2006.²⁵⁵

After the discovery of oil in Oloibiri, production started gradually and contributed only a marginal amount to the economy. By the 1970's, Nigeria was producing about 1 million barrels per day (bpd) of crude oil. When oil prices rose sharply around this period, Nigeria's income from oil also rose, creating an unexpected windfall for the country. For example, the contribution of oil to the Gross Domestic Product (GDP) rose from less than 1 percent in 1960, to about 14.6, 21.9 and 29 percents in 1970, 1975 and 1979 respectively.²⁵⁶ This figure peaked to about 2.5million barrels per day (mbpd) in 2004.²⁵⁷ As oil production increased in the country, it had a spiral effect on the agricultural sector, in that the production of agricultural products gradually dwindled to a near halt.²⁵⁸ On the converse however, oil's contribution to the export earnings rose dramatically from 58.1 percent in 1970 to about 95.6 percent in 1979.²⁵⁹

²⁵² Esogbue E, 'Oil in Nigeria: Curse of Blessing'?, available at <http://www.articlesbase.com/politics-articles/oil-in-nigeria-a-curse-or-blessing-325091.html> (accessed on 24 June 2009).

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ INFO COMM: Market information in commodities area on the United Nations Conference on Trade and Development (UNCTAD) website, available at <http://www.unctad.org/infocomm/anglais/cocoa/market.htm> (accessed on 17 December 2009).

²⁵⁶ Omotola S 'The Next Gulf? Oil Politics, Environmental Apocalypse and Rising Tensions in the Niger Delta' (2006) 1(3) *Accord Occasional Paper Series* 8-9.

²⁵⁷ Whaley, *supra*.

²⁵⁸ The cocoa example given above.

²⁵⁹ Omotola (2006) 1(3) *Accord Occasional Paper Series*.

In 1971, Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC). This opened up the country to foreign investors. A state-owned corporation was created in 1971, called the Nigerian National Oil Corporation (NNOC). It was later renamed the Nigerian National Petroleum Corporation (NNPC) in 1977. The NNPC was established with the purpose of overseeing the oil industry, and making sure that the returns from oil benefit the country. It had an agenda of nationalising the industry.²⁶⁰ Thus, any company wishing to carry out oil exploration in Nigeria had to enter into a joint venture with the NNPC. This gave the State about 60 percent ownership in any oil business in Nigeria.²⁶¹ The discovery of oil, coupled with the spike in oil prices mentioned above, meant a huge amount of revenue for the country, which unfortunately was not used to improve the living standards of the majority of the citizens.²⁶² Rather, the revenue has been and continues to be siphoned by the elite for their own purposes. This is due to several reasons which will be discussed below.

When the oil boom began in the seventies, the then government of Nigeria did not have any proper planning for development or industrialisation. The money from oil was so much that it resulted in the arbitrary increase of the salary of public servants (government workers), without an increase in the productivity of these workers.²⁶³ All of a sudden, the public service became the most beneficial place to work. The increased salaries amongst public servants also meant that they began to develop an ostentatious taste for goods, and it changed the psyche and consumption habits of the average Nigerian.²⁶⁴ Farmers left their farms and plantations, and went to the cities in search of the easy money from oil.

²⁶⁰ Prior to the creation of the NNPC, oil exploration had not been well controlled by the state, and foreign interests had been better served through their companies. By seeking to nationalise the industry, the NNPC was to ensure that the interests and benefits of the state from the exploration of oil were better served.

²⁶¹ Whaley *supra*.

²⁶² According to Omotola, revenue from oil amounted to not less than US \$300 billion between 1970 and 2002, despite this more than 70 percent of Nigerians live in poverty. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 10.

²⁶³ This came to be as a result of the Udoji Commission report in 1974, alluded to in Adedipe B, *Impact of Oil on Nigeria's Economic Policy Formulation*, paper presented by the author at conference organised in collaboration with the Nigerian Economic Summit Group, on 'Nigeria: Maximising Pro-poor Growth: Regenerating the Socio-Economic Data', 16 and 17 June 2004.

²⁶⁴ *Ibid*.

The increase in the purchasing power of people was, however, not met with an increase in the production of local goods, as the production and manufacturing sectors of the economy were not that well developed and so could not meet with the demands of the public. This resulted in the importation of goods. The ostentatious taste for goods and services developed by Nigerians meant that only imported items were good enough, not the locally produced ones. As everything began to be imported, locally produced goods were ignored to the advantage of the imported goods, ranging from consumables like chicken, sausages to petroleum products.²⁶⁵

One of the main problems of note around the issue of oil is the role played by military regimes over the years. Prior to the discovery of crude oil, and prior to the 1967 civil war in Nigeria, a 50 percent derivation formula was used to share the revenue accruing to the nation.²⁶⁶ Fifty percent of the revenue from extracted materials went back to the region from which the materials came, and 50 percent was retained at the central government. This was encapsulated in the 1946 Minerals Act²⁶⁷ passed into law by the colonial government, and retained even after independence.

The rise of military regimes, the civil war and the discovery and exploitation of oil in the Niger Delta signalled the death of this favourable policy of derivation,²⁶⁸ and the Minerals Act was later amended by the Minerals and Mining Decree of 1999.²⁶⁹ One of the reasons for this amendment was the threatened secession of Biafra in 1967. This would have had the implication that

²⁶⁵ The petroleum products were products from crude oil sourced from Nigeria. Nigeria did not and still does not have the capacity to refine the crude explored from its lands. Thus due to the lack of adequate and good enough oil refineries, Nigeria has had to import more than half of its annual total consumption of fuel. Coupled with this, the Federal government of Nigeria has over the years gradually been removing the subsidy in petroleum products prices, thus transferring the burden onto the citizens, who have not even benefitted directly from oil prices.

²⁶⁶ Ndongko WA, 'Revenue Allocation and the Stability of the Nigerian Federation 1960 – 1980' (1981) 1 *Public Admin. Dev.* 151 at 155.

²⁶⁷ Minerals Act (Chapter 121 of 1946).

²⁶⁸ International Crisis Group Africa Report No 119, *supra*.

²⁶⁹ Section 1(1) of this decree provided that

'the entire property in and control of all minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and watercourses throughout Nigeria, any area covered by territorial waters or constituency, the Exclusively Economic Zone is and shall be vested in the Government of the Federation *for and on behalf of the people* of Nigeria' (own emphasis).

much of the oil-rich eastern and southern areas would have been lost to Biafra, and not Nigeria. The military government felt that this was unacceptable, and thus in 1969 had passed the Petroleum Act of 1969. This was in a bid to ensure that in the event of future bids for succession, oil remained safely in the control of the centre, at the federal level.²⁷⁰

The Petroleum Act of 1969 vested the Nigerian state with ownership of all oil and gas in, under or upon any lands, anywhere in the country and even in its territorial waters and continental shelf. This differed greatly from the 1946 Act passed by the colonial powers, which basically allowed the different regions to benefit from the products of their lands. The consequence of this act was thus that all revenue from the exploration and exportation of crude oil went directly into the coffers of the federal government, which then adopted whatever derivation formula it felt was appropriate.²⁷¹ For instance, in 1992 only about 3 percent of the total revenue was going to the oil producing areas in the form of special allocation. About 24 percent and 20 percent of the total revenue went to the state and local governments respectively.²⁷²

The implication of this was that there was a lot of money at the centre, but less money at the different states and local government. By 1992, the federal government had control of about forty-six percent of the revenue. This huge income could be attributed as one of the factors that made government at the federal level so attractive to the military, and led to the incessant coup d'états experienced in Nigeria.²⁷³ This singular activity of changing the derivation formula and concentrating power at the centre has contributed to the erosion of the rule of law in the country, because it has made political positions generally more attractive and alluring, resulting in people being willing to do anything to get into power.

²⁷⁰ No 51 of 1969. In the preamble, the purpose of the Act is defined as
'an act to provide for the exploration of petroleum from the territorial waters and continental shelf of Nigeria, and to vest the ownership of all, and on all on-shore and off-shore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental thereto'.

²⁷¹ Crisis Group Africa Report No 119, *supra*.

²⁷² *Ibid.*

²⁷³ *Ibid.*

It appears that the modification of the law, which ended up conferring ownership of all minerals in, under or upon any lands on the federal government, was a deliberate attempt to starve the regions (especially the oil producing ones) of revenue. The military government had thought that this would prevent any further secessionist tendencies from rising, and would safeguard the sovereignty of the nation. Indirectly, however, it had the effect of denying the right to self-determination of its people. The modified law marked a substantial reduction from the colonial era's derivation figures, and did result in the starvation of the regions as intended. A similar version of this law is now enshrined in the section 44(3) of the 1999 Constitution.²⁷⁴ Persistent agitation from the people of the oil-producing regions resulted in the derivation principle in the 1999 Constitution being raised to 'not less than 13 percent of the total revenue accruing to the Federation Account from any natural resources'.²⁷⁵ In March 2006, a Joint Constitutional Review Committee proposed an increase of the derivation percentage to 18 percent, though this has not been approved.²⁷⁶

4.5.1.1 Effects of the exploration of oil in the oil producing regions

The oil producing regions have suffered greatly due to the starvation of funds by the federal government. The regions have remained highly underdeveloped compared to the other regions in the country. However, apart from the problem of funds, other problems, such as mismanagement of the little funds available, lack of accountability on the part of the oil exploring companies,²⁷⁷ greed and corruption, amongst other things, colluded to result in the present glaring discontent of the people of the region.²⁷⁸ They have also suffered greatly from

²⁷⁴ Section 44(3) states that

'the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest the Government of the Federation'.

²⁷⁵ Proviso to section 162(2) of the 1999 Constitution of the Federal Republic of Nigeria.

²⁷⁶ International Crisis Group Africa Report No 119, *supra*.

²⁷⁷ Multinational oil companies have continued the environmentally harmful practice of flaring excess natural gas, despite repeated promises to phase it out. Flaring has produced one of the best-known symbols of the Delta's problems in the controlled infernos that light up the night sky for miles around them.

²⁷⁸ Two governors from the oil rich region, Governors-Joshua Dariye and Diepreye Alamieyeseigha, were arrested in London in 2004 and late 2005 respectively, on charges of money laundering and both subsequently fled the country while out on bail; both were eventually impeached by their respective state legislatures.

the environmental degradation that comes with oil exploration,²⁷⁹ aggravated by the fact that the government has neglected the environment.

Of all the problems mentioned above, the following problems need to be singled out:

a) Oil theft, also called bunkering, is a present problem.²⁸⁰ The perpetrators of these illicit activities are often influential people with connections all around the country, and even in some of the oil companies. These people range from local politicians and community chiefs, to oil company staff and military officials. The fact is that large scale bunkering could not take place without the complicity of top and senior officials.²⁸¹

Both the state and federal governments are seen as being in complicity with the oil companies, in the ill-treatment of oil producing regions and their people.²⁸² Government has failed over the years to enforce various environmental and also oil prospecting laws of the land. Due to the lack of proper monitoring and enforcement, the multi-national companies involved in the exploration of oil were allowed to get away with non-compliance with the necessary environmental safeguards. As one of the richest regions in Nigeria in terms of crude oil, the Niger delta region is unfortunately also one of the most under-developed, having suffered many years of political neglect.

b) Despite the huge revenue and returns it brings the nation,²⁸³ crude oil exploration has had little positive impact on the Niger Delta communities from whose lands the oil is explored. Instead, it has had devastating consequences on

²⁷⁹ Every year the network of pipelines that crisscross the region's maze of creeks and mangrove swamps records hundreds of oil spills that often spoil farmland and waterways. The multinational company, Shell, which accounts for roughly half of the Delta's onshore infrastructure, recorded 224 spills in 2005 and 236 in 2004. Many residents of the Delta complain that these and other harmful practices have led to health problems and made it harder for them to earn a living off the land.

²⁸⁰ 'Bunkering' as a term takes its name from the technical practice of loading crude oil in a tanker. Illegal bunkering could take place in different forms. It could even be from a cut in the pipelines to siphon some of the oil, through the illicit filling of whole tankers. The stolen oil is then sold at black market rates.

²⁸¹ International Crisis Group Africa Report NO 119, *supra*.

²⁸² This is due to the fact that though the legal framework exists to address all of these acts of crime, they are not being enforced by the relevant government agencies. The necessary oversight within government structures also do not function.

²⁸³ An audit of the NNPC from 1999 to 2004 revealed that Nigeria profited by over \$96 billion in oil revenue.

the environment and on the people. Oil spillages have become common place in the regions. Between 1976 and 1999, there were about 3,000 oil spills formally reported by the oil companies to the NNPC.²⁸⁴ This translated into over 2 million barrels of oil spilled into the country's terrestrial, coastal and offshore marine environment.²⁸⁵ These oil spills, combined with decades of gas flaring, are now having serious consequences on the environment.

c) Apart from oil spills, gas flaring is another effect. It is a consequence of the extraction of crude oil from the earth. Gas is a natural by-product of the process of extraction of crude oil. Nigeria does not have the adequate facility to refine this gas that occurs whilst extracting crude oil, and to convert it for commercial use. The gas cannot be trapped and shipped off to the west to be refined like crude oil; it is therefore burnt off (flared) in the air.²⁸⁶ This amounts to waste, especially in the light of the demand for gas all over the world and in Nigeria itself. Instead the country imports gas at exorbitant prices.²⁸⁷

Gas flaring is a source of continuous air pollution. The combination of the oil spills and gas flaring have resulted in serious atmospheric pollution; ground water and soil contamination; constant heat around the flare pits and abnormal salinity of the pool water. These have resulted in serious health hazards for the inhabitants of the Niger Delta region, and grave disturbances to the life cycles of plants and animals, thus constituting grave violations of the rights of the inhabitants to clean air, water and a viable environment.²⁸⁸

The people of the Niger Delta are predominantly fishermen, and have been badly affected by the effects of water pollution, the latter the result of the contamination

²⁸⁴ There were probably much more than this official figure.

²⁸⁵ Agbu Osita, 'Oil and Environmental Conflicts' in Saliu, Hassan A (2005) (ed) *Nigeria Under Democratic Rule, 1999-2003*, vol 2, 82-83.

²⁸⁶ Omotola notes that in 1991 when Nigeria's gross gas production was 31,500,000 standard cubic feet, about 24, 240, 000 of it was flared, amounting to about 76 percent of the total. Consequently, by 1995, about 30-35 million tons of carbon dioxide and an estimated 12 million tons/year of methane were emitted into the atmosphere. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 10.

²⁸⁷ 'Energy Information Administration: Country Analysis Briefs', available at <http://www.eia.doe.gov/cabs/Nigeria/Full.html> (accessed on 29 July 2010).

²⁸⁸ International Crisis Group Africa Report No 113 of July 2006, titled 'Nigeria: Want in the Midst of Plenty', available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/Nigeria%20Want%20in%20the%20Midst%20of%20Plenty.ashx> (accessed on 29 June 2009).

of the waterways from the wastes of the exploration process (when it is not properly managed, this results in seepage into the waterways). All of these have had a great impact on the livelihood of the people, which revolves around rivers and the land, as they are mostly fishermen and farmers.²⁸⁹ Many of them have been left redundant as a result of the high levels of pollution in the waters and in the soil. The health of the people is also affected. Some of the gaseous pollutants released into the atmosphere, such as carbon monoxide, chlorine, nitrogen, etc, are known to be responsible for causing headaches, heart problems, irritation, oedema and others.²⁹⁰

d) Another problem experienced is that of the compulsory acquisition of land, and inadequate compensation. Oil companies are empowered by legislation to acquire land for the purposes of oil exploration and for public purposes, as long as compensation (or rent when using only a portion of the land) is paid to the land owners.²⁹¹ However, in many instances, the rent paid is often insufficient and the compensation, if it does come after long delays, is usually less than what the farmers would have received if they worked the land themselves.²⁹² These farmers do not have a choice to refuse sale, as the different legislations empower the companies to acquire land, and pay compensation or rent.²⁹³ The rate or value of the compensation to be paid is also set by the oil companies and not by independent bodies. The people end up being deprived of their fishing ponds, farming lands and other sources of income, and then do not get adequate compensation to allow them to enter into alternative businesses.²⁹⁴

²⁸⁹ International Crisis Group Africa Report No 113.

²⁹⁰ Omotola (2006) 1(3) *Accord Occasional Paper Series* 11.

²⁹¹ Section 11 of the Oil Pipeline Act of 1956, together with section 8 of the Land Use Act (1978) and section 44 of the 1999 Constitution of the Federal Republic of Nigeria provide the framework for compulsory acquisition of land for overriding public purposes and for oil prospecting. In particular, section 11 of the Oil Pipeline Act empowers the license holders to take possession of or use any land to, amongst other things, construct and operate an oil pipeline. The section however provides that compensation must be paid by the license holder to the person(s) whose land is injuriously affected by such action.

²⁹² Ogedengbe PS, 'Compulsory Acquisition of Oil Exploration Fields in Delta State, Nigeria: The compensation problem' (2007) 25(1) *Nigerian Journal of Property and Investment Finance* 70. Here the author lists his findings and makes recommendations to address the different problems of adequate and timely compensation in this area.

²⁹³ Section 11 of the Oil Pipelines Act of 1956 empowers the license holders to take possession of or use any land to, amongst other things, construct, maintain and operate an oil pipeline.

²⁹⁴ *Ibid.*

Government (both at state and central levels) has failed and continue to fail the people of the Niger Delta region in this regard, as they have allowed these practises to continue unabated over the forty and odd years that the oil companies have been operating in Nigeria. There has also been little or no enforcement of the requirements of the law. For example, the law requires that on the issue of compensation, qualified estate surveyors and valuers are to be used to assess the value of the land acquired.²⁹⁵ However, the oil companies have been making use of people they refer to as ‘Damage Clerks’, who are not professionals in the field, and who give a valuation favourable to the oil companies and not the affected indigenes.²⁹⁶ Nothing has been done so far by government to put a stop to this.

The combination of these factors discussed above has created a high level of unemployment, which has led to high levels of frustration and listlessness amongst the youths in the Niger Delta region. The consequence of this has been high rates of violent crimes in the region and the continued militancy of the region. The situation has been further worsened by the neglect of the region by the central government, and the pervasive corruption of the government at the state levels. Government has many times been accused of colluding with the oil companies, and has failed to enforce the legal environmental standards, and the development conditions (in terms of infrastructure development, social amenities, education, countering the effects of the pollution etc) contained in the law that were made a pre-condition of the oil concession agreements. In the light of these failures, alternative means of livelihood have not been provided to the people, and the youths are not being constructively engaged at any level.²⁹⁷ This has directly resulted in many of the youths joining the militant struggle for resource control.

The effects of these problems are long term, and have being felt for a while now. After years of suffering untold hardships, and of being ignored by the government, it is of some surprise that the armed struggle ongoing in this region did not start sooner. A culture of cynicism about government, economic stagnation and hopelessness has pervaded the region, and resulted initially in

²⁹⁵ Sections 19-20 of the Oil Pipelines Act of 1956.

²⁹⁶ Ogedengbe (2007) 25(1) *Nigerian Journal of Property and Investment Finance* 71-72.

²⁹⁷ International Crisis Group Africa Report No 113, *supra*.

low-grade violent conflicts, which later spiralled out into high grade violence.²⁹⁸ For the people, the exploitation they have suffered in the hands of the oil companies and government works to further the alienation that exists between the citizens and the government. The confidence and optimism that people would normally repose in the law, and in the apparatus of the law is now lacking in the case with the people of the Niger Delta region. They have been failed repeatedly by the law and the Nigerian state and have thus reached a stage where they have nothing further to lose. The youths of the region are more severely affected, as they bear the brunt of the scourge of unemployment, continuous pollution and the stark reality that they are not being catered for by the Nigerian state.

All of these have boiled over into the intense violence that is seen in the region, and evident in the cases of kidnappings of foreign and local citizens (for ransom and as a form of political posturing); armed attacks against oil installations; increased armed robberies, and increased bunkering activities amongst others.²⁹⁹ Next addressed are some aspects of the continued struggle of the people of the Niger Delta region, and how this situation and the inability of the Nigerian government to tackle it continue to undermine the rule of law.

4.5.1.2 Struggle for resource control

Different groups and organisations of civil society have emerged over the years from the different ethnic groups and communities, making up the Niger Delta people. They have actively agitated for the rights of the communities to justice in all areas of their lives. Over time, ‘resource control’ has been the operating mantra of some of these groups (that is the right to control the oil that is exploited in their region, as opposed to the Federal government). One of the first of these groups was the Movement for the Survival of the Ogoni People (MOSOP), a non-violent group formed in 1990.³⁰⁰

²⁹⁸ Global Security website ‘Nigeria – Niger Delta’, available at <http://www.globalsecurity.org/military/world/war/nigeria-2.htm> (accessed 22 April 2010).

²⁹⁹ Hazen JM *et al*, (2007) ‘Small Arms, Armed Violence, and Insecurity in Nigeria: The Niger Delta in Perspective’, *Occasional paper* of the Small Arms Survey Group: Geneva Institute of International Studies: Geneva.

³⁰⁰ ‘The Ogoni Struggle’, available at <http://remembersarowiwa.com/background/the-ogoni-struggle/> (accessed on 7 August 2009).

The Ogoni ethnic group is one of the largest ethnic groups in the area. The late human rights activist and freedom fighter, Ken Saro-Wiwa, an author and a businessman from Ogoni, was the leader of MOSOP. He worked through the organisation to raise the level of awareness of the rights of his people and of other groups that were being violated by the oil companies exploring oil within the area.³⁰¹ This was due to the fact as indicated above, that the necessary environmental law standards and requirements were not being observed by the oil companies, leading to huge levels of environmental pollution.

In 1992, Ken Saro-Wiwa canvassed the position of the people of the Niger Delta before the United Nations Working Group on Indigenous Peoples in Geneva.³⁰² In 1993, MOSOP organised peaceful protests and demonstrations, directed at Shell and other oil companies all over Ogoniland, and marked the 4th of January of that year as Ogoni day.³⁰³

Shell Petroleum Development Company of Nigeria (SPDC) is one of the multinational companies operating oil fields all over the oil producing areas of Nigeria. The company dominates Nigeria's oil sector, as its operations cover the largest area in the oil industry. Its parent company is Royal Dutch Shell, based in the Netherlands.³⁰⁴ SPDC started operating in Nigeria as early as 1936, and has since been a major player in Nigeria's oil industry. Shell is one of the oil companies that has been accused of illegal, environmentally crippling practices, and various breaches of the law.³⁰⁵

The peaceful protests of MOSOP and other organisations did not go down well with the oil companies. The companies were averse to such publicity and to the negative international exposure, and they began to look for ways to frustrate the efforts of the protesters. They demanded that the Federal Government of Nigeria provide security from the protesters for their various installations. The army troops were called in to ensure that the demonstrations were curbed, thus leading

³⁰¹ *Ibid.*

³⁰² He was also able to appeal to various other international organisations like Greenpeace, Amnesty International, and International Pen organisation.

³⁰³ 'The Ogoni Stuggle', *supra*.

³⁰⁴ It has British and Dutch origins.

³⁰⁵ There are quite a number of multinationals operating joint venture agreements with the Nigerian government (via the NNPC) in the oil sector. These include Chevron and ExxonMobil. Another company involved in the sector is Agip,

to a military crackdown on the peaceful protests and demonstrations. These army troops were funded by Shell.³⁰⁶ Protesters sustained serious injuries and some died as a result of the response of government troops to the marches.³⁰⁷ Around the same time, towards the end of 1993, General Sani Abacha came into power after a coup d'état, and his government intensified the crackdown on the Ogoni people. Their villages were attacked, trashed and burnt. The death rate increased as a result of these activities.³⁰⁸

It was during this crackdown on the peaceful protests that four Ogoni chiefs were brutally murdered, and Ken Saro-Wiwa and ten others were arrested by the military government, allegedly in connection with the death of chiefs, even though there was no evidence linking them to the deaths. An international outcry against the actions of the military government followed, because the actions were regarded as a ploy to quell the agitation of the people.³⁰⁹ In October 1995, Ken Saro-Wiwa and eight others were found guilty by a military court and sentenced to death by the then military Provisional Ruling Council (PRC).³¹⁰ Despite several pleas for clemency from both international and local sources, on the 10th of November, the judgement of the PRC was carried out and the men were executed.³¹¹ They were executed in defiance of international appeals for leniency by members of the Commonwealth, the United States and various other international organisations.³¹²

³⁰⁶ These facts became public knowledge as a result of a dispute between Shell Nigeria and another company before the Federal High Court in Lagos. An array of documents which implicated Shell in the crackdown on the Ogoni people were tendered before the court, an example of which is a letter to the Inspector General of Police from Shell requesting arms and ammunitions for its operations in the Niger Delta region. This evidence is referred to by Lock C 'Ken Saro-Wiwa or The Pacification of the Primitive Tribes of the Lower Niger' in McLuckie & McPhail *et al* (2000) *Ken Saro-Wiwa: writer and political analyst* 6-7.

³⁰⁷ The Ogoni Struggle, *supra*.

³⁰⁸ The Ogoni Struggle, *supra*.

³⁰⁹ Amnesty International (1994), 'Ken Saro-Wiwa, Writer and President of the Movement for the Survival of the Ogoni People (MOSOP)', *Urgent Action*, 24 May; Amnesty International (1994) 'Nigeria: Military Government Clampdown on Opposition', 11 November; Human Rights Watch/Africa (1995) 'The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria', *Human Rights Watch/Africa*, July, 7(5) 14.

³¹⁰ The remaining two men were acquitted.

³¹¹ The Ogoni Struggle, *supra*.

³¹² International pleas came from many world leaders, including President Bill Clinton of the US, Prime Minister John Major of Britain, President Nelson Mandela of South Africa.

Their execution evoked a lot of outrage internationally and led to Nigeria's immediate suspension from the Commonwealth and the imposition of sanctions by other countries.³¹³ The then Prime Minister of the United Kingdom, John Major, was quoted referring to the trial and murder as, 'a fraudulent trial, a bad verdict, and an unjust sentence, now followed by judicial murder'.³¹⁴ The military government, it seemed, had hoped that the executions would quell the agitations of the people of the Niger Delta. What it in fact did, was to increase the fervour and desperation of the people, by signalling to them that the Nigerian government was not ready or willing to defend their rights.

On the continental front, there was little or no reaction to this outrage. The community of African leaders (under the auspices of the OAU) did not make any attempt at meaningful intervention in the situation in Nigeria during this time, even though it had adopted the Mechanism for Conflict Prevention, Management and Resolution in 1993. This mechanism remained an aspirational instrument, rather than an effective mechanism.³¹⁵

Shell was implicated in the killings for its complicity and for its human rights violations in the Niger Delta. In 1994, Shell was sued in New York by the Ogoni who had suffered losses as a result of the company's actions in the region. After the Saro-Wiwa executions, the pleadings before the court were amended to include allegations against Shell for its involvement in the killings.³¹⁶ After fifteen years of legal battle and appeals, this case was eventually settled by Shell in June 2009, with a payout of \$15.5m to the plaintiffs.³¹⁷ The struggle of the

³¹³ Inamete UB (2001) *Foreign Policy decision-making in Nigeria* 277.

³¹⁴ Quoted by Bill Kovarik of the Society of Environmental Journalists in his article, 'Remembering Ken Saro-Wiwa', available at <http://www.radford.edu/wkovarik/misc/blog/17.wiwa.html> (accessed on 29 of November 2009).

³¹⁵ Cases related to the plight of the Ogoni, their arrest, trial (and subsequent execution), were filed by civil organisations before the African Commission for Human and Peoples Rights before the execution of the nine Ogoni. The Commission delayed and postponed its processes and failed to deliver decision until much after the execution.

³¹⁶ 'Shell to pay \$15.5m to Settle Nigerians Claims', available at <http://edition.cnn.com/2009/WORLD/africa/06/08/nigeria.shell/index.html> (accessed on 8 of August 2009).

³¹⁷ *Ibid*. This settlement amount is considered small compared to the damage that Shell has left in the region, and compared to the millions of dollars that Shell has made operating out of the region.

Niger Delta people continues till date, as the Federal Government has not found any solution to the crisis.

4.5.1.3 Interplay of the military

The above exposé on the challenges of the Niger Delta people leads to another angle that has to be explored. This is the issue of the manner in which oil and the existence of military regimes has influenced, to a certain degree, the interaction of the international community with Nigeria. It is felt that the international community have acquiesced to the different military regimes that Nigeria has had.³¹⁸ The abundance of hydrocarbon resources in Nigeria (in terms of oil and gas) has contributed to this acquiescence. In order to maintain the world production levels and to maintain prices in the world oil market, the international community has had to maintain a wide array of sources of hydrocarbons, Nigeria being one of them. This ‘maintenance’ showed in the way that the international community did not outrightly condemn Nigeria’s military regimes. Instead, there was a general silence (acquiescence) regarding the multiple coup d’états that continued to take place in Nigeria and the actions of those military regimes.³¹⁹ The military regimes in Nigeria allowed transnational oil companies virtually unfettered access to reserves in exchange for petroleum income from the 60 percent of the joint venture agreements owned by Nigeria. This income has been described as petroleum rents (money accruing from the exploration of crude, seen as form of rent taking), also called petro dollars.³²⁰

The access granted to the oil companies is said to be unfettered in the sense that although there are rules and regulations governing the exploration of crude in Nigeria as seen above, a culture of corruption and lack of will to enforce the law has seen these rules being blatantly jettisoned in favour of the trans- and multinational companies.³²¹ An example of this is the acquisition of lands for oil exploration, described above. In this case the rules governing compensation are

³¹⁸ White G. & Taylor S. ‘Well-Oiled Regimes: Oil & Uncertain Transitions in Algeria & Nigeria’ (2001) *Review of African Political Economy* 323-344.

³¹⁹ White (2001) *Review of African Political Economy* 323-344 at 325; in relation to the execution of Saro-Wiwa and others, Shell rationalised its inaction on the basis of respect for Nigeria’s sovereignty.

³²⁰ *Ibid.*

³²¹ *Ibid.*

provided for in the legislation, but blatantly ignored by the multinational companies.

Another example is the continued practice of gas flaring by the multinational companies even though legislation exist that make such practice illegal.³²² Gas flaring was made illegal (with certain exceptions) in Nigeria by virtue of an act passed in 1979.³²³ The act gave the oil companies five years to affect a plan of action to stop gas flaring by 1984, except in instances where ministerial consent had been obtained. For such consent to be granted, the Minister is required, under the act, to be satisfied that the utilisation or the reinjection of the gas is not appropriate or feasible in particular oil fields.³²⁴ Regulations published in 1984 pursuant to the 1979 act made those conditions more stringent.³²⁵ Even after the passing of the law, oil companies continued with gas flaring under the excuse that they had not had the time to put alternative processes in place. There has also not been any evidence of any special consent granted to any of the oil companies by the Minister to justify the continued gas flaring.³²⁶

In an attempt to address the situation of gas flaring, the Nigeria Liquefied Natural Gas Company Limited (NLNG) was incorporated in 1989, with the purpose of harnessing Nigeria's abundant gas reserves to produce liquefied natural gas, and other gas products. The company is a joint venture owned by the NNPC with a 49 percent stake, Shell with a 25.6 percent stake, and other oil companies also. The operation of the company's plant in Bonny Island, Port

³²² Umukoro BE, in his article, 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment: The Case of the Niger Delta', available at <http://www.scribd.com/doc/17914659/Gas-Flaring> (accessed on 8 August 2009), describes the flares as being, 'very loud, dangerously hot, which gratingly ascends to the heavens, twenty-four hours a day, thereby depriving the surrounding area of natural light, it emits thin, black, dense, cloudy smoke containing several harmful and poisonous gases'.

³²³ Associated Gas Reinjection Act of 1979, Chapter A25 Laws of the Federation of Nigeria (LFN) 2004.

³²⁴ Section 3 of the Associated Gas Reinjection Act.

³²⁵ Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1984. These more stringent conditions included that before the Minister allows continued gas flaring, more than 75 percent of the total gas produced should have been effectively utilised or conserved; and the produced gas must contain more than 15 percent impurities which would make it unsuitable for industrial use.

³²⁶ Some of the oil companies have invested in projects which they claim have reduced the gas flared. 'Gas gathering' projects for the purpose of gathering and diverting the gas as production have been implemented by Shell, and the gas is now diverted to supply domestic customers, produce some electricity, and to supply the Nigeria Liquefied Natural Gas plant.

Harcourt, has helped to reduce the volumes of gas flared in the country, though not completely. About 60 percent of gas flared is able to be diverted to the NLNG for further production.³²⁷ Forty percent of the gas produced is therefore still being flared in contravention of the Associated Gas Re-injection Act and Regulations. Shell, for its own part, has blamed this situation on the unrest in the Niger Delta which prevented the proper implementation of the mandate of the NLNG, also on the lack of funding from the government owned NNPC (which owns a majority of the joint venture).³²⁸

The continued flaring of gas in whatever quantities constitutes a disregard for the laws of the host country; an indication that the oil companies seem to be the ones dictating the rules in their various joint venture relationships with the Nigerian government. The Federal High Court of Nigeria, sitting in Benin in 2005, declared continued gas flaring by the oil companies unconstitutional and a breach of the right to life and or dignity of the human person enshrined in Sections 33(1) and 34(1) of the 1999 Constitution.³²⁹ This case will be discussed later in the chapter.

Dealing with the issue of the silence and acquiescence of the international community to the atrocities in these regions, White explains that such acquiescence is evidence of a desire not to ‘rock the boat’ in a way that will impact on international oil prices. Rocking the boat, he says, will adversely affect the economies of developed countries, as they are largely dependent on oil.³³⁰ He argues also that the fact that there are a limited number of actors in the oil extractive industry made it even more delicate for the international community to pressurise the non-democratic governments that ruled Nigeria at the time. This might have led to erratic behaviour from these governments, resulting in a drop in oil production.³³¹ As a result, few key actors in the international community have had the incentive to facilitate or encourage democratic processes, due to the

³²⁷ Shell Nigeria – ‘Gas Flare Out’ Shell website, available at http://www.shell.com/home/content/nigeria/about_shell/issues/gas_flaring/gasflare.html (accessed on 15 August 2009).

³²⁸ *Supra*.

³²⁹ *Jonah Gbemre v Shell Petroleum Development Company (Nigeria) Limited & Ors*. Suit No FHC/B/CS/153/05 (unreported), delivered on the 14th of November 2005.

³³⁰ White (2001) *Review of African Political Economy* 323-344 at 337.

³³¹ *Ibid*.

benefits they get under the military regime. This, together with the natural wealth of the country, has produced a situation in which oil companies and military regimes become mutually dependent.³³²

White further explains that the claim of sovereignty and territorial integrity is also another factor that contributes to this dynamic relationship. The proclaimed ‘inviolability’ of sovereign states has been used by the international community to explain their unwillingness to interfere in the domestic affairs of Nigeria.³³³ These situations have worked to erode the rule of law in the country, and to further delegitimise the already questionable legal system and laws of the country.

4.5.1.4 Effects of oil on Nigeria

It has been described as a paradox that despite the huge revenues coming in from oil in the past thirty odd years, Nigeria still remains to some extent at a stunted stage of development, and is still referred to as an under-developed economy. The explanation for this is said to be evident in the analysis of the effect that the focus on one export commodity has had on other sectors of the economy. Oil bonanza has also created a situation of political authoritarianism, and the propensity for corruption.³³⁴ As stated by White, ‘the existence of a lucrative lead sector not only prompts dependency in the sense of “vulgar dependencistas” but it also engenders, “a paradox of plenty”’.³³⁵

The term ‘paradox of plenty’ is one that has been used by Karl³³⁶ to explain why despite massive revenue from oil, different oil-exporting countries (like Venezuela, Iran, Nigeria, Algeria and others) have suffered disappointing developmental outcomes over the years. Karl explains that ‘*dependence on a particular export commodity shapes not only social classes and regime types ... but also the very institutions of the state, the framework for decision-making, and*

³³² White (2001) *Review of African Political Economy* 323-344 at 324. He feels that this scenario applies to Algeria also, which has been under military rule for many years.

³³³ White (2001) *Review of African Political Economy* 323-344 at 325.

³³⁴ White (2001) *Review of African Political Economy* 323-344 at 327.

³³⁵ *Ibid.*

³³⁶ Karl TL (1997) *The Paradox of Plenty: Oil Booms and Petro-States* (Studies in International Political Economy, no 26).

*the decision calculus of policy makers.*³³⁷ It would appear that the corrupt military regimes in Algeria and Nigeria had historically rejected developmentalist agendas in favour of their own personal objectives and agendas, which usually included securing access to oil rents, making the countries ‘rentier states’.

The theory of the ‘rentier state’ explains that countries that receive substantial amounts of oil revenues from the international community on a regular basis, tend to become autonomous from their societies, unaccountable to their citizens, and autocratic. The theory is used to help explain why these states with abundant resource wealth perform less well than their resource-poor counterparts.³³⁸ Omeje clarifies this definition further when he says that ‘a rentier state is a state reliant not on the surplus production of the domestic population or economy but on externally generated revenues or “rents”, usually derived from the extractive industry such as oil’.³³⁹

Karl contends further that in these oil-exporting states (which are also under-developed or developing), oil revenue makes it unnecessary for the states to depend on domestic production or domestic taxation to finance development or to finance the running of government. In such situations, governments are not forced to formulate their goals and objectives under the scrutiny of citizens who pay taxes and the bills. They are rather permitted to distribute funds (oil funds) among sectors and regions on an *ad hoc* basis.³⁴⁰ Thus, these states generally lack a productive outlook in this sense, as revenues from natural resource rents contribute a significant proportion of the gross domestic products and are distributed at the expense of the real productive sectors of the economy.³⁴¹ This distribution of rentier revenues, in the absence of stable and well-developed legal, political and bureaucratic institutions, is what is said to encourage corruption.³⁴²

Omeje goes further to explain that corruption in rentier states is further enhanced by the presence of what he refers to as a ‘patrimonial political culture’. This he adduces, describes what is observed in the ‘values, norms and networks of

³³⁷ Karl (1997) *Studies in International Political Economy* 7 (own emphasis).

³³⁸ *Ibid.*

³³⁹ Omeje K (2006) *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* 2.

³⁴⁰ Karl, (1997) *Studies in international Political Economy* 190.

³⁴¹ Omeje (2006) 3.

³⁴² *Ibid.* Nigeria is a perfect example.

inherited traditional patterns of politics in most African and post-colonial states', which outwardly appear to be institutionalised administrative states, but are really operating on the basis of 'patron-client networks and trajectories rooted in historical patterns of authority and social solidarity'.³⁴³ The effect of this is that it blurs the distinction between secular and sacred, and more importantly, between public and private resources.³⁴⁴ Further, he posits that it blurs the contemporary statutory distinction between public office, the office holder, public resources and private purposes.

In the 'rentier' state of Nigeria, this is the situation, as those in authority accumulate public funds for their own personal purposes, without regard to the purpose and state of the funds, and to the illegality of their actions. Corruption has therefore become an institutionalised practice of both the state and the society. The income ('rent') derived from oil has not only been used to provide infrastructure and social amenities, but it has mainly found its way into private pockets, as a tool for political and economic patronage. This has created distortions on the Nigerian economy. Purchasing loyalties have taken on a predatory quality giving rise to 'pirate capitalism', as described by Schatz.³⁴⁵ Cronyism and corruption thus have become the order of the day. A wide range of actors, both internal (the politicians, public servants, the private sectors of the society) and external (the international community comprising of donors, aid workers, World Bank officials, transnational corporations), are seen now as the contributors and beneficiaries (directly and indirectly) to the corruption that deforms economic and political life in Nigeria.³⁴⁶

The instances of corruption in Nigeria are varied and overwhelming. From the corruption at the highest levels of political authority (usually referred to as 'grand' corruption), to the corruption at the state system ('petty' corruption), all of these have resulted in a situation in which corruption has become pandemic in Nigeria.³⁴⁷ A few instances are provided below for the purposes of clarity.

³⁴³ *Ibid.* He refers to Grugel (2002) *Democratization: A Critical Introduction*.

³⁴⁴ *Ibid.*

³⁴⁵ Schatz SP 'Pirate Capitalism and the Inert Economy of Nigeria' (1984) 22(1) *J. of Modern African Studies* 45-57.

³⁴⁶ White (2001) *Review of African Political Economy* 323-344 at 328.

³⁴⁷ Dike V 'Corruption in Nigeria: A New Paradigm for Effective Control', available at

An instance of ‘grand’ corruption with international actors’ involvement is the recent indictment of KBR Incorporated and Halliburton Company by the US Securities and Exchange Commission, on charges related to the bribery of the then Nigerian president and government officials over a period spanning 10 years.³⁴⁸ KBR Incorporated was then in the early 1990’s a subsidiary of American based Halliburton Corporation. A United States Department of Justice investigation had discovered this bribe scheme in which amounts totalling \$180 million were paid in instalments to then President General Abacha and other government officials, in order to ensure that the company secured a \$6 billion contract to build a liquefied natural gas facility in the Niger Delta.³⁴⁹ Abacha, who ruled the country from 1993 to 1998, is accused of having amassed over £5 billion from the Nigerian treasury through various schemes. With these proceeds of ill-gotten wealth, he and his family were able to deposit in foreign accounts all over the world.³⁵⁰

Another example is what is referred to as the ‘Globacom affair’, which boiled over in 2005. In this scandal, then Vice President Abubakar was accused by the Economic and Financial Crimes Commission (EFCC) of Nigeria, of using his position as the vice president and chairperson of the Petroleum Technology Development Funds (PTDF)³⁵¹ to divert funds meant for the national treasury to himself and to secure his interests in other foreign companies. These cases are rampant in Nigeria, and unfortunately, criminal charges are rarely brought against the beneficiaries of such misappropriation.³⁵²

<http://www.africaneconomicanalysis.org/articles/gen/corruption-dike/htm.html> (accessed 22 April 2010).

³⁴⁸ Litigation Release No. 20897A / February 11, 2009 - *Securities and Exchange Commission v. Halliburton Company and KBR, Inc.*, 4:09-CV-399, S.D. Tex. (Houston), available at <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm> (accessed on 22 April 2010).

³⁴⁹ *Ibid.*

³⁵⁰ The Guardian, ‘London Slow to Act over Missing Billions’ 4th October 2001, available at <http://www.guardian.co.uk/uk/2001/oct/04/london> (accessed on 26 April 2010).

³⁵¹ This fund was set up with the purpose of empowering and equipping young Nigerians with the skills and knowledge needed in the oil and gas industry, i.e. to qualify Nigerians as graduates, professionals, technicians and craftsmen in the field of engineering, geology, science and management in the oil and gas industry. Contributions to the fund were from the government and oil companies etc.

³⁵² Edozie RK, ‘Nigeria’s 2007 Elections in Comparative Perspective: Democratic Capitalism and the Crisis of Democracy in Africa’ in Okafor VO (ed) (2007) *Nigeria’s Stumbling Democracy and its Implications for Africa’s Democratic Movement* 148.

Transparency International, an international non-governmental organisation, which focuses on how governments over the world deal with issues of accountability and transparency in the running of the state, has recently released its Corruption Perception Index (CPI).³⁵³ This is an annual survey of levels of perceived public sector corruption in countries all over the world, which has attained a great level of international integrity. In the past ten years, Nigeria has ranked as one of the most corrupt countries on the CPI surveys. In the year 2000 in particular, the country was ranked as one of the countries with the highest levels of corruption, out of ninety countries surveyed, with a rating of 0.6 (where 0 is the highest level of corruption and 10 the lowest).³⁵⁴ By 2009, Nigeria's ranking had improved by rising to the 130th position out of 180 countries surveyed, with a rating of 2.5.³⁵⁵

These actors have contributed in varying degrees to the endemic corruption that has now beset the country. This has considerably crippled the effectiveness of the rule of law in the country, as all the actors of society, whilst not identifying with the present 1999 Constitution due to its lack of legitimacy, have become gripped by the pandemic of corruption and mismanagement that have characterised the rentier state that Nigeria has become. The abundance of petrodollars had a beclouding effect on the reasoning of Nigerians. Oil wealth insulates authoritarian (military or civilian) states pretty well, enabling the state to shun a balanced development of the national economy, and to ignore societal objectives. In relation to this, Clapham has stated that

'it was symptomatic of the relationship between the rentier state and its population that despite the wave of democratisation sweeping Africa in the early 1990s, no African oil producing state - from Algeria south

³⁵³ Transparency International Corruption Perception Index (CPI) Survey, 2009, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009 (accessed on 26 April 2010).

³⁵⁴ Transparency International CPI survey, 2000, available at http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi/2000 (accessed on 26 April 2010).

³⁵⁵ Transparency International CPI survey, 2009, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (accessed on 26 April 2010). See table 2 in the annexure.

*through Nigeria and Gabon to Angola – achieved a successful democratic transition’.*³⁵⁶

Clapham’s observation is very poignant in relation to Africa. A look at other oil producing countries shows that there are other oil-producing nations outside of Africa, that have been able to proceed on the development path, despite having had military rule experiences. In the bureaucratic-authoritarian experience of Latin America, for example, economic development did occur to a degree. Countries such as Chile, Venezuela and even South Korea, have experienced significant economic development under military regimes. However, in the case of Nigeria, as well as other African oil-producing countries, little or no development occurred during such comparative military domination.

The reason for this has been said to be the utter dependence on oil – to the detriment of the development of other economic sectors, as well as to political liberalisation.³⁵⁷ Coupled with this, however, is the fact that the legal systems in African countries are mainly forced and foreign, and as a result, the countries and societies do not have an inherent value based legal system which would counter the effects and lure of corruption and other vices. This scenario is what led Diamond to observe that, ‘without question, both for democracy and development, oil has been more of a curse than a blessing for Nigeria’.³⁵⁸

The outcome of all of this is that in Nigeria, the facilitators of state power and the suppliers of the rents essential to military domination had been the transnational corporations, and consumers in advanced-industrialised countries respectively. Even in the case of the ‘democratic’ governments in Nigeria, the situation has remained the same. Politicians still depend a lot on the rents from transnational corporations. This creates an abnormal situation. A situation in which a social contract can be said to exist, not between those in government and the society; but between those in government and the multinationals that provide the state with resources, through the continued purchase of oil.³⁵⁹ Oil rents continue to be

³⁵⁶ Clapham C (1996) *Africa in the International System: The Politics of State Survival* 71 (own emphasis).

³⁵⁷ White (2001) *Review of African Political Economy* 328.

³⁵⁸ Diamond L (1997) ‘Postscript and Post-mortem’ in Diamond L, Kirk-Greene A and Oyediran O (eds) *Transition without End: Nigerian Politics and Civil Society under Babangida*.

³⁵⁹ White (2001) *Review of African Political Economy* 323 at 328.

paid, and is embezzled by those in government and the elite with their connections. The law is therefore rendered ineffective against these parties. In the absence of the necessary social contract between the government and the society, little can happen in terms of economic or social development, and ultimately in terms of the entire society working towards entrenching the rule of law in the nation.

The main point to note here is that authoritarian regimes, whether military or civilian, provide a certain ‘cloak’ for the operation of and profit-taking by transnational corporations in return for compensation.³⁶⁰ This situation can only be changed by the people if they are no longer willing to accept the *status quo* as it is.

4.5.1.5 Change through the power of the people

The 1995 execution of Ken Saro-Wiwa and the continued degradation of the Niger Delta environment, amongst other things, have resulted in Shell and other companies operating in the region suffering a loss of reputation amongst the people of the oil producing areas and Nigerians generally.³⁶¹ Consequently, the Niger Delta communities have withdrawn their social licence for the oil companies to operate in their lands. This has resulted in protests, demonstrations and violence against these companies which have escalated and turned deadly. An era of militancy has emerged in which heavily armed militants (mostly the youths of the regions who have been rendered redundant by the pollution and environmental degradation of the area), have taken up the battle against the oil companies and the Nigerian government. They have turned to sabotaging and blowing up oil fields, oil pipelines and structures; kidnapping expatriates working with the oil companies for ransom; as well as also kidnapping locals if they are associated with the oil business, politics or wealthy people. Heavy ransoms have been paid and continue to be paid by both the oil companies and the federal government.³⁶² These monies are then used to further arm the militants (and not

³⁶⁰ White (2001) *Review of African Political Economy* 323 at 335.

³⁶¹ President Yar’Adua was quoted in the *Punch* of 5th of June 2008, while explaining the possibility of the government withdrawing Shell’s licence to operate in the Niger Delta, as saying that there was ‘a total loss of confidence between Shell Petroleum and the Ogoni people’.

³⁶² This is despite the federal government’s denial of ever having paid any monies to the militants. Various cases of kidnapping have occurred: Pa Simeoun Soludo, father of the former

for the development of the area). High-handed attempts by the Nigerian law enforcement agencies to enforce law and order in these regions have ended up in deadly battle between the militants and the law enforcement agencies, and even the Nigerian army. All of these have made the region very volatile and have affected the production of the oil companies, resulting in the cutting of Nigeria's oil production by about a third.³⁶³

After various failed attempts to impose law and order in the regions without addressing the real demands of the people and the militants,³⁶⁴ in July 2009, the Federal Government of Nigeria offered amnesty from prosecution and punishment to the militants in exchange for their laying down their arms and ceasing all activities aimed at disrupting the operations of the oil companies.³⁶⁵ Militants who took up the offer were given a monthly stipend. The amnesty offer ended in October 2009, and seems to have achieved relative success, as a good number of militants laid down their arms in exchange for non-prosecution.³⁶⁶ On the 15th of April 2010, Acting President Jonathan in a CNN interview with CNN Anchor, Christiana Amanpour, mentioned the rehabilitation programs that were under way in the Niger Delta, to provide skills and knowledge to those of the militants who had taken up the amnesty offer of the Federal Government.³⁶⁷

Central Bank of Nigeria governor was kidnapped for ransom. It is alleged that ransom of between 200 and 500 million naira was paid. Many more instances are regularly reported in the daily newspapers. In 2009, the then Minister for Police Affairs, Ibrahim Yakubu Lame, reported that 512 people had been kidnapped in Nigeria in that year, compared to 353 people who were kidnapped in the year 2008. See '512 Kidnappings in Nigeria this Year', available at <http://www.naijafeed.com/naijafeed/2009/7/23/512-kidnappings-in-nigeria-this-year.html> (accessed on 18 June 2010); THISDAY newspaper, 11/01/09 – A Deputy Director in the Federal Ministry of Agriculture and Water Resources, Alhaji Abubakar, was kidnapped by gunmen, available at <http://www.thisdayonline.com/> (accessed on 13 June 2010).

³⁶³ Hanson S, *MEND: the Niger Delta's Umbrella Militant Group* Council on Foreign Relations website, available at <http://www.cfr.org/publication/12920/> (accessed on 1 December 2009). In 2009, Nigeria's oil production has reduced from about 2.6 million bpd in 2006 to about 1.7 million bpd in 2009.

³⁶⁴ Which included greater appropriation to the regions of the rents of oil; compensation for the costs of environmental degradation; provision of social amenities; provision of schools and sponsorship for the children; and employment opportunities being made available to the youths.

³⁶⁵ 'Nigeria begins Amnesty for Niger Delta militants', available at <http://www.guardian.co.uk/world/2009/aug/06/niger-delta-militants-amnesty-launched> (accessed on 24 April 2010).

³⁶⁶ 'Top Militants Accept Nigeria's Amnesty Offer', available at the Wall Street Journal website: <http://online.wsj.com/article/SB125461198947462111.html> (accessed on 1 December 2009).

³⁶⁷ Interview, titled 'Rehabilitation for Niger Delta Militants', available at

It is necessary to note that despite the fact that the actions of the militants in vandalising infrastructure, blowing up pipelines and others constitute breaches of the law under the Nigerian legal system, there is a dearth of any cases of enforcement of the law against these perpetrators. Section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria vests all minerals (oil and gas inclusive) in the control of the Federal government, to be used only as permitted by the National Assembly. Oil extraction and oil possession outside an agreement with the Federal government is therefore illegal. Another law regulating this matter is the Petroleum Production and Distribution (Anti-Sabotage) Act,³⁶⁸ section 1, which defines ‘sabotage’ and ‘saboteur’.³⁶⁹ This Act covers activities such as oil bunkering, pipeline vandalism, fuel scooping and oil terrorism. It criminalises all these activities and any person(s) or company found involved in such activities would be guilty of economic sabotage.³⁷⁰

The enforcement of these and other related laws have been a dismal failure, as the various law enforcement agencies have not been effective (or perhaps willing) in bringing the perpetrators of these acts of sabotage and terrorism against the nation to book. This failure on the part of law enforcement agencies and state security agencies may be attributed to the inability and unwillingness of the state, in good faith, to enforce its own laws. It could also be attributed to the ‘disconnect’ that exists between the people and the law due to the lack of legitimacy of the law. Thus, even at such levels of law enforcement, there appears to be no determination on the part of the officers to enforce the law as a manifestation of an innate desire to uphold values and norms. This is one of the challenges facing the enthronement of the rule of law in the country. The crisis in the Niger Delta did not happen suddenly. As this chapter has shown, the

<http://edition.cnn.com/2010/WORLD/africa/04/14/nigeria.jonathan/index.html?iref=allsearch> (accessed on 15 April 2010).

³⁶⁸ Act 353 of 1990.

³⁶⁹ The section defines oil pipeline sabotage as concerning the illegal or unauthorised act of destroying or puncturing of oil pipelines so as to disrupt supply or to siphon crude oil or its refined products for the purposes of appropriating it for personal use or for sale on the black market or any other outlet.

³⁷⁰ Petroleum Production and Distribution (Anti-Sabotage) Act of 1990.

discontent of the communities there had been festering and had built up over a number of years.³⁷¹

Despite the rampant nature of these breaches of the law in the Niger Delta, only Asari Dokubo (the leader of one of the groups operating in the region known as the Niger Delta People's Volunteer Force (NDPVF)), has been charged. He was arrested and charged with treason for making public statements declaring war on the Nigerian state in 2005. He was however later released from detention in June 2007 by the Federal High Court in 2007 on grounds of ill-health.³⁷² This sends out the wrong message to the citizenry and confirms to them that people can easily get away with any kind of wrongdoing, as the law is ineffective.

Corruption has been said to play a major role in this inability or unwillingness to enforce the law. In describing corruption as the root cause of this problem, Onuoha says the following:

'It is behind the rise in poverty and unemployment in the country, resulting in increasing numbers of young people without hope of making a living, which in turn makes it easy to recruit them for criminal activities. Just as corrupt government institutions over the years have allowed oil bunkering to take place on a larger scale, the lack of a comprehensive preventive program by the Federal *and State* governments to arrest the situation has contributed to the persistence of the illegal business.'³⁷³

This gives an indication of the state of the rule of law in Nigeria, and how badly encroached it has become. It furthers the psychological notion in the society that people can get away with anything in Nigeria, thereby encouraging the deviant actions of the militants in the Niger Delta. This is however not limited to the Niger Delta only; it is a reflection of what goes on in other aspects of national life, where the law has been turned into an ornament for the purpose of gracing

³⁷¹ A great deal has been written on the crises in the Niger Delta and even other oil producing areas in Nigeria. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 11 (above); Obi CI 'The Oil Paradox: Reflections on the Violent Dynamics of Petro-Politics and (Mis) Governance in Nigeria's Niger Delta' (2004) *African Institute Occasional Paper* No 73; Omeje (2006) chapter 3.

³⁷² 'Asari-Dokubo Arrives PH, vows to Continue Struggle', available at <http://allafrica.com/stories/200706170006.html> (accessed on 30 July 2010).

³⁷³ Onuoha FC 'Oil pipeline Sabotage in Nigeria: Dimensions, Actors and Implications for National Security' (2008) 17(3) *African Security Review* 99-115 at 113 (own emphasis).

our statute books. In every area and sphere of life, there is a blatant disregard for the law, and also a blatant inaction on the part of the enforcement agencies, persons and institutions.³⁷⁴

For the militants in the Delta, there is no sense of ownership or belonging to the notion of ‘Nigeria’. Their feelings of frustration and being let down by the Nigerian government and the injustices to which the government has turned a blind eye, have obliterated any sense of belonging or ownership they may have had to the ‘Nigerian’ nation and concept.

Apart from the internal influences affecting the rule of law in Nigeria, as discussed in chapter three, there are also various external influences that impact on the rule of law. Principal amongst these is the influence of globalisation. Globalisation is the lingo of the 21st century. Starting in the 20th century, globalisation as a phenomenon has impacted greatly on nations with either positive or negative effects. The following sections will take a look at globalisation in Nigeria, its effects and how it has impacted on the rule of law in the country.

4.5.2 Globalisation and its impact on Nigeria (especially on democracy)

Globalisation, as has been defined in chapter three, is the process of advancement or increasing interaction between and amongst the countries, peoples and economies of the world, facilitated by progressive technological change in locomotion, communication, political and military power, knowledge and skills, as well as interfacing of cultural and value systems and practices.³⁷⁵ It is a phenomenon propelled by recent developments in science and technology, which

³⁷⁴ The nation continues to be rocked by scandals of embezzlement, fraud, misappropriation of public funds, corruption and others. This is prevalent in all sectors and all sorts of people are involved. The latest of such scandals is the arraignment of the chairman of the ruling party, the Peoples Democratic Party (PDP), on charges of N100 million fraud – ‘Ogbulafor faces N100m fraud charge’, available at

<http://234next.com/csp/cms/sites/Next/Home/5560273->

[146/ogbulafor_faces_n100m_fraud_charge.csp](http://234next.com/csp/cms/sites/Next/Home/5560273-146/ogbulafor_faces_n100m_fraud_charge.csp) (accessed on 27 April 2010).

³⁷⁵ Nsibambi A ‘The Effects of Globalization on the State in Africa: Harnessing the Benefits and Minimizing the Costs’, United Nations General Assembly Second Committee Panel Discussion on Globalisation and the State, 2 Nov 2001.

in practice cuts across four aspects, namely trade, capital movements, movement of people, and the spreading of knowledge and technology.³⁷⁶

African countries also experienced this in the 70's and 80's, when prior to this time, inward-oriented policies led to a decline of their economies, high inflation and rise in poverty levels. However, a change to pursue outward-oriented (a necessity of globalisation) policies has led to a rise in their incomes, and a slow recovery of their economies, as a potential for growth, development and poverty reduction is emerging.³⁷⁷ There are many dimensions to globalisation, one of which is the influence it has had on democratisation across the world. As discussed in the previous chapter, globalisation and democracy are inextricably interlinked.³⁷⁸ Globalisation has enabled democracy as a system of government to spread rapidly around the globe in the past three decades.³⁷⁹ It has resulted in a situation whereby demands from ordinary citizens along with increased pressures and inducements from international communities have made democratisation a truly global phenomenon.³⁸⁰ This interaction between globalisation and democracy is what has been referred to as 'global-democratisation'.³⁸¹

The focus of this section is to examine the impact of globalisation in Nigeria, especially as it relates to democracy and the entronement of the rule of law and broader political dimensions.

In Nigeria, global-democratisation in all its fullness can be said to have begun in the mid 1980s³⁸² when the then military regime of General Ibrahim Babangida introduced and implemented the IMF (International Monetary Fund) and World Bank economic restructuring Structural Adjustment Programme (SAP) as a pre-

³⁷⁶ *Ibid.*

³⁷⁷ Okoye SE, 'Globalisation and the Political Future of Nigeria', Nigeriaworld Feature Article available at <http://nigeriaworld.com/articles/2004/oct/131.html> (accessed on 2 July 2009).

³⁷⁸ Kura SY (2005) 'Globalisation and Democracy: A Dialectical Framework for Understanding Democratization in Nigeria' *Globalisation*, available at <http://globalization.icaap.org/content/v5.1/kura.html> (accessed on 2 July 2009).

³⁷⁹ Shin DC & Tusalem RF 'The Cultural and Institutional Dynamics of Global Democratization: A Synthesis of Mass Experience and Congruence Theory' (2007) 3(1) *Taiwan Journal of Democracy* 1-28 at 2.

³⁸⁰ *Ibid.*

³⁸¹ Shin (2007) 3(1) *Taiwan Journal of Democracy* 1 at 3.

³⁸² See Kura (2005) (*ibid*) for a concise explanation of the links between globalisation and democratisation.

condition for lending.³⁸³ Even though there were elements of globalisation prior to the introduction of SAP, the introduction of SAP marked a turning point in Nigeria's interaction with the international community. This type of economic restructuring program was introduced all over Africa, and usually manifested under different acronyms such as structural economic reforms, economic adjustment policies, and economic reform programmes.³⁸⁴ They are basically designed in such a way as to open up the economy to international market forces of aggregate demand and aggregate supply to determine the direction of that economy. Such projects form part of the pillars of contemporary globalisation.³⁸⁵

SAP became necessary in the country, not only because it was demanded by the international financial institutions, but more importantly, because Nigeria as a country was going through a period of economic crisis, marked by a heavy debt burden, and a crisis of production (local production had earlier been affected by the introduction of oil dollars in the 70's that made it cheaper for people to import goods).³⁸⁶

Stabilisation of the Nigerian economy was necessary before SAP could be properly implemented. Thus, in the late seventies and early eighties, the Economic Stabilisation Act³⁸⁷ was implemented. SAP involved amongst other things, cuts in public expenditure, privatisation and commercialisation of public utilities and services, devaluation of the currency and deregulation of the exchange rate.³⁸⁸

³⁸³ Okoye, *supra*.

³⁸⁴ Referred to in Chapter 3 under sub-heading, 'Democratisation in Africa'.

³⁸⁵ Okoye, *supra*.

³⁸⁶ Kura, *supra*. The IMF felt that Nigeria's economic crisis was the result of the structural economic distortions being experienced in the country then. These were namely overvalued exchange rate (due to oil); import regulation; huge public sector expenditure; poor investment management and low returns on capital; high wage structure and low productive labour; and over-extended, inefficient and unproductive public enterprises. All of these, coupled with high rates of inflation and huge growth of foreign and domestic debts, meant that the economy was in a critical shape at the time of the implementation of the SAP. This was documented in the National Centre for Economic Management and Administration (NCEMA), Technical proposal titled, 'Structural Adjustment Programme in Nigeria: Causes, Processes and Outcomes' 2-4.

³⁸⁷ Economic Stabilisation Act of 1982, passed into law during the Shagari regime in early 1980's. It enabled the implementation of policies such as sharp restriction of domestic demand through monetary and fiscal measures, and longer term adjustment instruments.

³⁸⁸ Okoye *supra*.

There are different thoughts as to the effects of SAP in Nigeria. Some feel that it has had a totally negative effect, whilst others feel otherwise. It has been said that instead of developing the economy, SAP rather inflicted more hardship on the crisis-ridden economy of the nation, and on the citizens of the country as well. Inflation and unemployment increased, living conditions of the working class deteriorated due to the devaluation of the currency, and manufacturing industries nearly all closed down.³⁸⁹ The GDP stagnated and foreign debt rose exponentially.³⁹⁰ This led to a further degeneration of the Nigerian economy.³⁹¹ The introduction of SAP was said to be the beginning of Nigeria experiencing the negative consequence of globalisation.³⁹²

It is also believed that SAP made positive contributions to the Nigerian economy, despite the fact that the gains of SAP have now practically been eroded by the lack of policy consistency, graft and corruption, mismanagement in all spheres and primarily the lack of commitment to democracy and democratic values.³⁹³

Ihonvbere has stressed some of the gains of SAP as follows:

- SAP helped to bring to light the magnitude of the economic problem and challenges in Nigeria. The false sense of security and the inviolability of the Nigerian economy that prevailed after the discovery and exploration of oil were dispelled with the challenges of SAP. SAP brought about the realisation that the boom days of waste were over, and that there was need to plan and be prudent in the use of resources and materials.³⁹⁴
- Another occurrence that SAP helped to facilitate, whether directly or indirectly, is the emergence of political opposition parties. The implementation of the program without consideration of the hardship and suffering it imposed on the people; the growing and continuing disparity

³⁸⁹ Onyeonoru I, 'Globalisation and Industrial Performance in Nigeria' (2003) 28(3 & 4) *Africa Development* 33-66 at 38. The author gives the example of the Food Beverage and Tobacco industries, where there was a great contraction as their numbers in operation reduced from about 80 companies in 1986 to 69 surviving in 1992. Out of the 69, however, only 26 were thriving on the basis of their after tax profits.

³⁹⁰ Onyeonoru (2003) 28(3 & 4) *Africa Development* at 38; also Ihonvbere JO (1994) *Nigeria: The Politics of Adjustment and Democracy* 111-115.

³⁹¹ Kura, *supra*.

³⁹² Kura, *supra*.

³⁹³ Kura, *supra*.

³⁹⁴ Ihonvbere (1994) 123-124.

in the society; the grossly unequal distribution of the pains of adjustment; the arrogance of military power; the blatant affluence displayed by the rich (even when such riches was a product of corruption) in the face of deep levels of suffering amongst the populace, all led to the resurgence of opposition groups and civil liberties organisations.³⁹⁵

- SAP can also be said to have created a better appreciation of the need for resource management, savings and investment in productive activities.³⁹⁶

The economic restructuring policies of the Breton Wood institutions (which were introduced in Africa, and particularly in Nigeria), however, were unable to change the political terrain of governance in Nigeria.³⁹⁷ This has been explained to be due to the fact that SAP was introduced into Nigeria during two consecutive decades of military regimes (with a brief interval of four years, from 1979 to 1983, when a civilian regime was in place). These military regimes had little or no pressure from global partners to return the country to democratic rule due to the hugely unfettered access to oil that they provided to the global actors, and so the global partners were not interested in the proper implementation of the policies. Also, there was insufficient background work done as to the mode of implementation of the program in the country.

The question can rightly be asked whether Nigeria's entrance and participation in globalisation has improved the political situation or the rule of law in the country. One would have thought that with Nigeria's entrance into the global market, more attention would be paid by her global partners to the state of things within the country, especially in relation to her maintenance of the rule of law. However, global trade with Nigeria by international partners continued, despite the undemocratic state of things within the country and amongst the people. It is however to be noted that some of these international partners (like the OAU) are hindered by their constitutive laws (which prohibit any type of interference in the political affairs of any member state) from insisting on democratic governance within the Nigerian state. Such constitutive acts also prohibit the partners from being influenced in their decisions by the political character of the host states

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ Kura, *supra*.

concerned.³⁹⁸ The OAU especially, did not act based on the principles of ‘non-intervention’ and ‘sovereignty’ contained in its charter.³⁹⁹

Kura has pointed out that as part of the consequence of globalisation, the events within the country became of international note, to the effect that some aid and donor organisations worked in concert with Nigeria’s re-energised civil society to mount pressure on the government to return the country to civil rule, and to introduce the necessary political reforms that will see the country striving and being successful as a democratic project.⁴⁰⁰ Accordingly, in this sense, globalisation contributed immensely to the spread of democracy in the contemporary international system, however, its impact in individual states’ democratisation processes differ (in degree and scope).⁴⁰¹

As part of the impact of globalisation, the Nigerian state finds itself caught with having to share its decision-making powers with international forces of production and finance. For example, due to the country’s huge foreign debt, Nigeria’s budget formulation and implementation are designed to conform to provisions and directives from the IMF and International Financial Institutions (IFI).⁴⁰² This erodes the sovereignty of the nation, and has negative consequences on employment creation and poverty reduction strategies.⁴⁰³ This is so as government seems to have jettisoned its role in service delivery, and shifted focus from satisfying public demands, to simply removing market barriers and thereby loosing the necessary powers of distributive capabilities.

The adherence by government to the policies of the international community usually translates into failure to fulfil its electoral promises, and disappointment in the populace. This has resulted in highly confrontational incidents between the

³⁹⁸ In the constitutive acts of some of the partners, only economic considerations were considered relevant to their decisions, not political or social factors. See, for example, article 10, section 10 of the World Bank Act. This is either indicative of an attempt on the part of these partners not to interfere with the sovereignty of a state, or a complete focus on the benefits of trading with the country concerned.

³⁹⁹ See articles 2, 3 and 6 of the OAU Charter.

⁴⁰⁰ Kura, *supra*.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ United Nations Public Administration Network *The Challenges of Globalization in Africa: what Role for Civil Society and Other Stakeholders* 2002, available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008264.PDF> (accessed on 27 April 2010) 5.

government and the people (in the form of strikes, change of voting patterns at election and others),⁴⁰⁴ and amongst the people as well (religious and ethnic violence, stemming from the competition for scarce resources).⁴⁰⁵ Unfortunately, government has not been able to fashion out a good enough solution to these myriad of problems, as new programs and initiatives that were designed have not been able to address the needs and concerns of the people.

An indication of globalisation having caught up with Nigeria for a good number of years is evident in the presence and dominance of foreign investors in the telecommunications field. In 2001, then president Obasanjo's government de-regulated the telecommunications industry by removing NITEL's (Nigerian Telecommunications Limited) monopoly and granting the Global System for Mobile Communication (GSM) licenses to interested parties.⁴⁰⁶ The South African company, MTN, was one of the licensees, along with Globacom, Celtel, MTel and Etisala (of Middle Eastern origins).⁴⁰⁷

Another indication of the interplay that globalisation brings about is the effect that local happenings within Nigeria sometimes have on the international plane. For instance, volatile actions taken by any of the groups involved in the Niger Delta struggle usually pan out to have an effect on the prices of oil in the international market, causing spikes and hikes in the prices of oil internationally.⁴⁰⁸ For example, when Alhaji Mujahid Asari-Dokubo issued a

⁴⁰⁴ A very pertinent example is the strikes that have hit the education sector over the years. The Academic Staff Union of Universities (ASUU) in November 2009 called off an indefinite strike action it had taken over non- payment of salaries, non-improvement of tertiary education infrastructure, and many others.

⁴⁰⁵ Kura, *supra*. The spate of ethnic and religious violence breaking out in different parts of the nation over the years has been high indeed. Between February and May 2000, serious religious riots broke out in Kaduna (a northern state), in which over 1000 people were killed. Hundreds of ethnic Hausa were also killed in inter-religious rioting in Jos, Plateau State. In October 2001, hundreds were killed and thousands were again displaced in communal violence. See report available at

<http://www.globalsecurity.org/military/world/war/nigeria-1.htm> (accessed on 1st May 2010). Recently, in January 2010, fresh religious and ethnic riots broke out in Jos. This area has been plagued with ethnic and religious riots for over twenty years. Police put the estimate of people who lost their lives to about 326, whilst thousands were displaced in the fighting.

⁴⁰⁶ Taiwo R, 'The Thumb Tribe: Creativity and Social Change Through SMS in Nigeria' (2010) 35(1) *California Linguistic Notes* 2.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Imomoh EU 'The Global Effect of Supply Disruption on Crude Oil', paper presented at the Nigerian Extractive Industry Transparency Initiative (NEITI) Workshop in Abuja, Nigeria on the 17th February 2005, available at

statement in 2005, declaring the intention of the group to blow up oil installations in the Niger Delta, oil prices spiked to over \$50 per barrel mark.⁴⁰⁹ Thus the fluctuations in oil prices experienced over time usually have their roots in the developments in one or more of the oil producing countries.⁴¹⁰

In view of the above, it is worthy to note that any outbreak of conflict in Nigeria's oil rich region has the likelihood of impacting negatively on an already beleaguered world peace and affect other countries indirectly (especially Nigeria's trading partners, such as the US, UK and other western countries). A rise in the prices of crude oil on the international market would also bring about a rise in the prices of their derivative petroleum products, which would have a corresponding effect on the Nigerian domestic market, and will ultimately affect the standard of living of Nigerians.

Therefore, the fact that the unrest in the Niger Delta of Nigeria has an impact on her western trading partners,⁴¹¹ explains the interest that western countries (especially Nigeria's trading partners), have shown in events occurring in the Niger Delta. In some instances, they actually exert some kind of pressure on the leadership of Nigeria to ensure a containment of the situation in the Delta. This may be a probable explanation for the change seen in the way and manner the government of Nigeria has dealt with the Niger Delta crises.

It has been said that such interplay implies that the concept of an 'independent' country is a myth in an age of globalisation and that countries all over the world can no longer be referred to as strictly independent.⁴¹² This observation is true to an extent. The degree of independence of countries in the world had changed and

<http://www.neiti.org.ng/publications/The%20Global%20Effect%20of%20supply%20disruptions%20on%20prices1.pps> (accessed on 26 April 2010). This has been seen persistently for some years now, as events in the Niger Delta (be it the kidnapping of people, blowing up of oil installations or pipelines, engaging in gun battle with the Nigerian police), have all at various times led to hikes in the price of oil internationally.

⁴⁰⁹ Okoye, *supra*.

⁴¹⁰ During the Gulf war, oil prices almost doubled as a result of Iraq's invasion of Iran. The ongoing conflict in Iraq and other oil producing states have also translated into a spike in oil prices. The disputed presidential elections in Iran in June 2009, and the prolonged demonstrations that followed saw oil prices increasing. These fluctuations may at times not be more terribly felt due to the intervention of OPEC (Organisation of Petroleum Exporting Countries). OPEC is tasked with the regulation of oil prices in the international market, through measures such as production quota fixing for the different member countries.

⁴¹¹ Imomoh, *supra*.

⁴¹² *Ibid*.

lessened drastically with the advancement of globalisation and all that goes with it.

With the influence of globalisation, one may go as far as to say that presidents are no longer free agents; and that they must not only be accountable to their citizens, but their actions are also monitored by other foreign leaders who closely trace those actions to the degree they impact on their respective countries.⁴¹³ The rule of law within countries is thus impacted by international events and laws. This is the working of International law which has gone a long way towards influencing the way nations behave. It follows thus that happenings and events in Nigeria's political, social and economic world, in as much as they are of particular interest to other countries and players in the international community, are also to an extent a product of those countries and players in the international community. To this situation, international law has played a great role in impacting on nations, and on the development of the rule of law in Nigeria. The question to be examined here is how much of a role international law has played in the development of the rule of law in Nigeria.

4.6 International Law Impact in Nigeria

International law impacts on Nigeria through its different sources⁴¹⁴ and nature. As is the case in other jurisdictions, the Constitution of the Federal Republic of Nigeria sets the framework for the application and enforcement of international law within the Nigerian legal system. Section 19(d) lists 'respect for international law' as one of the foreign policy objectives of the country.⁴¹⁵ By broader definition, this means that the country would strive towards the observance and enforcement of international law when it is applicable in Nigeria. In terms of the application of international law in the Nigerian legal system, like most commonwealth countries, Nigeria operates what is termed as a dualist

⁴¹³ *Ibid.*

⁴¹⁴ The sources of international law have been extensively discussed in chapter 3.

⁴¹⁵ Section 19 states as follows:

'The foreign policy objectives shall be –

(d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication;'

system.⁴¹⁶ By this is meant that treaties cannot be domestically applied unless they have been incorporated into the legal system through domestic legislation.⁴¹⁷ Nigeria endorses acts of incorporation whereby international law (treaties) is granted full effect by municipal law.⁴¹⁸ Section 12 of the 1999 Constitution provides the framework for the enforcement and application of treaties in Nigeria. It states as follows:

- (1) ‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty’.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.’⁴¹⁹

This means that any time the Nigerian government ratifies or accedes to a treaty, for such to be enforceable in Nigeria, it would first have to be legislated into law by the National Assembly, which is the federal legislative arm of government in Nigeria. Such a treaty therefore requires an enabling act of the country’s legislative body.⁴²⁰ This has been further reinforced by the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi*.⁴²¹

Customary international law does not get the same treatment as treaties in the 1999 Constitution. The Constitution is silent on its application and the effect it has in the Nigerian legal system. As noted, section 12 of the constitution only refers to ‘treaties’ and not to ‘international law’ in general. This omission has

⁴¹⁶ Egede E ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ (2007) 51(2) *JAL* 249-284 at 250.

⁴¹⁷ Egede (2007) 51(2) *JAL* 249 at 250.

⁴¹⁸ Okeke CN ‘International Law in the Nigerian Legal System’ (1997) *California Western International Law Journal* 311-356 at 338.

⁴¹⁹ Section 12 of the 1999 Constitution.

⁴²⁰ Okeke (1997) *California Western International Law Journal* 311 at 337.

⁴²¹ (2000) 6 *NWLR* 228, pt 660.

been cleared up by the Supreme Court in the case of *Ibidapo v Lufthansa Airlines*,⁴²² in which the learned justice of the Supreme Court, Wali JSC, is quoted as saying, ‘Nigeria, like any other commonwealth country, inherited the English common law rules governing the municipal application of international law’.⁴²³ Under the English common law rules, customary international law has automatic application in the municipal setting,⁴²⁴ thus customary international law automatically applies as an enforceable part of Nigerian laws.

This position of the law relating to international law in Nigeria means that treaties are only applicable upon the act of an enabling legislation, whilst customary international law is automatically applicable in Nigeria.⁴²⁵

Turning now to international law and how it affects the rule of law in Nigeria, a few of the international law treaties that have been domesticated in Nigeria by way of Acts of law will be examined in order to determine the manner in which the provisions of these Acts are implemented.

4.6.1 Human rights treaties in Nigeria

Nigeria is signatory to a significant number of international and regional human rights treaties. As a member of the UN and party to the UN Charter, the country is obliged to promote ‘the ... respect for and observance of human rights, and fundamental freedoms for all, without distinction as to ..., sex, language or religion’.⁴²⁶ Article 56 of the UN Charter imposes an obligation on all members of the UN to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in the previous article.⁴²⁷

⁴²² (1997) 4 NWLR (pt 498) 124.

⁴²³ (1997) 4 NWLR (pt 498) 150.

⁴²⁴ See the English cases of *JH Rayner v Department of Trade and Industry* (1990) AC 418 at 550; Shaw LJ in the English Court of Appeal case of *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) *Queens Bench* 529 at 578.

⁴²⁵ See generally Egede E, ‘The New Territorial Waters (Amendment) Act 1998 – Comments on The Impact of International Law on Nigerian Law’ (2000) 12 *AJICL* 84-104.

⁴²⁶ Article 55 of the UN Charter.

⁴²⁷ Article 56 UN Charter.

Chapter IV of the 1999 Constitution provides for fundamental human rights.⁴²⁸ These provisions are essentially the same as in the other different constitutions that have preceded the 1999 Constitution (though they may be in different sections). Section 46 of the Constitution vests in any aggrieved person the right to seek redress in a competent court of law in cases when their fundamental human rights were infringed upon.⁴²⁹

However, it appears that Nigeria has not been able to live up to these obligations, either under the UN system or as provided in its Constitution. Events in Nigeria in relation to the violation of human rights have over time focused the attention of the world on Nigeria. This was most glaring during military regimes, when the respect for human rights was lacking and military governments used the might of their weapons to obtain compliance with their laws from the citizenry.⁴³⁰ The greatest onslaught on human rights protection in Nigeria during the military were the decrees that had no regard for constitutions as they suspended the operation of pertinent parts of constitutions. They came in the form of Constitution (Suspension and Modification) Decrees.⁴³¹ This was usually the first act of a military regime when it took over power. These decrees removed the supremacy of the constitution; ousted the jurisdiction of the courts,⁴³² and suspended the application of the chapter on fundamental human rights in the constitution (chapter IV in the 1999 Constitution).⁴³³

The situation is a bit different under democratically elected governments, as Nigerians are able to approach the courts according to section 46 (of the 1999 Constitution) whenever they feel their right is being violated under chapter IV of

⁴²⁸ Section 33 to 46 of the 1999 Constitution.

⁴²⁹ Section 46 of 1999 Constitution.

⁴³⁰ Cases of human rights violations were rampant, such as arbitrary arrests, detention without trial, illegal occupation by government of private property (without compensation), denial of freedom of movement, freedom of association or to gather, and many others.

⁴³¹ Okeke (1997) *California Western International Law Journal* 311 at 340. See also other writings on the detrimental effects of ouster clauses, Sagay I 'The Constitutional and Legal Framework for the Protection of Human Rights in Nigeria' (1992) 2(3) *JHRLP* 60 at 78-79

⁴³² This was done through what is referred to as "ouster clauses". For example, Decree No 1 (1966) provided that 'no question as to the validity of this or any other Decree or any Edict shall be entertained by any Court of law in Nigeria.'

⁴³³ See for example, section. 6 of the State Security (Detention of Persons) Decrees Nos 1-15 of 1966; the State Security (Detention of Persons) (Decree No. 2 of 1984), the Supremacy and Enforcement of Powers (Decree No. 13 of 1984).

the Constitution or under any of the human rights treaties that the country is a party too.⁴³⁴ Two international human rights treaties will be examined below.

a) Nigeria is a party to the African Charter on Human and Peoples' Rights. The African Charter is domesticated in Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,⁴³⁵ which makes all the provisions of the charter enforceable in Nigeria. The question, however, is how effective have the application of these laws been in Nigeria? As seen from case law, in some respect there has been satisfactory compliance, however, in certain other respects, the ability to enforce these rights is limited (especially where there is a conflict with the constitution, or where the government lacks the resources and capacity, or even the will).⁴³⁶ This has been observed by Egede who states as follows:

'[W]hile is it easy to implement the traditional civil and political rights in the African Charter, which are similar to the rights contained in chapter IV of the constitution ..., problems may arise regarding the implementation of economic, social and cultural rights, as well as solidarity rights. Certain provisions of the charter dealing with socio-economic rights, which are obviously intended to be justiciable, would have to be reconciled with similar provisions under chapter II of the 1999

⁴³⁴ There are quite a plethora of cases, some of which are *Abacha v Fawehinmi* ((2000) 6 NWLR 228, pt 660); *Comptroller of Nigerian Prisons & Oths v Adekanye & Oths* (1999) 10 NWLR (pt 623) 400 (in which the Court of Appeal held that during a military regime, which had ousted the jurisdiction of the courts, the court still had jurisdiction under the African Charter to hear a case involving an application for a writ of *Habeas Corpus* for unlawful detention); *Ubani v Director of State Security Services* (1999) 11 NWLR (pt 625) 129 (another case of unlawful detention by a military regime, in which the respondents claimed that the jurisdiction of the court had been ousted by Decree; the Court held that it had jurisdiction to hear the case under the African Charter of Human and Peoples Rights (Ratification and Enforcement) Act); also in *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria & 2 Ors Suit No M/102/93* in the Lagos High Court, where the defence of ouster clauses was again raised by the federal government. The Court held that since the African Charter was an international convention which imposes an international legal obligation on Nigeria, any domestic legislation in conflict with it, would be invalid; see also *Oshevire v British Caledonian Airways Limited Suit No NGSHC/NB/07/94* before the High Court of Niger State (in which the court held that any domestic legislation which is in conflict with an international convention is void), and others.

⁴³⁵ Chapter 10 Laws of the Federation of Nigeria 1990.

⁴³⁶ As in the case of the infringement on the Niger Delta people's right to a life and human dignity. See also cases referred to in n 433 above.

Constitution dealing with the fundamental objectives and directive principles of state policy, which are *not* justiciable'.⁴³⁷

Another limitation mentioned above, is where the government lacks the capacity to enforce the rights, whether in terms of the resources needed or in terms of the human capital needed.⁴³⁸ The South African case of *Government of South Africa & Others v Grootboom & Others*⁴³⁹ is a case in point here. The South African Constitutional Court held that the government had a positive obligation to take reasonable steps within its available resources to implement the respondents' socio-economic right to adequate housing, which was granted by section 26 of the 1996 Constitution of South Africa.

The African Commission on Human and People's Rights (ACHPR) has also passed a resolution on Economic, Social and Cultural Rights in Africa, requiring state parties to adopt legislative and other measures (might be through international cooperation) to give full effect to the economic, social and cultural rights in the African Charter.⁴⁴⁰ This resolution further imposes the obligation on state parties to ensure the satisfaction, at the very least, of the minimum levels of each of the rights contained in the African Charter.⁴⁴¹ It is very poignant to note that the resolution of the African Commission lists factors which it considered to be limitations to the full realisation of economic, social and cultural rights in Africa. Amongst these are: lack of good governance and planning; failure to allocate sufficient resources to implement the rights; lack of political will; corruption and the misuse and misdirection of financial resources.⁴⁴² In particular, these limitations are very apposite with the different problems of the entrenchment of the rule of law identified above.

So far there has been no decision of the Nigerian court dealing with the obligation of the government with respect to socio-economic rights under the African Charter Act.⁴⁴³ When this does happen, it will be interesting to see what

⁴³⁷ Egede (2007) 51(2) JAL 249 at 262 (own emphasis).

⁴³⁸ *Ibid.*

⁴³⁹ 2001 (1) SA 46.

⁴⁴⁰ ACHPR/Res. 73 (XXXVI) 04.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid* paragraph 3.

⁴⁴³ Egede (2007) 51(2) JAL 249 at 265.

the Nigerian courts will say about whether the government is, within its available resources, and through well-directed and reasonably implemented policies, fulfilling its obligations under the Charter.⁴⁴⁴

In relation to other rights, the African Commission in *SERAC* and *CESR v Nigeria*, upheld solidarity rights by finding the Nigerian government guilty of the failure to guarantee a clean and safe environment under article 24 of the Charter.⁴⁴⁵ This decision has been endorsed by the Nigerian court in the 2005 case of *Jonah Gbemre v Shell Petroleum Development Corporation & 2 Oths*,⁴⁴⁶ in which the court found that gas flaring of the respondents in the community constituted an infringement of the applicant's constitutionally guaranteed right to life and dignity of the human person.⁴⁴⁷ As stated above in section 4.5.1.3, the court held, amongst other things, that certain legislation and provisions of legislation that allowed continued gas flaring⁴⁴⁸ were 'inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the 1999 Constitution, and articles 4, 16 and 24 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act. These provisions allowing continuous gas flaring were therefore declared null and void.⁴⁴⁹ The court ordered the Attorney-General of the Federation to set in motion the process to introduce a bill to the National Assembly to amend the existing law and to criminalise gas flaring.⁴⁵⁰

The decision of the court is in line with the decisions and resolutions that have come out in the international plane. The UN Human Rights Committee in its

⁴⁴⁴ The African Commission has, however, in its decision in the case of *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* (Communication 155/96, case no ACHPR/COMM/A044/1) held Nigeria to be, amongst other things, in breach of Article 16 of the charter, by permitting oil companies to engage in mining activities in the Niger Delta, which have caused serious environmental degradation and affected the health of the Ogoni people.

⁴⁴⁵ Egede (2007) 51(2) JAL 249 at 266.

⁴⁴⁶ Suit No FHC/B/CS/153/05 (unreported).

⁴⁴⁷ For an analysis of the correlation between fundamental human rights and environmental harm, see Emiri F & Deinduomo G (eds)(2009) *Law and Petroleum Industry in Nigeria: Current Challenges* 54-57.

⁴⁴⁸ Example of such legislation such as the Associated Gas Re-Injection Act A25, LFN 2004; the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, which permitted gas flaring.

⁴⁴⁹ Suit No FHC/B/CS/153/05 (unreported), para. 4.

⁴⁵⁰ Suit No FHC/B/CS/153/05 (unreported), para 6.

comment on the right to life⁴⁵¹ has warned against a narrow interpretation of the right; it instead advocated a broad interpretation that would include positive measures being taken by the state to protect life.

It is interesting to note at this point that up until 2009, no action was taken by the Nigerian state to comply with the court order. This is an indication that the Nigerian government itself lacks the willingness to rectify the situation.⁴⁵² In July 2009, the Nigerian senate passed the Gas Flaring (Prohibition and Punishment) Bill of 2009. The bill sets a cut off date of December 31, 2010, to stop all gas flaring in the country, and seeks to penalise companies which continue to flare gas after the cut off date.⁴⁵³

There are also international law treaties applicable to the problem of gas flaring, as it is a source of greenhouse emissions. The Kyoto Protocol to the UN Climate Change Convention is one of such, and Nigeria is a party to it.⁴⁵⁴ The protocol came into force in February 2005.⁴⁵⁵ It is a further attempt of the international community to fight global warming. In the treaty, member parties commit themselves to different levels of greenhouse gas emission reductions. Even though as a non-Annex 1 member party to the protocol (Annex 1 member parties are those with specific targets), Nigeria has no specific reduction targets it has to meet; the country is however obliged to implement the general provisions of the treaty.

From the above analysis of the enforcement of international and regional obligations in Nigeria, it is apparent that Nigeria has not necessarily given adequate attention and consideration to the obligations that bind it at both the international and regional planes. The responsibilities of being a part of the international community and ratifying international treaties go beyond the mere act of ratifying them and domesticating them. It is imperative that these laws must be applied and enforced in Nigeria as they are expected to be, in order to

⁴⁵¹ UN Human Rights Committee, General Comment No. 6: The Right to Life, UN.Doc.HR/GEN/1/Rev1 at 6 (1994) at para 1 and 5.

⁴⁵² Umukoro, *supra*.

⁴⁵³ 'Gas Flaring – Senate Passes Prohibition Bill' ThisDay 3rd of July 2009, available at <http://allafrica.com/stories/200907030119.html> (accessed on 22 April 2010).

⁴⁵⁴ Nigeria ratified the protocol on the 10th December 2004.

⁴⁵⁵ 2005 Kyoto Protocol to the United Nations Framework Convention on Climate Change can be accessed at <http://unfccc.int/resource/docs/convkp/kpeng.html>

safeguard the rule of law in the country. The Federal High Court in the *Gbemre* case has shown courage in confronting the ubiquitous problem of gas flaring, and in declaring certain legislation in the country inconsistent with the Constitution. The National Assembly and the executive arm of government have eventually followed suit in obeying the order of the court in revising and amending the necessary legislation. It now remains to be seen how the new law will be enforced against the oil companies found to be in default.

b) Another important international treaty for consideration is the UN Convention on the Rights of the Child (CRC),⁴⁵⁶ and its African Union equivalent, the African Charter on the Rights and Welfare of the Child (ACRWC).⁴⁵⁷ Nigeria ratified these instruments on the 19th April 1991, and 23 July 2001 respectively, and domesticated them through the Rights of the Child Act (RCA) of 2003. However, out of the 36 states of the federation, only 18 states have so far implemented the Act.⁴⁵⁸ The Act defines the age of majority as 18 years, and thus anyone under the age of 18 is considered a child.⁴⁵⁹ Section 21 of the RCA prohibits child marriage,⁴⁶⁰ and section 23 criminalises the breach of section 21. It imposes a fine or a period of imprisonment.⁴⁶¹

The provisions of the Rights of the Child Act; and Nigeria's international obligations under the two treaties on children's rights were called to question in a recent matter which unfolded in the country. Senator Ahmed Sani Yerima, (former Governor of Zamfara State, one of the northern states in Nigeria, which practise Sharia as a system of law), was reported to have taken a 13-year old

⁴⁵⁶ Adopted in 1989, and containing the basic human rights to which children are entitled.

⁴⁵⁷ Adopted by the former Organisation of African Unity (OAU) in 1990. It came into force in 1999.

⁴⁵⁸ APRM Country Report on Nigeria, 2009, available on the APRM website at <http://www.nepadaprmnigeria.org/> (accessed on 14 March 2010) 6.

⁴⁵⁹ Adopting Arts 1 and 2 of the CRC and ACRWC respectively.

⁴⁶⁰ Section 21 of the RCA states:

'No person under the age of 18 is capable of contracting a valid marriage and accordingly, a marriage so contracted is null and void and of no effect whatsoever'.

⁴⁶¹ Section 23 states:

'A person who marries a child or to whom a child is betrothed, or (who) promotes the marriage of a child, or who betroths a child, commits an offence and is liable on conviction to a fine of N500,000 or imprisonment for a term of five years or both.'

Egyptian girl as a fourth wife.⁴⁶² Admittedly, his Islamic faith and African culture allow him to take more than one wife.⁴⁶³ However, the act of marrying a 13-year old constitutes a breach of the CRC and RCA. This meant that the country would be in breach of its international obligations if it did nothing to penalise the crime committed by the distinguished senator.

Petitions against Ahmed Yerima were laid before the Senate by the National Human Rights Commission in coalition with 10 other groups.⁴⁶⁴ The coalition sought the suspension of the senator for violating the Rights of the Child Act.⁴⁶⁵ The petition was finally accepted by the senate after it initially attempted to refuse it on the basis that the Senator had not broken any rules of the Senate.⁴⁶⁶ The matter was referred to the Senate Ethics Committee for investigation, but nothing eventually came of it.⁴⁶⁷

Ahmed Yerima is not alone in his recent act, and this is allegedly not the first time he is committing the same offence.⁴⁶⁸ Ordinarily, in a country where the rule of law prevailed, law enforcement agencies would have begun investigations into the alleged crime immediately. The fact that a serving Senator, sitting in the highest law making body in the country, willingly and wilfully decided to commit a breach of the law is definitely a matter of serious concern. It shows the level of respect for the rule of law even amongst the leaders. It also indicates again the de-linking and de-legitimation of the law that has occurred between Nigerians and the state, where there is no allegiance by the people to the state.

Another interesting pointer to the influence of international law and the international community on the rule of law within the country is the APRM

⁴⁶² Guardian Newspaper Editorial of 30th April 2010, available at http://www.ngrguardiannews.com/editorial_opinion/article01/300410?pdate=300410&ptitle=Yerima's%20alleged%20marriage%20to%20girl-child (accessed on 30 June 2010).

⁴⁶³ Though polygamy is not legal under Nigerian civil law, it is legal under Sharia law, and also under African customary law.

⁴⁶⁴ 'Senate may 'bury' Yerima matter' 234next on Thursday 29th April 2010, available at http://234next.com/csp/cms/sites/Next/Home/5561460-146/senate_may_bury_yerima_matter_.csp (accessed on 30 June 2010).

⁴⁶⁵ *Ibid.*

⁴⁶⁶ 'Senate muzzles opposition to Yerima's marriage', available at http://234next.com/csp/cms/sites/Next/News/National/5560909-146/senate_muzzles_opposition__to_yerimas.csp (accessed on 30 June 2010).

⁴⁶⁷ Guardian editorial, *supra*.

⁴⁶⁸ 'Senate muzzles opposition to Yerima's marriage', *supra*.

process. The review measures the performance of the country in line with the guidelines and principles in the base documents, which more or less are a reflection of international standards of governance. Through these, the state of the enthronement of the rule of law in Nigeria, amongst other things, has been surveyed. Nigeria, along with South Africa, was one of the founding members of the APRM, having acceded to the mechanism in March 2003.⁴⁶⁹ The country's APRM review commenced in 2005 but was only concluded in 2009, due to delays suffered as a result of changes in the national government. The review was the first of such in Nigeria, in which the different sectors of the nation would be examined to see if they are meeting with set objectives of improving the standards of the society. The success of the review would be an indication of the sincerity of the government towards accountability and good governance. However, for this to be truly the case, the checks and balances provided by the peer review process must be adhered to, in terms of civil society participation, public and private sector involvement in the process. The extent of this and other challenges faced in the review of Nigeria will be examined below. Also the impact (if any) of the APRM process on good governance and the rule of law in Nigeria will be examined.

4.6.2 The Impact of the APRM on the rule of law in Nigeria

As mandated by the APRM Base Documents, Nigeria appointed a National Focal Point (NFP) in the person of the Secretary to the Government of the Federation (SGF). A National Working Group (APRM-NWG) was appointed to oversee the self review process, and to sensitise the country on the review. According to the country guidelines, the APRM-NWG is designed to be autonomous, made of 'a diverse ensemble of stakeholder groups, representing a wide range of interest'.⁴⁷⁰ This group was initially dominated by members of the government and was not representative at all. A national APRM secretariat was also set up and located

⁴⁶⁹ At the 6th Summit of the NEPAD HSGIC meeting, held in Abuja, Nigeria, on the 9th of March 2003.

⁴⁷⁰ Jinadu A 'The African Peer Review Process in Nigeria' July 2008, available at <http://www.uneca.org/aprm/Documents/Guidelines%20for%20Countries%20to%20Prepare%20for%20and%20Participate%20in%20APRM.pdf> (accessed on 6 August 2010).

within the presidency, feeding suspicions that the review process was going to be government controlled.⁴⁷¹

Lead research organisations were appointed in 2006 to lead the assessment into the different areas of the APRM principles. These domesticated and adapted the APRM master questionnaire to the context of the country. They made use of computer research, household surveys, interviews and focus group discussions. At the end of 2006, the draft Country Self-Assessment Report (CSAR) and the National Program of Action (NPoA) were ready.⁴⁷² In validating the self assessment report, stakeholder workshops were held, sessions were also held with non-stakeholders in order to hear their view, the CSAR was printed and serialised in the national newspapers and magazines, summaries of the report were printed in the three major languages and mass circulated, and state governments were also encouraged to print and distribute the copies in local dialects.⁴⁷³

A two-phase nationwide validation of the CSAR was held in centres covering the 36 states of the federation, and the outcomes were considered in preparing a four year NPoA (2009-2012).⁴⁷⁴ The final CSAR and NPoA were submitted to the APR Panel in July 2008. The Country Review Mission (CRM) of the APRM then embarked on a month long validation of the report submitted by the country. Based on the documents submitted to the APRM Panel, the Country Review Report (CRR) was produced by the APRM.⁴⁷⁵

Of the thematic areas of self-assessment, Democracy and Political Governance is the one which is relevant to this discussion. The NEPAD/Heads of State and Government Implementation Committee had said of this thematic area that

‘the overall objective is to consolidate a constitutional political order in which democracy, respect for human rights, the rule of law, separation of

⁴⁷¹ *Ibid.*

⁴⁷² APRM Country Review Report on Nigeria 2009, 2.

⁴⁷³ *Ibid.*

⁴⁷⁴ APRM Country Review Report on Nigeria 2009, 3.

⁴⁷⁵ *Ibid*; the CRR focuses on three areas: accuracy of the CSAR in identifying major problems faced by the country, the extent to which the NPoA addresses the problems identified, and the nature of civil society participation in the production of the CSAR and the NPoA.

powers and effective, responsive public service are realised to ensure sustainable development and a peaceful and stable society'.⁴⁷⁶

The CRR, while acknowledging that the nation had made progress in the fields of treaty ratification and implementation and the promotion of peace in Africa, also highlighted various areas of challenge to the state. Most notable of these are the various ethnic, religious and state conflicts caused by pervasive social and economic inequality, distribution of wealth, religious intolerance and other causes.⁴⁷⁷

Amongst other issues raised was the endemic corruption which has plagued the country. This was seen as hindering the development of constitutional democracy in Nigeria and undermining the principles of good governance. The over-concentration of power in the central government was another issue identified as inhibiting true federalism in Nigeria. On this issue, even though the Constitution provides for a federal structure, with distribution of powers and resources, these provisions (especially the exclusive and concurrent lists in the annexure to the Constitution) are not in themselves truly representative of a federal structure of government. They confer much power on the central government. This was identified in the report as a legacy of military rule. *'The excessive powers of the executive vis-à-vis the legislature and judiciary – a legacy of the long period of military rule – curtail the realisation in practise of the principle of separation of powers with its inherent checks and balances'*.⁴⁷⁸

Nigeria is in the first year of implementing the NPoA, and is thus yet to submit a Progress report on the implementation.⁴⁷⁹ It is expected that when the first progress report is submitted, there will be signs and evidence to show that the country is making efforts to deal with the issues that have been raised in the CRR.

⁴⁷⁶ NEPAD/Heads of State and Government Implementation Committee (HSGIC)-03-2003/African Peer Review Mechanism (APRM)/Objectives, Standards, Criteria and Indicators for the APRM, 9 March 2003.

⁴⁷⁷ APRM Country Review Report on Nigeria 2009, 5.

⁴⁷⁸ APRM Country Review Report on Nigeria 2009, 5-6 (own emphasis).

⁴⁷⁹ Bing-Pappoe A (March 2010) 'Reviewing Africa's Peer Review Mechanism: A Seven Country Survey' available at http://www.pacweb.org/Documents/APRM/APRM_Seven_countries_March2010-E.pdf (accessed on 12 August 2010) 6.

4.7 Conclusion

Nigeria is a country that has undergone various dramatic changes at different times during its lifetime. The pre-colonial history (slavery included), colonial history and years of military rule that followed independence, have impacted on the society, the structures and systems of the nation. It has affected the psyche of the people and diminished the need and demand of the people to participate in the affairs of state. This history cannot however be solely blamed for the current problems with the rule of law in Nigeria. The failure of leadership over the years (epitomised in the selfishness, greed and corrupt practices that have become the norm) has further compounded the situation in the country.

The past and present constitutions of the country (despite the many attempts at review) have not been able to encapsulate the totality of the hopes and desires of the people. This is as a result of the fundamentally wrong constitution making processes that have been adopted, that do not properly engage with the people. At different times, the constitutions have been tinkered with to suit the needs of those doing the tinkering, for example, the politicians and the military.⁴⁸⁰ This has resulted in a situation whereby the constitutions are more or less impositions by either the colonial authorities, or impositions of the elite on the people, and thus affecting the legitimacy of the constitutions, and consequently of other actions and decisions emanating from these constitutions,⁴⁸¹ the 1999 Constitution inclusive. This lack of legitimacy is translated into the way law is viewed, the allegiance of the people and compliance to the law. It has resulted in a situation in which the allegiance which the people should have to each other and to the State has gradually ebbed away, as the State has shown itself not to be interested in the wellbeing of its citizens. What prevails currently is therefore

⁴⁸⁰ In 1966, the military regime of Major-General Aguyi-Ironsi suspended the 1963 Constitution by decree, reversing the federal system, and imposed a unitary system of government; in the same year a counter coup saw a reinstatement of federalism by decree also (with the constitution still suspended); in 1979, a constitutional drafting process was concluded that was more inclusive and participatory than any other seen in the country, however, just before the document was passed into law as the 1979 Constitution, the military regime of General Obasanjo unilaterally included seventeen new sections into the document and passed it into law as the 1979 Constitution of the Federal Republic of Nigeria. The current 1999 constitution is also no exception to these acts of 'tinkering', see section 4.2.3 above.

⁴⁸¹ Thus actions of the state and statutes passed by the legislature are all affected by this anomaly.

fractionalisation along regional, religious and ethnic lines. In such an environment, it is difficult for the rule of law to be vibrant or enthroned.

On the other hand, there appears to be no attempt by the State and leadership of the nation, to build the confidence of its citizens in its ability to lead and abide by the law. The citizens on their own part, in the absence of true leadership, and seeing those meant to be leading them engaged in grand corruption, theft of state funds, and self-enrichment, have adopted various forms of social ills like bribery and corruption as their own a way of life. As discussed above, there appears to be a very limited sense of nation-building or nationhood, or even ownership of the Nigerian state by Nigerians. Rather, what persists is the feeling that everybody has to do whatever it takes to survive on his or her own.

Law is meant to be a unifying norm that enables people within a particular society to identify together in working towards the attainment of their goals. However, in a situation in which the law lacks the input of the people and thus lacks legitimacy; in a situation in which the law is not effectively enforced, and there is the lack of will to make it effective; in a situation in which the rule of the law is fundamentally skewed and faulty, it will be very difficult to get to the level of the attainment of the goals of nationhood.

In order to reverse the state of affairs, there would need to be concerted attempts to deal with these challenges from the root. These attempts should be aimed and directed at steps that would foster a positive sense of nationhood, and inclusion. A proper, fully participatory review of the constitution making process is a very important step towards this. Such a process would need to be ‘wide-spread’, reaching to local communities and villages, debates would need to be held all over the country in the different languages prevalent in a particular area. It is important that the outcomes and recommendations of these processes be carried through into whatever document is produced at the end of the day, in order to foster a sense of ownership of the outcome of that process. Such would reflect the wishes of the people in relation to contentious issues of power-sharing, federalism and how it would work, ethnicity issues, derivation processes and formulae and others. The norm in the past whereby the elite or the military decide what goes into the constitution should be avoided. If the constitution

process is inclusive and public participatory oriented, this would immediately address the scepticism and reservations of the people towards the constitution.

Another step necessary to reverse the state of affairs with the rule of law in Nigeria is that of ensuring that elections are conducted in a clean, fair and transparent manner. This has not been the case in Nigeria. January 2011 heralds another elections year, wherein the country would conduct its presidential, state and local government elections. The National Assembly in the second half of 2010 adopted an amended 1999 Constitution. Amongst the proposed amendments are the electoral clauses and executive power transfer clauses.⁴⁸² There are, however, different opinions as to what is required for the amendment to take effect. The assembly is of the view that the amendments would be effective if they are approved by two-thirds of the State Assemblies (i.e. 24 out of the 36 state assemblies) and would become law.⁴⁸³ There is the opposing view that the amended constitution required presidential assent for it to become law.⁴⁸⁴ This is now before the law courts, and whatever the decision of the courts, it should be noted that these amendments are still not extensive enough, and the process was still not participatory. There was no evidence of the public hearings or consultations to sample what the population desires.

Addressing the Niger Delta crises requires political will. It requires the commitment of the government and the politicians to a peaceful and lasting resolution. Such commitment that is carried through in actions would signal an indication that the Nigerian government is serious with complying with the law (as it would be reflected in the Constitution). Section 4.5.1 above has alluded to the fact that the problems of managing oil as a resource for Nigerians, to be benefited from by Nigerians, is not so much the result of a lack of sufficient legislation; it is in fact the lack of enforcement, there is also a 'disconnect' or alienation that exists between the people and the government. This is due to the 'kick-backs' and corruption that are prevalent within the country and particularly within the minerals sector.

⁴⁸² 'Lawmakers approve harmonised constitution amendment', 4th of June 2010, available at <http://234next.com/csp/cms/sites/Next/Home/5576192-146/story.csp> (accessed on 12 August 2010).

⁴⁸³ In the event that the court decides that it does not need Presidential assent.

⁴⁸⁴ There are currently law suits challenging the need or otherwise of such assent.

The way ahead is embedded in a return to the principles of true democracy. For the Niger Delta (and possibly for the entire country), a thorough process of trust-building has to be embarked upon. A decentralised form of government is also necessary. The principles of federalism have to be adhered to and practised properly. Ultimately, it is only when the democratic and citizenship rights of the people of Nigeria are underpinned by a socially just and participatory social contract between them and a popular democratic state,⁴⁸⁵ that one would be able to see the rule of law at play in the country.

⁴⁸⁵ Obi CI 'Resource Control in Nigeria's Niger Delta' 2007 (2) *Global Knowledge*.