



LAW 243

CONSTITUTIONAL LAW 1

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Course Code	Law 243
Course Title	Constitutional Law 1
Course Developers	Professor Justus A. Sokefun Dr. Ifidon Oyakhiromen Mr. Ayodeji Ige Miss Omotayo Obayemi
Course Editor	Professor Justus A. Sokeun
Programme Leader	Dr. Godwin F. Oyakhiromen National Open University of Nigeria 14/16 Ahmadu Bello Way Victoria Island, Lagos
Course Coordinator	Mr. Ayodeji Ige



NATIONAL OPEN UNIVERSITY OF NIGERIA

National Open University of Nigeria
Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja office
No. 5 Dar es Salaam Street,
Off Aminu Kanu Crescent
Wuse II, Abuja
Nigeria

e-mail: centralinfo@nou.edu.ng
URL: www.nou.edu.ng

Published by:
National Open University of Nigeria 2008

First Printed 2008

ISBN: 978-058-772-1

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MODULE 1

Unit 1	Definition and Scope of Constitutional Law and Traditional Constitutional Concept
Unit 2	Sources of a Constitution
Unit 3	Federalism

UNIT 1 DEFINITION AND SCOPE OF CONSTITUTIONAL LAW AND TRADITIONAL CONSTITUTIONAL CONCEPT

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3.2	Scope of Constitutional Law
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1.0 INTRODUCTION

The term Constitution applies to the system of Law and government by which the affairs of a modern state are administered. Constitution is the document that embodies the steps that determine how we do things in the society; it is essentially the embodiment of the fundamental rules, principle and institutions which constitute the political affairs of the state. Since the advent of constitutional democracy in Nigeria, Constitutional Law has assumed a new and somewhat awesome status. Its importance becomes even more pronounced in the wake of the Supreme Court pronouncements on major constitutional questions concerning the limits of parliamentary power, the tenure of local government, legality of capital punishment, resource control, legality of impeachment proceeding and tenure of office of elected officials of the state. Constitution means the ultimate source of origin upon which the whole body of governmental apparatus or system derives its validity, its origin and strength.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the term Constitution;
- know the scope of Constitutional Law; and
- know the Traditional Constitutional Concept.

3.0 MAIN CONTENT

3.1 What is Constitution?

A constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate. In countries in which the constitution has overriding legal force, there is often a constitutional court which applies and interprets the text of the constitution in disputed cases. Such a court is the Supreme Court in Nigeria, the Supreme Court in USA or the Federal Constitutional Court in South Africa. However, United Kingdom or Great Britain has no constitution. There is no single document from which is derived the authority of the main organs of government such as the Crown, the cabinet, parliament and the courts of law. No single document lays down the relationship of the primary organs of government one with another or with the people.

But the word Constitution has wider meaning. As Bolingbroke stated in 1733: "By constitution, we mean whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason; that compose the general system, according to which the community had agreed to be governed or in more modern words "Constitution in its wider sense refers to the whole system of government of a country, the collection of rules which establish and regulate or govern the government". According to Lawrence Tribe (1978) "*the constitution is a historically discontinuous composition, it is the product, overtime, of a series of not altogether coherent common promises; it mirrors vision or philosophy but reflect instead a set of sometimes reinforcing and sometimes conflicting ideas and notion*". Whilst this may be true of the American constitution, it is certainly not true of all types especially in developing nations where constitution are often products or heritage of colonial rule.

The term "*Constitution*" has been variously defined in manners that are often a reflection of the particular constitution or constitutions to which the proponent of a particular definition is exposed. For example, it has been termed as "set of rules that are not subject to the will of the

sovereign authority in the state and which has existed and must exist in any state worthy of the term constitution”, a document, having special legal sanctity, which sets out the framework and the principal functions of the organs of government within the state and declared the principle by which such organs must operate, rules which set out the framework of government, postulates how it ought to operate and makes declaration about purposes of the states, society and the rights and duties of citizens, but no real sanction is provided against violation of particular provisions of the constitution. There is no doubt from the above definitions that writers and jurists based their definitions on the features of a particular constitution within their view. In addition there is often the implication of the “autochthony or home grown nature of constitutions being the basis of its authenticity and effectiveness. However, in many emerging nations especially of the third world, former colonial masters or military governments disengaging from power often enact many of the constitutions in such nations.

SELF-ASSESSMENT EXERCISE 1

Define the term Constitution and State briefly whether writers ever agreed on a definite definition of constitution.

3.2 Scope of Constitutional Law

According to one very wide definition, constitutional law is that part of the Law which relates to the system of government of the country or it can also be defined as meaning those laws which regulate the structure of the principal organs of government and their relationship to each other and to the citizen, and determine their main function. Constitutional law pervades all areas of law in that there is hardly any department of law which does not, at one time or another become of constitutional importance. In the field of family law, the importance of the protection of family life is stressed in the Nigeria 1999 Constitution and African charter on human rights. In industrial law, the freedom of association for industrial purpose and the law of picketing are of constitutional importance. In the sphere of public order and criminal law, the citizen looks to the court for protection. The constitutional lawyer has always had a particular interest in the means which the law provides for safeguarding individual liberty.

3.3 Traditional Constitutional Concept

Constitutional concepts are those ideas which influence the nature or form of constitution. A basic idea, which seems to encompass these concepts and has permeated constitutional making in modern world is that of “Constitutionalism” or “limited government” i.e. the idea of

including in the constitution certain rules and regulations geared towards preventing abuse or the exercise of arbitrary power-by government. This idea was first given birth to during the developmental years of natural law, sovereign powers by divine laws.

Noteworthy among these was John Locke's theory of 'Social Contract', which he believed predated societies and made government mere trustees of the common interest of the community. A written and entrenched constitution was later seen as primarily performing this role whilst an unwritten constitution perform it in a less rigid way, through the various constitutional law concepts and conventions.

Constitutionalism is a goal (i.e. a means to an end), and it refers to the regularity of political life within a state by means of a constitution. As a concept; Constitutionalism means limited government. i.e. a system of restraint on both the rule and the ruled. Constitutionalism asserts that there are fundamental limits which must be observed in the relationship between the ruler and the ruled, when the power relationship among the groups in political society becomes regularized under law and subject to well-defined restraint, the constitutional government exist.

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

The line demarcating constitutional and administrative law is very thin and this thin line cannot be precisely demarcated. Administrative law may be defined as the law which determines the organization, powers and duties of authorities. Like constitutional law, it deals with the exercise and control of governmental power. An artificial distinction may be made by suggesting that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law is concerned with the work of official agencies in providing services and in regulating the activities of citizens. Administrative law is directly affected by constitutional structure of government.

SELF-ASSESSMENT EXERCISE 2

- i. Explain the term Constitution
- ii. What is Constitutional Law
- iii. What is the relationship between Constitutional Law and Administrative Law
- iv. What is the scope of Constitutional Law

4.0 CONCLUSION

The major conclusion that could be drawn from the foregoing analysis is that Constitutional Law is central to all aspect of Law. The questions one may then ask is, what is the nature of the relationship and which is the dominant partner? Constitutional Law appears to be dominant to the extent that other areas of Law draw from the fountain.

In conclusion therefore, we see that Constitutional Law influences the content of other areas of law.

5.0 SUMMARY

In this Unit, you learnt that Constitution and Constitutional Law are both defined standard contained in a document which is imposed by the will of the people for proper conduct in society. Constitutional Law to some extent determines the content of Law and determine the code of conduct for the people. In the remaining Units of this module, you will encounter other sources of Constitutional Law, it uses and application of the concept for social control.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the term Constitution and relate it to how it can be used for social control.

7.0 REFERENCES/FURTHER READINGS

K. M. Mowoe (2005). *Constitutional Law in Nigeria*.

Oluyede P.A. O.(1992). *Constitutional Law in Nigeria*

Prof. Ben Nwabueze (1982.). *Presidential Constitution of Nigeria*,

The 1999 Constitution of the Federal Republic of Nigeria.

UNIT 2 SOURCES OF A CONSTITUTION

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- 1 Introduction
- 2 Objectives
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 - 2.1 Sources of a Constitutional
 - 2.2 Nature of the Constitutions
 - 2.3 Constitution as a Social Contract
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

In the previous Unit, you learnt about what Constitution is and the development of constitution through the ages from one society to the other. This Unit introduces us to the subject matter of sources of the various constitutions we have in very many parts of the world today as well as analyze the various approaches to determining the sources of a constitution.

2.0 OBJECTIVES

At the end of this Unit, you should be able to:

- identify the sources of a Constitution;
- differentiate between the various approaches to constitutional making in various societies in the world; and
- identify the various historical circumstances leading to different sources of a constitution.

3.0 MAIN CONTENT

3.1 The Sources of a Constitution

The sources of the various provisions found in a constitution are many, such as the past experiences of the country. For instance, the social economic, political, historical, geographical and notable historical documents such as the British Magna Carta of 1215, American Bill of Right statutes passed by parliament, decrees and edicts of military government, the intellectual works of eminent writers, jurists, historians, philosophers, essayists, politicians, and statesmen such as John Locke, A.V. Dicey, and so forth, case law or judicial precedents, customs and

way of life of the people, rules and conventions guiding human behaviour, the constitutions of other countries, the deliberations of constitutional conferences or Constituent Assemblies which may draft the constitution of the given country, rules of international law and so forth are important sources to draw from when writing a constitution for a country.

3.2 The Nature of the Constitution

The nature of a constitution is determined essentially by the source of its authority i.e. whether or not it is an original act of people, and, secondly by the justiciability of its provisions i.e. whether it is enforceable in the court or merely a political charter of government un-amenable to judicial enforcement.

A Constitution whether written or unwritten, rigid or flexible, unitary or federal etc. has two natures:

1. It is an expression of the will or desires of the people who make up the state or country
2. It is a social contract between the government as an entity and the people on the one hand. It is a contract between those who hold public offices and the people on the second hand, and it is also a social contract between and among the various ethnic peoples who make up a state or country on the third hand.

A constitution is an expression of the will of the people of a country or given political unit. The constitution may expressly spell out the following:

1. The desire of the various multi-ethnic people or race, to live together as one people and the legal basis on which they want to live together in such given political entity.
2. The ideas and fundamental objectives and directive principles of state policy they want to lead their lives.
3. Public revenues and the control of the public funds of the country or state.
4. The type and structure of government the people want at the various levels of government, their functions, powers and limits thereto.
5. The establishment of armed forces and their traditional, constitutional or professional roles
6. The framework, function and powers of the public service or public institutions and authorities.
7. The internal structure of the country, political institutions and the

functions and powers they want the government to exercise at the various levels of government.

3.3 Constitution as a Social Contract

A constitution is a social contract between the people and government

The second nature of a constitution is that it is a contract.

A constitution is a Legal Contract between the people and government containing legal rights which have force of law and are enforceable.

A Constitution is the pre-agreed contract and supreme document defining and regulating the relationship between the people and the government and its terms are binding on all persons and authorities in the country. A constitution guarantees rights and also attracts obligation or duties to the:

- i. Individual and
- ii. The government or public officers and authorities on the other hand.

SELF-ASSESSMENT EXERCISE 1

Do you agree with the saying that a Constitution is a Social Contract between the people and government? Discuss.

4.0 CONCLUSION

You have learned about the relationship between a constitution and the people. You have learned the way in which the people should be involved to make the Constitution; valid and enforceable and the central nature of a Constitution, the purpose which it must serve and the constitution as the express will of the people.

5.0SUMMARY

In this Unit, you have learnt that there are five different types of Constitution but there is supposed to be an inherent nature which is determined by the source of the authority.

6.0TUTOR-MARKED ASSIGNMENT

Critically examine whether the 1999 Nigeria Constitution is an express will of the Nigeria people.

7.0REFERENCES/FURTHER READING

Justus A. Sokefun (ed). *Issues in Constitutional Law and Practise in Nigeria: Honour of Dr Onagoruwa.*

K.M. Mowoe (2002). *Constitutional Law in Nigeria.*

Prof. Ben Nwabueze(1982). *Presidential Constitution of Nigeria The 1999 Constitution of Nigeria.*

UNIT 3 FEDERALISM

CONTENTS

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- 2.0 Objectives
- 3.0 Main Content
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 - 3.2 Constitutional Forms
 - 3.3 Basis and Justification of Federalism
- 4.0 Conclusion
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- 7.0 References/Further Readings

1.0 INTRODUCTION

In the proceeding Unit (i.e. unit 1) you learnt generally about the meaning of constitution. You will acquaint yourself further with the knowledge of this important area of constitutional law by keeping yourself abreast with how various ideas and themes have shaped the term federalism

2.0 OBJECTIVES

At the end of the unit, you should be able to understand:

the definition of federalism; and
the evolution of the idea termed federalism.

3.0 MAIN CONTENT

3.1 The Definition of Federalism

LEGAL UNDERPININGS OF FEDERALISM

The definitions of Federalism are often fraught with pitfalls because of their inability to encompass all forms of the particular concept or idea sought to be defined. Generally, the concept of federalism relates to the division of power between national government, and other regional or state governments and sometimes local governments. Such powers may however be shared in various ways, sometimes with a stronger center or with weaker center which is often referred to as co-federalism.

Meaning: Ben Nwabueze defines federalism as an arrangement

whereby powers of government within a country are shared between a national country-wide government and a number of regionalized (i.e. territorially localized) governments in such a way that each exists as a government separately and independently from the others, operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all others.

Five (5) different principles and issues are involved in this definition.

1. Government rather than geographical entities or people as the basis of the federal arrangement.
2. Separateness and independence of each government.
3. Equality between regional governments.
4. Number of regional governments between whom a federal arrangement can meaningfully exist.
5. Techniques for the division of powers underlying objective of the federal arrangements

3.2 Constitutional Forms

Lord Haldane in Attorney General for Commonwealth of Australia V Colonial Sugar Refinery Co. was of the view that:

“.....the natural and literal interpretations of the word ‘federal’ confines its appellation to cases in which states while agreeing in a measure of delegation of powers to a common government yet in the main continue to preserve their regional constitution. The word could only be used loosely, to describe states which agree to delegate their powers with a view to entirely new constitution even of the states themselves”. This definition presupposes a voluntary act on the part of the federating states in keeping with the theory of the social contract and perhaps does not contemplate a situation of federal state coming about as a result of coercion or the mechanical drawing of borders, which was the case in Nigeria.

To Carl Fredrich

Federalism is the process of federating as well as the particular pattern or design which the inter-group relation exhibits at the particular time.....not only unification (Germany, USA), but also proliferation (Russia, India) are examples of federating and the two processes may be going on at the same time.

According to **Prof. Ojo**

Federalism is capable of different meaning and conceptions, depending on the perspective and the background of the perceiver. There are writers whose emphasis has been on the form of the constitution and certain institutions and as far as they are concerned the absence of these makes any discussion on federalism futile. Another school holds that federalism is the product of social forces and that the ultimate political structure is dependent on those forces; still is another school that the party system is a crucial federal variable while another is that inter-governmental institutions and arrangements are critical for structuring political and social interaction. However, with the nebulous and uncertain form and content of federalism, we are in agreement that it is better to avoid argument about definition until theory and practice could be harmonized satisfactorily. This is most important in the developing countries which are presently laboratories of political and constitutional activities.

There is no doubt that it is still necessary to be in agreement as to the theory of the concepts before there can be any harmonization.

Williams Living Stone believes that:

The essential nature of federalism is to be sought not in the shading of legal and constitutional terminology, but in the forces-economic, social, political, cultural – that have made the outward forms of federalism necessary The essence of federalism is not in the constitutional or institutional structure, but in the society itself. Federal Government is a device by which the federal qualities of the society are articulated and proffered. In otherwords, it is factors that impel the formation of a federation that determine its essence or nature. The only conclusion that can be reached from this is that since various factors necessitate the forming of federalism in various states, their nature, form and scope necessarily differ. There is no Universal agreement as to what federalism is. A federal government means what the constitution says it means.

SELF-ASSESSMENT EXERCISE 1

Discuss with particular reference to Nigeria the meaning of the term federalism.

3.3 Basis and Justification of Federalism

Federalism evolves in various nations for different reasons, but is mostly seen in nations with vast expanse of land and multi-ethnic peoples; or diverse religions, historical, political, or other backgrounds.

In the United States of America for example, it was part of the fervour

of the war of independence, which led to the articles of co-federation that gave powers to the confederate states and the federation. This was later to be translated into a constitution which gave more powers to the federal government. In Nigeria, it came about as a result of the multi-ethnic nature of the country. Agitation of the minorities for a system of government which would ensure continuity and give them a sense of belonging and most importantly the existence side by side of the three major religions-Christianity, Islam and Traditional mode of worship, in such a way as to divide the nation into two major entities.

As was noted by Awa

“The Moslem group believing themselves to be superior on accounts of their religion disowned the other people initially. The southerners despised the Moslem for their lack of education, and assured that in view of their own better educational background and general experience, they would be the rightful people to take over the mantle of rulership from Britain. But they feared that the British officials who maintained a somewhat protective attitude towards the Northern Moslem might impose the Moslems on the country, particularly in view of the fact that the northerners were assured to be superior numerically than the other groups put together. It was realized that the most effective way of allaying the fears of the group was to evolve a federal government in which these major groups would be given autonomy over their local affairs.”

Authentication for this fact can perhaps be seen in the continuous agitation for creation of more states within borders that tend to include more and more people of a particular ethnic origin or language.

Whatever the prerequisites for the formation of a federal union, there is no doubt that there are certain minimum requirements which are the main focus of the federal concept and which must be in place before a nation can be said to be truly federal.

4.0 CONCLUSION

In this unit, we have attempted to examine the various definitions of the concept federalism. The relationship between the different tiers of government rather than different geographical entities comprising different people. Hence, from the legal perspective the federal state with its territory and people is one and indivisible going by the relationship created by arrangement which are with government and not the people.

5.0 SUMMARY

We have been able to establish how the various definitions of federalism evolved. We concluded with the view of Prof. Awa on the concept of federalism who believes in the evolvement of a federal government where major groups would be given autonomy over their local affairs.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the term federalism.
2. The minority tribes in Nigeria are clamouring for autonomy over their local affairs. Is this in consonance with federalism? Discuss.
3. Is the 1999 Nigeria Constitution a federal constitution?

7.0 REFERENCES/FURTHER READINGS

B. O. Nwabueze. (1982). *The Presidential Constitution of Nigeria*

K. M. Mowoe (2005). *Constitutional Law in Nigeria*.

Magistrate Association of Nigeria Ogun State Chapter:
Constitutionalism and Compliance in Nigeria.

MODULE 2

Unit 1	Separation of Powers
Unit 2	The Rule of Law
Unit 3	Classification of Constitutions
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UNIT 1 SEPERATION OF POWERS

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1.0 INTRODUCTION

Separation of powers is one of the devices used by the Anglo-American systems of government to protect the rule of law and prevent exercise of arbitrary power by the sovereign. The concept streamed from the writings of John Locke on the situation in England in the 17th century. He argued that it was fool-hardly to give lawmakers the power to execute law made by them because, in the process, they can exempt themselves from the observance of the law. To prevent arbitrariness he championed creation of a constitutionally limited government and three fold division of government into:

- a. Legislative power for creation of rules
- b. Executive power by which laws are enforced and
- c. Federative powers which concern making of war/peace and external relations.

He did not advocate separation between legislative and federative powers. The modern form of the concept is however due to the writing of Montesquieu.

2.0 OBJECTIVES

By the end of this unit, you should be able to explain:

the concept of separation of power;
the application in principle and practice; and
the differences between the application in parliamentary system and presidential system of government.

3.0 MAIN CONTENT

3.1 Definition of the Concept Called Separation of Powers

Separation of powers or classification of government powers is the division of government powers into three branches of legislative, executive, and judicial; each to be exercised by a separate and independent arm of government as a preventive measure against abuse of power, which will occur if the three powers are exercised by the same person or group of persons.

Thus, the concept of separation of powers may mean at least three different things.

- a. That the same person should not form part of more than one of the three organs of government.
- b. That one organ of government should not control or interfere with the work of another. For example the judiciary should be independent of the Executive and the Legislative.
- c. That one organ of government should not exercise the function of another. E.g. the Legislature should not carry out judicial functions.

Thus, separation of powers is the constitutional doctrine of the division of powers of government into the three branches of legislative, executive and judicial powers, each to be exercised by a different group of persons as a means of checks and balances in the government structure itself, and to protect the people against tyranny.

The three traditional arms of government or types of government power or division of government are the:

- | | | |
|------|--------------|---|
| i. | Legislative: | the law making arm of government |
| ii. | Executive: | the implementation of laws |
| iii. | Judiciary: | the interpreters and judges of the law. |

The doctrine of separation of powers as understood today came largely

from the work of the French jurist, Baron De Montesquieu, in his book “The Spirit of Law” (Esprit Des Lois Chapter XI) who studied and expanded the work of John Locke. He was concerned with preservation of the political liberty of the citizen. According to Montesquieu:

Political liberty is to be found only when there is no abuse of power. Experience shows that everyman invested with power will abuse it by carrying it as far as it can go. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another. When the Legislative, Executive and judicial powers are united in the same person or body..... There can be no liberty.....again there is no liberty if the judiciary powers is not separated from the legislative and executive..... there would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all there powers.

Therefore concentration of powers in the same person or body would no doubt lead to tyranny because power corrupts and absolute power corrupts absolutely.

In this vein, Prof Ben Nwabueze said “Concentration of government powers in the hand of one individual is the very definition of dictatorship, and absolute power is by its very nature arbitrary capricious and despotic”. In the words of Chief Obafemi Awolowo, “Man loves power, in the family, vicarage, town and state, in the club, groups, association businesses, in the institution of learning, newspaper office..... In this entire sphere, you see him always exacting in the use and abuse of power”.

In another breath he said “An independent judiciary is one of the bulkwarks of the liberty of the citizen..... a judiciary which is subservient to the executive and the legislature will be bound to administer the law with partial affection for those in authority and to the prejudice of the governed”.

According to Abiola Ojo, “a complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of two much power on anyone person or body and the check of one power by another”. The courts have continually pronounced on the importance of this concept.

In *Lakanmi and others V Attorney General of Western State*, the court noted inter alia

We must here revert once again to the separation of powers, which the learned, Attorney General Himself did not dispute still represent the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our constitution is based on separation of powers – the legislature, the Executive and the Judiciary. Our constitution clearly follows the model of the American constitution. In the distribution of powers, the courts are vested with the exclusive right to determine justifiably controversies between citizen and the state ... we must once again point out that those who took the government of this country in 1966 never for a moment intended to rule but by the constitution. They did in fact recognize the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of Decree 1 of 1966 does not envisage the performance of legislative function as a weapon for exercise of judicial powers, nor was it intended that the federal military government should, in its power to enact decrees, exceed the requirements or demands of the necessity of the case.

In *Bamidele and others V Commissioner for Local Government and Community Development Lagos State Uwaifo JCA*, as he then was, remarked on the important role of the courts in seeing that the constitution observed in a society.

“In a democratic society governed by a democratically elected government under the law and the constitution, this illegality, no matter its salutary intervention should not be permitted. Once a situation like that is allowed to go unchallenged by whoever is affected, more serious infractions will soon be committed. In due course, the constitution is rendered irrelevant. That means a slide into authoritarianism. All these and the non observance was connived at or acquired in, and the court in a competent action did nothing about it. That does not augur well for democracy and the rule of law. It rather weakens their framework and their practice”.

Unfortunately, it is because of the incapacitation of the courts in this respect under military rule that those traditional concepts cannot exist.

3.2 Military Rule and Separation of Powers

The organization of government under the military rule is contrary to the concepts of separation of power, traditionally or modern. It must be noted that the primary purpose of the concept is to guard against dictatorial rule by avoiding concentration of all the powers of government in one hand. With the advent of the military rule in Nigeria beginning from January 15, 1966, the military suspended and modified the 1963 Constitution by virtue of the constitution (suspension and

modification) Decree N. 1, 1966. By virtue of the decree, it dissolved the parliament and fused legislature and the executive powers in the Supreme Military Council (SMC) which was the ruling military council. This fusion of both legislative and executive functions or powers is repeated in every military regime. The ruling military council has also been known as Armed Forces Ruling Council (AFRC) and Provisional Ruling Council (PRC) and so forth in various military regimes. The military also passed the federal military Government (Supremacy and enforcement of powers) decree *No. 28 of 1970*, by virtue of which decree became the supreme laws of the land and the validity of any decree or edit cannot be inquired into by any court of law. But whenever an edict was inconsistent with a decree it became null and void to the extent of such inconsistency. Though the judiciary is never abolished nor its power taken away, its judicial powers was ousted in various matters by ouster clauses contained in the relevant decrees /edits which stripped those courts of power or jurisdiction to look into such specified matters.

A military regime wields a lot of powers especially legislative and executive powers. They also exercised judicial powers as they deemed fit from time to time. It could, by a decree, determine a person's guilt and mete out penalty.

3.3 Civil Rule and Separation of Powers

The Nigeria Constitution of 1999, provided for a presidential system of government. The constitution also provided for a clear division of the three powers or branches of government as follows:

Section 4: The Legislature with Legislative powers

Section 5: The Executive with executive powers

Section 6: The Judiciary with judicial powers

During Civil rule, the Constitution is the Supreme Law of the land and the rule of law is the basis of government actions. Any law or action that contravenes the provisions of the constitution is void to the extent of such inconsistency.

In *Attorney General of Bendel State V Attorney General of the federation and others*. The court declared unconstitutional the precedence by which the appropriation bill was passed by the National Assembly.

Also

In the Attorney General of the Federation V Attorney General

of Abia state, the Supreme court declared unconstitutional and contrary to the provisions of section 162 of the 1999 constitution the Act of the Federal Government in charging certain funds, like that of the judiciary, settlement of external federal debt joint venture contracts and the Nigeria National Petroleum Corporation (NNPC) priority projects, special allocation to the Federal Capital Territory in the federation Account out of which all the various levels of government are to take a share.

4.0 CONCLUSION

We draw our conclusion from the observation made by the Constitution Drafting Committee of the 1979 constitution which said:

Strict compartmentalized separation is not possible under modern systems of government as modern governments should be a co-operative co-coordinated effort and not a tug of war between the principal organs of government. Separation of executive and legislative function is necessary and desirable if limited government and individual liberty are to be secured, but certainly not a rigid separation

And this tallies with the views of Abiola Ojo, that “a complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on anyone person or body and the check of one power by another”.

5.0 SUMMARY

In this unit you should be able to explain the concept separation of powers and its application under:

Democratic dispensation
 Military dispensation
 In a Parliamentary System of Government.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the term separation of powers?
2. What is the implication of the judgment in the case of Lakanmi and others V Attorney General of Western Region.
3. Separation of powers under the Military Rule is an utopian dream. Discuss.
4. In a democratic dispensation, the executive arm of government

can make laws. Do you agree?

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UNIT 2 THE RULE OF LAW

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Historical Evolution of the concept of Rule of Law
 - 3.2 Definition of Rule of Law
 - 3.3 Supremacy of the Law
 - 3.4 Equality before the Law
 - 3.5 Enforcement of Rights
 - 3.6 Rule of Law: Nigerian Experience
 - 3.7 Requirements to the Validity of the Rule of Law
- 4.0 Conclusion.
- 5.0 Summary.
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings.

1.0 INTRODUCTION

The “Rule of Law” as a constitutional concept has generated a lot of controversy. The controversy stems from two things: the theoretical aspect of the concept and the practical aspect. The theoretical aspect is linked with the fallbacks or perhaps watertight explanations offered by Albert Venn Dicey, its main exponent. The main criticism as we shall see later is whether there is a possible extension of the concept beyond Anglo-Saxon tradition and the possibility of this assurance on matters affecting human rights. No doubt, the full application of the concept is likely to send jitters into governments’ spines because the central point there is succinctly put by *Stone* as being that state officials and ideally state organs themselves must be answerable in the courts like all other persons and bodies.

2.0 OBJECTIVES

The objectives of this unit in respect of the study of the constitutional concept of the Rule of Law are to examine those major components of what make up the rule of law, the contextual meaning of what this phrase means and its importance in the day-to-day running of the affairs of the state by the different agencies of government.

3.0 MAIN CONTENT

3.1 The Historical Evolution of Rule of Law Concept

The history of the Rule of Law dates back to the theories of early philosophers. As stated by Aristotle, *“The Rule of Law is preferable to that of any individual”*. Adopting this theory to that period (Middle Ages), Bracton, in the 13th century was of the opinion that, *“the King himself ought not to be subject to man but subject to God, and the law because the law makes the king”*.

This was the extent to which the early philosophers could stretch the rule of law. Much later, John Locke on the same concept added that;

“Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by legislative power created in it and not be subject to the constant and unknown arbitrary will of another man.

However, at the end of the nineteenth century A.V. Dicey described the principle of the rule of law as one of the two basic principles of the English Constitution. During the last thirty years, prominent jurists have devoted much attention to the study of the ideals of the rule of law.

In Nigeria, the Supreme Court has emphasized on several occasions the importance and continuing relevance of the idea of the rule of law even in the context of a military government. A very careful analysis of this idea is especially topical in Nigeria going by its implication as provided in the 1999 Constitution Federal Republic of Nigeria.

SELF-ASSESSMENT EXERCISE 1

Briefly trace the evolution of the concept of the “Rule of Law”.

3.2 Attempts at Defining the Rule of Law

The “Rule of Law” means that law rules or reigns. This presupposes a situation where everything is done in accordance with law thereby excluding any form of arbitrariness. The concept of the rule of law is of great antiquity. This is because, for many centuries, it was recognized that the state usually possessed enormous power which may be used to oppress individuals. This has been a point of concern for both political and legal philosophers who are in a continuous search for a suitable and somewhat permanent means of subjecting governmental power to control.

Aristotle argued that government by law was superior to government by

men. By this he meant that where the rule of law prevailed, government will be better organized unlike rule by the whims and caprices of the leader which will likely cause chaos.

The rule of law as a constitutional and political concept has been a subject of much interest to prominent writers even before the 19th century when A.V. Dicey wrote his thesis. So one can rightly assert that Dicey did not invent the rule of law concept, he only put his own interpretations upon its meaning.

While writing on the concept in the late 19th century he was very much influenced by his own understanding of the working of the British constitution. In his writings, Dicey acknowledged that the supremacy of the law had been one of the features at all times of the political institutions of England since the Norman Conquest.

From the foregoing analysis, it is clear therefore and one could safely say that the basic meaning of what the concept of the rule of law stands for is that the law of any given state is supreme over and above all the individuals, be it the kings and its subjects.

SELF-ASSESSMENT EXERCISE 2

What is the idea of the concept of the “Rule of Law?”

3.3 Supremacy of the Law

Professor A.V. Dicey in his epochal work distilled and expatiated on the “Rule of Law”. Even though the three aspects are subject to constructive criticism, writers on the subject are agreed that Dicey’s formulations are authoritative coming as the last stage of the evolution of the concept. One of the three formulations is the supremacy of the law.

This first aspect of the Rule of Law as formulated by Dicey was that the concept means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of wide discretionary authority on the part of government.

A further interpretation of this formulation is that no man should be punished or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

However, this proposition when Dicey said it was to the displeasure of non-Anglo-Saxon writers. He said: *“A man with us’ (the English Nation) may be punished for a breach of the law but he can be punished*

for nothing else.”

For the purpose of this discussion, this formulation can be subjected to at least two interpretations.

Firstly, it may mean that power, no matter from whom it came, must be exercised in accordance with the existing laws of the land.

The second possible interpretation is that the citizen could only be punished for a breach of the law established in the constitutional manner before a constitutionally constituted court of the land. This issue came up comprehensively in the popular case of *Mohammed Olayori and others*. The issue in that case was whether a decree which conferred special powers on the Chief of Army Staff to detain persons during the period of emergency was enforceable. TAYLOR C.J. said;

“...If we are to live by the rule of law, if we are to have our actions guided and restrained in certain ways for the benefits of society in general and individual members in particular then, whatever status or post we hold, we must succumb to the rule of law”.

The court, in the most instructive manner condemned the arbitrary powers of the Chief of Army Staff.

In the general sense, the first formulation means that the Rule of Law presupposes the absence of arbitrary and capricious law. Therefore, for a person to be punished for a law, that law must be written and ascertainable. This was the decision of the Nigeria Supreme Court in *AOKO V FAGBEMI (1969)1 ALL N.L.R. 400*. It is also a constitutional provision by the provisions of section 33 of the 1999 constitution of the Federal Republic of Nigeria.

SELF-ASSESSMENT EXERCISE 3

Explain the idea of the Supremacy of the Law.

3.4 Equality before the Law

This postulation is to the effect that every person no matter his status is subject to the laws of the land. In this sense, it means equality before the law or equal subjection of all classes of persons to the ordinary law of the land administered by the ordinary law court.

This postulation includes equality, justice, and equality of rights. It is also a constitutional provision by the provisions of section 17(1) of the 1999 constitution of the Federal Republic of Nigeria.

A further interpretation of this postulation means that no man is above the law and that every man, whatever, his rank or condition is subject to the law of the land and amenable to the jurisdiction of the ordinary tribunals.

Ordinarily, most countries observe this sense of the rule of law in that the socio-political or economic status of an individual is per se no answer to legal proceedings, yet there are a number of exceptions when it comes to practical experiences. For example, from the nature of the duties they have to discharge judges, diplomatic representatives and parliamentarians are usually protected and given certain privileges. They are also exempted from certain liabilities. Similarly, the police have special powers of arrest and search which the ordinary man does not possess.

Furthermore, in modern times, it is not easy to keep to the ideal that every person is brought before the ordinary courts of law. Special courts, as for example, juvenile courts are established to handle special cases. We also have courts for the trial of military personnel who have committed offences. These courts apply special laws which do not apply to every citizen. Similarly, various tribunals and panels have been constituted and charged with the responsibilities of disciplining erring members of the different professions.

However, the decisions of these tribunals are usually subject to review by superior courts. For instance in *DENLOYE V DENTAL PRACTITIONERS. DISCIPLINARY TRIBUNAL (1981) 1 N.C.L.R.35* the decision of the tribunal was set aside by the Supreme Court of Nigeria when the court found that the appellant had not been accorded a fair trial before being penalized.

On the whole, the exigencies of modern government suggest that many persons have peculiar rights, powers, immunities and duties which the ordinary citizen does not have. It is apparent; therefore, that equality before the law in modern times does not mean that every person, officials and ordinary citizens alike have the same rights and duties. Rather, it means that all people are subject to the law but the law which some are subject may be different from the law to which others are subject.

In *GOVERNMENT OF LAGOS STATE V OJUKWU (1986) 1 N.W.L.R. 621 at 647* Oputa J.S.C. said that the Rule of Law presupposes:-

1. That the state is subject to law
2. That the judiciary is necessary agency of the Rule of Law,
3. That government should respect the right of individual citizens.

4. That to the judiciary is assigned the role of adjudicating in proceedings relating to matters in dispute between persons or between government or an authority and any person in Nigeria.”

SELF-ASSESSMENT EXERCISE 4

What is the effect of equality before the law in its application in Nigeria?

3.5 Enforcement of Rights and Protection

In A.V. Dicey’s view, the constitutional law of England is not the source but the result of the ordinary law of the land. Dicey here merely emphasized the protection of and the enforcement of personal rights and freedoms by the courts even though there may be no written constitution in England conferring such rights. He did not really consider the wider constitutional principles such as the sovereignty of parliament which in essence means that parliament could make laws denying both the right and the remedy and nothing could be done against such law.

While the above is true of England, it is not the same case in all jurisdictions. For instance, in jurisdictions where there are laid down constitutional provisions on human rights like Nigeria, fundamental human rights are entrenched in the constitution by virtue of specific chapters. Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria.

The Rule of Law started taking a different dimension in 1948. It adopted an international status through the Universal Declaration of Human Rights which was set out by different United Nations Members. This was followed by the European Convention on Human Rights of 1950.

In Africa, there has been in recent times a Declaration of Human Rights which African Nations are being encouraged to adopt in their municipal laws and through the regional organizations such as ECOWAS and AU.

World jurists have had conventions on the Rule of Law ever since the creation of the Universal Declaration of Human Rights in 1948. These conventions include:

1. The Acts of Athens convention of 1955
2. Declaration of Delhi of 1959
3. Law of Lagos.

The postulations and criticisms of the Rule of Law by Dicey and his critics have given a different scope to the concept.

SELF-ASSESSMENT EXERCISE 5

As a component of the rule of law, how can the protection of and enforcement of rights of the citizens be guaranteed?

3.6 Rule of Law: The Nigerian Experience

SELF-ASSESSMENT EXERCISE 6

Enumerate the major recognized impediments to the successful application of the Rule of Law in Nigeria?

3.7 Requirements for the Validity of the Rule of Law

Over the years, the following basic points have been recognized as means of identifying the successful application of the Rule of Law in any given jurisdiction. These include:

1. Law should be prospective in its effects.
2. The Law in such countries should be certain, clear and publicly known.
3. Laws should be general and making of particular legal orders should be guided and constrained by general laws.
4. The judiciary should be independent and easily accessible.

4.0 CONCLUSION

From the basic concept of the rule of law so far discussed, it is clear that as a constitutional concept, it is desirable. The utility value cannot be overestimated otherwise, there would be chaos.

5.0 SUMMARY

Summarily, the concept of the “Rule of Law” as formulated by different writers, jurists and Legal Philosophers means the follows:

The officials must obey the legal rules in their actions;
The legal rules out the arbitrary discretion of officials.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the rule of law?

2. Examine the three formulations of A.V. Dicey in his postulations in respect of the Rule of Law.
3. What are the effects of military intervention in Nigeria Political on the sustainability of the Rule of Law?
4. Examine the basic requirements for the validity of the application of the Rule of Law.

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UNIT 3 CLASSIFICATION OF CONSTITUTIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Definition of Constitution
 - 3.2 Unwritten and Written Constitution
 - 3.3 Rigid and Flexible Constitution
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

In Unit 1, you were introduced to the definition and sources of constitutional law. In this unit, we shall be looking at the classification of the constitution. The Unit begins by giving a brief definition of constitution, its nature, functions and origin.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- define constitution; and
- explain the different types of constitutions.

3.0 MAIN CONTENT

3.1 Definition of Constitution

Attempts have been made by many authors to define the word “Constitution”. Some writers adopt the simplistic view point of defining “Constitution” as the means by which a people organize themselves into a political community and define the aims and objectives of their association, the condition of membership, the organs and powers necessary for the conduct of the affairs of the association and duties and responsibilities of those organs to the individual. This kind of arrangement exists even at the lower level of clubs and associations.

Linking the constitution with the government, Nwabueze has suggested that: “... a constitution refers simply to the frame or composition of a government, to the way in which a government is actually structured in terms of organs, the distribution of powers within it, the relations of the

organs inter se, and the procedures for exercising power.”

From this definition, we can deduce that a constitution must concern itself with the structures of government as well as organs and the interrelationship of such organs.

The Webster’s New Twentieth Century Dictionary defines Constitution as (a) the way in which a government, state, society is organized; (b) the system of fundamental laws and principles of government, state, society, corporation etc. written or unwritten; (c) a document or set of documents in which these laws and principles are written down. This definition emphasizes the function and nature of a constitution.

Blacks Law Dictionary defines constitution as “the organic and fundamental law of a nation or state which may be written or unwritten, establishing the character and organising the government and regulating, distributing and limiting the functions of its different departments and prescribing the extent and manner of the exercise of sovereign powers”.

The above is made clearer by the definition contained in the Oxford Law Companion as follows: “A Constitution is the:

- a. Body of rules prescribing the major elements of the structure and organisation of any group of persons, including clubs, associations, trade unions, political parties and citizens of a state.
- b. The fundamental political and legal structure of government of a distinct political community, setting such matters as the Head of State, the legislature, the executive and judiciary, their constitutional powers and relations”.

NATURE, FUNCTION AND ORIGIN

The nature of the constitution has been aptly put by Hon. Justice Adolphus G. Karibi-Whyte as the “...*Fons et origo* of the exercise of powers, the employment of rights, and discharge of obligations...” Some of the functions of the Constitution as contained in the 1999 Constitution of Nigeria are as follows:

1. It states the aims and objectives of the people. See the preamble.
2. It establishes a national government.
3. It controls the relationship between the governments. See part II of the first schedule.
4. It defines and preserves personal liberties. See chapter IV.
5. It contains provisions to enable the government to perpetuate itself.... See sections 1, 2, and 3.

The preamble of the 1999 Constitution lays solid foundation for the political element and origin of the constitution. It states that “We the People of the Federal Republic of Nigeria having firmly and solemnly resolved to live in unity and harmony ... and to provide for a constitution for the purpose of promoting the good government do hereby make, enact and give to ourselves the following constitution....”

The constitution could be decreed by the existing government as was done for instance by the military government in 1979 and 1999.

Hood Phillips has suggested that the word “Constitution” could be used in two different senses; the abstract and the concrete. In the abstract sense, it refers to the system of laws, customs and conventions which define the composition and power of organs of the state and regulate the relations of the various state organs to one another and to the private citizens. In the concrete sense, it is a document in which the most important laws of the Constitution are authoritatively ordained. This brings us to the issue of the written and unwritten (flexible and rigid) constitutions.

3.2 Unwritten and Written Constitutions

UNWRITTEN CONSTITUTION

Great Britain remains the most often referred to nation with an unwritten constitution. In Britain, it is difficult to point at a single document as the constitution of the country as is usually the case for countries with written constitutions like Nigeria. This does not mean that the British people are not guided by political philosophies which exist under a constitution. They are only obtained in various documents.

At the time of the Norman Conquest, constitutions were of a customary nature. After the Civil War of the 17th Century, Oliver Cromwell drew up an instrument of Government in 1653. This instrument served as the constitution and it came to an end seven years after the restoration of the monarchy.

The Laws of the unwritten British Constitution comprise of three kinds of rules; statute, common law and custom. In view of contemporary development, it is necessary to include international conventions. Treaties are not themselves part of the British Laws except they are so transformed.

Statutes are epitomised by Acts of Parliament and subordinate legislation. It must be stated that they consist of the most important

constitutional principles that are found in concrete constitutional documents as they exist today. For instance, the famous Magna Carta of 1215 which resulted from successful efforts by the medieval landowners to wrench some rights, the 1688, progenitor of Fundamental Human Rights provisions in written constitutions, the Act of Settlement of 1700, the Act of Union with Scotland of 1706, the Statute of West Minister, the Supreme Court of Judicature Act, 1925, the Nigerian Independence Act of 1960, e.t.c. If all these pieces of legislation and others are put together, in the words of Professor Mitchell; “by the use of scissors and paste, it would be possible to produce out of the Statute Book a ‘Constitution’ which would be very nearly complete”.

Agreeing with this contention, Oluyede added that such a British Constitution would be complete in view of the fact that a written constitution cannot contain more than a section of Constitutional Law. Such a Constitution as suggested by Professor Mitchell, will be well detailed and will have the effect of pervading nearly all facets of Constitutional Law of England as well as having a strong historical and anthropological bearing with its setting. It may be difficult to include customs, conventions as well as judicial pronouncements into this constitution. One way out will be to legislate on such matters that have been settled under these three different headings and transform them. According to Prof. Sokefun, this may be exhuming Cromwell who fashioned out the only Constitution that was ever used in Britain between 1653 and 1660 and it will definitely produce a detailed unit document that could be referred to as the British Constitution.

It is necessary to refer to delegated legislation as well as judicial discussions, custom and literary authority when discussing the unwritten constitution of Great Britain. In the case of delegated legislation, it must be pointed out that these are pieces of legislation derived from the exercise of powers endowed upon Ministers and other arms of State. They come in the form of orders, regulations or bye-laws. The power is also conferred on the Queen-in-Council to legislate on matters of emergency or when it is necessary to give effect to enabling Acts.

As judicial decisions also developed into Constitutional Law in England, in *Watson V. Walter* (1868) L.R. 4 Q.B 73, the principle of qualified privilege was extended to unauthorized reports of parliamentary debates. In *Ridge V. Baldwin* (1964) A.C 40 H.L, the famous principle of *audi alteram partem* was reaffirmed.

For custom to be accepted as part of the Constitutional Law in England, it need not have been adjudicated upon by the court, but it must be judicially recognized. To be recognized, it must be certain, reasonable, obligatory to the subjects, as well as possessing continuous existence

coupled with immemorial antiquity. Literary authorities are sometimes relied upon as statements of Constitutional Law in England. The dependant factors are usually the reputation of the author and the date.

WRITTEN CONSTITUTION

A Constitution is referred to as written according to Hood Phillips, when the most important constitutional Laws are specifically enacted. By this, a specific legislative enactment on the organization of a state and administration of justice, as well as other national constitutional issues are provided for. This usually produces a single document with a limited number of sections which may be amended from time to time to suit the prevailing circumstances.

Where there is a written constitution, such document is taken to be an organic instrument which claims superiority over and above any other document in the state. The constitution thus formed establishes a framework and principles of government in broad and general terms with a view to applying to varying conditions in the several communities in the state.

The clearest characteristic of all written constitutions is that it is possible to point to one document or a combination of documents, as the Constitution. A good example of a combination of documents is the experience of Nigeria when there were four Regions in the country and each Region had its own constitution while there was another for the Federation. Written constitutions are now widespread in the world. Such constitutions invariably spell out the three arms of government namely, the Legislative, the Executive and the Judiciary.

The most fundamental attribute of written constitution is that it cannot be changed, amended or repealed like an ordinary enactment. Thus it may have the characteristic of rigidity. This leads us to the discussion of Rigid and Flexible Constitutions.

3.3 Flexible and Rigid Constitutions

Bryce makes reference to distinction between flexible and rigid constitutions. This distinction has a strong bearing on the mode of amendment of the constitution. The opinion had been lobbied by Dicey that, a flexible constitution is that under which every description can legally be changed with the same ease and in the same manner and same body.

This approach is supported by Hood Phillips who adds that the flexibility of the British Constitution is a corollary to the fact that no

written constitution or higher law is binding on the Parliament. As would be seen later, it is not only written constitutions that possess the flexible quality. To emphasize this point, Bryce cites the example of Singapore whose constitution is written but is entirely flexible and the constitutions of the Australian States which are written and largely flexible. A look at the Nigerian Constitution will show that the Constitution is written and flexible. This is because the Constitution provides for modes of altering it, though streamlined and intricate as contained in section 9.

Whether a written constitution is flexible or rigid depends on how easy or otherwise it is to amend. It is however a common saying that the main fundamental attribute of a written constitution is rigidity, that is, it cannot be changed, amended or repealed like an ordinary enactment. This view tends to ignore the fact that there could be a written but flexible constitution which allows for easy amendment as the need may arise like a constitution for a colonized community; for example, the Nigerian Constitutions of 1922, 1946 and 1951. They could all not only be amended at will by the colonial power, but also abrogated just like the Military did to the 1963 Republican constitution in January 1966 and the 1979 Constitution in January 1984. Dicey has said that a rigid constitution is “one under which certain laws generally known as Constitutional or fundamental laws cannot be changed in the same manner as ordinary laws”. The Nigerian Constitution cited above partially belies Dicey’s definitions of Rigid and Flexible Constitution.

A more complete reaction to Dicey’s view in this matter is provided by Hood Phillips when he said *inter alia* that: “A more significant classification of the types of constitution is that into ‘flexible’ and ‘rigid’ metaphors given currency by Bryce...Unwritten Constitutions are in practice flexible, but written constitutions are not necessarily rigid....”

It is perhaps better to describe each constitution according to its wording rather than give a broad classification of written and unwritten to determine the rigidity or flexibility of a constitution.

4.0 CONCLUSION

In conclusion, it is only safe to admit that any Constitution can only be considered in entirety by its whole text to know the category it fits into. There cannot be any straight jacket rule for written and unwritten constitutions in terms of flexibility or rigidity.

5.0 SUMMARY

In this unit, you learnt about the constitution and the various categories it can be classified into. You should by now be able to define the constitution and explain its various classifications.

6.0 TUTOR-MARKED ASSIGNMENT

1.
 - a. Define Constitution.
 - b. How rigid is the Nigerian Constitution?

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UNIT 4 SYSTEMS OF GOVERNMENT

CONTENTS

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- 2.0 Objective
- 3.0 Main Content
 - 3.1 Federal and Unitary Systems of Government
 - 3.1.1 Federal System
 - 3.1.2 Unitary System of Government
 - 3.2 Presidential and Parliamentary Systems of Government
 - 3.2.1 Presidential System of Government
 - 3.2.2 Parliamentary System of Government
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings.

1.0 INTRODUCTION

This unit deals with systems of government in Nigeria. We will consider the federal and unitary systems as well as presidential and parliamentary systems of government.

2.0 OBJECTIVE

By the end of this unit, you should be able to:

explain the various systems of government that we have in Nigeria.

3.0 MAIN CONTENT

3.1 Federal and Unitary Systems of Government

3.1.1 Federal System

Nigeria is a Federation comprising of 36 states and the Federal Capital Territory. Section 1 of the 1999 Constitution refers to the nation as a Federal Republic.

The journey towards a Federal form of government in Nigeria started in 1946 when the Richard's Constitution introduced a quasi-federal structure of government into the country. By this time, it had already dawned on the British administration in Nigeria that the country was made up of diverse elements with linguistic, cultural and religious

background. There was a feeling of the need to promote the unity of Nigeria and provide adequately within that unity for the diverse elements which make up the country.

It was also envisaged at this period that the principle of greater regional autonomy would bring about the desired unity in Nigeria. In this regard, Sir Bernard Bourdillon opined that: "In fact, this measure represents not the division of one unit into three, but the beginning of the fusion of innumerable small units into three and from these into one... the regional House of Assembly will encourage not only a very useful interchange of ideas, but the beginning of that widening of the social, economic and political horizon which is essential if the unity of Nigeria is to have any real meaning to its inhabitants."

Three new Regional Houses of Assembly were thus established with headquarters in Enugu, Kaduna and Ibadan. The Richards Constitution which came into force on 1st of January 1947, was pre-eminently concerned with how many units should comprise the federal union and not with whether there should be a sort of Federal union. Thus it was quasi-federal in nature.

In 1951, the Macpherson Constitution was passed. It further formalized the division of Nigeria into three regions. It also established a central Legislative and a Council of Ministers for the whole country, together with a separate Legislative and Executive Council for each of the three regions. However, this constitution was basically a unitary constitution giving extensive power and authority to the central government over the regions. The legislative power of the central legislature was unlimited. It extended even to matters assigned to the regions. There was also the problem of inter regional factions championed by the ethnic based political parties in each of the three regions. However, the federal form of government was adopted with the promulgation of Lyttleton Constitution on 1st of October, 1954. The concept of federalism was also adopted in 1960 Independence Constitution and the 1963 Republic constitution.

The Federal Status of Nigeria had a setback in 1966 when the then Military government promulgated the Constitution (Suspension and Modification) Decree No. 34 of 1966. Section 1 of the Decree stated that as from May 24th 1966, Nigeria would cease to be a federation and would be known as the Republic of Nigeria.

The decree made far-reaching changes in the political structure of the country and converted it to a unitary state. The government at the Centre was named the National Military Government while regions were called groups of provinces. Commenting on this Decree the eminent jurist, Dr.

T. O. Elias said: “It would seem that by this Decree, a unitary form of government had been established for Nigeria. The Federation itself was abolished as were the regions as such, although the replacement of the former region by the new name, Group of Provinces, as well as the retention of the offices of Regional Governors would appear to have retained the essence of the former administrative arrangement.”

According to Professor J.D. Ojo, “This Decree that was promulgated without taking into consideration the heterogeneous nature of the society was to say the least, an exercise in futility”. Nigeria was however restored to a federation as from September 1st 1966 sequel to another coup d’etat that ousted General Aguiyi-Ironsi through the operation of the Constitution (Suspension and Modification) Decree No. 59 of 1966.

DEFINITION OF FEDERATION

Opinions differ among writers as to what the term “federalism” implies. According to Abiola Ojo, federalism is capable of different meanings and conceptions depending on the perspective and the background of the perceiver. There are writers whose emphasis is on the form of the constitution and certain institutions. As far as they are concerned, the absence of these makes any discussion on federalism futile. Another school of thought opines that federalism is the product of social forces, while yet another posits that party system is a crucial federal variable.

However, Ben Nwabueze made attempt at defining federalism when he described it as: “An arrangement whereby powers of a government within a country are shared between a national country –wide government and number of regionalized (i.e. territorial localized governments) in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area”.

A.V. Dicey conceived federalism as: “.... A political contrivance intended to reconcile national unity with the maintenance of the state rights”.

To Taiwo Osipitan, federalism connotes an arrangement whereby powers are shared between the different levels of government such that matters of national interest are handled centrally and locally. R. L. Watts contends that federalism implies a form of political association in which two or more states constitute a political unit with a common government but in which these member states retain a measure of autonomy.

Adele Jinadu however views federalism as a form of government and institutional structure deliberately designed by political architects to

cope with the twin but difficult task of maintaining unity while also preserving diversity.

The definition of K.S. Wheare appears comprehensive. He defined federalism as a system of government where the powers of government are divided between the central and the component parts of the country in such a way that each government is legally independent within its own sphere and the states are coordinate and equal.

SELF-ASSESSMENT EXERCISE 1

What do you understand by federalism?

CHARACTERISTICS OF A FEDERAL SYSTEM OF GOVERNMENT

1. SUPREMACY OF THE CONSTITUTION

One of the striking features of countries which operate the federal system of government is the supremacy of the constitution. It is the constitution that spells out the extent and limits of power exercisable by the central (Federal) government and its component parts (States). This is to minimize frictions. As Osipitan suggested, one of the fundamental features of a federal arrangement is the need for a supreme constitution which binds all persons, governments and authority. A supreme constitution has the added advantage of highlighting the existence of a binding arrangement which exists among the states within the federation.

According to Section 1(1) of the 1999 Constitution of Nigeria, the “... Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”.

A similar provision is contained in the Constitution of the United States of America. Article VI, Section 2 provides that “This constitution and the laws of the United States of America which shall be made in pursuance thereof... shall be supreme law of the land and the judges in every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding”.

This supremacy means that the laws passed by any authority in violation of the constitution may be declared null and void.

In *Kalu V Odili (1992) 5 NWLR pt 240 p. 130 at 188*, Karibi-Whyte JSC stated inter alia: “It is both a fundamental and elementary principle of our law that the constitution is the basic law of the land. It is supreme

law and its provisions have binding force on all authorities, institutions and persons throughout the country”.

2. DIVISION OF POWERS

The federal process is conditioned by a distinctive division of powers between the central (Federal) and other levels of government (State and Local). Powers are shared among the constituent parts to substantially reflect institutional and functional interactions, cooperation and coordination. The 1999 constitution clearly demarcates the functions and powers between the federal and state governments.

Section 4(1) vests legislative powers of the Federal Republic of Nigeria in the National Assembly. The areas in which the National Assembly may make laws have been enumerated in the Exclusive Legislative list contained in the second schedule of part 1 of the Constitution. It contains 68 items. The areas covered include accounts of the Federation, defence, arms and ammunition, aviation, copyright, etc. The areas in which the National Assembly and State Houses of Assembly have concurrent powers to make laws are contained in the second schedule of part II. It contains 30 items. The House of Assembly of a State has power to legislate on any matter not included in the Exclusive Legislative list. Such matters are deemed to be residual. See section 4(7) (a) of the constitution.

It is also noteworthy that the executive body at the federal level is headed by the President and Commander in Chief of the Armed Forces. He is to be assisted by the Vice-President and Ministers of the Government of the Federation. At the state level, the Governor is the Chief Executive and he is assisted by the Deputy Governor, Commissioners and Advisers. The Local Governments are also established under Section 7 of the 1999 Constitution. Their functions are enumerated in the fourth schedule to the Constitution. The Local Government Council is headed by a Chairman as the head of the executive branch while the councilors compose the legislative arm.

Judicial powers are vested in the courts established for the Federation. At the apex is the Supreme Court. Other courts at the Federal level are the Court of Appeal, the Federal High Court; High Court of the Federal Capital Territory and such other courts as may be authorized by Act of the National Assembly. The state judiciary consists of the High Court of a State, Magistrate Court, Customary Court and such other Courts as may be authorized by law of the House of Assembly of a State.

The Constitution also makes provisions for the establishment of federal agencies or bodies like the Code of Conduct Bureau, the Federal Civil

Service Commission, the Federal Character Commission, the Federal Judicial Service Commission, etc. See Section 197 of the Constitution.

It would therefore be seen that in any federal arrangement, there must be a well laid down division of powers. It must be stated that if a state makes a law over an item on the concurrent legislative list which is inconsistent with a Federal law on the same item, the state law shall be void by virtue of the express provision of the Constitution. But where such state's law is consistent with the Federal law but the latter has covered the field, the state law will be void under the doctrine of "covering the field".

SELF-ASSESSMENT EXERCISE 2

List 5 items each contained in the Executive Legislative list and the Concurrent legislative list.

3. RIGID CONSTITUTION

Another institutionalized device in a federal system is the existence of a rigid form of amending the constitution. This is to preserve the corporate existence of the country and check secession bid by any of the states making up the federation. In line with section 9 (2) of the 1999 Constitution, an Act of the National Assembly for the alteration of the Constitution other than creation of states, shall not be passed in either House of the National Assembly unless:

- i. The proposal is supported by the votes of not less than two-thirds majority of all the members of that House; and
- ii. Approved by resolution of the Houses of Assembly of not less than two-thirds of all the states.

Also, section 9(3) provides that sections 8 and 9 and chapter IV of the Constitution can only be amended if:

- i. The proposal is supported by the votes of not less than four-fifth majority of the National Assembly; and
- ii. Approved by resolution of two thirds of states Houses of Assembly in the country.

In the United States, an amendment to the Constitution as stated in Article IV Section 3(1) of the U.S. Constitution, can be made by a two-thirds vote in each House of Congress or by a convention called by congress upon the application of the legislatures of two-thirds of the states. The amendments proposed by either body must be ratified by the legislatures of three-quarters of the states.

In Australia, any amendment to the Constitution passed by both the Senate and House of Representatives must be submitted in each of the States to the electors qualified to vote for the election of members to the House of Representatives. If any of such law is passed by one House and rejected by the other and is passed the second time by the initiating House, after an interval of three months the Governor-General may refer the law to the electors of the House of Representatives. If it is accepted by a majority of the total number of voters, it becomes law.

In the United States, an attempt by American Southern States to secede from the American Union led to American Civil War between 1869 and 1871. In the American case of *Texas V. White* 74 U.S. (7 Wall) 700, the US Supreme Court declared the American Federal union as perpetual and indissoluble. The court further declared that the union did not provide any place for reconsideration or revocation except through a revolution or through the consent of the states.

3.1.2 Unitary System of Government

A Unitary government is a government where all powers are concentrated in a single central government, which does not share power with any other body in the country, but delegates powers to regional and local governments and other subordinate bodies. All government powers are concentrated in the central or national government as the only source of authority from which power emanates. A country operating a unitary system of government usually adopts a unitary constitution. The constitution though supreme, is usually flexible and not rigid, as the government has power to amend as may be necessary.

There is no constitutional sharing and division of powers between the central government and the regional governments or local authorities. Usually there is no constitutional conflict between the central government and its subordinate regional or local district authorities, which are created for administrative purposes and are an extension of the national government. The national government can alter the powers and boundaries of the various constituent parts of the country and there may be no need for separate parliaments in the constituent parts of the country.

The central parliament often has parliamentary supremacy to make laws for the country. A unitary system usually has a strong and powerful central government. The people usually owe allegiance to only one government, that is, the central government. Examples of countries operating a unitary system of government are the United Kingdom, France, Belgium, Italy, Gambia, Liberia, Cameroon, Ethiopia, etc.

The reasons why different countries adopt a unitary system of government may vary slightly from one country to another. However, the common reasons include: the small land area or small size of the country, the homogenous nature of the people of the country and the absence of serious tribal differences among them. Others are absence of the fear of domination of the minority by the majority tribes, possession of a common language and culture which bind the people together in unity, absence of marked economic inequalities among the different peoples or regions that make up the country and thus lack of fear of economic domination of one people by another, absence of minority people who may be afraid of a majority tribe dominating the strong central government that does not share power with any other tier of government under the constitution, the need for cohesion of the country and to build strong solidarity and loyalty in the people to the national government, encourage patriotism and promote national unity instead of tribalism, sectionalism, stateism, etc, which often mark federalism.

MERITS OF A UNITARY SYSTEM OF GOVERNMENT

1. A unitary system of government usually removes the problem of constitutional friction between the national and regional government.
2. It promotes the spirit of oneness among the people and eliminates the feeling of double loyalty to one's regional government and then to the national government.
3. A unitary government by concentrating powers in the national government tends to promote a strong and stable government, than a federal system where power is divided between the federal and state governments.
4. It is small and simple to operate since there is no duplication of government and offices at every level.
5. Every other government in the country being a creation and an extension of the national government, it therefore requires lesser personnel and financial resources.
6. It prevents the waste of human, financial and material resources unlike a federal system of government which is flamboyant with the duplication of government and offices.
7. A unitary system of government usually has a flexible constitution. Thus the constitution even though written, can easily be amended to meet the changing social, economic and political needs of the country.
8. A unitary system of government is by nature small. This makes it easy for consultations to be concluded and decisions quickly made.
9. As a result of the small size of the government, it is usually less bureaucratic unlike a federal system where the number of governments and authorities to be consulted are usually more.

THE DEMERITS OF A UNITARY SYSTEM OF GOVERNMENT

1. Power is concentrated in the central or national government. Due to this, it may be burdened with too many functions and responsibilities with which it may not cope very well.
2. The concentration of power in the national government may encourage dictatorial tendencies on the part of the executive.
3. The concentration of powers in the national government prevents autonomy as the local authorities are discouraged from exercising powers within their district, unless authorized or delegated by the national government.
4. The concentration of powers in the national government as the decision making authority in the country, may make it look down on good initiatives at the local level and kill initiative at that level.
5. The concentration of powers in the central government in the capital city and the small size of personnel needed to run a unitary system of government may make the government seem far away from the people, especially those in the rural and local parts of the country.
6. It is not suitable for a large country with a large population, multi-ethnic population or diverse languages.
7. It is unsuitable for a multi-ethnic country, as the majority may hold on to power and dominate the minorities who may be compelled to struggle for self determination or independence.
8. The concentration of powers in the central government which is controlled by a relatively small number of personnel, may lead to different constituent parts of the country feeling left out, forgotten or marginalised and thereby breeding disaffection.
9. A unitary system of government is unsuitable for a multi-ethnic and multi-lingual country. If it is adopted instead of federalism, the majority will lord it over the minorities and it may lead to disaffection, instability and even civil unrest.
10. The small size of a unitary government and the small size of personnel needed to run it does not create opportunity for a wide representation of the Central government.
11. Furthermore, the small size of a unitary government which is a result of the merger of the legislative and the executive arms of government, the non-division of powers and the non-duplication of offices, do not create employment opportunities for the people as opposed to a federal or confederal system of government, both of which usually have a big public administration or civil service and have a lot of employment opportunities.

3.2 Presidential and Parliamentary Systems of Government

3.2.1 Presidential System of Government

A presidential system of government is a government where all executive powers are vested in a president who is the head of state and head of government. The president may exercise the executive powers of government either directly by himself or through the vice-president, ministers or other officers in the public service of the federation. See section 5(1) of the 1999 Constitution. The powers of the president is to maintain the constitution and to apply all the laws made by the legislature for the time being in force and to implement party programmes and generally uphold the interest of the nation and the welfare of the people at all times.

The President is elected directly by the people or indirectly through an electoral college. The President and the cabinet of ministers appointed by him are not members of the legislature. The President is free to choose his ministers from within and outside his party subject to confirmation by the Legislature. The President is a member of the ruling party. The party advises and supports him and he implements the programmes of the party. The ministers are first responsible to the president who appointed them and he is primarily responsible to discipline the ministers or otherwise call them to order. The legislature and the executive may be controlled by different political parties.

The president is responsible to the legislature which may investigate and impeach him for gross misconduct and he is also responsible to the people who are the sovereign power in a country and who may not renew his mandate at election. The United States of America, Nigeria, Ghana, Kenya and South Africa are examples of countries operating a presidential system of government.

There are many checks and balances under the presidential system of government. While the legislature may refuse to vote for taxes, thus checking a difficult Executive, the Executive (President) in turn may veto a bill which has been passed by an uncompromising legislature. But if the bill is passed the second time by two thirds majority, it becomes law. If however the Bill/Law is challenged on questions of illegality/constitutionality in court, the judiciary may declare it unconstitutional, thus acting as a check though the judges are appointed by the Executive. One can then say that the presidential model of government is in essence a government of separation of powers coupled with checks and balances.

3.2.2 Parliamentary System of Government

A parliamentary or cabinet system of government is a government where

all the executive powers of government are vested in a Prime Minister who is the head of government and head of the majority party or ruling party, but is not the head of state. In this system of government, the head of state who exercises only ceremonial functions may be a monarch or president who is the figure head.

The prime minister and the entire ministers in his cabinet are all members of the same party or coalition of parties. In a cabinet system of government, there is no complete separation of powers, nor a complete fusion of powers. Though the executive and the legislature are completely fused, there is no over-lapping of powers because the same people constitute both arms. Apart from the minister of justice, the judiciary is completely separate from the legislature and the executive.

Apart from the doctrine of collective ministerial responsibility and the doctrine of individual ministerial responsibility to parliament, the prime minister as head of the government or executive arm has the power to dismiss any minister and he is primarily responsible for the discipline of his cabinet. The stability of the government depends a lot on the ruling party controlling a reasonable majority in the parliament or being able to form a coalition government with another party or parties.

There is an official opposition party in the parliament, which is usually the party having the highest number of votes next to the ruling party in the parliament. The members of the parliament and the executive arm are one. The prime minister is subject to his party and is controlled by the party. He remains in office as long as his party has the majority of members in the parliament. However when a vote of "no confidence" is passed on him and his cabinet by parliament, the Prime Minister and his entire cabinet is obliged to resign.

The United Kingdom is the origin and home of this system of government. Other countries operating a parliamentary system of government include: Canada, Jamaica, Israel, India, Australia, Lesotho, Ethiopia, etc. Before independence and between 1960 to 1966, Nigeria operated a parliamentary system of government.

MERITS

The merits of a parliamentary system of government are numerous. As a matter of fact, the fusion of the executive and the legislative arms of government have several advantages as follows:

1. It reduces friction and promotes co-operation between the two arms of government.
2. It helps free-flow of information between the two arms of government and bridges gaps that may lead to misunderstanding.
3. The fusion makes parliamentary approval of the policies and programmes of government fast and thereby helping quick decision and implementation of government policies and programmes.
4. The fusion of the legislature and the executive means that less personnel and costs are required to run it.
5. The fusion of the two arms enables daily or frequent scrutiny, questioning and criticism of the policies and programmes of the executive, leading to the discarding of bad decisions and ill-considered actions. This promotes good governance. The immediate individual and collective responsibility of the executive to parliament make all members of the cabinet to work hard for the successful administration of the country.
6. The fusion of the executive and legislative arm enables parliamentarians to check the government in parliament. This ensures discipline in the cabinet as they are under the daily watch and close check of parliament.

Furthermore, the executive or cabinet being aware that parliament is watching and will not hesitate to pass a vote of “no confidence” on the executive and make it resign, will usually behave itself and discharge its functions efficiently. This normally translates into stability of the government and the political system.

DEMERITS

The demerits of a cabinet system of government are several and include:

1. Uncertainty of tenure of office, because the parliament by a vote of “no confidence” can dismiss the cabinet and elect a new party leader as prime minister or premier to form a new cabinet and government.
2. The sudden and frequent change of government if not carefully managed, may lead to crisis and instability in a country.
3. The fusion of the legislative and executive functions in the members of the cabinet may over burden the members of the cabinet with double functions and some ministers may not cope very well.
4. A minister may lack specialization in the art of governance in one arm of government, thus leading to inefficiency in such regard.
5. Furthermore, the fusion of executive and legislative powers in the members of the cabinet may make them too powerful, arrogant

and likely to abuse power.

6. Lastly, the prime Minister is not directly elected by the electorate, as he becomes Prime Minister by virtue of being the leader of his party. This may make him more loyal to his party than to his oath of office as Prime Minister.

4.0 CONCLUSION

To conclude, there are other systems of government which were not operated in Nigeria, such as confederation, collegiate or conventional systems of government, etc. Nigeria is presently operating the presidential system of government.

5.0 SUMMARY

In this unit, we have considered the various systems of government that is operated in Nigeria. You should now be able to explain each one of them.

6.0 TUTOR-MARKED ASSIGNMENT

1. Mention 20 items contained on the Exclusive Legislative List.
2. Why do countries adopt a unitary system of government?

7.0 REFERENCES/FURTHER READINGS

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MODULE 3

Unit 1 Constitutional Supremacy
Unit 2 Parliamentary Supremacy

UNIT 1 CONSTITUTIONAL SUPREMACY

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Independence Constitution 1960
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1.0 INTRODUCTION

In his Poetics, Aristotle had argued that good government would exist only when the powers of government are divided. He was one of the exponents of Constitutional philosophy – separation of powers of government bodies, which now consists of the Legislative, Executive and the Judiciary. You will note that the motive for agitating for separation of power was to prevent the exercise of arbitrary power inherent in executive and judicial powers as it were in his time and to save people from autocracy. (*Myer's V US 1767*).

In the same vein, John Locke argued that:

It may be too great a temptation to human frailty apt to grasp at power for the same persons who have the powers of making law to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made and suit the law, both in its making and execution to their own private advantage.

Montesquieu also argued that men entrusted with power seem to abuse it; that political liberty is to be found only when there is no abuse of power and no liberty if the power of the judge is not separated from the legislative and executive power. In orthodox theory, separation extends

beyond functions and avenues to the personnel of agencies [**what the idea of separation of power is not**]:

- To promote efficiency
- To avoid friction.

What the idea of separation of power is:

To prevent arbitrary exercise of power

To save people from autocracy.

To prevent law makers, executives from exempting themselves from observing the law or facing the consequence of breach.

To prevent them from making self-serving laws.

To prevent abuse.

To keep to the minimum powers which are lodged in one single organ.

To be able to oppose one organ or another or other organs.

To enable the legislature exercise checks on executive powers, and vice versa and the judiciary also

To exercise checks on both executive and the legislature.

As you proceed with this unit, you should occasionally hold you breath and ask:

In the scheme of things, where has supremacy or sovereignty resided?
Is supremacy resident in the people (electorate), Constitution, Legislative, Executive or the Judiciary or the President; or a combination of two or more or all of them?

2.0 OBJECTIVES

When you would have completed this unit, you should be able to:

distinguish between Parliamentary supremacy and Constitutional supremacy; and
discuss issues of supremacy in a democracy and under a military dictatorship.

3.0 MAIN CONTENT

SOVEREIGNTY (OR SUPREMACY) IN MODERN NIGERIA

In Pre-colonial times, the traditional ruler legislated, administered and adjudicated. He was the legislature, the chief executive and judge. In the Colony and protectorate of Nigeria, the very keystone of Constitutional law and concept of parliamentary sovereignty is that the Queen – in – Parliament is competent to make or unmake any law whatsoever on any matter whatsoever and no court of law in the land is competent to question the validity of such Act of Parliament. Every other law making body either derives its authority from Parliament or exercises it at the sufferance of Parliament; it cannot be superior to or even coordinate with, but must be subordinate to Parliament. What then is the position of sovereignty or supremacy in modern Nigeria; Commencing from 1960 when Nigeria became an independent and sovereignty state?

3.1 The Independence Constitution

The Independence Constitution 1960 marked the beginning of self-rule but it retained some vestiges of colonialism. Some of the Changes brought about by the Constitution are:

The Status of Nigeria Changed from ‘the Colony and Protectorate of Nigeria’ to ‘Nigeria’.

The Nigerian Legislature assumed power to enact its laws or even extra territorial legislations, repeal or amend any Act of the United Kingdom Parliament extending to Nigeria.

The Executive comprised elected members of the legislature.

The Queen of England remained queen of Nigeria and was sovereign.

Legislation in Nigeria was in the name of Her Majesty, the Queen.

The Government and its institutions in Nigeria were the Queens.

A non-executive Governor General represented the Queen in Nigeria.

Appeals from the decisions of the Federal Supreme Court lay to Her Majesty’s judicial committee of the Privy Council sitting in London.

3.2 The Republican Constitution, 1963

Further changes were carried out in 1963, namely:

The Republican Constitution, 1963, consolidated Nigeria's Independence; the Queen of England ceased to be Queen and Head of State of Nigeria; Appeals to the judicial committee of the Privy Council also ceased; Political independence with its accompanying sovereignty was accordingly restored.

SELF-ASSESSMENT EXERCISE 1

Differentiate between sovereignty or supremacy in 1960 – 1963 and 1963 – 66 constitutions.

3.3 Military Dictatorship

The military seizure of political power has been discussed elsewhere. Suffice it to say that in 1966; the military regime:

- Suspended the Legislative and Executive institutions in the Regions and at the centre.
- Vested state powers on the Supreme Military Council.
- Invested on itself, the power to make laws, for the peace, order and good government of Nigeria or any part thereof, with respect to any matter whatsoever.
- Legislated by decrees (Federation) and edicts (regions). Federalism was abolished and replaced with Unitary Structure in May 1966. On July 2, 1966 a second military coup d'état restored the federal structure.
- Maintained that Nigeria is one indivisible and indissoluble sovereign state.
- Curtailed individual rights, and the capacity of the judiciary to execute its jurisdiction and powers, [abrogated pre-existing legal order except to the extent that it was prepared to concede or preserve] and vested, vis et armis, sovereignty on the Federal Military Government.

See the Constitution (Suspension and Modification) Decrees, 1966-84.

3.4 The Constitution of the Federal Republic of Nigeria, 1979 and 1999

The Constitution of the Federal Republic of Nigeria 1979 and 1999 provided for distribution of powers and functions among the three departments of governance (Legislative, Executive and Judiciary). There should be no interference except to the extent to which the constitution allows such power of interference.

3.5 Where Lies the Sovereignty or Supremacy?

In all these things, who has been the sovereignty?

Has it resided on one person or body of persons all through or on different persons and bodies at different times?

Has sovereignty always been total or slit?

Remember that Sovereignty or Supremacy is concerned with the nature and extent of power and with the question of obedience to power.

On the notion of obedience, consider the following:

Command

Nature of Obedience

SELF-ASSESSMENT EXERCISE 2

Where would you say sovereignty or supremacy resides in a Military Regime?

3.6 The Bench Mark of Supremacy or Sovereignty

3.6.1 Bodin has said that the ruler is not totally absolute, but subject to the Constitution because it is the Constitution that makes him a ruler. The constitution must, according to him, accord with the “*Laws of God and Nature to which all kings and princes are subject.*”

3.6.2 Hooker (1554 – 1600), Grotius (1583 – 1645) Hobbes (1588 – 1679) Locke (1632 – 1704) and Rousseau (1712 – 78) enunciated and expanded the social contract theories. They are consensual that man, by contract with fellow men surrendered his personal sovereignty – the “*summe*” of rights of nature – to the sovereign (the state or a ruler or *volonte generale*). The compact was in pursuance of man’s quest for a society for his own good (Hooker), to alleviate the ‘solitary, poor, nasty, brutish, and short’ life in a state of nature (Hobbes), to preserve his property, life, liberty and estate of man as he lived in the golden era (Locke) or to defend and protect with common force, the person and goods of each associate. (Rousseau). The surrender was to the Prince (Bodin), ruler (Hooker), sovereign command (Hobbes) general will of the community rather than a single sovereign (Rousseau) or the community which acts through its representatives (the Legislative), itself a creation of the people (Locke).

Whether the social contract theory is real or a fiction and whether or not it has been borne out by anthropological research is not the issue here. Our concern is their conception of sovereignty or supremacy.

3.6.3 According to the founder of the English analytical positivist, Jeremy *Bentham* (1748 – 1832) and his disciple, *John Austin* (1790 – 1859), the sovereign is a superior, who may be a person or assemblage of persons whose act or command is law and whose subjects are supposed to be in the habit of obeying him. In their view, the sovereignty does not receive order from anybody and is above the law. Austin believed that every developed state has to have a “sovereign” who makes laws in the form of commands which are habitually obeyed and whose legal authority is absolute, indivisible and without limit.

3.6.4 The Sovereignty may be subject to certain checks. Bodin’s *Prince* is subject to the Constitution which made him Prince and to the law of god and nature. In other cases, the fundamental terms of the compact are over-riding.

If the sovereign (for example) commands a man to kill, wound or maim himself or not to resist those that assault him or to abstain from the use of food, air, medicine, or any other thing without which he cannot live, yet hath that man the liberty to disobey “*Locke and Roussean* have argued that the Sovereign is the Community, and the government acts in fiduciary capacity, like what the board of directors is to a registered company.

3.6.4 The State must be distinguished from its ruler. When man entered into compact with fellow men and gave up personal sovereignty, the state evolved. (*Hooker*) *Machicavelli* (1469 – 1527) saw the preservation and success of that State as an end. There is no independent community (or state) governed by law without some authority ‘whether residing in one person or in several whereby the law themselves are established and from which they proceed.

Bodin in his book *Six Books of the Republic* wrote:

It is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes laws for the subjects, abrogates law already made and amends absolute law. No one who is subject either to the law or to some other person can do this. That is why it is laid down in the civil law that the Prince is above the law, for the word law in Latin implies the ‘command of him who is invested with sovereign’.

Wheare concludes saying that Parliament is sovereign and supreme and there is no legal limits on its power of amendment in the United Kingdom.

3.7 Sovereignty (or Supremacy) in Relation to Nigeria

WHICH IS superior in Nigeria today – the Legislative, Executive, Judiciary or Constitution?

3.7.1 Legislative

The constitution defines the functions, powers and limits of the legislature, executive and judiciary, constituted some 67 or more important functions in the exclusive Legislative list and made them exclusive to the Federal Government. It can enact any law regardless of its badness, or goodness, morality or immorality and cannot be questioned. By various Constitution (Suspension and Modification) Decrees 1966 – 93, the military concentrated legislative and executive powers in itself, ousted jurisdiction of the court at its discretion, and subordinated the Constitution to its decrees. The Legislature under the Constitution, 1979 and 1999, may impeach the governor of a state or President of the Federation, approve or disapprove ministerial or certain other appointments, criticize or censor the executive or even bring down a government. But the powers of the national and state assemblies are subject to the Constitution.

SELF-ASSESSMENT EXERCISE 3

What is the import of the Constitution of Federal Republic of Nigeria, 1999, Section 4!

3.7.2 Executive

The constitution, 1979 and 1999 united the heads of state and of government in the President and vested him with executive powers of the federation. He is also the commander-in-chief of the Armed Forces. Executive Powers extend to the execution and maintenance of the Constitution and all laws, appointment of minister and Chief Justice of Nigeria among others. The Executive may veto a legislation or even dissolve the legislature. The President in the right of the dignity of his office, enjoys (but rarely exercises) inherent prerogative powers and conventions that are outside the ordinary course of the law and above all persons.

SELF-ASSESSMENT EXERCISE 4

- i. What does the 1999 constitution of the Federal Republic of Nigeria say of the Executive and its functions?
- ii. What do you understand by Prerogative Powers and Conventions?

3.7.3 Judiciary

The constitution has vested on the judiciary, judicial powers of the Federation. The Nigerian Courts may in certain circumstances legally and legitimately review the constitutionality or legality of an Act of the legislature and propriety of Administrative acts of a quasi – judicial nature; they may declare a legislation unconstitutional and refuse to apply or enforce it.

SELF-ASSESSMENT EXERCISE 5

Write a concise note on section 6 of the 1999 Constitution of the Federal Republic of Nigeria.

You have seen how government functions have been shared among the three organs (Legislature, Executive and Judiciary). Hardly is anyone completely devoid of quasi legislative, quasi executive and quasi judiciary functions.

Hamilton says that this does not by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both and that if the will of the legislature, declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former.

Obviously, the search for sovereignty within a federal constitutional system is an unrewarding pursuit. However, it seems that in the Constitution of the Federal Republic of Nigeria lies the explanation of Legislative power to make laws, the executive to administer or to enforce and the judicial power to adjudicate. The Constitution then is the primary source of legal authority in Nigeria. We have to live and abide with all its provisions, which have been fashioned for the governance of the people of Nigeria.

According to Tobi JSC

As our Country is sovereign, so too our Constitution and this court (Supreme Court) will always bow or kowtow to the sovereign nature of our Constitution, a sovereign which gives rise to supremacy over

all laws of the land. “(Olafisoye V FRN, 2004), “A government operating under a written Constitution must act in accordance therewith; any exercise of power outside the Constitution or which is unauthorized by it is invalid. The Constitution operates therefore with supreme authority and it is this recognition of the constitution as a superior law that compels the greater obedience, which people are prepared to give it.

It is a striking and fundamental feature of Federation, therefore that its Constitution is supreme and binds all persons, governments and authorities, institutions and among the federating States. The Legislative may pass any law it pleases without legal inhibitions whatsoever. But the court exercises power to decline to apply and enforce any law purportedly passed by the Legislature which violates the Constitution. The constitution is supreme law.

4.0 CONCLUSION

You have come to the end of the discourse concerning parliamentary or constitutional sovereignty or supremacy. You have noted the differences between both. Although supremacy is indivisible, its residence has not been static. Rather, its location shifted as the country also drifted from traditionalism, to colonialism, Westminster Parliamentary system, Republicanism, Military dictatorship and back to republicanism.

5.0 SUMMARY

In customary jurisprudence, the monarch is considered a divine King or ruler and as such could intercede with physical and spiritual forces to shape the overcome of events (Wayre Mornson 2006). The positivists and exponent of the same contract theory profess the Queen – in parliament as sovereign as indeed it was in the colony and protectorate of Nigeria (Antia, Locks, Hobbes, Rousseau). Now, however, the constitution is supreme, except under the military when it was subordinated to a decree. (Nwabueze and case law).

6.0 TUTOR-MARKED ASSIGNMENT

“Every developed state has to have a “sovereign” who make laws in the form of commands which are habitually obeyed, and whose legal authority is absolute, indivisible and illimitable” (Austin). Discuss with reference to the legal position in Nigeria.

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UNIT 2 PARLIAMENTARY SUPREMACY

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1.0 INTRODUCTION

A System of parliamentary government involves the supremacy of parliament. Republicanism on the other hand espouses the supremacy of the constitution. Military revolution or coup d'état abrogates, suspends and modifies existing constitutional instrument. The pre-colonial societies had element of permanence and regularity which are the indices of political society as well as comparative arrangements for the solution of their political, social and economic problems, although they lacked particular institutions of government as we know them today. In this unit, we shall examine the issue of sovereignty or supremacy in pre-colonial Nigeria and during the colonial era.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- describe a Constitution;
- distinguish between sovereignty and supremacy;
- identify the institution, however rudimentary, for solution of politico-socio-economic problems in pre-modern Nigeria; and
- locate where supremacy or sovereignty resides.

3.0 MAIN CONTENT

3.1 Definition of Terms

3.1.1 The Constitution

The term “Constitution” may be described in the following ways:

Formal document having the force of law by which a society organizes a government for itself, defines and limits its powers, prescribes relations of its various organs *inter se* and with the citizens.

Document (or a book) having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a state and declares the principles of governing the operation of those organs (Wade & Bradley).

The means by which a people organize themselves into a political community and define the aims and objectives of their association, the condition of membership, the organs and powers necessary for the conduct of the affairs of the association and duties and responsibilities of those organs to the individuals (Nwabueze, B.).

Organic Law or ground-norm of the people, formulation of all the laws from which the institutions of state derive their creation, legitimacy and very being; the unifying force into nation apportioning rights and imposing obligations on the people who are subject to its operation.

Very important composite document or a group of documents embodying a selection of the most important rules about political authority and power, the location, conferment, distribution, exercise and limitation of authority and power among the organs of state or about the government of the country (de Smith). The rules which regulate the structure of the principal organs of government and their relationship to each other and determine their principal functions. Those laws and practices (as in unwritten Constitution) and the document containing those laws and practices (as in a written constitution) which regulates the exercise and distribution of sovereign power in a state. –“fons et origo of the exercise of powers, the enjoyment of rights, discharge of obligation” (Karibi Whyte).

There is no hard and fast definition of the term ‘Constitution’. It is a lofty declaration of objectives, description of organs of government in

terms of their import (devoid of enforceability), - a legal restraint on government and supreme law and bedrock of constitutionalism. It expressly states the aims and objectives of the people, abolishes the federal or state government, Controls the relationship between the tiers of government, defines and preserves personal liberties even though not justiciable and also makes provisions which enables the government to perpetuate itself. Thus, the constitution is a symbol and instrument of constitutionalism, an instrument of restraint on government and the fundamental law regulating the organization of government.

3.1.2 Unwritten and Written Constitution

A written Constitution, unlike an unwritten Constitution cannot be changed, amended or repealed like an ordinary enactment: (Sokefun J.A.) It is rigid. A rigid constitution is one under which certain laws generally known as fundamental Laws cannot be changed in the same manner as ordinary laws (A. V. Dicey).

Some written Constitutions are not rigid. For example the constitution of Zealand is written and alterable by a simple majority.

What is of essence is not whether a constitution is written, unwritten, rigid or flexible as such by the people. The Swiss Constitution was adopted by a constituent assembly and ratified in a plebiscite. The United States Constitution was drafted, subjected to venomous discussion on popular platform, then to a referendum, ratification in various states and formal promulgation by pre-existing state authority. In these states, the constitution is law ordained and established by the people and their force and efficacy to this fact that they can be said to be established by the people to be governed by it.

A Constitution Drafting Committee drafted the Constitution of Nigeria and the supreme Military Council promulgated it into law. They acted as organs of existing political society declaring in its preamble:

“WE THE PEOPLE OF THE FEDERAL REPUBLIC OF NIGERIA DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES THE FOLLOWING CONSTITUTION.”

A Constitution may be written or unwritten.

3.1.3 Unwritten Constitution

The Great Britain has an unwritten Constitution. However there are certain statutes which though are not different from others are held with peculiar veneration. Examples are:

- The Margna Carta 1215
- Petition of Rights 1628
- Acts of Settlement 1701
- The Act of Union with Scotland 1706
- The Parliament Act, 1911 -49
- The Supreme Court of Judicature Acts 1873-1925
- The Statute of Westminster 1931
- The Ministers of Crown Act. 1946 – 75
- The Nigerian Independence Act. 1960.

3.1.4 Written Constitution

Among countries with written constitution are Nigeria, United States of America, the Commonwealth of Australia, and Canada etc. A written constitution was adopted for African in order to launch them into their new independent existence and impose checks against majority power in the interest of ethnic, racial or religious minorities. To this end, their constitution is an act of conscious creation in a written form, a purely political (not legal) act, not having been enacted through its regular procedure for law making. The drafters may be regarded (or at least regard themselves) as organs of existing political society.

SELF-ASSESSMENT EXERCISE 1

What do you understand by the term Constitution?

3.2 Sovereignty or Supremacy

Sovereignty refers to:

- Supreme dominion, authority or rule
- Supreme political authority of an independent state
- Person (e.g. Absolute Monarch), body (e.g. Parliament, national or state Assembly
- or supernatural entity (as in theocracy), vested with independent and supreme authority or power to make and enforce laws and demand obedience of subjects supremacy, the right or demand obedience and exercise control.
- One or a body who is obeyed because he is acknowledged to stand at the top, whose will must be expected to prevail, who can get own way and make others so his because such is the practice of the country.

- Etymologically means merely Superiority.
- Sovereign or sovereignty. This connotes different things. Dicey says that the Queen in council is the legal sovereign; the electorate, the political sovereign; the state, a national sovereignty and parliament, parliamentary sovereignty. Some writers for this confusion, prefer the term “Supremacy”.

SELF-ASSESSMENT EXERCISE 2

- i. What do you understand by the term “Sovereign; Sovereignty”?
- ii. Who is a sovereign?

Where Lies Sovereignty or Supremacy

Let us attempt to locate where sovereignty or supremacy resides. To do so, we have to under-take, in a nutshell, an exploration of Pre-colonial, Colonial and Modern Scheme of things.

3.2.1 Power in Pre-Colonial Nigeria

In Pre-colonial times, what is today called Nigeria was an aggregation of self-sufficient, widely disintegrated and uncoordinated non-urban independent and hostile settlements. These settlements by absorbing one another in the process of growth and by conquest grew into great hierarchical kingdoms and empires like the Oyo Empire, Kanemi – Bornu, and Sokoto Caliphate. Subjects submitted to their family heads, family heads to clan-heads, clan heads to village heads and village heads to their monarchs in areas with a Chief or to the - Aro Chukwu Oracle and other governing bodies in areas without a Chief.

The Monarchs are supreme, and all powers legislative, executive and the judiciary resided in them. These were checks. For example, a Monarch may by reason of misrule be asked to open the calabash which is an invitation to commit suicide.

SELF-ASSESSMENT EXERCISE 3

Sovereignty was hierarchical in pre-colonial times. Discuss?
Attempt to locate whose sovereignty lay in pre-colonial times in the area now called “Nigeria.”

3.2.2 The sovereignty or Supremacy in Colonial Times

Colonial rule commenced in 1861 and terminated at independence in 1960 – a period of nearly 100 years. This period may be broken down into phases:

- a. Total dependence on Imperial Parliament (1861-1921). The British Crown acquired Lagos by the Treaty of Session, 1861, the Sokoto Caliphate, Benin and Aro Chukwu by Conquest and most to the rest of Eastern native states by bilateral arrangements. The implication is that Lagos or the Yoruba Empire, and the Northern Provinces became mere extension of the British Isles; while the native states east of the Nigeria were British Protected. The Imperial Parliament empowered the Crown to legislate by order – in-Council for the colony, protectorates and foreign states.

The combined effect of the supreme court ordinance, 1863, southern Nigeria order-in-Council 1899 and the Northern Nigeria order-in-Council 1899 was to establish English type of courts and empower them to observe, apply and enforce the common law of England, Equity, Statutes of General Application as at 1874 (later Varied to 1900) as well as native laws and custom which were not repugnant to natural justice, equity and good or incompatible with any local enactment. Appeal from certain courts (Native courts and Provincial court) lay to the Resident and the High Commissioner respectively, and later to the Lieutenant Governor.

The Governor was sole executive. He was appointed by the crown and responsible to the secretary of state. Thus, it can be said that by 1900, the British Crown had acquired full and complete legislative, executive and judicial powers over the hitherto to independent and autonomous native states now constituting Nigeria.

Between 1901 and 1906, the various native states had been merged into two Protectorates – the Colony of Lagos and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria. Both Protectorates amalgamated in 1914 to form the protectorate of Nigeria in 1914.

SELF-ASSESSMENT EXERCISE 4

- i. Describe the constitution the Colony of Lagos and Protectorate of Nigeria.
 - ii. Compare Sovereignty in the traditional legal system and the colonial legal system.
- b. Emergence of Written Constitution in Nigeria**

Nigeria Order-in-Council, 1913 established for Nigeria, a Nigeria Council. It was an advisory and deliberative council. A legislative

Council for the Colony of Lagos was also set up. The Legislative, Executive and Judicial structures already in place were more extended to the whole country.

Richard Constitution, 1946

This Constitution established for Nigeria (i) a legislative Council and (ii) Executive Council – comprising officials only. It also vested legislative powers in the governor absolutely but with the advice of the legislative council. Both Legislative and Executive Councils were in 1947 replaced with only one Legislative Council comprising unofficial majority and the governor thereafter legislated with its advice and consent. The supremacy which had been usurped had commended its return journey by installment.

Major reforms of the judiciary occurred in 1933 with the passing in that year of the Supreme Court (Amendment) ordinance. The Protectorate Courts Ordinance, West African Court of Appeal Ordinance and the Native Courts Ordinance. The combined effect was to establish the Magistrates and High Court systems as we have them today and remove from the jurisdiction of Administrative officers matters which are judicial. However, judicial functions remain shared between the executive and judicial organs of government. Additional reforms occurred in 1943 and a separate law for juveniles and juvenile courts were created.

McPherson Constitution, 1951

This Constitution formalized the division of Nigeria into three regions with headquarters in Kaduna, Ibadan and Enugu. It established Central and Regional legislatures controlled by elected majority, a council of Ministers, majority of which were elected. Natives for the first Time began to participate in the legislative process. But the Governor still legislated without advice in specific area and also exercises a casting vote.

In keeping with **Lyttleton constitution, 1954**, members of the legislative Council and the Executive Council were elected except the Governor-General (Centre), Governors (Regions) and three officials. The Judiciary was regionalized. The Federal Supreme Court replaced the West African Court of Appeal. Appeals lay to Her Majesty's Judicial Committee of the Privy Council, UK.

SELF-ASSESSMENT EXERCISE 5

Examine critically how the provisions of the constitutions of 1922 and 1954 affected the Parliamentary Supremacy or Constitutional

Supremacy in Nigeria.

From 1957, the executive began to be elected representative; the regional governor appointed the premier and the Governor –General, including the Prime Minister from the majority party. The Regional premiers and the Governor General (or in his absence, the Prime Minister) presided over the Executive Council of the Region and Federation respectively until 1960.

4.0 CONCLUSION

In Pre-colonial settlement later known as Nigeria, laws were unwritten and supremacy or sovereignty resided in the monarch. There was no written constitution until 1922 when Clifford constitution was promulgated. Then followed a succession of constitutions one after another, namely; Richards Constitution 1946, McPherson Constitution, 1951, Lytleton Constitution, 1954 and the Independence Constitution 1960. In the colony and protectorate of Nigeria as was as the Federation of Nigeria at independence, the Queen in parliament was supreme.

5.0 SUMMARY

In this Unit, you have learnt about the definition and types of constitutions. You should be able to distinguish sovereignty and supremacy and identify where each resided at different stages of development in pre-modern Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by Parliamentary Supremacy?

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MODULE 4

Unit 1 Constitutional Development of Nigeria: (Pre-colonial Nigeria to British Rule)

- Unit 2 Constitutional Development of Nigeria; 1960-1979
 Unit 3 Constitutional Development in Nigeria 1979 to Date

UNIT 1 CONSTITUTIONAL DEVELOPMENT OF NIGERIA: (PRE-COLONIAL NIGERIA TO BRITISH RULE)

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 - 3.4.1 Clifford's Constitution
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 - 3.5 1951-1956.
 - 3.5.1 Macphersons Constitution
 - 3.5.2 Lyttleton's Constitution
 - 3.6 The 1957 and 1958 Constitutional Conference
- 4.0 Conclusion
- 5.0 Summary
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1.0 INTRODUCTION

Nigeria, like many other nations, has a history of its constitutional development. From time immemorial, the landmass now occupied by Nigeria was occupied by persons of diverse culture, language and political arrangements. Indeed, there were different nationalities. These factors affected the fusion of these nationalities. By all means, however, they accumulate to form the bedrock of Nigerian constitutional development. This was a phenomenon that spread over time. Accordingly, in this unit, discussion shall focus on the pre-colonial period up to the end of the British Rule.

2.0 OBJECTIVE

By the end of this unit, you should be able to:

understand the constitutional development of Nigeria from pre-colonial times to the end of British Rule.

3.0 MAIN CONTENT

3.1 Historical Background and Pre-Colonial Nigeria

Nigeria is situated on a landmass of about 925,000 hectares in the western part of Africa. With a population of about 140 million people, it remains the most populous Black nation in the world having about 250 ethnic groups. There are three groups that are recognized as dominant. These are the Hausa/Fulani, Igbo and Yoruba.

The many different indigenous communities in what is known as Nigeria came under British rule in three ways; for this reason, Nigeria was divided into three.

Prior to the advent of the European colonialists, there existed numerous indigenous communities, which organized themselves internally by different methods. In the Northern part of Nigeria, there were the all-powerful Emirs who were both political as well as spiritual heads. In the West, there were the Yorubas who had Obas who were usually assisted by their chiefs-in-cabinets but were not as strong as the Emirs autocracy. In the East, there was the government by the age grades. With these in view and perhaps to fulfill their own selfish political and economic whims, the British Colonial Government adopted indirect rule for their colonies.

With this short history at the back of our mind, it should be relatively easier to understand the intricacies that trailed the activities of the colonial masters while their rule lasted.

SELF-ASSESSMENT EXERCISE 1

Attempt a brief historical background of Nigeria before the intrusion of the colonial masters.

3.2 Pre - Colonial Nigeria

The advent of the Caucasoid into Nigeria could be traced to around 1472 when the first Portuguese vessel of adventurers came into Benin. They were followed slightly over eighty years thereafter by the British whose vessels berthed at the Benin- harbor around 1553.

The adventurous Mungo Park got to the Niger in 1796. Slave trade commenced immediately afterwards and to date, the Negroid world still

feels the indelible marks of this crime against her. No doubt, the Europeans were impressed by the industrious and hospitable nature of the indigenous African and this might have been the reason why the abolitionists found it difficult and nearly impossible to abort the practice that threw some of our fore-fathers into foreign lands and their pedigree into the Diaspora.

One most significant fact worthy of note is the fact that the name 'Nigeria', was said to have been suggested by a certain Miss Flora Shaw, a press correspondent in Cairo. In an article in January 1897, she wrote.

“In the first place, as the title Royal Company’s Territories is not only inconvenient to use, but to some extent is also misleading, it may be possible to coin a shorter title for the agglomeration of pagan and Mohammedan status which have been brought by the exertions of the Royal Niger Company, within the confines of a British protectorate and thus for the first time in their history, need to be described as an entity by some general name.”

Further to this, she suggested that:

“The name ‘Nigeria’ applying to no other portion of Africa, may without offence to any neighbours, be accepted as co-extensive with the territories over which the Royal Niger Company has extended British influence.”

It is on record that Miss Shaw later got married to Lord Fredrick Lugard, the first colonial Governor General of Nigeria. Following the acquisition by the British Government, the sovereignty of the indigenous societies divested to Britain. Accordingly, the legislative, judicial and executive powers of these territories were vested in the imperial Government without limitation.

By virtue of a 1863 Supreme Court Ordinances, native laws which were not incompatible with the due exercise of the power and jurisdiction were rendered enforceable.

It is noteworthy that the period between 1472 and 1863 and by extension 1899 could practically be said to be the period of pre-colonial administration in Nigeria. It was during this period that the Whiteman expanded their slave trade business and introduced the Christian religion and other high profile businesses into the present day Nigeria.

SELF-ASSESSMENT EXERISE 2

What is the origin of the name Nigeria?

3.3 1900-1919

On January 1st 1900, the protectorates of the Northern and Southern Nigeria were proclaimed by the instrument and power of the Supreme Court Ordinance of 1863. By this, there were the Northern and Southern Protectorates as well as the Colony of Lagos. The significant difference between the protectorates and the colony was the mode of enacting laws for them at that time.

In the case of the protectorates, legislation was made by Order-in-Council under the Foreign Jurisdiction Act while the colony applied legislation introduced by letters of patent issued under the seal of the United Kingdom by the monarch and with the advice of the Privy Council. This was particularly the advent of British concept of Constitutional Law into Nigeria.

The three administrative offices, that is, one for each of the protectorates and one for the colony of Lagos were reduced to two in 1906 with the amalgamation of the Colony of Lagos with the Southern Protectorate. This fusion resulted to two administrative offices in the Northern and Southern Protectorates.

In 1914, Lord Frederick Lugard assumed office as the Governor of the two protectorates which had just been amalgamated to form the Protectorate of Nigeria under the British. This historical landmark achievement by Lord Lugard marked the commencement of Central Administration for Nigeria. By this new arrangement, the Governor acted as a Sole Administrator without a judiciary, executive or legislative arm of government but with the assistance of other officials appointed by him and responsible to him.

1914 saw the establishment of the Lagos Colony Legislative Councils while an Advisory and Deliberative Council called the Nigerian Council was established for the whole country. With this, the Governor had an executive and legislative council to assist him in the exercise of his powers under Article 6 of the Protectorate Order-In-Council of 1899.

The Nigeria Protectorate Order-In-Council, 1913, the [Nigerian Council] Order-In-Council, 1912, and the Letters Patent of 1913 were documents that served the constitutional needs of the amalgamated Nigeria. As such, they could pass for the constitution of the country.

As for the Advisory Deliberative Council, the membership was thirty, seventeen ex-officio and thirteen other official members, seven of whom

represented commercial, shipping, mining and banking interests while only six members represented the indigenous communities. The executive and legislative council were populated by British officials and beyond simple advisory roles. Nigerians were not involved. This was the position until 1920.

SELF-ASSESSMENT EXERCISE 3

Briefly examine the significant events between 1900 and 1919 in the Colonial Administration of Nigeria by Lord Fredrick Lugard.

3.4 1920-1950

The founding colonial Sole Administrator of Nigeria between 1911 and 1919, Lord Fredrick Lugard could not see to the full implementation of his policies when in 1919 Sir Hugh Clifford was appointed the second Colonial Sole Administrator and Governor of Nigeria. The Clifford constitution of 1922 emanated as a result of the pressures from Casely Hayford's West African Congress. This constitution was meant to make some reforms in the constitutional and administration setting in the country.

The Clifford Constitution of 1922 marked a watershed in the constitutional development of Nigeria for it introduced a formal document to Nigeria as a constitution.

3.4.1 Clifford's Constitution

The Clifford's Constitution took its name after Sir Hugh Clifford who under pressure from the West African Congress led by Casely Hayford was forced to make some reforms in the political and administrative system of the country. It was under this constitution that the first electoral system emerged which brought about the first elections in 1923. It also saw the emergence of the legislative council of four members-three for Lagos and one for Calabar.

The Legislative Council had jurisdiction on the Southern Provinces and the Colony of Lagos. In respect of the Northern protectorate, legislative power was vested in the Governor. There were other members of the legislative council who were the nominees of the Governor. These were the Chief Secretary, the Lieutenant –Governor, Administrator of the Colony of Lagos, the Attorney-General, and the Commandant of the Nigeria Regiment, Director of Medical Services, Controller of Customs and the Secretary for Native Affairs.

There was no indigenous representation on this council and this gave

rise to political agitation among Nigerian elite resulting in the emergence of both the National Democratic Party and the Nigerian Youth Movement which was succeeded by the National Council of Nigeria and Cameroon. [NCNC].

A memorandum submitted in 1924 by the West African Students Union in London to the Governor of Nigeria demanding a federal constitution for Nigeria yielded fruit and resulted in the Richard's Constitution. In spite of the lack of indigenous representation under the Clifford's Constitution, it took the credit of being the first constitution for a unified Nigeria.

3. 4.2 The Richard's Constitution

The Richard's Constitution of 1946 came as a result of proposals which aimed at promoting the unity of the country and ensuring more participation of Nigerians in their affairs. It incorporated three Regions. The Northern, Eastern and Western Regions, each having a House of Assembly with the North having a House of Chiefs as well. The powers of these Houses were only consultative. There was also the legislative council in Lagos which legislated for the whole country.

The Executive Council in Lagos had for the first time indigenous representative in Sir Adeyemo Alakija and Mr. S.B. Rhodes. It is noteworthy that under this constitution, there emerged a sort of a representative government and regionalization. The Regional Houses of Assembly were advisory and not legislative by any means. Thus, there were still more reasons for the Nationalists to press for participation by Nigerians in their affairs.

SELF-ASSESSMENT EXERCISE 4

Examine the major achievements of the colonial administration in Nigeria between 1920 and 1950.

3.5 Colonial Period in Nigeria – 1951-1953

3.5.1 The MaCpherson Constitution 1951

Between 1949 and 1950, Nigerians were consulted through questionnaires at villages and districts. Before this, a select committee of the Legislative Council had been set up to review the Richard's Constitution of 1946. The effect of this was a General Conference at Ibadan where a draft constitution was adopted forming the Nigeria (Constitution) Order – In - Council of 1951 which came later to be referred to as the MaCpherson's Constitution.

This constitution formalized the division of Nigeria into three regions and it seemed to re-emphasize the principle of greater autonomy and the retention of the unity of the country. With this, the movement towards a federal structure was a quicker and surer way of solving religious, economic, educational and political differences existing in Nigeria.

The highpoint of this Constitution is that a House of Representatives with 148 members replaced the Legislative Council. The Governor exercised legislative powers with the advice and consent of the House of Representative. As for the regional legislatures, they had power to legislate on a specific number of items. The membership of the House of Representatives consisted of the members of the Regional House of Assembly from among their own members.

The most significant effect of this Constitution is that it set the pace for regionalization, federalism and democracy.

3.5.2 The Lyttleton Constitution, 1954

The crisis in the Eastern Region in 1951 and the crisis at the centre actuated the Constitutional Conference in London and Lagos in 1953 and 1954 respectively. At these Conferences, it was generally agreed that a truly federal constitution should be enacted. As a result of the recommendations from these conferences, another constitution came into force in 1954. It is usually referred to as the Lyttleton Constitution [named after Sir Oliver Lyttleton the Governor of Nigeria at that time].

The major and one of the outstanding achievements of the Lyttleton Constitution was the operation of a federation of three regions with the federal territory of Lagos as the capital. The Eastern Region and the Western Region were to achieve self-government in 1957 while the North achieved same in 1959. This time, there was more participation by Nigerians.

Other important achievements of these constitutions were the establishment of the Federal High Courts, a High Court for each of the regions, and the Southern Cameroon's. Between 1958 and 1959, there was a major Constitutional Conference in London during which the independence constitution was proposed. By this time, the Eastern and Western Regions had attained self-government and Nigeria had her first Prime Minister in the person of Sir Abubakar Tafawa Balewa.

SELF-ASSESSMENT EXERCISE 5

- i. What are the essential achievements of the 1951 Constitution?
- ii. Discuss the landmarks achievements of the 1954 Constitution.

3.6 The 1957 And 1958 Constitutional Conferences

As the case was in India where a constituent assembly was formed, the 1957 conference in London was attended by the major political parties in Nigeria. There, the issue of self-government was discussed extensively. The Western and Eastern Regions were endowed with self-government with their Premiers presiding over their Executive Councils.

Of note was the setting up of the Minorities Commission and another on Revenue Allocation to evolve a formula for revenue allocation. Along these lines, the Raisman Fiscal Commission was inaugurated.

All the above recommendations were carried over to the Lancaster Constitutional Conference in 1958. The Lancaster Conference was prompted by the concern for the independence of Nigeria and the contents of the independence constitution. Besides, it was agreed that the Northern Region should attain self-government in March 15, 1959 and that independence for the country Nigeria should be attained on the October 1, 1960.

Other important issues discussed and agreed upon in 1957 were:

- a. Dual control of a centralized police force.
- b. Nigeria citizenship.
- c. The establishment of the council of the prerogative of mercy.
- d. Provisions in the constitution on the creation of more regions, and
- e. Mode of amending the constitution.

However, the Southern Cameroon later exercised its right of self-determination through a referendum in December 1959. On the basis of the new constitutional arrangement, elections were conducted with Sir Abubakar Tafawa Balewa of the Northern People's Congress emerging as the Prime Minister, Dr Nnamdi Azikwe the Governor –General and Chief Obafemi Awolowo became the opposition leader of the House of Representatives.

SELF-ASSESSMENT EXERCISE 6

What were the highpoints at the Constitutional Conference of 1957?

4.0 CONCLUSION

In this discourse, you learnt about the constitutional development in pre-colonial and colonial Nigeria. In her Europeanization mission, Britain planted the indigenous native administration and introduced in succession, the Clifford's constitution (1951), Littleton's constitution (1954) and the Independence constitution (1960).

5.0 SUMMARY

In pre-colonial time the Emir ruled in the Hausa/Fulani Empire (North) the Oba in the Yoruba/Bini Kingdoms (West and South) the Obi, or Igwe and council of age grades in the East. The Territory came under the influence of a variety of European trader's colonial administration from 1472 to 1861 when Lagos colony was ceded. The advent of British concept of constitutional law into Nigeria commenced in 1900 with the proclamation of the Northern Protectorate and the Southern Protectorate and Colony of Lagos. The Clifford constitution was promulgated in 1922 introducing some constitutional and administrative arrangements into Nigeria in the name of humanity, civilization, socialization, progress, constitutionalism and rule of law. In the subsequent lectures, you will learn about the Post-independence constitutions.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the constitutional development in pre-independent Nigeria, showing the merits or demerits (if any) in the various colonial constitutions, 1922 – 1960.

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UNIT 2 CONSTITUTIONAL DEVELOPMENT OF NIGERIA: 1960-1979

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 The Independence Constitution
 - 3.2 The 1963 Republican Constitution
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

Nigeria gained independence from the British on October 1, 1960 after much agitation. This unit will focus on the constitutional development of Nigeria from 1960 to 1979.

2.0 OBJECTIVE

By the end of this unit, you should be able to:

Identify the constitutional developments that took place between 1960 and 1979.

3.0 MAIN CONTENT

3.1 The Independence Constitution

Nigeria became a self-governing state in October 1, 1960. The effect of this on the nation was that it “attained full responsible status within the commonwealth.” Thus, legal status of the country ceased from being a colony and protectorate of Nigeria and a declaration was made that as from October 1, 1960, “Her majesty’s Government in the United Kingdom shall have no more responsibility for the Government of Nigeria or any part thereof”.

The 1960 Constitution bore a semblance to the 1954 Constitution except that there were some basic exceptions as follows:

- a. The Governor-General was transformed into a Head of State and he acted only on the advice of his ministers;
- b. Judges of the Federal Supreme Court and the High Courts were appointed on the advice of the Judicial Service Commission and their dismissal could only be effected by a recommendation of a tribunal

- of judges after confirmation by the Judicial Committee of the Privy Council;
- c. Constitutional provisions were made for citizenship; and
 - d. A procedure for amendment was introduced into the constitution.

For ease of administration, powers were divided between the federal and three regional governments. There was the Exclusive List as well as the Concurrent List. The former was placed exclusively under the jurisdiction of the federal government while the latter was under the federal and regional governments. Matters not mentioned there were referred to as Residual Matters.

Under this constitution, all other items that did not feature in both lists were regarded as being under the jurisdiction of the regional government, though where any law made by the region was inconsistent with a federal law, such law became void to the extent of its inconsistency. Under section 65(1) of this constitution, the Federal Supreme Court was given the power of judicial review.

By the provisions of section 107 of the constitution, the federal parliament could exercise legislative powers on any subject matter in an emergency with a comprehensive definition of “period of emergency” provided under section 63(3).

A renowned constitutional law teacher Professor Jadesola Akande, while describing the main features of the 1960 constitution noted that it had the following characteristics:

- a. Separation of the Head of State from the effective Head of Council.
- b. The plurality of the effective executive. i.e. the Prime Minister as head of the Executive Council.
- c. The parliamentary character of the executive since the Ministers was chosen from the Legislative Houses.
- d. The responsibility of the Ministers to the legislature.

As a matter of fact, the 1960 constitution was a giant stride in the march towards the constitutional development of Nigeria and it was through it that all other subsequent constitution sought inspiration even though in some areas, for instance, the judiciary, appeals still lied at the Privy Council. Their decisions were taken as advisory and some lands were still vested in the Queen. There was, for the first time, a Council of Ministers manned solely by Nigerians, a free Director of Public Prosecution and some aspects of government like prison, police, etc. were still controlled by the crown.

SELF-ASSESSMENT EXERCISE 1

The 1960 independence constitution was the mother of all other constitutions in Nigeria up to date. Discuss.

3.2 The 1963 Republican Constitution

The significant feature in this constitution was that in contents, it was similar to the 1960 constitution. However, certain significant changes were made. For instance; the federal parliament enacted the Constitution of the Federation Act 1963. This Act had the effect of repealing the Nigeria Independence Act, 1960. By virtue of this constitution, Nigeria assumed the status of a Republic and all powers that hitherto belonged to the Monarch were transferred to the president and regional governors.

Other important and significant changes were the creation of the Mid-West Region, the provision of fundamental human rights and also the creation of the Supreme Court of Nigeria as the highest appellate court drawing from each region. All these new innovations removed the imperial stigma from the Nigerian constitution. It has been observed that one of the reasons for acceptance of presidential and the change to a republic was probably the desire for the removal of the trait of imperialism from the nation's social order.

4.0 CONCLUSION

The Military took over power in 1966 and from that period to 1979 when a democratic president was elected, there were no significant constitutional developments. The constitution was rather suspended or modified by the various constitutions (suspension and modification) Decrees.

5.0 SUMMARY

In this unit, we have considered the constitutional development of Nigeria between 1960 and 1979. You should now be able to identify these developments.

6.0 TUTOR-MARKED ASSIGNMENT

What is the significant difference between the 1960 and 1963 Constitutions of Nigeria?

7.0 REFERENCES/FURTHER READINGS

1960 Constitution.

1963 Constitution.

UNIT 3 CONSTITUTIONAL DEVELOPMENT IN NIGERIA 1979 TO DATE

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 The 1979 Constitution
 - 3.2 The 1989 Constitution
 - 3.3 The 1995 Draft Constitution
 - 3.4 The 1999 Constitution
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

In this unit, we shall consider the constitutional development of Nigeria between 1979 and 1999.

2.0 OBJECTIVE

By the end of this unit, you should be able to:

identify the various constitutional developments that took place between the periods 1979 to 1999 in Nigeria.

3.0 MAIN CONTENT

3.1 The 1979 Constitution

The 1979 constitution came into force on October 1, 1979. Before its advent, general elections were held in the country on August 11, 1979 under the Electoral Decree of 1979 as amended in 1978. The draft of the 1979 constitution which had been approved by the Constituent Assembly was accepted by the Federal Military Government with a number of amendments.

The most significant effect of the constitution was that it provided for a presidential system of governance for the country.

3.2 The 1989 Constitution

The 1989 constitution, which had little or no significant improvement on the 1979 constitution, was enacted by the Military Government of General Ibrahim Badamosi, Babangida (Rtd). Even though the constitution was to take effect from 1989 the Government of Babangida did not cease to be in power until August 27, 1993. Hence, the 1989 constitution was merely drafted, printed and circulated but was never promulgated into law.

3.3 The 1995 Draft Constitution

The 1995 Draft Constitution was as a result of the perceived inconsistencies evident in the 1979 constitution and more particularly as a means of dousing the tension in the polity following the emergence of Late General Sanni Abacha as the Head of State of Nigeria after the 1993 presidential election annulment crisis.

This constitution was the product of the 1994 Constitutional Conference which consisted of 273 elected 94 nominees and three delegates for each state and one for the Federal Capital Territory, Abuja. One delegate each was nominated to represent each of the special interests like the Nigeria Labour Congress, Nigeria Union of Teachers, e.t.c. The total was three Hundred and Eighty delegates.

The constitutional conference was the brainchild of the then Minister of Justice, and Attorney General of the Federation, Dr. Olu Onagoruwa and his team. During the inaugural address, the former Head of State, Late General Sanni Abacha, in his terms of reference, had the following to say to the conference.

“You have the mandate to deliberate upon the structure of the Nigeria Nation-State and to work out the modality for ensuring good governance; to device for our people a system of government, guaranteeing equal opportunity, the right to aspire to any public office, irrespective of state of origin, ethnicity or creed, and thus engender a sense of belonging in all citizens”.

The above were the exact issues addressed in that constitution. For the purpose of argument, it is necessary to outline some sections important to the continuity of the Nigeria nation:

- a. Section 229-Rotation of President, Governor and Chairman of Local Government Council: - It provided that rotation shall be to these offices between the North and South; the three Senatorial Districts and the Local Government Area respectively.

- b. Section 220-Multiple political parties: - It provided that there shall be multiple political parties in the federation.
- c. Section 1(2) provided that no person or group of persons shall take control of government except in accordance with the constitution.
- d. Section 1(3) provided that any person who attempted to breach the provisions of section 1(2) shall be prosecuted and if found guilty shall be punished accordingly.

It is important to point out that the 1995 constitution presented a model constitution for Nigeria.

The current 1999 constitution is a replica of that constitution though this was not acknowledged in any form by the drafters and the makers of the 1999 constitution.

3.4 The 1999 Constitution

The Draft 1999 constitution was given to the Constitutional Debate Co-ordinating Committee (CDCC) to work on by accepting memoranda from different shades of opinion and grafting of issue raised into the final draft.

Essentially, the CDCC was inaugurated on the November 11, 1998 by the Military Government of General Abdusalam Abubakar (Rtd) to among other things, pilot the debate on the new constitution for Nigeria, co-ordinate and collate views for a new constitution for the Federation of Nigeria.

It was reported that the committee benefited from the report of large volumes of memoranda from Nigerians at home and abroad and oral presentations at its hearings. The conviction of the committee from these sources was that the 1979 constitution could be retained with some amendments and additions.

Section 18 provides an instance of such additions. It provides as follows:

1. Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels
2. Government shall promote science and technology.
3. Government shall strive to eradicate illiteracy and to this end, government shall as and when practicable provide:
 - a. Free compulsory and universal primary education.
 - b. Free secondary education
 - c. Free university education

d. Free adult literacy programme

One significant improvement was that for the first time, there was a constitutional provision on the environment in section 20 to the effect that; “The state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria”.

The major shortfall of the constitution is that as lofty and innovative as this provision appears, they are not justiciable as they fell under Chapter II which is on Fundamental Objectives and Directives Principles of State Policy. It would have been more commendable if the provisions were enforceable.

Another innovation is contained in section 147(3) where the president is mandated to appoint at least one Minister from each state, who shall be an indigence of such state. This section gives sanction to the even and equitable spread of national political offices.

In the same vein, section 149 provides that a Minister at the Government of the Federation shall not enter upon the duties of his office, unless he had declared his assets and liabilities as prescribed in the constitution.

Lastly, the 1999 constitution is not structurally different from the 1979 constitution. In adopted the position of president who is a Chief Executive, Head of Government and Commander-in-Chief of the Armed Forces of the federation.

In recommending the presidential system, the constitutional conference accepted the main features of the presidential system of government as enunciated in the 1979 constitution.

SELF-ASSESSMENT EXERCISE 8

Examine the peculiar differences and similarities between the 1963, 1979, 1995 and 1999 constitutions of the Federal Republic of Nigeria.

4.0 CONCLUSION

An in-depth digging into the archives of Nigeria’s constitutional development history is what has been attempted in the foregoing expositions. A thorough research into this history of constitutional development is further recommended as what has been produced here form the basic background knowledge required by the learner.

5.0 SUMMARY

A thorough investigation into the origins of modern constitutions will reveal that, practically without exception, they were drawn up and adopted because the people wanted a document to guide their governance. The circumstances of constitutional development vary from one jurisdiction to the other. However, in almost all cases, countries have a constitution for the very simple and elementary reason that they wanted, to formally outline, at least, their ethics of governance. This aptly described the situation in Nigeria.

It must be admitted that no constitution is completely adequate and flawless. Hence, there is the need to amend a constitution as occasion and circumstances demand and require.

6.0 TUTOR-MARKED ASSIGNMENT

Succinctly attempt a brief history of Nigeria's constitutional development between 1979 to date.

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