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SCHOOL OF POSTGRADUATE STUDIES

FACULTY OF LAW

COURSE CODE: PUL801

COURSE TITLE: COMPARATIVE CONSTITUTIONAL LAW I

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PUL801– COMPARATIVE CONSTITUTIONAL LAW I

COURSE GUIDE

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INTRODUCTION

Constitutional law generally deals with the matters of the constitution and its administration as well as application within a given State. Constitution It is essentially the embodiment of the fundamental rules, principles 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.

Our discussion in this semester will focus on definition and scope of constitutional Law. We will also look at the structure and development of constitution in Nigeria as well as its sources and functions.

Course Learning Outcomes

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

1) Explain what constitution is
2) Discuss the sources and functions of Constitution
3) Explain the various stages of constitutional developments in Nigeria.

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise,and at points in the course you are required to submit assignments for assessment purposes. Atthe end of the course there is a final examination. The course should take you about 11 weeks to complete. You will find all the components of the course listed below. You need to makeout time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

a) Course guide.
b) Study Units.

c) Textbooks
d) Assignment file/Seminar Paper
e) Presentation schedule.

MODULES AND STUDY UNITS

The discussion in this course is broken down to 16 (sixteen) study units that are broadly dividedinto FOUR modules as follows –

Module 1.....

Unit 1 Definition and Scope of Constitutional Law

Unit 2 Traditional Constitutional Concept and Comparison between Constitutional Law and Administrative Law.....

Unit 3Sources and Functions of a Constitution.....

Unit 4Classifications/Types of Constitutions.....

Module 2.....

Unit 1 Constitutional Structure and Development in Nigeria

Unit 2 Problems of Constitutional Evolution in Nigeria and the Pre-Colonial Rule

Unit3 Constitutional Development in Nigeria between 1960 and 1979

Unit 4 Constitutional Development in Nigeria between 1979-date

Module 3……

Unit 1 Constitutional Supremacy through the Cases

Unit 2Constitutional Development and Structure in France

Unit 3 Constitutional Development and Structure in South Africa

Unit 4 Constitutional Development and Structure in India

Module 4.....

Unit 1 Federal System of Government

Unit 2 Unitary System of Government

Unit 3 Presidential and Parliamentary Systems

Unit 4 Constitutional Autochthony and Diarchy Systems of Government

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a commontheme. You will gain more from them if you have first carried out work on the law of sea. You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous units.

Each study unit consists of one week's work and includes specific Learning Outcomes, directions for study, reading materials and Self-Assessment Exercises *(SAE).* Together, these exercises will assist you in achieving the stated Learning Outcomes of the individual units andof the course.

REFERENCES / FURTHER READING

Certain books have been recommended in the course. You should read them where so directedbefore attempting the exercise.

ASSESSMENT

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquiredduring the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. Thework that you submit to your tutor for assessment will count for 30% of your total score.

SELF-ASSESSMENT EXERCISES

There is a self-assessment exercise at the end for every unit. You are required to attempt all theassignments. You will be assessed on all of them, but the best three performances will be usedfor assessment. The assignments carry 10% each. Extensions will not be granted after the duedate unless under exceptional circumstances.

FINAL EXAMINATION AND GRADING

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self- assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review yourself assessment exercises and tutor marked assignments before the examination.

COURSE SCORE DISTRIBUTION

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four counts at 30% of course marks.
Final examination	70% of overall course score
Total	100% of course score.

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best.Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might giveyou in-class exercise, you study units provide exercises for you to do at appropriate times. Each of the study units follows the same format. The first item is an introduction to the subjectmatter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should beable to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you haveachieved the objectives. If you make a habit of doing this, you will significantly improve yourchances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit.Examples are given in the study units. Work through these when you have come to them.

TUTORS AND TUTORIALS

There are 11 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group. Your tutor will mark and comment on yourassignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutorand returned to you as soon as possible.

Please do not hesitate to contact your tutor by telephone or e-mail if:

- You do not understand any part of the study units or the assigned readings.
- You have difficulty with the self-assessment exercises.
- You have a question or a problem with an assignment, with your tutor's comments onan assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

MODULE 1.....

Unit 1: Definition and Scope of Constitutional Law

Contents

1.1 Introduction

The term 'Constitution' refers to the document which contains the system of Law and Government by which the affairs of a State are administered. It is the document that embodies the steps that determine how things are done in the society.

It is essentially the embodiment of the fundamental rules, principles 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 is the ultimate source of all laws and it is the foundation upon which the whole body of governmental apparatus or system derives its validity, its origin and strength.

Consequently, any law that is inconsistent with the provisions of the constitution, the provisions of the constitution shall prevail and other inconsistent laws shall be null and void (See s1(1)(3)), Nigerian Constitution, 1999)

1.2 Learning Outcomes

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

i. Define the term Constitution; and
ii. Know the scope of Constitutional Law.

1.3 What is Constitution?

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, Kopcke is of the view that it is a ‘set of rules that are not subject to the will of the sovereign authority in the state and which has existed and must 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 declare the principles 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. (see Sokefun, 'Constitutional Law through the Cases'). 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. In many emerging nations especially the third world, former colonial masters or military governments disengaging from power often enact many of the constitutions in such nations.

(***With the help of authorities, explain the term 'constitution'***). As Viscount Bolingbroke stated in Biography, Accomplishments, and Facts-Encyclopedia Britannica 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.

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 reflects 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 constitutions are often products or heritage of colonial rule.

A Constitution may also mean a document having a special legal sanctity which set 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. The United Kingdom or Great Britain has no written constitution. There is no single document from which it 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.

A Constitution contains the powers of a Government established in the country, consisting the structure, the organs of government and providing the consequences of the exercise of the powers of government. A Government in exercising the constitutional powers can regulate, re-organize, kill or destroy through its institutions any individual, body or enterprise. (See *Shugaba v Minister of Internal Affairs* (1981) NCLR 459; Dele Giwa v ICAP (1984), Unreported suit No M/44/83 of 30/7/84).

Self-Assessment Exercise 1

1. Define the term Constitution and State briefly whether writers ever agreed on its definition.
2. In which countries do you find ‘Constitutional Court’?

1.4 Scope of Constitutional Law

Understanding the Scope of Constitutional Law would help the Constitutional Law student to know the superiority of the Constitution over and above every other Law.

- Constitutional Law is that part of the Law which relates to the system of government of the country. It can also be described as the study of those laws which regulate the structure of the principal organs of government and their relationship with each other, the citizens, organs and determine their main functions. 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 some international human rights treaties and instruments such as the universal Declaration of human Rights, 1948, International covenant on civil and political Rights, 1966, African Charter on Human and Political Rights, 1966 and others. In Industrial Law, the freedom of association and expression for industrial purpose 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 by which the law safeguards individual liberty.

In *Nigeria Development Co LTD v Adamawa State Water Board & 3 Ors* (2008) 9 NWLR 498, the Supreme Court of Nigeria, held, *inter alia* that the issue of the constitutionality of a statute or law is not a small matter but big and fundamental matter in any legal system. It has to do with the abrogation or nullification of a statute in the event of breach. Accordingly, before a statute

or law is pronounced unconstitutional by a Court of Law, there must be a clear contravention or violation of the Constitution.

In Eze & 147 Ors v Governor, Abia State & 2 Ors (2010)15 NWLR 324**,** the Court of Appeal of Nigeria emphasized on the supremacy and binding force of the Constitution of the Federal Republic of Nigeria,1999. The Court held that the Constitution of the Federal Republic of Nigeria is supreme and has a binding force. It is the basic law of Nigeria and its provisions make it supreme, so that failure to follow its provisions render whatever is done to it unconstitutional (s1(1)(3)) of the Nigerian Constitution, 1999). The provisions of the constitution are superior to every provision made in any Act or Law, and are binding on and must be respected by all persons and authorities in Nigeria. (***How does the knowledge of the scope of constitutional law help law students?***). This is because in a democratic system of government with a supreme constitution, all laws flow from the constitution and any law inconsistent with the provisions of the Constitution is void to the extent of such inconsistency.

Self-Assessment Exercise 2

1. What is Constitutional Law?
2. Briefly explain the Scope of Constitutional law

The conclusion that can be drawn from the foregoing analysis is that Constitutional Law is central to all aspects of Law. The question 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.

1.5 Summary

In this Unit, you have learnt that the Constitution controls the organs in the State and it is the origin of all others laws. Constitutional Law is the study of the Constitution. Constitutional Law to some extent determines the content of Law and determines the code of conduct for the people. In the remaining Units of this module, you will encounter concepts in the Constitution, Constitutional Law, and social control.

1.6 References/Further Readings/Web Resources

Sokefun JA, *Constitutional Law Through the Cases,* Caligata Publishers, 2011

Oluyede PA, *Constitutional Law in Nigeria* (Evan brothers (Nigeria Publishers Ltd 1992)

Nwabueze B, *Presidential Constitution of Nigeria:* The 1999 Constitution of the Federal Republic of Nigeria.

Sokefun JA, *Issues in Constitutional Law and Practice in Nigeria* (2002….)

Nwabueze B,*Presidential Constitution of Nigeria* (1982) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Sokefun JA, *Issues in Constitutional Law and Practice in Nigeria* (2002)Faculty of Law Olabisi Onabanjo University

Maris Kopcke- The Americana Jurnalist of Juris, Volume 66 Issue1, June 2021

Bolingbroke- Biography, Accomplishments, & Facts- Encyclopedia Britannica

1.7 Possible Answers to Self-Assessment Exercise(s)

1. Constitutional Law is the branch of public Law which relates to the system of government of the country. It can also be described as the study of those laws which regulate the structure of the principal organs of government

and their relationship with each other, the citizens, organs and determine their main functions.

2. Constitutional Law is very wide in scope. It actually 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.

UNIT 2 Traditional Constitutional Concepts

Ii. Constitutional Law and Administrative Law Compared

Contents

2.1 Introduction

2.2 Learning Outcomes

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

i. Analyze constitutional and administrative law

2.3 Constitutional Law and Administrative Law Compared

2.3.1 Traditional Constitutional Concepts

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'- that is 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. (***Explain the term 'Constitutionalism'***). A written and entrenched Constitution was later

seen as primarily performing this role whilst an unwritten Constitution performs it in a less rigid way, through the various constitutional law concepts and conventions.

Constitutionalism is a goal (that is, 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. This means 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.

2.3.2 Constitutional Law and Administrative Law compared

The line demarcating Constitutional Law and Administrative Law is very thin and 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 Government 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 1

1. What do you understand by constitutional concept?
2. What is the relationship between Constitutional Law and Administrative Law?

The conclusion that can be drawn from the foregoing analysis is that Constitutional Law is central to all aspects of Law. The question 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.

2.4 Summary

In this Unit, you have learnt that the Constitution controls the organs in the state and it is the origin of all others laws while Constitutional Law is the study of the constitution.

Constitutional Law to some extent determines the content of Law and determines the code of conduct for the people.

You have also learnt the dynamism of Constitutional Law and its distinction from Administrative Law, amongst others.

2.5 References/Further Readings/Web Resources

Oluyede PAO (1992) *Constitutional Law in Nigeria*

Prof. Ben Nwabueze , *Presidential Constitution of Nigeria* (1982.)*;* Constitution of the Federal Republic of Nigeria, 1999 (as Amended).

Justus A Sokefun , *Issues in Constitutional Law and Practice in Nigeria* (2002).

Justus A Sokefun, Constitutional Law through the Cases, Caligata Publishers, (2011).

2.6 Possible Answers to Self-Assessment Exercise(s)

1. Constitutional concepts are those ideas which influence the nature or form of constitution, such as the idea of 'constitutionalism' or 'limited government'. These ideas tend to enshrine certain rules and regulations geared towards preventing abuse or the exercise of arbitrary power by Government

2. Constitutional Law is mainly concerned with the structure of the primary organs of Government, while administrative law is concerned with the work of official agencies in providing services and in regulating the activities of citizens

UNIT 3: Sources of Constitution

Contents

3.1 Introduction

In the previous Units, 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 analyse the various approaches to determining the sources of a Constitution.

3.2 Learning Outcomes

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

i. identify the sources of a Constitution;
ii. differentiate between the various approaches to Constitutional Law; and

iii. Identify the various historical circumstances leading to different sources of a Constitution.

3.3 Sources of Constitution

3.3.1 The Nature of the Constitution

The nature of a constitution is determined essentially by the source of its authority, ie whether or not it is an original act of people, and, secondly by the justiciability of its provision. In other words, whether it is enforceable in the court or merely a political charter of government un-amenable to judicial enforcement. It has been aptly put by Hon. Justice Adolphus G. Karibi Whyte as the–*fons et origo* of the exercise of powers; the enjoyment of rights, discharge of obligations**.**

Self-Assessment Exercises 1

1. What are various sources of Constitution you know?
2. What are the functions of a Constitution?

3.3.2 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. Examples are as follows:

i. The social economic, political, historical, geographical and notable historical documents such as the British Right statutes passed by Parliament;
ii. Decrees and Edicts of Military Government;
iii. the intellectual works of eminent writers, jurists, historians, philosophers, essayists, politicians, and statesmen such as John Locke, AV Dicey, and so forth;
iv. Case law or Judicial precedents;
v. Customs and way of life of the people, rules and conventions guiding human behavior;
vi. The Constitutions of other countries;
vii. The deliberations of Constitutional conferences or Constituent Assemblies which may draft the Constitution of the given country;
viii. Rules of International law and so forth.

For the purpose of this class, each of these sources shall be duly considered in no particular order.

i. Conventions

A convention is a regularly observed practice considered appropriate for a given set of circumstances. Constitutional conventions are, therefore, sets of rules established over time by custom and practice, which relate to the exercise of government powers.

Note: Conventions are not legally binding.

ii. Major Constitutional documents

A number of documents often form the basis of the Constitution because they establish important principles. Some of these notable documents are the Magna Carta 1215, Bill of Rights 1689, and Act of Settlement 1701 among others.

iii. Common Law

This is also known as "case law". It refers to law formed on the basis of precedents set in previous cases – i.e. judgments made by the superior court which must be followed by other courts in the future if they face a similar case. Common Laws are not products of any legislative process; but a reflection of the accumulated wisdom of the past which binds judges into acceptance of these legal precedents. Most of the original laws concerning civil rights began in this way, such as freedom of speech and freedom of movement.

iv. Royal Prerogative

The royal prerogative consists of a number of powers or privileges in the past performed by the monarch but now performed by ministers on his or her behalf. Their authority is derived from the Crown, not Parliament. Examples of these powers include the right to declare war, make treaties, give orders to the armed forces, dissolve parliament, appoint ministers and dispense honours. (***What is convention?)***

3.3.3 Functions of A Constitution

In this connection, reference shall be made to the Nigerian Constitution. The Constitution, amongst other things, serves the following functions:

(a) States the aims and objectives of the people;
(b) establishes a national government;
(c) controls the relationship between the government;
(d) Defines and preserves personal liberties; and
(e) Contains provisions to enable the government to perpetuate itself.

The Nigerian Constitution is the will of the people. See the preamble of the 1999 Constitution (as amended) which states 'WE THE PEOPLE of the Federal Republic of Nigeria… DO HEREBY MAKE AND GIVE TO OURSELVES the following Constitution').

In conclusion, it is safe to admit that a Constitution is the history and reflection of its people. For a Constitution to serve its purpose, it must accommodate the ideals of its people.

3.4 Summary

In this unit, you learnt about the Constitution as the legal framework of the State. You learnt the various sources from which a Constitution can be drawn, as well as, the functions of a Constitution in a Sovereign State.

3.5 References/Further Readings/Web Resources

Justus A Sokefun, Constitutional Law Through the Cases, Caligata Publishers (2011).

Justus A Sokefun, *Issues in Constitutional Law and Practice in Nigeria* in Justus A Sokefun,*Issues in Constitutional Law and Practice in Nigeria*in Justus A Sokefun (ed)*Essays in Honor of Dr. OluOnagoruwa,(2002)Faculty of Law, Olabisi Onabanjo University, Ago Iwoye*

Nwabueze, BO, *The Presidential Constitution of Nigeria* (198).

Webster's New Twentieth Century Dictionary.

Blacks Law Dictionary, fifth Edition.

The Oxford Law Companion, 1980.

Karibi-Whyte, A. G. (1987) *"The Relevance of the Judiciary in the Polity in Historical Perspective".* Lecture delivered at the Nigerian Institute of Advanced Legal Studies.

1999 Constitution of the Federal Republic of Nigeria(as amended)

Hood Phillips, *Constitution of the Federal Republic of Nigeria, 1999.*

Hood Phillips. *Constitutional and Administrative Law, (*7lh edn

Gardiner, SR, *Constitutional Documents of the Puritan Revolution,* 1906).

Oluyede, PA O *Constitutional Law in Nigeria* (1992).

Mitchell, JDB *Constitutional Law,* 2nd edn.

Bryce, *Studies in History and Jurisprudence,* Vol1 Essay 3.

Dicey, AV *Law of the Constitution* (1914).

3.6 Possible Answers to SAEs

1. Sources of constitutions can broadly be classified into:

i. Conventions
ii. Common law
iii. Royal Prerogatives

2. Constitution preserves the personal liberty of the people, state the aims and objectives of the people, establishes national government, regulates the relations among the organs of the government etc.

Module 2

Unit:1 Constitutional Structure and Development in Nigeria I

Contents

1.3.2 The Pre - Colonial Nigeria:

1. 1900-1919
2. 1920-1950

1.3..3 Clifford's Constitution

1.3.4 Richard's Constitution

1.1 Introduction

Nigeria, like many other nations, has a history of its Constitutional development. It grew up as a nation through the configuration of the British, its colonial overlord. It was made up of several settlements, each with its own distinct identity, administrative techniques and method of governance. 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.

1.2 Learning Outcomes

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

(a) Understand the Constitutional development of Nigeria from pre-colonial times to the end of British rule.

1.3 Constitutional Structure and Development in Nigeria I

1.3.1 Historical Background and Pre-Colonial Nigeria

Nigeria is situating on a landmass of about 925,000 hectares in the western part of Africa. With a population of over 170 million people, it remains the most populous Black nation in the world having over 250 ethnic groups. There are three groups that are recognized as dominant. These are the Hausa/Fulani, Igbo and Yoruba.

The presence of the British in the various territories now known as Nigeria started in phases with respect to the various settlements. English Law was introduced in Lagos in 1863 with effect from March 4, 1863. Prior to the cession of Lagos to the British in 1861, and by virtue of the Supreme Court Ordinance No II of 1863, the first Supreme Court of the Colony was established.

(***Briefly recount the historical background of Nigeria before the intrusion of the colonial masters***). 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

Where and when was English law first introduced in Nigeria?

1.3.2 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 feel 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, at 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 neighbors, 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 1863 Supreme Court Ordinances, native laws which were not incompatible with the due exercise of the power and jurisdiction were rendered enforceable. Also, by virtue of the Southern Nigerian Order in Council 1899, the Niger South Coast Protectorate and the territories of the Royal Niger Company of Idah were amalgamated. Both became known as Protectorate of Southern Nigeria with effect from January 1, 1900. With respect to the Northern part of Nigeria, some British firms traded along the banks of River Niger. They later formed a coalition and received a Royal Charter called National African Company in 1886, then revoked in 1899. The British established the Northern Nigeria Order in Council in 1899 with effect from January 1, 1900.

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. (***Briefly discuss the origin of the name 'Nigeria'***)

1. 1900-1919

On 1st January1900, 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.

The emergence of Nigeria as a colonial state was summarily described by Afigbo when he said:

> The first to emerge was the colony of Lagos (1861), which within twenty years or so grow into the Lagos colony and protectorate incorporating also most of Yoruba land. Then came the oil Rivers Protectorate (1885), which by 1900 grew into the Southern Nigeria Protectorate. Finally, there was the territory of the Royal Nigeria Company (1886) which again in 1900 became the Protectorate of Northern Nigeria.

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 (the colony and protectorate of Southern and Northern Nigeria). 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. Also, 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 2

Which of these first arrived Nigeria

a. Britain
b. Portugal

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.

1.3.3 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 Hay fordwas forced to make some reforms in the political and administrative system of the country. The Nigerian Council was distasteful to him and he was critical of its ineffectiveness. It was under this Constitution that the first electoral system emerged which brought about the first elections in 1923. The Legislative

Council comprised of 26 official members. It also saw the emergence of the legislative Council of four members-three for Lagos which was the capital and commercial Nerve Centre 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 who retained power to legislate for Northern Nigeria by means of proclamations. 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, 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.

1.3.4 Richard's Constitution

All said and done, 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.

The Clifford's Constitution was replaced by the Richard's Constitution. It was introduced after World War II in line with the Spirit of the moment. The Richard's Constitution of 1946 came as a result of proposals which were four in number. The first two which aimed at promoting the unity of the country and ensuring more participation of Nigerians in their affairs contained in sessional paper No 4 of 1945 and the other evolving a constitutional framework embracing the whole of Nigeria and re-establishing a legislative council in which all sections of Nigeria would be represented. (***Compare and contrast Clifford's and Richard's Constitutions***)

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.

In line with the above proposals, the Constitution Order in Council 1946 was issued. The Protectorate of Nigeria was divided into Northern and Southern provinces. The Southern Province was further divided into the Western region and Eastern region. It should be noted that the Regional Assemblies established under this Constitution has no legislative power.

Self-Assessment Exercise 3

Why was Clifford's constitution applauded?

1.4 Possible Answers to Self-Assessments

SAE 1. English law was first introduced in Lagos in 1863 with effect from March 4, 1863.

SAE 2. b. Portugal

SAE 3. It was the first Constitution for a unified Nigeria

UNIT2: Constitutional Structure and Development In Nigeria II

Contents

2.1 Introduction

2.2 Learning Outcomes

2.3 Constitutional Structure and Development in Nigeria Ii

2.3.1 The Macpherson Constitution of 1951

Between 1949 and 1950, Nigerians were consulted through questionnaires at villages and districts. Each Region clamored for power. The Macpherson Constitution came into existence in 1951 to remedy the defects of Richard's Constitution. Before this, a selected committee of the Legislative Council had been set up to review the Richard's Constitution of 1946. The effect of that 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 or 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.

The Macpherson's Constitution made provisions for the following:

(1) Representative Legislative consisting of a central legislative for the whole of Nigeria known as the House of Representative, and the central executive council known as Council of Ministers.

(2) Regional Legislative called the House of Assembly for each of the three regions and Regional Executive Council each region.

2.3.2 Littleton Constitution of 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). It had the effect of creating 'a loose Federation'. The three regions and the Southern Cameroon were accorded sovereign status. They existed like separate and independent regions within Nigeria. (***Compare and contrast Macpherson and Littleton Constitutions***).

The major and one of the outstanding achievements of the Littleton 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 TafawaBalewa.

Self-Assessment Exercise 1

1. What was the major and essential achievement of the Littleton Constitution?

2.3.3 The Constitutional Conferences 1957 and 1958

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. What is important to note was the setting up of the Minorities Commission 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 2

What was the crux of the discussion in the Constitutional Conference of 1957?

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), Lyttleton'sConstitution(1954) and the Independence Constitution (1960).

2.4 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.

2.5 References/Further Readings/Web Resources

Justus A Sokefun, *Issues In Constitutional Law and Practices in Nigeria (*Faculty of Law, OOU, Ago-Iwoye 2002)).

Justus A Sokefun, Constitutional Law through the Cases, (Caligata Publishers 2011)

Dicey A, *Law of the Constitution* (1885).

Ache D and Oluyede P *Cases and Materials on Constitutional Law in Nigeria* (1987).

Nwabuwze B, *The Presidential Constitution of Nigeria,* 1982).

2.7 Possible Answers to SAEs

SAE 1. *The* major achievement of the Littleton Constitution was the operation of a federation of three regions with the Federal Territory of Lagos as the capital

SAE 2. The issue of self-determination

UNIT 3: Constitutional Development in Nigeria: 1960-1979

Contents

3.1 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.

3.2 Learning Outcomes

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

- identify the Constitutional developments that took place between 1960 and 1979.

3.3 Constitutional Development in Nigeria: 1960-1979

3.3.1 Historical Background and Pre-Colonial Nigeria

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 differences as follows:

a. The Governor-General was transformed into a Head of State and he acted 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. (***Mention the immediate and important consequence of self-governing/independent state that Nigerian gained in October 1, 1960***).

In 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 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 were chosen from the Legislative Houses.
d. The responsibility of the Ministers to the legislature.

As a matter of fact, the Independence Constitution, 1960 was a giant stride in the march towards the constitutional development of Nigeria and it was through

it that all other subsequent Constitutions 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, *et cetera*. 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. TRUE or FALSE

3.3.2 The Republican Constitution, 1963

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 system of Government and the change to a republic was probably the desire for the removal of the trait of imperialism from the nation's social order.

In 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.

3.4 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.

3.5 References/Further Readings/Web Resources

1960 Constitution

1963 Constitution

3.6 Possible Answers to SAEs

TRUE

UNIT 4: Constitutional Development In Nigeria 1979 To 1999

Contents

4.1 Introduction

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

4.2 Learning Outcomes

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

i. identify the various constitutional developments that took place between the periods 1 979 to 1999 in Nigeria.

4.3 Constitutional Development in Nigeria 1979 To 1999

4.3.1 Constitution of the Federal Republic of Nigeria, 1999

The Constitution of the Federal Republic of Nigeria, 1979 came into force on October I, 1979 (1979 Constitution). 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.

4.3.2 The Constitution of the Federal Republic of Nigeria, 1989

The Constitution of the Federal Republic of Nigeria, 1989 (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.

4.3.3 The Draft Constitution, 1995

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 3 delegates from 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, etc. The total was three Hundred and Eighty (380) delegates. The Constitutional conference was headed by (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 attempts 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.

4.3.4 Constitution of the Federal Republic of Nigeria, 1999

The Draft 1999 Constitution was given to the Constitutional Debate Co-Coordinating 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 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 as 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; and
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'.

(***Identify the major changes and amendments to the Nigerian constitution between 1979 to 1999***). 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 event 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.

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.

Lastly, the 1999 Constitution is not structurally different from the 1979 Constitution. It 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 1

What factors prompted the 1995 Draft Constitution?

In 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.

4.4 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.

4.5 References/Further Readings/Web Resources

Justus A Sokefun, *Issues in Constitutional Law and Practices in Nigeria* (Faculty of Law, OOU, Ago-Iwoye 2002)

Justus A Sokefun, *Constitutional Law through the Cases*, (Caligata Publishers 2011).

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Aihe D and Oluyede P, *Cases and Materials on Constitutional Law in Nigeria*, (1987).

Nwabuwze, B, *The Presidential Constitution of Nigeria*, (1982).

4.6 Possible Answers to SAEs

The 1995 Draft Constitution was prompted by

i. The perceived inconsistencies evident in the 1979 Constitution

ii. The need to douse 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

MODULE 3

UNIT 1: Constitutional Supremacy Through the Cases

Contents

1.1 Introduction

This unit is an excerpt, with few modifications, from the book titled Constitutional Law through the Cases, written by Justus A Sokefun. The same has been used with the permission of the author.

In this unit, we shall consider several case laws bordering on the issue of Constitutional Supremacy in Nigeria and other jurisdictions.

1.2 Learning Outcomes

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

i. identify the issues involved in the idea of constitutional supremacy in Nigeria during the period 1979 to 1999

1.3 Constitutional Supremacy Through the Cases

1.3.1 Introduction to Constitutional Supremacy

In Module 1, we defined Constitution in several terms and from several authors' perspective. The Constitution is an instrument of government expressing a set of political principles about the nation's ideals, objectives and legitimate processes.

We have equally discussed the functions and salient provisions of the 1999 Constitution (as amended). Some of which are as follows:

(a) States the aims and objectives of the people;

(b) Establishes a national government;

(c) Controls the relationship between the governments;

(d) Defines and preserves personal liberties; and

(e) Contains provisions to enable the government to perpetuate itself.

Constitutional Supremacy postulates the Lordship of the Constitution over all persons and authorities. As the highest Law in any sovereign State, whenever any law is inconsistent with any provision of the Constitution, that Law is void to the extent of its inconsistency (See Section 1(3) of the 1999 Constitution).

When there is a rule by the military, legislation is done through a body consisting mainly of armed forces personnel. The last of such in Nigeria was referred to as Provisional Ruling Council. It ruled by Decrees. These Decrees were superior to the Constitution. Indeed, the Constitution (Suspension and Modification) Decree, No 107, 1993 suspended a substantial part of the Constitution of the Federal Republic of Nigeria, 1979. These Decrees contained ouster clauses which precluded the Courts from examining their validity or otherwise. In this instance, the Constitution took a second position after Federal Military Government decrees. Inspite of this, there was still a special legal sanctity and status accorded to the Constitution.

Self-Assessment Exercises 1

1. What do you understand by Constitutional Supremacy?

1.3.2 **Constitutional Supremacy Through the Cases**

CASE NO 1: *Alhaja Karimu Adisa v Emmanuel Oyinwola & Ors* (2000) FWLR (Pt 8) 1349, SC.

FACTS:

The plaintiffs in the High Court of Oyo State claimed from the defendant a declaration of customary right of occupancy, damages for trespass and injunction. Among the issues canvassed at the Supreme Court was the status of the Land Use Act, 1978. The issue was whether by virtue of section 274(5) which made the Land Use Act an extra-ordinary statute, the Act was part of the Constitution. The Supreme Court decided inter alia that the Land Use Act was not an integral part of the Constitution. The Court went further to decide that where the provisions of the Act were inconsistent with those of the Constitution, such provisions were to the extent of such inconsistency null and void. One of the cases relied on was *Adeniran& Anor v Interland Transport Limited* [1991] 9 NWLR (Part 214) 155 *at 179* where the Supreme Court of Nigeria decided that the Constitution of the Federal Republic of Nigeria is supreme and its provisions have binding force on all.

CASE NO 2:

Chief Humphrey Omorogbe Osagie v Col S O Ogbemudia, Military Governor, Mid-Western State of Nigeria and 3 Others [1973] ALL NLR 345, SC.

Section 31(1) of the Constitution of the Federation 1963 prohibits the compulsory acquisition of property except under a law that:

(a) Requires payment of adequate compensation, and

(b) Gives to a claimant for compensation, a right of access to the High Court in respect thereof.

But subsection (3) excludes 'any general law … *(i)* relating to the limitation of actions'.

The questions referred to the Supreme Court were:

(a) Whether section 10(2) of the Public Lands Acquisition Law (Cap. 105) Laws of Western State of Nigeria applicable in the Mid-Western State of Nigeria is repugnant or inconsistent with section 31 of the Constitution of the Federation in so far as the said section 10(2) seeks to abolish after 12 months the rights of claimant to any estate, rights, interest or compensation to land or interest in land compulsory acquired by the government of the Mid-Western State of Nigeria.

(b) Whether in view of (a) above, section 10 (2) of Cap 105 of the said Public Lands Acquisition Law is null, void and of no effect particularly as there is no time limit for compensation in the comparable Federal Act, Cap 167

Section 1 of the said Constitution renders any law which is inconsistent therewith void to the extent of the inconsistency; and by section 3 (4) of the Constitution (Suspension and Modification) Decree 1966 made by the Federal Military Government on or after that date is given supremacy over any existing or subsequent State law, to the extent of any inconsistency between them.

Counsel for the plaintiff submitted that by virtue of these provisions section 10 (2) of the Public Lands Acquisition Law is invalid for inconsistency with section 31 of the Constitution since the latter section confers on the owner of acquired land, an unrestricted right to compensation and of access to the High Court whereas the provision in question imposes a limitation on the time within which he may exercise his right; and that the words 'general law relating to the limitation of actions' in section 31(3) *(i)* refers only the Limitation Law, Cap 64 Laws of the Western State.

The Attorney-General of the Mid-Western State (and the Solicitor-General of the Western State as *amicus curiae)* contended that Section 10(2) is expressly preserved and validated by section 31 (3) *(i)* of the Constitution.

HELD:

> It was held that the test is generally of the nature of the legislation concerned: for an enactment to be regarded as a general law, it must be one which in its nature affects the public at large as distinguished from one which in its nature affects private, personal or local interest. Section 10 (2) of the Public lands Acquisition Law, Cap. 105 Laws of the Western State, is therefore a general law, and it relates to the limitation of actions in so far as it stipulates the time outside which no claims can be brought or made in respect of the states, interest or right envisaged by the section; so, by virtue of section 31(3) *(i)* of the Constitution, the said section 10 (2) is valid and not inconsistent with section 31 of the Constitution of the Federation.

CASE NO 3:

Prince A Ademiluyi v Brigadier R A Adebayo

(Military Government of Western State & Attorney General (Western State of Nigeria [1968] All NLR 649, HC, Western State

Counsel for the Plaintiff contended that before the first Defendant could validly make an order forfeiting the properties of a public officer into whose assets an enquiry is held, the prior consent of the Head of the National Military Government must first be obtained under section 5(3) of Decree No. 51 of 1966. It was conceded that this prior consent was never obtained. Counsel for the Defendants contended that in as much as Decree No. 51 of 1966 came into effect as from the 28th June, 1966, it is a decree coming within the provision

of section 69 and is therefore to have effect as the Edict of the Military Government of the Western State.

HELD:

(1) It is enshrined in our Constitution and in Decree No 1 of 1966 that no Regional law or Edict shall override the provisions of the Federal Legislation or a Decree. The High Court of Lagos State like any other Court of Federation is bound by the Decrees of the Federal Military Government, and any Edicts of the Regional/ State Government are to be disregarded.

(2) Matters pertaining to Enquiries into the Assets of Public Officers are certainly matters included in both the Exclusive and Concurrent Legislative Lists and that is the subject matter of Decree No 51 of 1966 though made after the 16th January, 1966, is not caught by the provisions of S 69 (3A) of Decree N0. 80 of 1967.

CASE NO 5:

Alhaji DS Adegbenro v Attorney General of the Federation and 2 Others (1962) All NLR 337, FSC.

The Plaintiff in this action was served with a Restriction Order issued under the Emergency Powers (Restriction Orders) Regulations, 1962, by the third defendant, who was appointed by the second defendant as Administrator of Western Nigeria under the Emergency Powers Act, 1961. The Order restricted the plaintiff's movements to within a radius of three miles of the township of Oshogbo.

Held:

(1) The validity of an Act of Parliament depends on its conformity with the provisions of the Constitution of the Federation, and not on whether Parliament acted *mala fide* in passing it.

(2) The Court is not entitled to look beyond the provisions of the Constitution of the Federation in determining the validity of an Act of Parliament; where Parliament has declared a State of Public

Emergency in conformity with provisions of the Constitution of the Federation, the Court must hold that such a Declaration is valid.

CASE NO 6:

Chief Ohwovwiogor Ikine (The Senior Odion & Clan Head of Uwheren) &3 others v Chief Olori Edjerode (The Odion of Ebere Quarter) (For himself and on behalf of Ebere Quarters, Uwherun Clan) & 5 Others [1996] 2 NWLR Part 431, 468, CA.

Facts:

The respondents as plaintiffs filed an action at the Ughelli High Court (Delta State) praying the court for declaratory reliefs as to the custom of the Uwherun Clan of Ughelli on the appointment of the Senior Odion of Uwherun Clan.

Upon being served with the writ of summons, the 1st – 4th appellants (as 1st - 4th defendants) filed an application for orders of court dismissing the action for reasons:

(i) of being frivolous, vexatious, oppressive and an abuse of the process of court.

(ii) (ii) that the court not having jurisdiction to entertain it.

(iii) (iii) that the subject matter of the suit being the appointment and recognition of a chief is not justifiable.

To support their contention on the frivolity and abusive nature of the court process of the suit, the appellants contended that an earlier suit NoUHC/34/87 on the same issues, against same parties was instituted by the respondent/plaintiff and same was pending during the pendency of the present suit.

The appellant contended that the suit was statute- barred as the cause of action arose in 1979 when the Bendel State Legal Notice No. 88 of 1979 was published which notice stipulated the entitlement of other quarters of Uwherun

Clan to the Senior Odion Chieftaincy and not 1985 when the name of the 1st appellant was gazetted as the senior Odion of Uwherun Clan.

On the issue of jurisdiction of court, the appellants contended that the cause of action, having arisen in 1979 before the coming into force of the 1979 Constitution, was governed by the provisions of the 1963 Constitution which by virtue of the provisions of section 16 (3) and ousted the jurisdiction of the trial court in a chieftaincy matter.

The trial court granted the prayers of the appellant and dismissed the action of the respondents. On appeal to the Court of Appeal, the decision of the High Court was set aside. Being dissatisfied with the decision of the Court of Appeal, the defendant/appellants appealed to the Supreme Court.

Held:

1. The 1963 Constitution went in abeyance with the coming into force of the 1979 Constitution and will only apply to causes of action which arose under it.
2. Under the provisions of section 4 (8) of the 1979 Constitution, any law enacted before the coming into force of the 1979 Constitution which contradicts any of the provisions of the said Constitution after it came into force is either modified or repealed to conform with the Constitution. It is in order to provide for this type of situation that section 274 of the 1979 Constitution was enacted.

Per EJIWUNMI, JSC:

'One of the issues raised in the case of *Chief Aliu Abu &Ors Chief AbubakarZibriOdugbo & Othersrs,* SC.112/ 96 (2001) 7 SCNJ 170, (2001) FWLR (pt 69) 1260, was similar to the question now under consideration. As

what I said in the course of my judgment is appropriate answer to this question, I will therefore quote, in *extenso*, what I said, *inter alia*, in that judgment…

> It is therefore my view that, taking into consideration the provisions of the 1979 Constitution (supra) the ouster clauses in the Traditional Rulers and Chiefs Law, 1979 of the defunct Bendel State, now applicable to Delta State, stood impliedly repealed or modified by the 1979 Constitution in order that it is brought into conformity with its provisions. The fact that Decree No. 1 of 1984 suspended section 4(8) of the 1979 Constitution, will not revive the ouster clauses in the Traditional Rulers and Chiefs Law 1979 since the Decree did not contain express provision to that effect nor can such manifest intentionbe gathered from its provisions, the Traditional Rulers and Chiefs Law 1979 of Bendel State stands repealed in part (see pages 366- 368 of *Craies on Statute Law* (7th edn))

Per EJIWUNMI, JSC:

'The decision in Uwaifo's case prohibits the courts, even after 1st October 1979 from questioning any Edict or Decree made between 1st January 1966 and 30th September, 1979 on the ground that the person or authority which made it had no capacity or power to make it, but did not preclude the courts from questioning the validity of such laws or any of the provisions of the 1979 Constitution. In order words, Courts are precluded from questioning the capacity and power of the authorities in promulgating such laws. They are 'equally prohibited from questioning the validity of such laws or interfering with accrued or subsisting rights by virtue of such actions at the time they were still valid and subsisting. In Uwaifo's case, *supra*, Idigbe, JSC succinctly stated the law in the following words:

In *Garlett v Bradley* (1879) 3 App Cas 944 at 966, commenting on the issue of implied repeal of a statute by Lord Blackburn, where His Lordship said:

I shall not make attempt to recite all the contrarieties which make one statute with another. The contraria which make second statute repeal the first. But there is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely that when a new enactment is couched in a general affirmative language and the previous law, whether a law of custom or not, can well stand with it for the language used is all that the old law shall be repealed…. But when the new affirmative words are, as was said in *Stradling Plowed vs. Morgan*, 206 such as by their necessity to import a contradiction, that is to say, where one can see that it must have intended that the two should be in conflict, the two could not stand together, the second repeals the first

CASE NO 7

In the matter of the Constitution of the Federation, 1960,

and in the Matter of the Emergency Powers (Jurisdiction) Act, 1962.

In re:

Alhaji DS Adegbenro v Attorney General of the Federation & 2 Others [1962]

All NLR 428, SC.

HELD:

(1) Any law which is inconsistent with the Constitution is void to the extent of the inconsistency only; a law may be valid in part and void in part. In this action, since the question whether the plaintiff was validly appointed Premier of the Region was *sub judice* in other proceedings, the Plaintiff had not shown that he could not lawfully be prevented from discharging the functions of that office; and his claim for a declaration, brought in this action, in his alleged capacity as Premier of the Region, that the Emergency Powers Act 1961, and the Regulations made there under, were unconstitutional and *ultra vires,* failed.

(3) In an Action for a declaration, the Federal Supreme Court will decline to pronounce on the validity of Regulations, or of the Act under which such Regulations were made, where it is shown that the plaintiff's inability to carry out his functions in the capacity in which he seeks relief, was caused upon him pursuant to other Regulations, which are not in issue.

(***Explain how Constitutional Supremacy apply under Military rule***)

The conclusion from these decided cases among others, we see that the Constitution is the supreme law where there is a written Constitution, and in a democracy.

The written Constitution gives validity to other laws and bodies. It cannot be amended or altered in any form except in accordance with its own provisions. It is for this reason that writers adopt the phrase 'Constitutional supremacy' as against 'Parliamentary supremacy'.

1.4 Summary

The Constitution is the supreme law of the land and prevails over every other law in the land. The exception, however, lies in the era of military dictatorship where legislation is done through a body consisting mainly of armed forces personnel. Under Military regimes, Decrees were superior to the Constitution, as they often suspend a substantial part of the Constitution.

1.5 References/Further Readings/Web Resources

Justus A Sokefun, *Issues In Constitutional Law and Practices in Nigeria* (Faculty of Law, OOU, Ago-Iwoye (2002).

Justus A Sokefun, *Constitutional Law through the Cases* (*Caligata Publishers* 2011)

1.6 Possible Answers to SAEs

Constitutional Supremacy is a concept which postulates that the constitution is supreme and above over all persons and authorities. As

the highest Law in any sovereign State, whenever any law is inconsistent with any provision of the Constitution, that Law is void to the extent of its inconsistency (See Section 1(3) of the 1999 Constitution

UNIT 2: Constitutional Development and Structure in France

Contents

2.1 Introduction

In this unit, we shall consider the constitutional development of France.

2.2 Learning Outcomes

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

- identify the various constitutional developments that took place in France.

2.3 Constitutional Development and Structure in France

2.3.1 Constitutional Development of France

A study of the present Constitution of the Fifth Republic France demands a brief study of the history of constitutional development, particularly after the French Revolution of 1789. The Constitution has in fact inherited a lot from

the past Constitutions in general and from the Constitutions of the Third and the Fourth Republics in particular. In a way, France holds a world record in the field of Constitution-making.

Since 1789, she has been changing her Constitution after about every 12 years. Between 1789-1858, France had 16 Constitutions, one of which was *Acte Additionnel* (1835) which remained in force for only 21 days. The Constitutions of the Third and the Fourth Republics did remain in operation for a number of years, but their working was found to be unsatisfactory. The Constitution of the Third Republic continued for 65 years, but the multi-party system kept every government established under it in a state of continuous flux. The Constitution of the Fifth Republic, however, has been working quite successfully for the last about six decades and it seems that the French are going to keep it working.

The Constitution of the Fifth Republic was framed under the guidance of its Chief patron, General de Gaulle as well as in the light of the past constitutional experience. As such, for a proper analysis and understanding of the Constitution of the Fifth Republic, study of constitution-making in France is imperative.

The French Revolution and the Establishment of the First Republic France

It is natural to begin the study of Modern Constitutional History of France from 1789, the year of the Revolution. Prior to that, France was governed by an all-powerful monarchy aided by high nobility. (***Briefly recount the constitutional***

development of France). The excesses of the autocratic rule compelled the people of France to revolt against it. In 1789, a bloody but popular revolution took place in France. The people, in the name of 'Liberty, Equality and Fraternity' revolted against the King, the bureaucracy and the nobility. After the Revolution, the Estates General of France was converted into the National Assembly. On 26th August 1789, this Assembly issued the historic Declaration of the Rights of Man and citizen.

Declaration of the Rights of Man and Citizen

The following are some excerpts from this Historical Declaration: 'Men are born free and equal in rights'. Law is the expression of the general will. No one ought to be disturbed on account of his opinions. The free communication of ideas and opinions is one of the most precious rights of man…..'

The aim of every political association is the preservation of the practical and imprescriptible rights of man. The rights are liberty, property, security and resistance to oppression. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members, of society the enjoyment of these same rights.

In the words of Macridis

> Obviously to the King's absolute rule, the Revolution countered the notion of absolute popular sovereignty—supreme, inalienable, pure and always right the old maxim 'The King can do no wrong' was replaced by the new on: ''The people are always right''.

Later on, in 1791, a Constitution was prepared under which France was declared to be a Republic. However, this Constitution was disliked by the radical revolutionaries. Consequently, in 1792, another Constitution was drafted and it was approved by the people in 1793.

Under the 1793 Constitution, France was declared to be a Liberal Democratic State based upon the principles of direct election and universal adult manhood franchise. But, this Constitution was also severely criticized by the revolutionaries. To satisfy them, a number of amendments were made in it. By 1795, the Constitution was changed to the extent of making it a new Constitution altogether.

A Directory consisting of 500 members was created and five members were appointed Directors. Even this institution failed to root out the evils. In 1799, the Directory was replaced by a Consulate. In this very year, a military officer Napoleon became its First Consul and started concentrating powers in his own hands.

France Re-Establishes Monarchy (1804)

Power, authority and popularity was fully exploited by Napoleon and in 1804, he declared himself to be the King of France. Under Napoleon a strong administration was established and France began gaining strength. However, power intoxicated Napoleon and as part of his dream of world conquest, he adopted the policy of expanding his empire through war and aggression. War was used as a means to expand French power and possessions.

However, in 1815, Napoleon was defeated by the British in the battle of Waterloo. After this, the Bourbon Monarchy (Louis XVIII) came to be restored to power in France. In 1815, Louis XVIII, a brother of Louis XIV, was made the King of France. To pacify both the liberals and the reactionaries, he issued a Charter granting religious freedom and freedom of the press to the people. However, even this failed to win popular support for monarchy. Louis XVIII died in 1824 and was succeeded by Charles X. The new King tried to make French Monarchy quite strong and in consequence provoked the people to revolt a second time.

Second Revolution 1830

In 1830, France had a second revolution. Charles X fled away from France. The people elected the Duke of Lance, Phillips, as their King. He was made a Constitutional monarch. A parliamentary system was set up in France. The King was quite popular with the people and he introduced a number of liberal reforms in France. But, he too was not accepted by the radicals as their King. In 1848, still another revolution look place in France.

The Third Revolution (1848) and Establishment of the Second Republic France

The revolution of 1848 was once again directed against monarchy and some of the revolutionaries even raised the cry of socialism. After the ouster of King Phillips, France adopted a new Republican Constitution. It came to be known as the Constitution of the Second Republic. Under this Constitution, a Presidential system of government on the model of the United States of American system was adopted. The French President was made the real executive head for a fixed term of four years.

Under this Constitution, Louis Napoleon, a nephew of Napoleon Bonaparte, was elected as the first President of the Second Republic. He was also very ambitious and wanted to become a despotic ruler. On the eve of the election of the President in 1851, he crushed the opposition with the help of the army, and took over all authority.

Through a 'referendum', he got proclaimed as the King of France (1852). As such, the Second Republic came to an end and monarchy appeared again. Louis Napoleon became King in 1852 and tried to be a popular ruler. However, his policies involved France in a war with Germany. Germany under Bismarck proved stronger than France under Louis Napoleon. Napoleon suffered a defeat in 1870 and it ended this era of monarchy. France was again declared to be Democratic Republic—The Third Republic.

The Third Republic

In 1871, the National Assembly of France entered into a peace treaty with Germany. However, the end of the war was accompanied by the outbreak of an internal civil war in France. The Government of France was in a position to meet this menace in nearly three years. In 1875, a new Constitution was adopted by France and it came to be known as the Constitution of the Third Republic. Under this constitution, a Parliamentary form of government was adopted. The President was made a Constitutional Head of the State. Real executive powers were vested in the Prime Minister and the Council of Ministers. The executive was made responsible to the National Assembly. The National Parliament was made a bi-cameral legislature consisting of the Chamber of Deputies and the National Assembly. Special provisions were

included for dealing with emergencies. The Constitution of the Third Republic, with all its defects, incompleteness and excessive flexibility—continued for 65 years, that is up to the defeat of France in the Second World War. During this period, France had 99 ministries.

The Second World War and the French System of Government

The defeat of France in 1940 brought to an end the Third Republic. Under General Petain, a new Government was established. The new Government entered into a treaty with Germany and Italy, and prepared a new Constitution for France. This Constitution lasted only till 1944 i.e. up to the time of the defeat of Germany in the Second World War.

The Fourth Republic France 1946

The Interim Government which was established in France after the end of Second World War decided to organize a Constituent assembly for framing a Constitution. On October 21, 1945, a Constitutional Assembly was elected for the purpose.

The Constitution prepared by this assembly was, however, rejected by the people in a referendum held on May 5, 1946. Thereupon a new Constituent Assembly was constituted. The Constitution framed by this Assembly was accepted by the people in October 1946 and this became the Constitution of the Fourth Republic. Under this Constitution, France was declared to be a Republic— indivisible, secular, democratic and social, and a Parliamentary System of government was adopted.

The Fifth Republic France 1958

By the year 1954, the instability and weakness of the French governments had become clear beyond doubt. France had to withdraw from a number of colonies. The victory of Vietnam over France gave a crushing blow to French prestige. At the same time, momentum for independence was gaining in Algeria. On 13 May 1958, the students of Algeria besieged the Government buildings and indulged in big violent demonstrations. A Public Defence Committee was constituted to meet the situation. In this Committee, the supporters of General De Gaulle were in majority. They demanded that De Gaulle should be given full authority to deal with the situation.

In 1958, De Gaulle became the Prime Minister of France. Soon after taking over his office, he declared his intentions of re-making the Constitution of France. He was not in favour of the Parliamentary System or the Party System of Government. In fact, he categorically declared his preference for a presidential system.

Under his direction and initiative, the Constitution of the Fifth Republic was prepared and got approved by the people in a referendum. The new constitution came into force on 4th October 1958 and it marked the end of the Fourth Republic and the beginning of the Fifth Republic.

THE FRANCE FIFTH REPUBLIC CONSTITUTION

The current Constitution of France was adopted on the 4th of October 1958. It is called the Constitution of the Fifth Republic and replaced that of the Fourth Republic dating from 1946. However, on 21st of July, 2008 the Congress passed the bill for the latest amendment to the Constitution. This recent amendment is the 24th amendment which is one of the most comprehensive

revisions in the history of the French Constitution and essentially provides three important novelties:

i. The institutional strengthening of the parliament (eg, Art 11, 13);
ii. A revision of statutes regarding the exercise of executive power (eg, Art 6, 49 (3));
iii. The extension of civil and political rights of the people (eg Art 11, 61-1).

The Constitution of the Fifth Republic has been in operation since October 4, 1958. It has been successful in securing constitutional stability. In this way, it has acted as a source of continuous development of France. It was framed by a Constituent Assembly which drew inspiration from General De Gaulle.

One of the key objectives of the new Constitution was to eliminate the chances of constitutional instability which had reigned menacingly during the period of the Fourth Republic. It has been successful in achieving this objective. The Constitution of Fifth Republic incorporates a mixed Presidential-Parliamentary model of Government. It reconciles the republican and democratic principles of enlightenment philosophy (liberalism) with the need for a strong and stable executive.

The Main Features of the Constitution of Fifth Republic France are:

1. Written, Brief and Enacted Constitution:

The Constitution of the Fifth Republic is a written and enacted Constitution like the Constitution of the United States of America. Initially it consisted of a Preamble and 92 Articles. However, after Algerian independence and dropping of the provision regarding French Community, the total number of Articles came down to 89. These now stand divided into XVII Titles (Chapters). Each

title contains provisions covering a particular institution/feature of the constitutional system. The details are as follows:

Title I, Articles 2 to 4, Provisions regarding Sovereignty.
Title II, Articles 5 to 19, The President of Republic.
Title III, Articles 20 to 23, The Government.
Title IV, Articles 24 to 33, Parliament.
Title V, Articles 34 to 51, Relations between the Parliament and Government.
Title VI, Articles 52 to 55, Treaties and International Agreements.
Title VII, Articles 55 to 63, The Constitutional Council.
Title VIII, Articles 64 to 66, Judicial Authority.
Title IX, Articles 67 to 68, The High Court of Justice.
Title X, Articles 68-1 to 68-3 Criminal Liability of the Members of Government.
Title XI, Articles 69 to 71, The Economic and Social Council.
Title XII, Articles 72 to 75, Territorial Units.
Title XIII, Repealed.
Title XIV, Articles 88, Association Agreements.
Title XV, Articles 88-1 of 88-4, European Communities and European Union.
Title XVI, Articles 89, Amendment of the Constitution.
Title XVII, Repealed.

The Constitution of the Fifth Republic is an adopted and enacted Constitution. It was made by the Constituent Assembly of France. It was also approved by the people of France in a referendum. It has been a self-made Constitution of the people of France which has been successfully guiding their march towards progress and prosperity.

2. Preamble of the Constitution

The Constitution opens with a Preamble which projects the objectives and ideals underlying the enactment of the Constitution. It reads: 'The French people solemnly proclaim their attachment to the rights of man and to the principles of national sovereignty as defined by the Declaration of1789 and confirmed and completed by the Preamble to the Constitution of 1946'.

It also provides:

> By virtue of these principles and that of the free determination of people, the Republic offers to those overseas territories which express a desire to accept membership of the new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic evolution.

Article 2 states that the motto of the Republic is Liberty, Equality and Fraternity.

3. Popular Sovereignty

Like the Constitutions of India and the U.S.A., the French Constitution of 1958 affirms belief in the sovereignty of the people. Article 3 declares: 'National Sovereignty belongs to the people, who exercise it through their representatives and by way of referendum. No section of the people and no individual may claim to exercise it….'.

Further, the Constitution in its Article 2 declares: "Its principle is Government of the people by the people and for the people."

4. Constitution is the Supreme Law

The French Constitution is the supreme law of the land. Every organ of the Government derives its powers from the Constitution. Acts and Laws of all the authorities are subject to the review of the Constitutional Council, which can reject anything that it finds to be unconstitutional.

5. France is a Secular State

France, like India, is a secular polity. Article 2 declares: 'France is an indivisible, secular, democratic and social Republic. It ensures equality of all citizens before law without distinction of origin, race or religion. It respects all beliefs…'. The motto of the Republic is liberty, equality and fraternity. France is now trying to eliminate distinctive religious symbols from the social life of France. It has now banned the wearing of religious symbols as a part of the dress. Some sections of the people are opposed to all this. Sikhs in France have been asserting their right to wear turban and carry all sacred symbols of Sikh religion.

6. A Rigid Constitution

Under Title XVI and Article 89, the method of amendment of the French Constitution has been laid down. The method of amendment that has been prescribed is a rigid method. The power to propose an amendment is with the President cum the Prime Minister, and with the members of the Parliament. The power of amendment is with the Parliament. Article 89 reads:

The initiative for amending the constitution shall belong both to the President of the Republic on the proposal of the Premier and to the members of the Parliament. The Government or the Parliamentary Bill for

amendment must be passed by the two assemblies in identical terms. The amendment shall become definite after approval by a referendum.

It continues:

> Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to the Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three fifth majority of the votes cast…

In this way, we find that for amending the Constitution, it is essential that the proposed amendment should be passed by the two houses of the Parliament in identical terms and then it should be submitted to the people for approval in a referendum. There is another method of amendment stipulated in this very Article. According to it, if a Government Bill is proposed by the President in the joint bill sitting of the two Houses and if it is passed by a 3/5th majority, then the proposed Bill becomes an amendment even without having been approved by the people in a referendum. As such, the French Constitution is a rigid Constitution. Both the methods of amendments are rigid in nature and content. The method of amendment has an inbuilt ambiguity.

According to Duverger , Article 89 has an inbuilt ambiguity. It is ambiguous in that it does not make clear whether the President's decision not to submit a proposed revision to a referendum renders the first stage unnecessary or is taken only when this has been completed.

The Article is further inadequate as it does not specify as to how the proposal for revision is to be passed by the Parliament. The term 'identical terms' also lacks clarity as it fails to specify the method of resolving conflict between the two Houses over an amendment proposal. Like the U.S. constitution, there are two limitations imposed on the amendment of the French Constitution.

These are:

(i) The amendment cannot be initiated at a time when the integrity of the nation is under attack, and
(ii) The republican form of the constitution cannot be changed.

7. Republican Constitution

Like the Indian and American constitutions, the French Constitution too is a Republican Constitution. The Head of the State is the President of France who is directly elected by the people of France. Article 6 declares that '[th]e President of the Republic is elected for seven years by direct universal suffrage'.

8. Democratic Constitution

The Constitution of the Fifth Republic provides for a democratic State in its true spirit. All the essential features which constitute a democratic State are present in the French Constitution. These democratic features are: popular sovereignty, universal adult franchise, periodic and free elections, right to form political associations, regular elections, direct elections, secret voting, representativeness responsible and accountable Government, etc. Thus, the French Constitution is a liberal democratic constitution.

9. Mixture of Parliamentary and Presidential Systems of Government

The French Constitution provides for a mixed type of government in France. It combines the features of both Parliamentary and Presidential forms. The President is the Head of the State but he is neither a purely nominal head of the state like the Indian President nor an all-powerful executive like the United States of American President.

(***What are the various highlights in the Constitutional history of France?***). In France, executive powers have been divided between the President and the Prime Minister. The President exercises some real executive powers. The President has been made an arbiter between the Parliament and the Government (Ministry).

Self-Assessment Exercises 1

From the constitution of France, one can easily assert that it is a _ State

A. Traditional States
B. Secular State
C. Religious State

In times of emergency, he becomes very powerful. Normally also, he appoints the Prime Minister and presides over the meetings of the Council of Ministers. Along with this, it has been stated in Article 21 that the Prime Minister is in-charge of the work of Government. He directs the operation of Government. He is responsible for the national defence. He ensures the execution of laws. He deputises for the President of the Republic whenever necessary. He can delegate certain of his functions to the ministers. The Prime Minister and other Ministers are not members of the Parliament (Art 23). However Article 4 makes it responsible before the Parliament. The Parliament can pass a vote of no confidence or a censure motion against the Prime Minister or the Government and can force the Prime Minister to resign forthwith (Article 50). The Prime Minister can also recommend to the President, the need for the dissolution of the Parliament.

Moreover, ministers not members of the Parliament, but they can take part in its work in every way except when the Parliament comes to vote on a measure. Thus, the French executive represents a mixture of Parliamentary and Presidential executives. Brogan has rightly stated:

> The French Constitution is neither a Presidential Constitution of American type nor a Parliamentary Constitution of English type, it is a mixture of the two.

Analyzing the nature of the Parliamentary executive in the Fifth Republic, CF Strong points out that it has two basic features of the parliamentary form: 'That the President should appoint the Prime Minster on whose proposal, he should appoint the other members of the Government' (Article 8) and 'that the Government (Ministry) should be responsible to the Parliament' (Art. 20). To that extent, France under the Fifth Republic has a Parliamentary form.

(***Make a comparison between the French and Indian Constitutions***). However, there are several features which make the system a semi-Presidential system based on the principle of separation of powers. First, the President is now directly elected by the people and enjoys some real executive powers. Second, the ministers are not members of the Parliament and thus are not subject to the discipline of the parties and the pressure of the electors. Third, the President is 'the Chief Executive and active head of State. Fourth, the President has the right to dissolve the Parliament and call for new elections.

Finally, the Constitution gives to the President the authority to take drastic emergency measures when there develops a threat to the institutions of the

Republic, independence of the nation, the integrity of its territory or the execution of its international obligations. These features reflect the 'Presidential nature' of the executive under the Fifth Republic. All these bring out the fact that the French system is neither purely parliamentary nor purely presidential.

10. Bi-cameral Parliament

The Constitution establishes a Bi- Cameral legislature in France. Article 24 declares that 'Parliament is composed of the National Assembly and the Senate'. The National Assembly is the lower, popular, directly elected and more powerful House of the Parliament. The Senate is the upper, less popular, quasi-permanent, indirectly elected and less powerful House. In it, representation has been given to the territorial entities of France and the French citizens residing abroad. In the text of the Constitution, the membership of the two Houses, the tenure of the two Houses, the qualifications and disqualifications of the members of the Parliament, have been left to be decided by organic laws. Under Articles 26 and 27, the members of the Parliament have been given certain privileges.

11. Rights of the French People

In the body of the Constitution, a separate list of the rights and freedoms of the people has not been included. But this does not mean that the French have no rights. The Preamble to the Constitution declares that the French people continue to enjoy all those rights and freedoms which they had been enjoying under the Constitution of 1946 and which had been mentioned in the Declaration of Rights. Moreover, Article I declares the objectives of the Republic as liberty, equality and fraternity and Articles 3 and 4 give them

their political rights viz the right to vote and right to form political associations.

12. Constitutional Council-the Institution for Judicial Review

Under the French Constitution, a special institution has been formed to determine the validity of laws and orders made by the Parliament and the Government. This power, which in other countries like India and the United States of America has been given to the courts, has been given in France to the Constitutional Council. It consists of 9 members, each having tenure of 9 years. One third of the members retire after every three years.

The President of France, the Presidents of both the National Assembly and the Senate nominate 3 members each to the Constitutional Council. In addition to these nine members all former Presidents of the Republic are *ex- officio* life members of the Constitutional Council. The President of the Constitutional Council is appointed by the President of the Republic. This Council has been given the power to judge the constitutionality or unconstitutionality of organic laws before their promulgation and the ordinary laws and the rules of procedure of the parliamentary assemblies before their application. This Council also acts as the Election Commission and the Election Tribunal in parliamentary elections. This is a unique French institution. It has been copied by the Constitution of Russia.

13. Economic and Social Council

Under Title XI and Articles 69, 70 and 71, a new Council—the Economic and Social Council has been created. The Government can seek its advice on any law. Any plan or any Bill of economic and social character can be submitted to it for its opinion. The members of this Council can present their opinions on any Bill which is under discussion in the Parliament.

14. Provisions Regarding Territorial Units of French Republic

The territorial units of the French Republic are: the communes, the departments and the overseas territories. These are self-governing units and each has an elected council. The delegates of the Government of France, have the responsibility to secure national interests and to maintain administrative supervision over the departments and territories. The overseas territories have their own particular organisations. For each such territory an Act of the Government of France lays down the organisation and functions of its administrative organisation.

15. Provisions regarding European Communities and European Union

Title XV (Articles 88-1 to 88-4) contains provisions relating to the French membership of the European Communities and the European Union (EU). France is a member of the European Union and its three communities. It actively participates in the formulation and execution of the policies; and decisions of these communities and the EU. After becoming party to the Treaty on EU on 7th February 1992, France has transferred some of its powers for establishing the European economic and monetary union as well as for the formulation of rules relating to crossing of external borders of the

Member States of the EU. Citizens of the Members States of the European Union, who are residing in France have been given the right to vote and contest elections to the Municipal Councils of the local areas. However, they are not eligible to become Mayors or Deputy Mayors or to get elected as senators. All resolutions of the European Union come before the French Parliament for its approval.

16. System of Administrative Law and Administrative Courts

Article 2 of the Constitution declares equality of all citizens before law. However, as Dicey puts it, a distinction is made between ordinary citizens and civil servants in respect of treatment before law. In France, the civil servants are under Administrative Law and can be used only in Administrative Courts whereas ordinary citizens are under ordinary Laws and are sued in ordinary courts. This feature is in sharp contrast to the system prevailing in Britain and India. In both these countries there is a single system of law enforced by one type of Courts. No difference is made between ordinary citizens and civil servants. Taking into account this difference, Dicey declares that the rule of law does not exist in France. However, Dicey's observation is not really valid.

17. Unitary Constitution: Like Britain, France is also a unitary state. All powers of administration of France have been vested in the Central Government which exercises them for all the people and over whole of the French territory. Local Governments derive their powers not from the Constitution but from the Government of France.

17. Multi-Party System

Like our country Nigeria, in France also a Multi-party System is in operation. The French enjoys the constitutional right to form political associations. Unlike the Indian Constitution which presupposes the existence of political parties but never mentions it, the Constitution of France makes a mention of political parties. Article 4 declares:

> Parties and political groups play a part in the exercise of the right to vote. The right to form parties and their freedom of action are unrestricted. They must respect the principles of national sovereignty and of democracy.

The last sentence constitutes two democratic limitations upon the organisation and activities of political parties. Several political parties are actively present in the French Political System.

From the study of these features of the Constitution of the Fifth Republic France we can say that a bold and constructive attempt has been made by the French acting through their constitution to wipe out the evil of political instability that had previously plagued their political life. The present constitution decidedly constitutes an improvement over all the previous constitutions.

In this Constitution, the framers have tried to put together the experiences of the past. Although it has been labelled by some of the French writers, as: 'Tailor-made for General De Gaulle', 'Quasi-Monarchical', '*Quasi*-Presidential', 'A Parliamentary Empire', 'Unworkable', 'the worst drafted in French Constitutional history', yet it must be admitted on the basis of its working, that it has been successful in giving France a consistently stable Republican Government. The Constitution of the Fifth Republic contains a

good synthesis of the features of Parliamentary and Presidential forms of government. It has already been in operation for about six decades and its practicability has been amply proved.

Initially its biggest defect used to be its incomplete nature because in it, a number of questions were left to be decided by organic laws. That defect is no longer there. A network of organic laws has already supplemented it. It appears quite certain that this Constitution of France is going to live a very long life.

It is evident from this account that the Constitutional development in France is an historical event, a reflection of the society and its people. France had a chequered history which necessitated the various changes in its Constitution.

2.4 Summary

Like the historical account of other countries, we see the Constitutional development of France as a reflection of its people, their feelings, sentiments and opinions.

2.5 References/Further Readings/Web Resources

2.6 Possible Answers to SAEs

SAE. b. Secular State

UNIT 3: Constitutional Development and Structure in South Africa

Contents

3.1 Introduction

In this unit, we shall consider the constitutional development of South Africa.

3.2 Learning Outcomes

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

i. identify the various constitutional developments that took place in South Africa.

3.3 Constitutional Development and Structure in South Africa

3.3.1 The birth of South Africa

The Anglo-Boer War, which began in 1899, resulted in the unification of four independent territories into the Union of South Africa. During this war, many

African people associated themselves with the British in the hope of improving their lot. According to Andre Odendaal, a prominent historian at the University of the Western Cape, 'in stating the reasons for their surrender in the discussions that preceded the Treaty of Vereeniging in May 1902, the Afrikaner leaders gave as a third reason the fact that ‘the Kaffir Tribes’ inside and outside the Republics had almost all been armed and were fighting against them. A fortnight before the Republican surrender, General Botha had declared, ‘The Kaffir question is becoming daily more serious’ (Odendaal, 1984:36).

The Afrikaners were mistaken, however, for at least 37, 472 African people were incarcerated alongside Afrikaners in British concentration camps. The British seemed to have much in common with the Afrikaners. In the Treaty of Vereeniging, Clause 8 simply stated, 'The question of granting the Franchise to natives will not be decided until after the introduction of (Afrikaner) self-government'. (***Briefly explain the cause and result of Anglo-Boer War***). The repeated pleas by African leaders to the British not to compromise the few pitiful rights they had in the Cape were ignored.

On 12 October 1908, exactly nine years after the outbreak of the Anglo-Boer War in 1899, a National Convention of white representatives from the four colonies assembled in Durban. Whites, who were until then at war with each other, united to form a government that excluded the African majority. Two major debates were to dominate the deliberations of these Constitution makers: the 'Native question', and the choice between a federal and a unitary dispensation.

The latter debate cut across the racial divide. For the Afrikaner-ruled republics, a federation would mean that they could maintain their independence, and would not have to succumb to the liberalism of the Cape. The question was also vociferously debated in African newspapers (Izwilabantu, 1907 & Odendaal, 1984:95) and within African organizations. At the first meeting of the South African Native Congress held in August 1907, the members resolved:

That this Conference of the coloured people and natives of the Cape Colony assembly at Queenstown is of the opinion that in the event of the adoption of any form of closer union of the South African colonies:

(a) Federation is preferable to unification.

(b) That form of federation should be adopted in which the Federal Parliament exercises such powers only as are specifically given to it in the Federal Constitution.

(c) The Cape Franchise should be the basis of federal franchise.

(d) The basis of representation of the Federal Parliament should be the voters' list.

(e) The present so-called native territories (Swaziland, Basutoland and British Bechuanaland) should be regarded as outside Federal territory and under the protection of the Imperial government represented by the High Commissioner for such native territories, unless or until provision shall be made for the representation of such territories in the Federal Parliament by members elected on the same basis as in colonies forming the federation (Odendaal, 1984:100).

While African people were not represented in the negotiation of the constitution, they were not prevented from petitioning the convention drafting it. The fear of losing what rights they did hold agitated many African people

and boosted support for the few organizations that represented their interests. Upon the convergence of such interests, African organizations consulted with each other to find ways of influencing the convention. This, in part, laid the basis for a single national organization. In its submission to the convention, the Natal Native Congress declared:

> We Natives of Natal, though loyal subjects of the Crown and sharing the burden of taxation, are labouring under serious disabilities by being excluded from free access to the Franchise, and having no efficient means of making our wants known to Parliament and no say in matters regarding our most vital interests such as taxation and other thing. We humbly beg, with regard to our future Government, for some degree of representation in the Legislature. This would go far to remove all causes of complaint and make the Natives a more contented and devoted people under His Majesty's gracious rule. Any scheme for the Closer Union of the Colonies under the British Crown should include a provision that representation should be accorded fairly to all sections of the community without distinction of colour, and that in Natal, as a precedent to any union with the other Colonies of South Africa, the native population should first be placed in the fair position Natives hold in the Cape Colony (Odendaal, 1984:142).

The report of the National Convention, the draft South Africa Act, was released on 9 February 1909. Anticipating the negative approach of the Constitution makers, the Orange River Colony Native Congress prepared for the first joint convention of Africans from the whole of South Africa, with the aim of formulating and publicizing its views on the union.

The draft South Africa Act was endorsed by the four colonial Parliaments and referred back to the National Convention at the beginning of May that year. However, not all parliamentarians supported it. In a debate in the Cape Parliament, W. P. Schreiner, who was also a supporter of equal rights, made an impassioned plea for non-racialism under the slogan, 'Union with Honour'.

The rights of the coloured people should not be bartered away from any benefit which the Europeans should get. 'Union with honour before all things. There was something pathetic in it that they should take the rights of others away, and make them a matter of bargaining, and say, 'If you do not give them up there will be no Union...' He would stand out of Union rather than given up his trust in the matter. Federation and unification, among others, were questions of detail; but the question stood out as an absolutely essential one. ... Union without honour ... was the greatest danger any nation could incur. (quoted in Odendaal,1984:191-192).

After approval the draft constitution was submitted to Britain for assent by the Imperial Parliament, and African people saw this as a further opportunity to ensure that their interests were consulted. A delegation of leaders, including Schreiner, went to London and presented a petition to the House of Commons. The Bill now before the Parliament of Great Britain and Ireland for the purpose of enacting a Constitution to unite the self-governing British Colonies of South Africa into a legislative union under the Crown would for the first time in the history of the legislation of that Parliament by virtue of the phrase 'of European descent' ... create a political discrimination against non-European subjects of His Majesty, and thus introduce for the first time since the establishment of representative institutions in the year 1852 into the Colony of the Cape of Good Hope a colour line in respect of political rights and privileges. It was however only on 31 May 1910, eight years after the Treaty of Vereeniging, that the Union of South Africa was inaugurated. The Constitution provided for an all-powerful government consisting only of white men, even removing the minimal voting rights which black people had previously held.

The new dispensation was seminal in the development of South Africa's constitutional history. Quite aside from being the first constitution, it gave rise to two parallel streams of constitutional thought would dominate the country's political and social history. One stream of thought developed within the framework of the established status quo, while the other was shaped by the struggle of the majority for a system free of discrimination.

This Constitution allowed the government to quickly introduce a series of legislative measures, including the infamous 1913 Land Act, effectively to dispossess and disenfranchise African people. The response of the African people was to unite under a single body that would pursue their interests. One of the pioneers in this regard was Pixley KaIsakaSeme, a lawyer trained in Britain, who immediately set about the establishment of a 'Native Union'. He called for a congress that would get 'all the dark races of this subcontinent to come together, once or twice a year, in order to review the past and reject therein all those things which have retarded our progress'. He made a significant appeal for the unity of the African people: 'The demon of racialism, the aberrations of the Xhosa-Fingo feud, the animosity that exists between the Zulus and the T[s]ongas, between Basothosand every native, must be buried up and forgotten; it has shed among us sufficient blood. We are one people. These divisions, these jealousies are the cause of all our woes and all our backwardness and ignorance today'. (Rive &Couzens, 1991: 9-10 & Walshe,1971:33) The call made by Seme was answered with the formation of the African National Congress (ANC) on 8 January 1912. The birth of the ANC provided the African majority with a united leadership that articulated their plight and led their resistance, but more importantly, it provided African people with a vision of a better life. Almost invariably the struggles they fought were

against a constitutional dispensation that provided the legal basis for their oppression. Accordingly, their vision also included a just and democratic constitutional dispensation.

3.3.2 The Rise of Nationalism

The Union of South Africa also meant economic cohesion between previously separate and competing economies, affording the British-owned mines greater access to cheaper labour and the ability to transport their goods to harbours for international export. As a result, constitutional and legislative development focused on the restriction of social interaction, and limited the access of African people to skills and the market to such an extent that they became no more than cheap labour. Along with industrialization and the development of the economy came urbanization, greater segregationist laws, and a growing militancy among workers.

This economic boom was soon threatened by a post-war economic crisis, which resulted in great social upheaval. An example of this crisis was the drop in the price of gold from 130 shillings an ounce in 1919 to 95 shillings in 1921. To maintain profitability, the Chamber of Mines decided to reduce its white work force by employing semi-skilled black workers at lower rates of pay, inadvertently fostering conflict between black and white workers.

Politically, the formation of the Union of South Africa made possible the development of nationalism among white and black people alike. The previously separate African tribes were presented with a common authority that sought to disenfranchise them; in other words, they now had one enemy.

The Union's new dispensation also paved the way for an economy that was increasingly dependent on a common working class. As a result, this period also saw the rise of the South African Communist Party (SACP), which already had a growing base amongst the white working class. In December 1928 the SACP formulated a new rallying call: A South African Native Republic as a stage towards workers' and peasants' government with full protection and equal rights for all national minorities'.

The 'Native Republic' thesis was developed after the Communist International discussed the situation in South Africa at its sixth congress. The concept was developed further by the South African Communist Party. The annual report of the party dated 31 January 1929 dealt with the 'Native Republic' thesis. Its programme issued on 1 January 1929 clearly reflects how the adoption of this thesis translated into actual demands.

This was the seed for the concept of majority rule in South Africa, and it provided a basis for the theoretical development of the African nationalism that would develop in the following years. It was based on the following argument. The overwhelming majority of the population is made up of Negroes and coloured people (about 5 500 000 Negroes and coloured people and about 1 500 000 white people according to the 1921 census). A characteristic feature of the colonial type of the country is the almost complete landlessness of the Negro population: the Negroes hold only one-eighth of the land whilst seven-eighths have been expropriated by the white population. There is no Negro bourgeoisie as a class, apart from individual Negroes engaged in trading and a thin strata of Negro intellectuals who do not play any essential role in the economic and political life of the country The Negroes constitute also the

majority of the working class: among the workers employed in industry and transport, 420 000 are black and coloured people and 145 000 white; among agricultural labourers 435 000 are black and 50 000 are white. (Extract from a resolution on 'The South Africa Question' adopted by the executive committee of the Communist International following the Sixth Comintern Congress).

The social transformation brought about by the replacement of expensive white, particularly Afrikaner labour with cheaper black labour saw the development of a growing number of poor whites. White people demanded further segregation and job reservation laws, and these demands in turn encouraged the development of Afrikaner nationalism. At the same time, the development of an urban African working class allowed for greater unity.

3.3.3 The Development of a Vision

In August 1941, Franklin D. Roosevelt and Winston Churchill signed the Atlantic Charter. This agreement contained eight principles: renunciation of territorial aggression; no territorial changes without consent of the peoples concerned; restoration of sovereign rights and self-government; access to raw materials for all nations; world economic co-operation; freedom from fear and want; freedom of the seas; and the disarmament of aggressors. These principles inspired the emerging African nationalists of South Africa, for it raised the general issue of basic rights and, more particularly, the question of self-determination. Drawing from the Atlantic Charter, the ANC drafted its own 'African Claims', which demanded full citizenship, the right to land, and an end to all discriminatory legislation. This was the first time that the concepts of fundamental rights or self-determination were considered demands.

The Atlantic Charter was an Anglo-American statement of common principles issued on 14 August 1941 by United States President, Franklin D Roosevelt, and British Prime Minister, Winston Churchill. They had conferred for four days (9-12 August) abord the USS Augusta off Newfoundland. Although the United States had not yet entered World War II, the statement became an unofficial manifesto of American and British aims in war and peace. The Charter's principles were endorsed by 26 allies in the United Nations Declaration signed in Washington D
C on 1 January 1942.

In 1948 the National Party (NP) came to power, introduced the policy of apartheid, and enacted such notorious laws as the Suppression of Communism Act, the Group Areas Act, the Separate Registration of Voters Act, the Bantu Authorities Act, the Pass Laws, and the Stock Limitation Laws. Apartheid provoked resistance. In response to these laws, the African, coloured, and Indian people found cause to unite in action, and launched a defiance campaign in 1952. The campaign commenced on 6 April 1952, the 300th anniversary of the arrival of van Riebeeck, a leader of the first Dutch settlers in South Africa.

On 26 June 1955 the Congress of the People took place, a meeting to which all political parties were invited. After nation-wide consultation, several thousand delegates met in Johannesburg to draft the Freedom Charter, which was in effect the first draft of a new constitution for South Africa. The political movement of the oppressed majority had finally matured, graduating from a simple opposition to a movement with leadership and solutions. This Charter,

particularly its opening paragraph, sketched a vision of what the country's political landscape ought to be, a vision that was to become deeply etched in the thinking of several generations of political leaders. The inspiration provided by the Charter can be seen clearly in the drafting of the final Constitution. Its opening paragraph states:

> We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief.

3.3.4 The Demand for a National Convention

In May 1957 the ANC President-General, Albert Luthuli, made an impassioned appeal for a national convention that would allow representatives from all sections of the population to meet to discuss the conflict and look at solutions. His appeal was ignored.

On 16 December 1960 a Consultative Conference of African Leaders was held in Orlando, Soweto, when forty African leaders met with liberal and progressive whites. This conference rejected the establishment of a republic and made a call to the African leadership to attend an 'all-in conference', with the purpose of demanding a call for a nation convention. This convention had to be representative of the people South Africa, and it had to consider a new political dispensation and individual fundamental rights.

On 25 March 1961 the All-in Conference met and called for the negotiation of a democratic dispensation. Fourteen hundred delegates from all over the country representing 150 different religious, social, cultural, and political bodies gathered. At this conference, Nelson Mandela's call for a national convention of elected representatives to determine a new non-racial democratic constitution for South Africa was adopted. The Conference resolved that:

> 1. WE DECLARE that no constitution or form of government decided without the participation of the African people who form an absolute majority of the population can enjoy moral validity or merit support either within South Africa or beyond its borders.
>
> 2. WE DEMAND that a National Convention of elected representatives of all adult men and women on an equal basis irrespective of race, colour, creed or other limitation, be called by the Union government not later than 31 May 1961; that the convention shall have sovereign powers to determine, in any way the majority of the representatives decide, a new non-racial democratic constitution for South Africa. (Karis & Carter, 1977)

The Conference also directed Mandela to draw Prime Hendrik Verwoerd's attention to the resolution. In a letter to the Prime Minister, Mandela referred to the rising tide of unrest in many parts of the country, and stated that 'It was the earnest opinion of the Conference that this dangerous situation could be averted only by calling of a sovereign national convention representative of Africans, to draw up a new non-racial and democratic Constitution. Such a convention would discuss our national problems in a sober manner, and would work out solutions which sought to preserve and safeguard the interests of all sections of the population.

Unfortunately, this call, like Luthuli's, went unheeded. In an attempt to gain further support for the idea, Mandela addressed a further letter to the leader of the parliamentary opposition, Sir de Villiers Graaf:

> We can see no workable alternative to this proposal, except that the Nationalist Government proceeds to enforce a minority decision on all of us, with the certain consequence of still deeper crisis, and a continuing period of strife and disaster ahead. Stated bluntly, the alternatives appear to be these: talk it out, or shoot it out. Outside of the Nationalist Party, most of the important influential bodies of public opinion have clearly decided to talk it out. The South African Indian Congress, the only substantial Indian community organisation, has welcomed and endorsed the call for a National Convention. So, too have the Coloured people through the Coloured Convention movement which has backing of the main bodies of Coloured opinion. A substantial European body of opinion, represented by both the Progressive and the Liberal Parties, has endorsed our call. Support for a National Convention has come also from the bulk of the English language press, from several national church organisations, and from many others.

'But where, Sir does the United Party stand? We have yet to hear from this most important organisation-the main organisation in fact of anti-Nationalist opinion amongst the European community; or from you, its leader. If the country's leading statesmen fail to lead at this moment, then the worst is inevitable. It is time for you, Sir, and your Party, to speak out. Are you for a democratic and peaceable solution to our problems? Are you, therefore, for a National Convention? We in South Africa and the world outside expect an answer. Silence at this time enables Dr. Verwoerd to lead us onwards towards the brink of disaster'.

This appeal also came to naught, and the tension in the country had reached breaking point. A successful national general strike was called with the start of

a massive defiance campaign, during which more than 10 000 people were arrested. There were clear signs of frustration on the part of the African nationalists. The change of tone between the letters by Luthuli in 1957 and those of Mandela in 1961 clearly reflect a growing militancy in ANC thinking. On 31 May 1961 the Government, after holding a whites-only referendum, declared South Africa a Republic.

This marked a decisive break in South Africa's history, for the country was to slide into an armed conflict lasting 30 years. Instead of heeding the advice of the All-in Conference, the Government banned the ANC and other organizations, and left them with no legal avenue to pursue their interests. They found they had no option but to resort to armed struggle. The ANC had been transformed from a non-violent African nationalist organization into a revolutionary liberation movement. By 1964, most of the ANC's leaders were jailed and the resistance seemed effectively silenced. However, this silence did not last.

The ANC's 'Guidelines on Strategy and Tactics', which was produced at the organization's National Conference in Morogoro, Tanzania, in 1969 provides a clear explanation of the revolutionary armed strategy the ANC was to pursue.

3.3.5 The Politics of Reform and Repression

In June 1976 the government met its fiercest resistance yet from students protesting against the imposition of Afrikaans as a medium of education. Several hundred students were killed in the uprisings that ensued and South Africa became a focus of attention throughout the world as apartheid was condemned internationally. Thousands left the country to join the liberation

movements, and the armed struggle gained momentum. The Government was obliged to prove willingness to reform.

Upon coming to power in 1978, Prime Minister (and later President) P. W. Botha began reorganizing the state. One of the significant developments was the creation of a new Government department, Department of Constitutional Development and Planning. This department was mandated to introduce 'reforms' while the security establishment took over the major strategic decision-making responsibilities of the state (Swilling & Phillips,1989:114). This unusual delegation of tasks was given effect through the creation of a multi-tiered, interdepartmental structure dominated by the military but staffed by civilians, called the National Security Management System (NSMS). The role of the NSMS was to address economic and social problems in local 'hotspots', in a designed to win the support of the populace in a given area. The idea was that this would isolate those responsible for 'political unrest' and leave them to the mercy of the State's repressive might.

As part of Botha's reform strategy, the next major constitutional development took place in 1983, in the form of a new Tricameral Parliament and a President's Council. Parliament was made up of three houses: the white House of Assembly, the coloured House of Representatives, and the Indian House of Delegates. Africans were excluded from this dispensation. Differences between the three houses were referred to the President's Council.

Botha's regime was characterized by a dual approach to the growing militancy of the anti-apartheid forces - reform and repression. It was a method informed by Botha's militarized style of government, learnt while in office as Minister

of Defence, and drawing on the strategies of the military dictatorships of Latin America.

The NSMS, which was initiated in 1979, and the 1983 constitution reforms initiated by Chris Heunis, Minister of Constitutional Affairs and planning, were manifestations of a shift in National Party (NP) thinking and strategy. While maintaining the apartheid project, the NP had begun to focus more closely on other cleavages that could be exploited within the black community. The reform packages that characterized the 1980s were aimed at creating a group of 'urban insiders', which were small, privileged African elite who could act as a buffer against the majority of black South Africans (Cock & Nathan, 1989:139). This was the aim that informed both the Riekert and Wiehahn Commissions and the 1983 Constitution.

The reform and repression approach employed by the NP, at its most sophisticated in the form of the NSMS, created a brief respite for the Botha regime, for it was able to quell some of the political turmoil of the mid-eighties, and to illustrate the sophisticated might of the apartheid state. In retrospect, it appears that at this point in South Africa's history an impasse had been reached. The NSMS clearly showed the military might of the South African regime, ruling out the possibility of any successful military victory by the anti-apartheid forces. On the other hand, real tensions were developing within the state itself as political reformers began plotting different trajectories for South Africa's future.

The strategy of reform and repression had only limited success. Armed resistance intensified, and by 1984 armed actions had risen to an average of

fifty operations per year. In 1985 the ANC first deployed landmines and began to develop a presence in rural areas. The organization declared 1986 the year of the people's army, Umkhonto we Sizwe (MK). As alternative township structures, street committees, and people's courts began functioning in many areas, the state, whose agenda was dominated by insurrectionary politics, was struggling to govern much of the country. The next step for the resistance was 'the transformation of armed propaganda into a people's war'. The Bethal trial of ANC underground activists exposed the elaborate plans the ANC had developed for its revolutionary warfare (Moss,1988:3). From 1986 onwards the number of attacks rose to between 250 and 300 per year. It was also during this period that a vigorous debate arose within the liberation movement between those who argued for an 'insurrectionary people's war' and those who wanted a war to force the regime to the negotiating table (Lodge,1989:42).

3.3.6 The Search for Constitutional Solutions

It was in this context that the first exploratory discussions began in 1985 between Nelson Mandela and representatives of P. W. Botha's government. It had become apparent to Botha that the crisis in South Africa was reaching unmanageable proportions, and that drastic political changes had to take place. He also realized that constitutional changes would have to include representatives of the black majority. In August 1985 he was confronted with a choice between two broad approaches: he could release political leaders and start a process of genuine negotiation, or he could consult with representatives hand-picked by himself in a process that he could manage, and be reasonably certain of a satisfactory outcome. Botha was not bold enough for negotiation, and chose the latter; he was not yet prepared to cross the Rubicon. However, this arrogance did not last much longer.

The period saw a similar attitude in South Africa's relationship with its neighbours. Until the first quarter of 1988 South Africa carried out a brutal campaign of aggression and destabilization against its Southern African counterparts. However, the balance of forces in the region was to be altered by a historic military defeat suffered by the South African Defence Force (SADF) that year at Cuito Caunavale in Angola. The defeat proved that South Africa's military might was not invincible after all. The effect was immediate: 'In the first week of May, South African negotiators travelled to London for the first of several rounds of talks on Angola and Namibia with officials from Angola, Cuba and United States. These resulted in an agreement over the withdrawal of SADF troops from Angola (completed on 30 August 1988), followed by accords signed in Brazzaville and New York (on 13 and 22 December respectively) providing for Namibia to begin its transition to independence in accordance with United Nations Security Council Resolution 435 of 1978 on 1 April 1989' (Davies,1989:155).

Botha now had further incentives to seek solutions to the crisis. On 21 April 1988 he outlined a new constitutional framework for the country based on a federal or confederal structure that would enable black people to be co-opted into the political process as far as the cabinet. The proposal included: the creation of black regional bodies representing black people outside the homelands; the appointment of a prime minister; that 'recognizable' black leaders be co-opted as cabinet members; the establishment of a national council referred to as the 'Great Indaba' ('indaba' is Zulu for a gathering or council); and the downgrading of the President's Council to a part-time body. Part of the

responsibility of the 'Indaba' would be to negotiate a new constitution for consideration by the white Parliament.

Self-Assessment Exercises

Why do you think the white limited and regulated the African access to skill and market?

3.3.7 The Demand for a Negotiated Settlement

Two overriding principles shaped Botha's proposals: the first was the NP's determination to retain political control, and the second, to continue the separation of races. Whites would continue to control all decision-making structures, which were essentially undemocratic. The result was that the proposals were roundly condemned. Until this stage, the demands made by the anti-apartheid movement had been for the release of political prisoners, free political activity, the unbanning of political organizations and a universal franchise. What changed was the reintroduction of a demand first made in March 1960 for the negotiation of a new constitutional dispensation with the true representatives of the people.

The Government's constitutional proposals took shape during June and July 1988 when a package of several bills was introduced. Among these were the Promotion of Constitutional Development Act, the Extension of Political Participation Bill, the Group Areas Amendment Bill, the Free Settlement Areas Bill, and the Local Government Affairs in Free Settlement Areas Bill. The

primary purpose of the reforms brought about by these laws was to strengthen the hand of 'moderate' black people and pave the way for their involvement in the constitution-making process. Black 'moderates' had a great deal to gain by these proposals, for it provided them with unprecedented powers over townships. The lifting of restrictions imposed by the Group Areas Act would appease a significant number of moderate coloured and Indian people, and it was hoped that the changes brought about by these reforms would also make it possible for moderate black leaders to participate in the proposed national council. The objective of this council would be to produce a constitution that would win the hearts and minds of the majority.

But this was not to be, for a constitutional crisis developed when the Houses of Representatives and Delegates, in a move that amounted to filibustering, refused to allow debate on the Group Areas Act. The Government's response was to change the rules of Parliament and force the legislation through, raising a storm of protest. Botha failed to obtain the support of even moderate black leaders.

At the same time, political parties both inside and outside the country were revising their views on a constitution for the country After two years work, the ANC published the main provisions of constitutional vision, which included the establishment of a democratic state that guaranteed rights and freedoms on the one hand, and promoted affirmative action on the other.

The constitutional vision of the Progressive Federal Party (PFP) was also being reviewed. Its policy proposed a Government based on geographic federation with universal franchise, but with various checks and balances to prevent

majority rule, including a bill of rights and a minority veto over cabinet decisions. The PFP also saw the constitutional dispensation negotiated at a national convention.

In August 1988 the spotlight fell on Mandela when he was hospitalized with tuberculosis at Tygerberg Hospital, and speculation about the release of political prisoners and the unbanning of the ANC intensified. In the meantime, a power struggle was taking place with the NP: Botha's ill health provided an opportunity for the party to look to new leadership in the figure of F.W. de Klerk. Soon after taking over, De Klerk committed himself to seeking a new Constitution that would offer 'full participation' to all South Africans in a new federal constitutional dispensation. Its goals would be to eliminate the domination of any one group by another; the maintenance of community life in a non-discriminatory manner; a strong economy based on free enterprise and competition; social and economic upliftment for the communities suffering backlogs; and the firm maintenance of law and order. In this regard, he recognized the need for inclusive negotiation among the leaders of the different parties. However, De Klerk remained implacably opposed to a one-person-one-vote system, which he argued would lead to domination by the majority.

The Minister of Constitutional Development and Planning, Chris Heunis, voiced similar sentiments as the white electorate prepared to go to the polls on 6 September of that year. This election provided De Klerk's Government with a mandate to proceed with the new constitutional proposals; it was also to be the last whites-only general election. The demand for constitutional negotiation was developing a momentum of its own. Contemporary events in Eastern Europe around the 'collapse' of communism were also relevant: the

world seemed to be going through a process of tremendous and far-reaching change, and South Africa was an integral part of it.

To prepare for the forthcoming elections, the NP on 29 June 1989 published its five-year plan. There was a deliberate lack of detail in its provisions. It confined itself to general statements that pointed to various reforms, such as a bill of rights which allowed for group rights; the engagement of 'recognised leaders of all groups' to negotiate a new dispensation; a review of the functions and powers of the Head of State; the promotion of 'self-determination regarding own affairs', along with joint decision-making on 'general affairs', by means of the division and devolution of power in a non-discriminatory manner; and a vote for black people within five years. Despite the lack of detail, the policies of the NP were beginning to look more like those of the Democratic Party (DP), the recently remade and renamed PFP. Most importantly, the NP had started to question many of its own earlier beliefs.

Black leaders rejected the plan, insisting that apartheid be scrapped altogether to create a climate conducive to negotiation. The plan also received attention in the British media, and they too were disappointed. According to an editorial in the Star:

> The Nationalist Government is chasing a train that has already left the station. Where it intends to be five years from now is where it should have been a decade ago'. However, the positive aspect was that 'The plan envisages negotiation with black South Africans and it offers black people a vote at national level within five years. This is an encouraging shift, especially following years of oppressive apartheid and erosion of the rule of law.

By this time, influential sectors in society, including business, religious bodies, youth organizations, and academics were holding consultations with the ANC

in various African countries in defiance of South African law. These meetings considered issues such as violence, sanctions, constitutional models, the economy, and the role of whites in the transformation and future of South Africa, issues that the South African public was debating and wanted leadership on. The NP lacked the boldness or confidence required to provide such leadership, and hesitated in breaking with its apartheid past and its obsession with group rights.

Nonetheless, the 1989 election was a resounding success for De Klerk, one which he interpreted as a mandate for reform. In the second week of September De Klerk felt confident enough to allow a protest march by 30 000 people on the city hall in Cape Town, led by Archbishop Desmond Tutu and Alan Boesak, a cleric and prominent leader in the United Democratic Front. This marked the relaxation of restrictions on protest action, and 'petty apartheid' legislation was no longer stringently enforced.

In another development, the Department of Constitutional Development and Planning was streamlined under the leadership of Gerrit Viljoen to deal specifically with the process of negotiation. He was the leader of the Broederbond and the Government's chief ideologue, negotiator, and spokesperson on constitutional matters. He was one of the most influential people in the shaping of the development of Government and National Party strategy. The Department began looking at various constitutional models, and all major Government speeches now spoke of a 'new South Africa'. The continued state of emergency, incarceration of political prisoners, and ban on a number of political parties, however, remained obstacles in the way of negotiation. There was a determination to effect certain changes, and for these De Klerk had the public support of Dr Zach de Beer, the leader of the Democratic Party.

The beginning of October 1989 saw the Government's international allies intensify the pressure for change. British Prime Minister Margaret Thatcher looked to the South African government to provide her with sufficient grounds to stave off demands made by Commonwealth leaders for tougher sanctions. In the United States of America, the Assistant Secretary of State, Herman Cohen, set out state policy options on South Africa, which included demands that the South African Government unban political parties, lift the state of emergency, allow for the return of exiles, remove all discriminatory legislation, and begin negotiating with credible black leaders on a new constitutional order by June 1990. Internally, even the Inkatha Freedom Party (IFP) refused to negotiate until these obstacles were removed. Weeks later, the government unconditionally released several senior political prisoners.

One of the difficulties the Government faced was recognizing the ANC as a major negotiating partner. Hence, the Government's chief negotiator, Gerrit Viljoen, mooted the idea of an election among black people outside the homelands to choose their negotiating leaders, a proposal which the Mass Democratic Movement (MDM) and other major organizations immediately rejected. Walter Sisulu, one of the ANC leaders released in October 1989, denounced the Government's plan to lift the State of emergency and to repeal the Separate Amenities Act as not enough to start a process of genuine negotiation. According to him, in order to create a basis for discussions the government had to release political prisoners, unban organizations like the ANC, withdraw troops from the townships, and scrap all undemocratic laws. He described Gerrit Viljoen's plans to hold elections to identify black leaders as ridiculous, and even the homeland leaders were opposed to this idea.

On 10 November 1989 a high-powered delegation of business leaders from the Associated Chambers of Commerce and Industry (ASSOCOM) met with De Klerk to urge him to speed up the process of constitutional reform. The accumulated pressure of South Africa's political crisis, right-wing resistance, economic concerns, the changing political situation in Eastern Europe, and the international community led De Klerk to the inescapable conclusion that clinging to power would only lead to a bloody conflict. Thus, in November 1989, he called for an accord among all peoples of the country that would offer full political rights to everyone. He argued that nowhere in the world had a minority been able to cling to power without facing a revolution. The demand for the creation of a climate conducive to negotiation could not be refused: there was simply no other option open to the Government.

The pressure on De Klerk did not let up. By early December critics in the United States were still not convinced that the changes were sufficient, and regarded them as merely cosmetic. De Klerk sought to lower the expectations made of his Government and asked for greater latitude, arguing that his Government was different from that of his predecessor, and that, only a few months in power, he needed time to effect change.

To add to the woes of the South African Government, the United Nations (UN) General Assembly was to hold a special session from 12 to 14 December 1989 to consider a Declaration on apartheid and its destructive consequences for Southern Africa. The twelve leaders the European Community (EC) also met in Strasbourg, and after a two-day summit issued a Declaration adopting economic measures to ban the promotion of tourism to South Africa and the

import of certain South African goods. While De Klerk's commitment to reform was recognized, it was stated that 'these measures, however, are insufficient with respect to the immense task posed by the dismantling of apartheid'.

In response to the mounting pressure, De Klerk and his cabinet held a special work session on 4 and 5 December 1989. Some of the matters considered included the release of Mandela and other prisoners, unbanning of political organizations, constitutional proposals, and the announcement De Klerk was to make at the opening of the new parliamentary session on 2 February 1990. After this meeting Minister of Constitutional Development and Planning, GerritViljoen declared that group rights were no longer a non-negotiable demand the government in constitutional negotiation. This was one of the most significant policy shifts in NP thinking.

The momentum generated by the demand for constitutional negotiation was further intensified by the Conference for a Democratic Future that started its work on 8 December 1989. The Conference, organized by the Mass Democratic Movement (MDM), was attended by more than 6 000 delegates from the country representing 2 000 organizations. Even eleven affiliates of the National Congress of Trade Unions (NACTU), an Africanist Union Federation, defied its central Committee and attended the Conference. Parties and leaders from various homelands were also present.

Speaking at the Conference's opening session, Walter Sisulu invited De Klerk to attend its deliberations and urged the Government to abandon the ideas of a 'Great Indaba' and a 'black election'. He confirmed the commitment of the

United Democratic Front (UDF), MDM, and civil society to the demands set out in the Harare Declaration, and called on the government to create the necessary climate for negotiation to take place. The Conference adopted a Resolution and recommitted delegates to intensify the pressure on the Government to commit itself to genuine negotiation. A call was also made to the international community to maintain the pressure already mounted on the South African Government.

The history of constitutional development spans nine decades between two major milestones, both peace treaties that ended conflict and gave birth to new constitutional orders. The first was the Treaty of Vereeniging of 31 May 1902, which ended the Anglo-Boer War and laid the basis for the adoption of South Africa's first Constitution. This Constitution was drafted in an unrepresentative Convention. The second was the 1993 Interim Constitution, which has also been described as a peace treaty that ended conflict. Like the previous peace treaty, it laid the basis for a new Constitution, only this time it was to be drafted in a democratically elected Convention, the Constitutional Assembly. There have been four Constitutions in South Africa.

In 1910, Britain decided to withdraw from the Government of South Africa and handed the country over to the white residents of South Africa. These people were the British settlers and the Boers. The first Constitution for the Union of South Africa was adopted in 1910. This gave rights to the white minority but took away the right to vote of the majority of South Africans.

In 1960 the white Government held a referendum to decide whether South Africa would become a Republic. On 31 May 1961 South Africa was declared

a Republic and the Government adopted the second Constitution. This also took away the rights of black people.

In 1983 the government passed the third Constitution. This Constitution created the tricameral parliament, which meant there was a separate Parliament for the White, Coloured and Indian groups. This Constitution excluded black people and automatically made them citizens of the homeland where they were born. They had no rights outside these homelands.

In 1994, twenty-six parties negotiated and adopted an interim Constitution that gave the vote to everyone. This Constitution lasted for two years. During that time the elected Government worked as the Constitutional Assembly and had to draw up a final Constitution.

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3.5 Possible Answers to SAEs

The white refused to expose African to required skills and market in order to continue to have cheap labour offered by Africans.

UNIT 4: Constitutional Development and Structure in India

Contents

4.1 Introduction

In this unit, we shall consider the Constitutional development of India.

4.2 Learning Outcomes

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

i. identify the various constitutional developments that took place in India.

4.3 Constitutional Development and Structure in India

4.3.1 Historical Development of Indian Constitution

A careful study of the Indian Constitution reveals at least eight essential principles which are embodied in it, just like every other Constitution, including that of Nigeria. These include:

i. Sovereignty;
ii. Socialism;
iii. Secularism;
iv. Directive Principles of State Policy;
v. Fundamental rights;
vi. Independence of the Judiciary;
vii. Centralism (Note that Nigeria practices Federalism);
viii. Cabinet administration (Nigeria operates a Presidential system).

On the 15th of August, 1947, India gained independence from British rule. That was 13 years before Nigeria's independence (also from Britain) on 1st October, 1960. On 26th January, 1950, India adopted a Constitution and became a sovereign State.

Self-Assessment Exercise

Mention at least any two significant changes the Pitts India Act of 1784 introduced.

4.3.2 Background of The Indian Constitution

The Portuguese were the first to visit India. Thereafter the Dutch, the French and the British merchants became the rivals of the Portuguese in India. The British arrived in India as traders in 1600 under the name of the East India Company. (**Identify at least, four essential principles embedded in Indian Constitution**). The British defeated their rivals and became rulers in India. They implemented a policy of conquest, annexation and consolidation. After the death of Aurangzeb, the Mughal emperor who ruled India for 49years, in 1707, the British company took active interest in Indian politics.

Britain imperialistic approach to rule India became evident after the battle of Plassey in 1757. In that battle, the British defeated Siraj-Ud-Daulah, Nawab of Bengal. They conspired with Siraj-Ud-Daulah's army Chief Mir Jafar. With the Battle of Buxar (1764) and the annexation of Punjab (1849), the British established imperialism in India.

Constitutional reforms were introduced during the British imperialism. The Regulating Act of 1773 and the Pitts India Act of 1784 were passed. By the Regulating Act, the Governor of Bengal was made the Governor General. Warren Hastings was the first to be appointed to that role.

Secondly, an executive 4-man committee was created to assist the Governor General. Thirdly, a Supreme Court was set up at Calcutta and a Chief Justice and three judges were appointed. Fourthly, the number of Directors of the East India Company was fixed at 24. The Regulating Act also initiated the process of centralization in India. (***What brought about the termination of the Rule of the East Indian Company?***)

4.3.3 The Pitts India Act of 1784

The Act introduced significant changes among which were as follows:

a. The number of members of the Governor General's committee was reduced from four to three, and the Commander-in-Chief was to be one of them.
b. A Special Court was established for fair trial of the East Indian Company's officials in England in respect of offences committed by them in India.

The Rule of the East Indian Company was terminated in the year 1858 when the Indian Committee Act was passed by the British Indian Parliament. By that Act, the power to govern India was transferred from the company to the Crown and India was to be governed by and in the name of Her Majesty.

In 1861, the British Indian Parliament passed the Indian Councils Act (1861). The Act created devolution of powers in India. Also, the Act increased the membership of the Governor General's Executive Committee from four to five. The Act restored the legislative members of the Bombay and Madras Government.

Another Act was passed by the British Indian Parliament in 1892. The 1892 Act, known as Indian Committee Act, introduced the principle of indirect election. By the Act, the elected members could ask questions and seek information from the Government.

4.3.4 The Indian Committee Act of 1909

Mostly known as Morley-Minto Reforms of 1909, the Indian Committee Act remains a significant Act in the Constitutional history of India for the following reasons:

a. It enlarged the size of the Central and Regional Legislative Committees to 60 in the Central Legislature and the Regional Legislative Committees were to consist of 30 to 50 members;
b. It increased the powers and functions of the Central and Regional Committees;
c. It provided for the appointment of an Indian member in the Executive Committee of the Governor General;
d. It introduced communal representation.

4.3.5 Government of India Act 1919

Also known as Montague-Chelmsford Reforms, the 1919 Act made several important changes in the Central and Regional Government:

a. The Act introduced a bicameral legislature at the Centre: The Legislative Assembly (Lower house) and Committee of States (Upper House);
b. The Act set the term of office for the two houses to five and three years respectively. It however vested power in the Governor General to alter the term.
c. The Act increased the powers and functions of both houses.

d. The number of the Indians in the Executive committee was raised from one to three.
e. The Act introduced the system of direct election

4.3.6 Government of India Act 1935

The Government of India Act of 1935 proposed a Federal system of Government. It provided a bicameral legislature at the Centre consisting of Central assembly (Lower House) and Committee of States (Upper House). Of the 375 members of the Central assembly, 125 were from the Indian States, while the remaining 250 were elected by the People of British Provinces.

The Upper House consisted of 260 members; 250 were elected from the British provinces, 104 were nominated by the rulers of the States and 6 were nominated by the Governor-General.

The 1935 Act introduced Diarchy system at the Centre**.** The Central Subjects were divided into the Reserved and the Transferred subjects. The Act provided Division of powers by creating Central list; Regional List, Concurrent List and also a provision for Residuary Subjects. 59 subjects were included in Central List consisting of Defense, Currency and Coinage, post and Telegraphs, Foreign Affairs etc. Regional List included 54 subjects such as Police, Government of Justice, Education, Agriculture, Industry, Land revenue etc. There were 36 subjects in Concurrent list. These were Newspaper and Printing Press, Marriage and Divorce, registration, Criminal Procedure Code etc. The subjects who were not included in any of the above lists were residuary subjects. They were looked after by the Governor General. The Act established a Central Court at Delhi. Central Court was to decide inter-state disputes and heard appeals against the decisions of the High Courts. The system of Dyarchy was replaced by the Regional autonomy in the Provinces. The Act introduced

a bicameral legislature (viz, Legislative Assembly and Legislative Committee) in six out of total eleven provinces. These six provinces were- Bengal, Bihar, Bombay, Uttar Pradesh, Madras and Assam. Rest five Provinces Punjab, Central Provinces, Orissa, and North-West Frontier Provinces (NWFP) and Sind were to have Legislative Assembly only. The Legislative Committee was the Upper Chamber and the Legislative Assembly was the Lower Chamber. The Legislative Committee was to be a permanent body and one third of its members were to retire every three years. The members of the Legislative Assembly were elected for five years. Governor was the executive head of the Provinces. The India Committee of the Secretary of State for India was replaced by an Advisory Committee. A Central Public Service Commission was established.

4.4 Summary

The members of the Legislative Assembly were elected for five years. Governor was the executive head of the Provinces. The India Committee of the Secretary of State for India was replaced by an Advisory Committee. A Central Public Service Commission was established.

4.5 References/Further Readings/Web Resources

4.6 Possible Answers to SAEs

The major changes introduced by the Pitts India Act of 1784 are:

a. The number of members of the Governor General's committee was reduced from four to three, and the Commander-in-Chief was to be one of them.

b. A Special Court was established for fair trial of the East Indian Company's officials in England in respect of offences committed by them in India.

MODULE 4: SYSTEMS OF GOVERNMENT

Unit 1 **Federal System of Government**

Unit 2 **Unitary System of Government**

Unit 3 **Presidential and Parliamentary Systems**

Unit 4 **Constitutional Autochthony and Diarchy System Of Government**

Unit 1: Federal System of Government Contents

1.1 Introduction

This module deals with the Systems of Government in Nigeria. In this unit, we will consider the Federal system of Government.

1.2 Learning Outcomes

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

i. Explain the Federal system of Government.

1.3 Federal System of Government Contents

Nigeria is a Federation comprising of 36 States and the Federal Capital Territory. Section 1 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, 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;

> In fact, this measure represents 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. (see Sokefun, Constitutional Law through the Cases)

The Richard's Constitution came into force on 1st of January 1947, and was pre-eminent concerned with how many units should comprise the Federal union 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 regions. (***Briefly explain the term 'Federal System of Government' making mention of Littleton Constitution)***. However, this Constitution was basically a Unitary Constitution giving extensive power and authority to the Central Government over regions. The legislative power of the central legislature was unlimited. It extended even to matters assigned to the regions. There was also 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 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 Modification) Decree No. 34 of 1966. Section 1 of the Decree stated 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 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, 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 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.

1.3.1 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 (ie 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.

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 to but difficult task of maintaining unity while also preserving diversity.

The definition of 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?

1.3.1.1 Characteristics of A Federal System 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 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 federation.

According to Section 1(1) of the 1999 Constitution of Nigeria, the "…. Constitution is supreme and its provisions shall have binding force onall 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 inpursuance thereof... shall be supreme law of the land and the judges m every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding". (***Identify the features of Federal System of Government***).

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, 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 covered the field, the state law will be void under the doctrine of "covering the field".

Self-Assessment Exercise 2

What is the core essence of rigid constitution?

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 making up the federation. In line with section 9 (2) of the 1999 Constitution, an Act of the National Assembly for the alteration of 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 than two-thirds of all the states.

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

i. The proposal is supported by the votes of not less than four-fifthmajority of the National Assembly; and

ii. Approved by resolution of two thirds of states Houses ofAssembly 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 states. The amendments proposed by either body must be ratified by 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 US (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.

In conclusion, the Federal system has been suitable to Nigeria due to its diverse ethnicity among other considerations. There are other systems of government which were not operated in Nigeria, such as confederation, collegiate or conventional systems of government, etc. Nigeria and South Africa are presently operating the Presidential system of government.

1.4 Summary

In this unit, we have considered the Federal system of government. You should now be able to discuss it with all its features.

1.5 References/Further Readings/Web Resources

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1.6 Possible Answers to SAEs

1. Federalism refers to an arrangement whereby powers are shared between the different levels of government such that matters of national interest are handled centrally and locally. It equally 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.

2. Rigid constitution is meant to preserve the corporate existence of the country and check secession bid by any of the making up the federation

UNIT 2: Unitary System of Government

Contents

2.1 Introduction

This module deals with the Systems of government in Nigeria. In this unit, we will consider the unitary system.

2.2 Learning Outcomes

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

i. explain the unitary system of government.

2.3 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.

Self-Assessment Exercises

What is the leading feature of a unitary system of government?

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 government may vary slightly from one country to another. However, the common reasons are as follows:

a. Small land area or small size of the country;
b. Homogenous nature of the people of the country;
c. Absence of serious tribal differences among the people;
d. Absence of fear of domination of the minority by the majority tribes;
e. Possession of a common language and culture which bind the people together in unity;
f. Absence of marked economic inequalities among the different peoples or regions that make up the country;
g. Lack of fear of economic domination of one people by another;
h. 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;
i. 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 tribalism, sectionalism, and stateism which often mark federalism. (***Why do countries adopt unitary system of government?)***

2.3.1 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 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.

2.3.2 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 determinationor 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 marginalized 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.

(***Why would you prefer federal system to a unitary system of government?***). The peculiarity of each State determines its choice of a system of government. In this unit, the various characteristics that could warrant a unitary system of governments have been duly considered.

2.4 Summary

In this unit, we have considered the unitary system of government. You should now be able to discuss it with all its features.

2.5 References/Further Readings/Web Resources

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2.6 Possible Answers to SAEs

In unitary system of government, there is no Constitutional sharing and division of powers between the central government and the regional governments or local authorities

UNIT 3 Presidential and Parliamentary Systems of Government

Contents

3.1 Introduction

The Presidential and Parliamentary systems of government are two long existing systems that have been largely accepted across the world. In this unit, we will consider the two systems in details.

3.2 Learning Outcomes

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

i. explain the Presidential and Parliamentary systems of government.

3.3 Presidential and Parliamentary Systems of Government

3.3.1 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 power 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 are to maintain the Constitution and to apply all the laws made by legislature for the time being in force and to implement party programmes and generally uphold the interest of the nation and 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 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. (***Comparatively discuss the Presidential and Parliamentary systems of government***).

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 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 refuse to 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 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.

Self-Assessment Exercises

The doctrine of collective ministerial responsibility is found in which system of government.

3.3.2 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 between1960 to 1966, Nigeria operated a parliamentary system of government.

3.3.2.1 Merits of Parliamentary System

The merits of a parliamentary system of government are numerous. As a matter of fact, the fusion of the executive and the legislative arm 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 considered actions. This promotes good governance, 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 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 Minster 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.

PARLIAMENTARY SUPREMACY

Parliamentary Supremacy or Parliamentary Sovereignty relates to the absolute power of parliament to make laws. The idea of parliamentary supremacy is relevant to a system that does not have a written constitution, e.g Britain. The Parliament is therefore looked up to for the purpose of making laws to take care of pertinent issues.

In this regard, the Parliament can make laws with respect to any issue without looking up to a document in the form of a Constitution that may curtail its powers.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'etat 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.

Notable features of the Presidential system and that of the Parliamentary system have been extensively discussed in this unit. The discourse is, however, is a continuous one, as systems of government evolve with the society. The peculiarity of each State determines its choice of a system of government.

3.4 Summary

In this unit, we have considered the Presidential and Parliamentary systemsof government. You should now be able to discuss it with all its features.

3.5 References/Further Readings/Web Resources

Abiola Ojo, Constitutional Law and Military Rule in Nigeria, EvansPublishers Ltd.

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3.6 Possible Answers to SAEs

Parliamentary system of government

UNIT 4: Diarchy System of Government and Constitutional Autochthony

Contents

4.1 Introduction

The purport of this unit is to complete the series on systems of government. The Presidential and Parliamentary systems of government are two long existing systems that have been largely accepted across the world. In this unit, we will consider the two systems in details.

4.2 Learning Outcomes

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

i. explain the Presidential and Parliamentary systems of government.

4.3 Diarchy System of Government and Constitutional Autochthony

Diarchy has been adopted by a lot of countries in different continents in the past centuries and it is still prevalent. Diarchy is a system of double government introduced by the Government of India Act (1919) for the provinces of British India. It marked the first introduction of the democratic principle into the executive branch of the British administration of India. Though much criticized, it signified a breakthrough in British India Government and was the forerunner of India's full provision autonomy (1935) and independence (1947). The principle of Diarchy was a division of the executive branch of each provincial government into authoritarian and popularly responsible sections. (***Explain the term 'Diarchy as a system of government***).

Self-Assessment Exercises

What are the major features of Diarchy as a type of government?

4.3.1 Characteristics of Diarchy

The attribute which make any type of Government unique are its characteristics. Diarchy characteristics are peculiar. As a Government form, Diarchy does not have majority rule. Heritance is the type of succession in diarchy, though Parliament and Constitution are sometimes present in diarchy. The few countries that practice diarchy are India, Andorra, Rome and Swaziland.

4.3.2 Constitutional Autochthony

Autochthony is a word that rarely surfaces in everyday English, but it is a synonym for ‘native’ or ‘indigenous’. It is most often used in anthropology, biology and related sciences, but is also used in law. When referring to ‘Constitutional autochthony’, one is therefore referring to the nativity or indigenous nature of a Constitution. This has two practical applications in that context: when referring to a Constitution that emerges internally from a jurisdiction or country, meaning that it is free from external legal control and influence; or when referring to a Constitution that is redrafted, amended or otherwise remade to ‘reclaim’ it as being autonomous and native. When talking about this last meaning — reclamation– this often has occurred when countries achieved independence from colonial powers. Post-colonial countries amend or replace these Constitutions with ones developed in the native country, as they are considered more legitimate and authentic and therefore more valid and enforceable. Specific examples include the redrafting of the Irish constitution in 1937 (and previous amendments to the 1922 constitution), India in 1949, Zambia in 1991 (replacing the constitution of 1973) Nigeria Constitution 1999 as amended, France constitution of 1958 and South Africa in 1996.

Constitutional autochthony is therefore concerned both with the autonomy of the government that has adopted the Constitution, as well as with the indigenous (‘native’) nature of the Constitution.

The issue of home-grown nature of a Constitution continues to be a growing concern. In this unit, we have considered the characteristics of a diarchy system of government. We have equally discussed the concept of

autochthonous as it relates to Constitutions. For a Constitution to achieve originality, it must emanate from the society of the people it seeks to administer.

4.4 Summary

Diarchy as a system of government originated from India. It is a form of double government introduced by the Government of India Act (1919) for the provinces of British India. The principle of Diarchy was a division of the executive branch of each provincial government into authoritarian and popularly responsible sections. With respect to autochtonous Constitution, it refers to a Constitution that is home-grown.

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4.6 Possible Answers to SAEs

Diarchy has the following features:

a. It does not have majority rule

b. Heritance is the type of succession