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Articles

Nigeria and The Riddle of Two Constitutions

Akintunde Emiola and Idowu A Akinloye***

ABSTRACT

This article brings to the fore the problem of two constitutions (the 1963 and the 1999 Constitutions) coexisting in Nigeria. It argues that the ongoing debate on the need for Nigeria's restructuring may not be resolved until this problem is addressed. By using a historical approach and an analytical research methodology, the article lifts the discourse about restructuring above mere political expediency to the realm of law, which is the only instrument for restructuring. The authors forcefully argue that the 1979 and 1999 Nigerian constitutions are "military unconstitutional constitutions" that lack legitimacy and legal validity. It submits that the 1963 Constitution, which made Nigeria a republican state, was never repealed but was used by the military to govern and it is, therefore, intact, unencumbered and operatable in the country. This paper argues that it is only after reverting to the 1963 Constitution that an honest and sincere search for a valid foundation upon which a truly federal, democratic and just Nigerian society can be built.

Keywords: 1963 Constitution, 1979 Constitution, 1999 Constitution, military constitutions, legitimate constitution, restructuring, federalism

1 INTRODUCTION

Nigeria is a nation full of paradoxes.[1] The celebration of its 60th anniversary on 1 October 2020 has come and gone. As planned

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1 A "paradox" is "a person, thing or situation that has two opposite features and therefore seems strange", *Oxford Advanced Learner's Dictionary* 9 ed (Oxford: Oxford University Press 2015); "a person or thing displaying contradictory qualities", *Webster's Dictionary* (Nichols Publishing Group 1995); or "a person, situation or action exhibiting inexplicable or contradictory aspects" *American Heritage Dictionary* (Boston, Mass: Houghton Mifflin 1991). This is evident in Nigeria's political and constitutional history, which, as a federation, has been governed with "Unitary Constitutions" since 1954—except the period of 1 October 1960 to 15 January 1966, but still recognising the concept of ONE monolithic North, allotted permanently by the current Constitution a majority in parliament and cabinet in a nation supposed to be a federation. Nigeria is

by the rulers of the nation, the anniversary was "celebrated" in a low-key fashion. That is understandable, given the current political and economic situation of the nation. But curiously, the presidency announced that the nation would celebrate "Nigeria at 60" for the next one year, that is, until October 2021.[2]

Nigeria ranks as the poverty capital of the world;[3] the third nation with respect to world terrorism;[4] and the third-worst governed country in the world.[5] Nigeria spends more of its annual budget on servicing its debt than on providing social and infrastructural services[6] and many investors have relocated to its neighbouring states.[7] People within and outside Nigeria consider Nigeria a "failing state".[8] Surely, these cannot be the achievements worth celebrating for one year by a country described as "a toddler at 60".[9]

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perhaps the only "federation" with one omnibus constitution in the world that assigns to the state executives the duties of chief security officer of the state but denies the right and power to establish a state police.

2 Terhemba Daka, 'Nigeria to Celebrate 60th Independence Anniversary for a Year' *The Guardian* Lagos, 16 September 2020 available at: <https://guardian.ng/news/nigeria-to-celebrate-60th-independence-anniversary-for-a-year/> accessed on 20 October 2020.

3 World Poverty Clock available at: <https://worldpoverty.io/map_assessed> accessed on 3 July 2021; Bukola Adebayo 'Nigeria Overtakes India in Extreme Poverty Ranking' *CNN World* 26 July 2018 available at: <https://edition.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html> accessed on 18 June 2021.

4 See the 'Global Terrorism Index 2019' *Institute for Economics and Peace* available at: <https://www.economicsandpeace.org/wp-content/uploads/2020/08/GTI-2019web.pdf> accessed on 23 June 2021; Tonye Bakare 'Nigeria Still Third Most Impacted Country by Terrorism' *The Guardian* Lagos 21 November 2019 available at: <https://guardian.ng/news/nigeria-still-third-most-impacted-country-by-terrorism/> accessed on 2 June 2021).

5 See 'Chandler Good Government Index Report on Good Governance' available at: <https://chandlergovernmentindex.com/country-rankings/> accessed on 2 June 2021; Ochogwu Sunday 'Reactions as Nigeria now Third Worst Governed Country in the World' *Daily Post* Lagos 4 May 2021 available at: <https://dailypost.ng/2021/05/04/reactions-as-nigeria-now-third-worst-governed-country-in-the-world/> accessed on 2 June 2021.

6 Geoff Iyatse, 'Nigeria and Realities of Growing Debt Burden' *The Guardian* Lagos 28 June 2021 available at: <https://guardian.ng/business-services/nigeria-and-realities-of-growing-debt-burden/> accessed on 3 July 2021.

7 A Alade, SM Ogwu, A Aliyu and CT Alabi 'Why More International Firms Prefer Ghana to Nigeria' *Daily Trust* Lagos 18 April 2021 available at: <https://dailytrust.com/why-more-international-firms-prefer-ghana-to-nigeria> accessed on 18 June 2021.

8 Oghenekevwe Uche, 'Nigeria is Now a Failed State – Former US Ambassador' *International Centre for Investigative Reporting* 3 June 2021 available at: <https://www.icirnigeria.org/nigeria-is-now-a-failed-state-former-us-ambassador/> accessed on 3 July 2021.

9 Emmanuel Onwubiko, 'Nigeria is 60 But Still a Toddler' *Daily Post* Lagos 17 September 2020 available at: <https://dailypost.ng/2020/09/17/emmanuel-

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Within the last decade, public debate on the need for Nigeria restructuring[10] has increasingly made the headlines in the press. While some argue that all that Nigeria needs is mere economic restructuring,[11] others argue that the restructuring that Nigeria needs are political,[12] among others.[13] Public Administration scholars, Ideobodo Nwafor-Orizu et al[14] confirm that:

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onwubiko-nigeria-is-60-but-still-a-toddler/> accessed on 2 October 2020; Seyi Oyetunbi, 'Nigeria: A 60-year-old Child Crawling is Worrisome' *Sahara Reporters* 1 October 2020 available at: <http://saharareporters.com/2020/10/01/nigeria-60-year-old-child-crawling-worrisome-seyi-oyetunbi> accessed on 21 October 2020.

10 The authors' idea of Nigeria restructuring includes a reorganisation of national governance to address the legal and structural imbalances in the administration of the country in order to make it work effectively.

11 Editorial Board (The) 'Nigeria Needs Economic not Political Restructuring' *Business Day* Lagos 31 July 2020 available at: <https://businessday.ng/editorial/article/nigeria-needs-economic-not-political-restructuring/> accessed on 20 October 2020.

12 Musa Abutudu, 'Federalism, Political Restructuring, and the Lingering National Question' in Said Adejumobi (ed), *Governance and Politics in Post-Military Nigeria* (New York: Palgrave Macmillan. 2010) 23–60; GU Osimen, AT Aghemelo and OO Oyewole, 'Political Restructuring, Federalism and Democratic Sustainability in Nigeria' (2018) 9 (21) *Journal of Economics and Sustainable Development* 100–116; Olisa Agbakoba, 'What Nigeria Needs: Devolution of Powers, Not Restructuring' *Thisday* Lagos 13 October 2020 available at: <https://www.thisdaylive.com/index.php/2020/10/13/what-nigeria-needs-devolution-of-powers-not-restructuring/> accessed on 17 October 2020; MF Bin Othman and OB Nazariah, 'Restructuring Nigeria: The Dilemma and Critical Issues' (2019) 5(1) *Journal of Business and Social Review in Emerging Economics* 79–98; Dele Babalola and Hakeem Onapajo, 'New Clamour for Restructuring in Nigeria: Elite Politics, Contradictions, and Good Governance' (2019) 18 (4) *African Studies Quarterly* 41–55.

13 Sanusi Lamido Sanusi, 'Issues in Restructuring Corporate Nigeria' A paper presented at the National Conference on the 1999 Constitution jointly organized by the Network for Justice and the Vision Trust Foundation, at the Arewa House, Kaduna from 11th–12th September 1999; Terhemba Daka, 'Presidency to Adeboye: Buhari Will Not Succumb to Threat Over Restructuring' *The Guardian* Lagos 5 October 2020) available at: <https://editor.guardian.ng/news/presidency-to-adeboye-buhari-will-not-succumb-to-threat-over-restructuring/> accessed on 25 October 2020; Julaina Taiwo-Obalonye, 'Why Nigeria Does Not Need Restructuring—Olorogun Gbagi' *Sun News Online* 20 June 2020 available at: <https://www.sunnewsonline.com/why-nigeria-does-not-need-restructuring-olorogun-gbagi-ex-education-minister/> accessed on 12 November 2020.

14 Ideobodo Nwafor-Orizu, Okolo Modesta Chinyere and Eze Kierian Tochukwu, 'Political Restructuring in Nigeria: The Need, Challenges and Prospects' (2018) 18(5) *Global Journal of Human-Social Science* 19; Nasir Ahmed el-Rufai, 'Next Generation Nigeria: What is Restructuring and Does Nigeria Need It?' *Africa Programme Meeting Transcript – Chatham House The Royal Institute of International Affairs* 21 September 2017.

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> Restructuring is a song on the lips of many Nigerians. It has trended for decades and seems to be an inter-generational topical issue in Nigeria. The persistent call for restructuring takes numerous dimensions, but particularly outstanding is in the dimension of politics.

Several patriotic Nigerians, scholars,[15] organisations and opinion moulders have joined in this debate. Recently, retired Roman Catholic Archbishop Onaiyekan is credited with saying in an interview that, unless Nigeria is restructured, we run the risk of losing it as a nation.[16] Pastor Enoch Adeboye, the revered General-Overseer of the Redeemed Christian Church, who is totally apolitical and respected throughout the nation, is reported to have warned in a sermon on Sunday, 4 October 2020 that the country will collapse if it is not restructured.[17]

In his anniversary interview reported in the *Nigerian Tribune* on Thursday, 1 October 2020, the author of the 1999 Constitution as the head of state, General Abdulsalam Abubakar, said that unless we embrace discipline, the future of the country is bleak. He, however, noted the beneficial effect of federalism on interregional competitive development among the federating regions. Professor Attahiru Jega, the political scientist who is the former chairman of the Independent National Electoral Commission, is reported to have told the *Nigerian Tribune* that, for countries that are diverse in complex and intricate ethno-religious mosaics, such as Nigeria, federalism is the only game in town.[18]

From the above, there is a widely held view that Nigeria's restructuring is not only indispensable but imminent. However, where the vacuum appears to lie concerns what is to be restructured and how the process of restructuring is to commence. It is these gaps that this contribution seeks to fill. This article, thus, lifts the discourse above mere political

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[15] Philips C Aka, 'Why Nigeria Needs Restructuring Now And How It can Peacefully Do It' (2018) 46(2) *Denver Journal of International Law and Policy* 133. Aka argues that "the catalog of trouble[s] with Nigeria" brings us back to thoroughgoing restructuring as the only antidote to the state-building problems that the country confronts in the first quarter of the twenty-first century; AO Farayibi, 'The Structure of Nigeria's Restructuring Rhetoric' *Ibadan: Centre for Allied Research and Economic Development*.

[16] Friday Olokor, 'Nigeria Can Break up Before 2023 If We Remain Irresponsible' *Punch* Lagos 20 September 2020 available at: <https://punchng.com/nigeria-can-break-up-before-2023-if-we-remain-irresponsible-onaiyekan/> accessed on 28 October 2020.

[17] 'Restructure Nigeria now or it breaks up, Pastor Adeboye warns FG' *Nigerian Tribune* Ibadan 3 October 2020 5.

[18] E Remi Aiyede, 'Restructuring Nigeria: A Response and Contribution to a Discussion by Professor Jega' *Nigerian Tribune* Lagos 22 August 2020 available at: <https://tribuneonlineng.com/restructuring-nigeria-a-response-and-contribution-to-a-discussion-by-professor-jega/>accessed on 24 August 2020.

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expediency to the realm of law—which is the only instrument for restructuring. To achieve its objectives, after the introduction, the article will provide a little background history of Nigeria to enable the reader to appreciate the essence of this discussion. Thereafter, the article engages with the legal framework for restructuring Nigeria, arguing that there is an extant problem of two constitutions (i.e. the 1963 and 1999 Constitutions) coexisting in Nigeria. The authors submit that the ongoing debate on the need for Nigeria's restructuring cannot arise until the problem of the coexisting constitutions is resolved. They further argue that the history and peculiarity of a people should determine the type of constitution they should have for their governance. In this article, the authors submit that the 1979 and 1999 Constitutions are illegitimate and they strongly recommend that these constitutions be discarded and that the 1963 Constitution, which best represents Nigeria's peculiarity, be reactivated or becomes a template for a new constitution.

2 A SHORT HISTORY OF NIGERIA

Nigeria is a nation with a complex history. At least a little of its history needs to be known to enable the reader to appreciate the essence of this discussion. It is said that, if a people do not know their past, they cannot evaluate the present to enable them plan for the future.

The country comprises over 300 ethnic nationalities with different languages, varying cultures and religious orientations, which existed as independent city-states, kingdoms and empires scattered over the sprawling landscape now known as Nigeria. Then came the British missionaries and traders. A writer once said of them:

> So, while the missionaries carried the battle for the soul of man from one centre of population to another, the traders talked the local rulers out of their independence and concluded with them treaties of dubious validity, sometimes by cajolery and sometimes by sheer force of arms.[19]

By 1900, the British had acquired the vast expanse of 356 669 square miles of territory, which was later grouped into Northern and Southern Protectorates, apart from Lagos, which they subdued as a "colony" in the second half of the nineteenth century. On 1 January 1914, the two Protectorates were welded together to become the one country, Nigeria, ruled by Britain until 1 October 1960 when it became an independent nation.

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[19] Akintunde Emiola, *Public Servants and the Law* 2 ed (Ogbomoso, Nigeria: Emiola Publishers 2007) 7–8.

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2.1 *The Making of the Independence Constitution*

Prior to independence, a series of constitutional conferences were held, beginning with one at Ibadan and concluding with a conference at Lancaster House in London in 1958, to ascertain the wishes of the Nigerian people.[20] The London conferences produced the 1960 Federal Constitution, ostensibly because of Nigeria's disparate ethnic nationalities; multiple languages; plural cultures and religions; and diverse social orientations. In the first five years of independence, the 1960 Constitution, and later the 1963 Republican Constitution, worked—and worked admirably—before the military interrupted the democratic federal system.[21] To support this assertion, Oni and Faluyi submitted that the intervention of the military in the body politic of Nigeria in 1966 disrupted an effective federal structure that brought much prosperity to Nigeria as a nation and its federating units in the country's first republic between 1960 and 1966.[22]

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[20] See the Lugard Constitution (1914–1922), the Clifford Constitution (1922–1946), the Richard Constitution (1946–1950), the Macpherson Constitution (1951–1954), and the Lyttleton Constitution (1954–1960). The Clifford Constitution replaced the Legislative Council for the Colony and the Nigerian Council. The new Legislative Council was adjudged a success because it introduced the elective principle. See further, Tunde I Ogunwewo, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (2000) 44(2) *Journal of African Law* 139; TO Elias, *Nigeria: The Development of Its Laws and Constitution* (London: Steven and Sons 1967) 26–27.

[21] In fact, we know of one major crisis under the 1960 Constitution, namely the internal feud within the Action Group (AG), which was escalated by declaring a state of emergency in Western Nigeria. There was also a crisis under the 1963 Republican Constitution in 1964 arising from a rigged election in the West. We are not aware of any other crises. These crises were not national crises. This is notwithstanding, the view of some scholars, like Akin Alao, who is of the opinion that the "Republic Constitution of 1963 was introduced, among other things, to allay the fears of insecurity by the Prime Minister, bolster the powers of the Executive, regulate Cabinet/Legislature relations, and enhance the leverage of the Executive over the Judiciary through subtle intimidation. The Prime Minister believed that Nigeria should review her relationship with Britain to reflect her sovereignty and independence". Akin Alao, 'The Republican Constitution of 1963, the Supreme Court and Federalism in Nigeria' (2001) 10(2) *Miami International and Comparative Law Review* 91–107; see also, B.O. Nwabueze, *A Constitutional History of Nigeria* (London: C Hurst and Company 1982) 6.

[22] Ebenezer Oni and Olumuyiwa Faluyi, 'Federalism, Military Legacies and the Restructuring Debate in Contemporary Nigeria' (2018) 7(2) *African Journal of Governance and Development* 5. The authors agreed with CC Ikeji, 'Politics of Revenue Allocation in Nigeria: A Reconsideration of Some Contending Issues' (2011) 1(1) *Sacha Journal of Policy and Strategic Studies* 121–136 that the rationale for the practice of federal system is the formation of a union without jeopardising the identity of the different groups that form such a union.

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The Nigerian (Constitution) Order in Council of 1960[23] provided for a federal constitution that was established in the Second Schedule to the Order in Council. It also provided for three regional constitutions in the Third, Fourth and Fifth Schedules with respect of the North, West and East, respectively. The fourth region, the Mid-Western Region,[24] was added in 1963. In 1963, the Independence Constitution was amended and Nigeria became a Republic, renamed Federal Republic of Nigeria.[25]

The 1963 Constitution left the structure of the nation intact with amendment to the 1960 Constitution. It only:

(a) replaced the Queen of England as Nigeria's Head of State by a President;

(b) made the Supreme Court the final court of appeal; and

(c) changed the country's name from 'Federation of Nigeria' to 'Federal Republic of Nigeria'.

The 1963 Constitution provided for effective power devolution and resource control in such a manner that made both the national and regional governments independent and coordinated in the true sense of the words.[26] Two years into the republican federal system, and five years after independence, young military "boys"—and boys indeed they were, because they were all in the 20-year age bracket—overthrew the elected government on 15 January 1966. These young soldiers continued to overthrow one another's regimes (five or six in all!), bringing in inexperienced officers to rule the country with no visible plans. They ruled for about 30 years. These regimes were characterised by a unitary command and the concentration of authority.[27] This appears to have influenced Adekanye, a political scientist, to conclude that military institutions and federal society are diametrically opposed political arrangements.[28]

2.2 *Restructuring Nigeria*

In Nigerian history, there have been two separate, distinct and independent coups d'etat against the civilian governments of the nation. The first coup d'etat, staged on 15 January 1966, brought the nation to its knees under military rule from January 1966 to 30 September 1979—a period of 13 years and five months, although

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23 No. 1652 gazetted as LN 159 of 1960 at B221 of the 1960 Laws of the Federation.

24 See Act No. 19 of 12 August 1963. All these constitutional instruments are contained in pages B 299–430 of the Laws of Federation 196).

25 Act No. 20 of 1963.

26 Oni and Faluyi (n 22) 5.

27 ibid 6.

28 B Adekanye, 'Military Organization and Federal Society' in AO Sanda, O Ojo and V Ayeni (eds), *Impact of Military Rule in Nigerian Administration* (Ife: Faculty of Administration, University of Ife 1987).

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there was an interlude of a civilian government from 1 October 1979 to 31 December 1983, headed by Alhaji Shehu Shagari, which lasted for four years and three months. But four years later, the military struck for the second time. The second coup d'etat, led by Muhammadu Buhari, then a military Major-General and now the civilian president of Nigeria—although he insists he wishes to be addressed as "Major General"—was staged on 31 December 1983. That junta held to power for 15 years and five months (as in the first set) and left the nation with their own form of military constitution, Constitution 1999.

Since the beginning of the Fourth Republic in 1999, it appears that the Nigerian people have become fed-up with the "military constitutions" and there has been strident agitation for a return to the 1963 Republican Constitution, or a holistic review of the 1999 Constitution. As will be shown later in this contribution, both of the military constitutions of 1979 and 1999 are illegitimate and, therefore, null and void. So, there is nothing in them to review. Nigeria's only option, then, is to return to the 1963 Constitution, dust it off, and put it to use for the nation. Chief Afe Babalola, a Nigerian nationalist, Senior Advocate of Nigeria and erudite commentator on public affairs, said:

> While it is indeed true that no set of rules, including the constitution of a nation, is etched in stone and incapable of amendments to conform to present realities, the peculiarity of the 1999 Constitution is inherent in the fact that it is not a product of the will of Nigerian people …. The sour implication, therefore, is that no extent of amendment, however good-intentioned, can impose or confer the legitimacy and massive acceptability which the 1999 Constitution lacks and which any true constitution connotes.[29]

He had said earlier:

> Nevertheless, the Independence and Republican Constitutions of 1960 and 1963 respectively best suited the ideals of the Nigerian people.[30]

There are three ways in which the 1963 Constitution could have been restored and reactivated by any of the previous civilian governments.

First, the National Assembly could have enacted an act, assented to by an elected civilian government, reinstating the 1963 Constitution—deeming the president and National Assembly to be elected, respectively, under sections 34, 35 and 52 of the 1963 Constitution.

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[29] *Nigerian Tribune* 10 September 2020 32. See also, FT Abioye, 'Constitution-making, Legitimacy and Rule of Law: A Comparative Analysis' (2011) 44(1) *The Comparative and International Law Journal of Southern Africa* 59–79; Ogowewo (n 20); EI Amah, 'Nigeria—The Search for Autochthonous Constitution' (2017) 8(1) *Beijing Law Review* 141–158.

[30] *Nigerian Tribune* 30 July 2020 31.

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Secondly, in the event of one of the two arms of government (the presidency and parliament) refusing to cooperate, the National Assembly (now functioning as parliament)—if it is the executive that refuses to assent—might yet pass the act by majority of all members of both Houses of Parliament.

Thirdly, if it is the National Assembly (acting as parliament) that withholds cooperation in passing the act, the president (if sufficiently patriotic) might, relying on the doctrine of necessity[31]—described as the "principle of implied mandate"[32] and implied in the constitution of every nation[33]—issue an executive order dispensing with the suspension of the 29 sections of the Constitution and reinstating the fundamental law of the nation to their original state before January 1966, in the best interest of the people of Nigeria. Thereafter, a Nigerian peoples' conference or national conference could be called to make necessary amendments (in the light of past experiences) to the Constitution and then submit its report to a referendum, as suggested by the Northern Elders Forum.[34]

However, for a meaningful and objective appraisal of the situation now facing the country, the public should be fully informed about the 1963 Constitution—which is now intact, unencumbered and operatable. Most of the current adults in Nigerians were born or were toddlers during the military era (1966–1999), with a brief interlude of a civilian administration of four years. As a matter of history, the Nigerian people should be made aware of the general content, principles and foundational philosophy of the federal nature of the 1963 Constitution. Nigerians should also know how the military disrupted the smooth running civilian administration of the nation. They, however, retained the Constitution of the Federal Republic of Nigeria 1963 and ruled the nation for 28 years and two months with the Constitution—without the presidency and parliament—having suspended[35] 29 out of 166 sections of the Constitution.

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31 See Akintunde Emiola, *Remedies in Administrative Law* 2 ed (Ogbomoso, Nigeria: Emiola Publishers 2011) 96–100.

32 *Madzimbamuto v Lardner-Burke* (1969) AC 645, 740 (PC).

33 BO Nwabueze, *Military Rule and Constitutionalism* (Ibadan, Nigeria: Spectrum Law Publications 1992) 4.

34 *Nigerian Tribune* 31 August 2020 25.

35 Constitution (Suspension and Modification) Decree 1966.

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3 CONSTITUTION NOT SUSPENDED

As soon as they seized power in January 1966, the military enacted Decree No. 1, the Constitution (Suspension and Modification) Decree 1966.[36] That decree was the anchor for the six military regimes that ruled the country for about 30 years. It is the anchor because it was from it that succeeding regimes derived the power to make subsequent decrees[37] and take executive decisions.[38] The decree retained the 1963 Constitution[39] but suspended[40] its 29 provisions, divesting the president of his executive powers, and members of parliament of their legislative powers and functions. The governors and legislative houses of the regions were similarly treated.[41] The decree provided:

> *Subject to*[42] this and any other Decree, the provisions of the Constitution of the Federation which are not suspended…shall have effect subject to the modifications in Schedule 2 of this Decree.[43]

The military neither suspended or repealed the 1963 Constitution, nor rendered it inoperative. It suspended just 29 core sections of it.[44] What the military did was a temporary[45] amendment[46] of the Constitution 1963 by suspending some of its provisions. Decree No. 1 had no "repeal" provision, so nothing in the Constitution was repealed.

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36 ibid s 2.

37 ibid s 1(2).

38 ibid s 7(1).

39 ibid s 1(2); see also, Public Officers (Special Provisions) Decree No. 17 of 1984 s 3(2).

40 ibid s 1(1).

41 ibid s 2.

42 Italics for emphasis. "Subject to" means "governed or affected by"; for a definition of "subordinate" see Henry Campbell Black, Michael J Connolly and Joseph R Nolan, *Black's Law Dictionary* 5 ed (St Paul: West Publishing Company 1979) 1278; for a definition of "conditional", see *Webster's Dictionary* (n 1) 986; "depending on something in order to be completed or agreed", see *Oxford Advanced Learner's Dictionary* (n 1) 1194. In *Dokun Ajayi Labiyi v Mustapha Anretiola & Ors* (1992) 8 NWLR (Pt. 258) 139 at 163–164, Karibi-Whyte JSC held that "the expression [subject to] is often used in statute to introduce a condition, a *proviso,* a restriction and indeed a limitation" and that "the effect is that the expression evinces an intention to subordinate the provisions of the subject to the section referred to which is intended not be affected by the provision of the latter". He cited previous Supreme Court judgments in *Oke v Oke* (1974) 1 All NLR 401 and *Aqua Ltd v Ondo State Sports Council* (1988) 4 NWLR (Pt. 91) 622.

43 Constitution supra (n 35) s 1(2).

44 ibid s 1(2).

45 "Temporary" means "lasting or intended to last only for a short time; not permanent", see *Oxford Advanced Learner's Dictionary* (n 1) 1233.

46 "Amendment" is "a small change or improvement that is made to a law or a document" see *Oxford Advanced Learner's Dictionary* (n 1) 34; an "alteration by modification, deletion, or addition", see HC Black *Black's Law Dictionary* (n 42) 74.

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One of the other decrees of the military was Decree No. 17 of 1984[47] (now an act).[48] It provided (as a decree) that "any enactment, law or instrument (including the Constitution of the Federal Republic of Nigeria) relating to [employment] matters, shall [continue to] have effect"[49] In *Bashir Shitta-Bey v Federal Public Service Commission*,[50] the Nigerian Supreme Court held that the Federal Civil Service Rules "made in 1974 [by the military] pursuant to the provisions of the 1963 Constitution have constitutional force [and public officers] can be properly and legally removed only as provided by the rules—affirming the supremacy of the Constitution in the military era, even in spite of Decree No. 1.[51]

Among the enactments, laws and instruments (including the Constitution) preserved by section 3(2) of the Public Officers (Special Provisions) Decree 1984 and not suspended by Decree No. 1 is the fair hearing provision in section 22(1) of the 1963 Constitution, thus qualifying the exercise of the powers conferred by the Decree. This, as the court also held in *Yesufu Garba & Ors v University of Maiduguri*,[52] is because a "*fair hearing* is not only a common law requirement but a statutory and constitutional requirements".[53] So no decree was absolute; all decrees were subject to section 22(1) of the 1963 Constitution, which was not suspended.[54]

Let us look at the salient provisions of Decree No. 1 of 1966. Section 3 of the decree vested in the Federal Military Government (FMG) all the legislative powers as provided under the Nigerian Constitution, and subsection 7 of section 3 declared the "Exclusive" and "Concurrent" Legislative lists as merged. This meant that the military governors could not even make laws for their regions "except with the prior consent of the FMG"—even laws on the Concurrent List.

By section 7 of the decree, the executive authority of the nation was vested in the head of the Federal Military Government (HFMG) and "extends to the execution and *maintenance of the Constitution of the Federation*".[55] Surprisingly, the military governor of a region could not perform the "executive functions falling to be performed within that

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47 Public Officers (Special Provisions) Decree No. 17 of 1984.

48 See Nigerian Constitution 1999 s 315(1)(a).

49 See s 3(2).

50 (1981) 12 NSCC 19; (1981) 1 SC 40; (1981) 2 PLR 201.

51 The cause of action arose in 1977 during the military regime.

52 (1986) ANLR 149; (1986) 1 NWLR (Pt. 18) 550; (1986) 2 SC 128.

53 See *Saidu Garba and Ors v Federal Civil Service Commission* (1988) 1 NWLR (Pt. 171) 449.

54 See Akintunde Emiola and NA Inegbedion, 'Are Military Decrees so Sacrosanct?' (1996) *Nigerian Current Law Review* 289.

55 Constitution supra (n 35) s 7(2).

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Region in relation to any matter" unless the HFMG either conditionally or unconditionally delegate to the Military Governor such functions.[56]

The provisions of sections 2 and 7(3) of the decree thus deprived the military governor of a region of both legislative and executive powers of a civilian government. The upshot of the provisions of Decree No. 1 was that both the executive powers of the president and of civilian governors of the regions, along with their legislative powers, became concentrated in one person—the HFMG. The path to an authoritarian rule was thus cleared.

However, the redeeming feature is that, before retreating into their barracks on 30 September 1978, the military repealed—by Decree No. 26 of the 1978—all decrees expressly (by listing the repealed decrees) "or *consequentially repealed*[57] as the case may require". Hence, even if Decree No. 1, which suspended certain provisions of the 1963 Constitution, was lawful, by "repeal consequentially", the military left at their exit the "Republican Constitution" as they found it—neat, complete and unencumbered. The Military Constitution of 1979 was, therefore, illegitimate, null and void.

So, we must first resolve the constitutional impasse created by the automatic revival and reactivation of the 1963 Constitution that is coexisting with the military constitutions bequeathed to the nation in 1979 and 1999. No one can deny the existence of the 1963 Constitution, or ignore that of the military version. The Supreme Court held in *Dokun Ajayi Labiyi v Mustapha Anretiola*[58] that the inconsistency lies in the fact that … the two [conflicting laws] cannot co-exist.

Anyone who doubts the continuing existence of the 1963 Constitution is entitled to approach the court for a declaration under our law. A private citizen with *locus standi*—which is not applicable in constitutional and human rights matters[59]—can seek clarification

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56 ibid s 7(3).

57 To repeal a statute "consequentially" is leaving the repeal to "*cause* and *effect* or [to] what occurs in nature, as found by observation and experiment to be true as in the law of gravitation" See *Webster's Dictionary* (n 1) 560; "consequentially repealed" means a repeal "following as an effect, result", see *American Heritage Dictionary* (n 1) 283. 'Consequentially' is to be construed in the same context.

58 (1992) 8 NWLR (Pt. 258) 139.

59 Fundamental Rights (Enforcement Procedure) Rules 2009 Preamble para 3(e).

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from the courts on any doubtful[60] or disputed points of law,[61] or can challenge the validity of a statute or decision.[62]

4 SUPREMACY OF THE CONSTITUTION

Section 1 of the 1963 Constitution gives the Nigerian Constitution the force of law and declares imperatively that if *any other*[63] law … is inconsistent with [the] Constitution…the Constitution shall prevail and the other [law] shall to the extent of the inconsistency, be void.[64] Courts have decided that the word "'*any*' is not confined to a plural sense";[65] but is "any word which excludes limitation or qualification",[66] and also means "as wide as possible".[67] Accordingly, the words "any other" that occur in section 1 of the 1963 Constitution are wide enough to embrace "any other "person"[68] and "any other matter'[69]—and by extension, to the military and constitutional matters, in interpreting section 1 of the 1963 Republican Constitution.

In interpreting section 1 of the 1960 and 1963 constitutions—which was copied *verbatim* in section 1(3) of the 1979 and 1999 military constitutions—the Privy Council endorsed the decision of the Federal Supreme Court[70] that the provisions of the Commissions and Tribunals of Inquiry Act 1961 authorising the Prime Minister to create any offence in relation to any subject on the legislative lists would be too wide; it would enable him to remodel the criminal law and involves an interference with the liberty of the subject, contrary to section 20 of the 1960 Constitution.

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60 Emiola (n 31) 236; Stanley A de Smith and John Maxwell Evans, *De Smith's Judicial Review of Administrative Action* 4 ed (London: Stevens & Sons 1980) 494; *AG of Abia State & Ors v AG of the Federation & Ors* (2002) 6 NWLR (Pt 763) 791; (2002) 1 WRN 1.

61 Emiola (n 31) 230*; Archbishop Olubunmi Okojie v AG of Lagos & Ors* (1981) 2 NCLR 625; *AG of Bendel State v AG of the Federation & Ors* (1981) ANLR 85; (1982) 3 NCLR 1; *Independent National Electoral Commission v Balarabe Musa & Ors* (2003) 3 NWLR (Pt. 806) 72; (2003) 10 WRN 1.

62 Emiola (n 31) 230 232; *Senator Adebayo Doherty v Abubakar Tafawa Balewa* (1961) All NLR 604; on appeal (1963) 1 WLR 949 (PC); *AG of Bendel State v AG of the Federation & Ors* (1981) ANLR 85; (1982) 3 NCLR 1; *Dr. O.G. Sofekun v Akinyemi & Ors* (1981) 1 NCLR 135 (1982) 5-7 SC 1.

63 Italics for emphasis.

64 Constitution of the Federal Republic of Nigeria 1963 s 1.

65 *Eaton v Lyon* (1798) 3 Ves. 690.

66 *Duck v Bates* (1884) 12 QBD 79.

67 *Beckett v Sutton* (1844) 51 LJ Ch 433.

68 *Bingham v Bruce* [1962] 1 WLR 70.

69 *Lee v Minister of Transport* [1966] 1 QB 111.

70 *Sir Abubakar Tafawa Balewa v Senator Adebayo Doherty* (1963) 1 WLR 949 (PC).

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First, the Decree No. 1 of 1966 was inconsistent with section 1 of 1963 Constitution. Secondly, although the military regimes purported to rank decrees above the Constitution,[71] Decree No. 26, which brought the Military Constitution of 1979 into existence, became an existing act and was required, even by Decree No. 25 itself,[72] to be brought in line with the overriding supremacy of the 1963 Constitution.[73] We have noted that Decree No. 1 suspended only 29 of the 166 sections of the 1963 Constitution. Just suspension!

5 EFFECT OF SUSPENSION

Every suspension of anything has a limited duration. Suspension is never intended to be permanent; it is always for a specified time or for a period of time needed to achieve or accomplish a purpose. According to Henry Black, to suspend simply means "to discontinue *temporarily*, but with an expectation or purpose of resumption" of what had been suspended.[74] Specifically, it is said that "the suspension of a statute [is] temporary termination of its power of law … for a limited time [and it] operates so as to prevent its [the law's] operation for the time; but it has not the effect of a repeal".[75] It also means "abeyance" or "temporary suspension, usually, of custom, rule or law".[76]

Two highest courts in England and Nigeria, respectively, approved the definition of the word "suspend". In *AG v De Keyser's Royal Hotels Ltd*[77] and *Ibiyemi Oduye v Nigeria Airways Ltd*,[78] both the House of Lords (then the highest court in England) and the Nigerian Supreme Court held that suspension means abeyance, which was also defined as a temporary suspension, usually, of a custom, rule or law.

The military, *ab initio,* conceded the continuing existence of the 1963 Constitution under the military rule. In Schedule 2 to Decree No. 1 under the heading "Additional Modifications of particular provisions", it said (in a proviso) that: "Provided that this [still talking about the 1963] Constitution shall not prevail over a Decree and nothing in this Constitution shall render any provision void to any extent whatsoever."

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71 Constitution supra (n 35) ss 1(2); 4(4); see also, *Labiyi v Anretiola* (1992) 8 NWLR (Pt. 258) 139 at 162.

72 Constitution supra (n 35) s 4(4).

73 In *Labiyi v Anretiola* supra (n 71) at 164, the Supreme Court held that "the inconsistency lies in the fact that the two laws cannot co-exist".

74 *Black's Law Dictionary* (n 42) 1297.

75 ibid.

76 See also, *Webster's Dictionary* (n 1) 997.

77 (1920) AC 508.

78 (1987) NWLR (Pt. 55) 126.

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What is more, the military continued to apply the remaining provisions of the Constitution that were not suspended. Suspension was to protect decrees. The temporariness of the military intervention and the recognition of the existence of the 1963 Constitution throughout the duration of the military era is evident in the repeal—expressly or by necessary implication—by Decree No. 26 of 1978, of all decrees before they left the stage. Decree No. 25 titled "Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978" (of three sections) was provided by the military. It came into force on 1 October 1979, as stipulated by section 279(1) of the first Military Constitution of 1979. It had no repeal provision. That constitution so promulgated was illegitimate. Commenting on the use of the word "suspend" in the suspension decree, Ogunwewo posits:

> After all, the use of the word 'suspend' in the suspension decree implies that what was put in abeyance would come back to life at some point in the future.[79]

Even if it had purported to repeal the 1963 Constitution, it would still have been "illegitimate", since the military government that midwifed it was also illegitimate by virtue of section 1 of the 1963 Constitution, which prohibits unlawful change of the government of Nigeria by force other than as provided by the Constitution. This has been settled by the courts. It is illegal and void.

Professor Nsongurua Udombana has argued in his thesis that legitimacy addresses the question of *acceptability* and that if people *consciously* and *deliberately participated* in the constitution-making, the acts of a military regime would be legitimate.[80] The question is how truly we can say that an act ordered by a military, the people consciously and deliberately participate in the process ordered by a military junta? The people have no choice.

We submit that, even if people are deemed to have "consciously and deliberately participated in the constitution-making process", that would still not make a constitution legitimate. The coup d'etat that brings a military government into existence is illegal. We have stated earlier that section 1 of the 1963 Constitution is prohibitive; it prohibits ab initio the overthrow of a legitimate government elected by force of arms; its target objective is the coup. *Illegitimate* is defined as "illegal; contrary to law". All acts in breach of the Constitution are illegal; every illegality renders an act null and void and cannot be saved by an ouster clause. The position of the law is that "[people]

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79 Ogunwewo (n 20) 143.

80 Nsongurua Udombana 'Constitutional Restructuring in Nigeria: An Impact Assessment' SSRN 7 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960030> accessed on 19 June 2021.

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cannot by consent or *acquiescence* or *failure to object* nullify the effect of a statute".[81] Writing on the illegitimacy and legal invalidity of 1999 Constitution, Ogunwewo rightfully and forcefully argues that the Constitution is a nullity and emphasises the inherent powers and legal grounds of the court to annul the Constitution.[82]

Even if the military government had purported to repeal the 1963 Constitution, it would still have been "illegitimate", since the military government the midwifed it was also illegitimate by virtue of section 1 of the 1963 Constitution, which prohibits unlawful change of the government of Nigeria by force, other than as provided for by the Constitution. This has been settled by the courts. It is illegal and void.

In *Benjamin Macfoy v UAC Ltd*[83] Lord Denning said that if an act is void, it is in law a nullity. And the Supreme Court of Nigeria agreed. The court in *Kolawole v Alberto*[84] held that an "act [that] is … void [and] is a nullity… is as if the act had never occurred". In another case, the Supreme Court again said that an act that is void "is void for all purposes and all times"[85] and that anything that occurred before or after the act is equally null and void.[86]

The implication of the declaration in section 1(2) of Decree No. 1 that "the Constitution … shall [continue to] have effect", the judicial and statutory effect of suspension and the "consequential" repeal of the Decree No. 1 is that the suspended sections of the 1963 Constitution fell back into their original positions in the Constitution from 1 October 1979, when Decree No. 25 of 1978 became effective. From then onwards, the process of restructuring of the system could begin.

With the suspended 29 sections restored automatically to their places in the 1963 Constitution, the process of restructuring could, and still can, be commenced. The first task is for the National Assembly to reaffirm the restoration of the 1963 Constitution as the only legal and authentic instrument for the governance of the nation. A confirmatory statute may or may not be necessary. But an act affirming the revival of the Constitution (as enacted) and the conversion on transmutation

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81 *Idowu Alase & Ors v. Sanya Olori-Ilu & Ors* (1965) NMLR 66, 71. See also, *Eperokun v. University of Lagos* (1986) 4 NWLR (Pt. 34) 162 179.

82 Ogowewo (n 20) 135 140. The major point of divergence between this article and the view expressed by Ogunwewo in his article is that the former rejects the legal validity of the 1979 and 1999 constitutions, but the latter is silent on the validity of the 1979 Constitution and reject that of the 1999 Constitution. Ogunwewo also did not reference the valid existence of the 1963 Constitution, which the former does.

83 (1962) AC 160; (1961) 3 WLR 1405.

84 (1989) 1 NWLR (Pt. 98) 382.

85 *Eperokun v University of Lagos* (1986) 4 NWLR (Pt. 3) 162 201.

86 *Sea Trucks Nigeria Ltd v Anigboro* (2001) 10 WRN 78 96.

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of the National Assembly and its members, to parliament and members of parliament (MPs) under the 1963 Constitution, might be essential before they can carry out the work of restructuring. This does not mean that the reactivated 1963 Constitution is the only option. The 1999 Constitution may be used as a format and panel beaten to get the Constitution that the people want. Of course, a brand new constitution may be preferred. However, whichever form the restructuring may later take, a valid and legal constitution is needed to do it. And the Constitution of the Federal Republic of Nigeria 1963 is the only feasible legal instrument available under the current circumstances. Moreover, it appears to be the best available instrument that currently addresses the sociopolitical peculiarities of Nigeria.[87]

The above argument is supported by the view of other respected legal practitioners and scholars. Itse Sagay, a professor of law and a senior advocate of Nigeria, reportedly said that "we should scrap this [1999] constitution and adopt the 1963 Republican Constitution. If we had that, with amendments here and there to make it accommodate states rather than regions, which we used to have, I think all these agitations will die down and everybody will be happy."[88] In the same vein, Akeredolu, the incumbent elected governor of Ondo State and also a senior advocate of Nigeria, is reported to have said that the 1963 Constitution, which reflected the republican status of the country, remained the best document for a country as heterogeneous as Nigeria and that the powers of the federal government must be trimmed down because these powers were the major cause of friction in the country and politics of bitterness.[89]

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87 Oni and Faluyi (n 22) 9. The authors emphasise the need for each country to practice a federal system that reflects its sociopolitical peculiarities.

88 Vincent Ufuoma, 'Republican Constitution of 1963 will Address All Agitations in Nigeria—Sagay' *International Centre For Investigative Reporting*, 25 May 2021 available at: <https://www.icirnigeria.org/republican-constitution-will-address-all-agitations-in-nigeria-sagay/> accessed on 3 July 2021.

89 Osagie Otabor, 'Constitution Review: Akeredolu Backs Return to 1963 Constitution' *The Nation* Lagos 26 May 201 available at: <https://thenationonlineng.net/constitution-review-akeredolu-backs-return-to-1963-constitution/> accessed on 1 July 2021; see also, Oyetunji Abioye and Ramon Oladimeji, 'Falana Backs Calls for Return to 1963 Constitution' *Punch* Lagos 7 August 2017 available at: <https://punchng.com/falana-backs-calls-for-return-to-1963-constitution/> accessed on 1 July 2021. Femi Falana, a human right activist and senior advocate of Nigeria, reportedly submitted that "restructuring the country to the '1963 Constitution with necessary modifications' would put an end to the needless arguments over what kind of restructuring the country actually needs"; Chioma Gabriel, 'We Need to Return to 1963 Constitution to Get Nigeria Right—Femi Okunnu' *Vanguard* Lagos 2 October 2018 available at: <https://www.vanguardngr.com/2018/10/we-need-to-return-to-1963-constitution-to-get-nigeria-right-femi-okunnu/> accessed on 2 July 2021.

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6 CONCLUSION

This short contribution to the ongoing debate on the "restructuring" of Nigeria has highlighted the awkward legal situation in which the *illegitimate*[90] military constitutions (1979 and 1999) had competed (and still compete) for political space with the *legitimate* Constitution of the Federal Republic of Nigeria 1963. It is believed that this is the point where and when an honest and sincere people search for a valid foundation upon which a truly democratic and just society can be built.

We have argued that the military constitutions were illegitimate because section 1 of the 1963 Constitution—which is pre-emptive[91]—declares the Constitution as supreme[92] and has "the force of law throughout Nigeria … [and] if *any other*[93] law … is inconsistent with it [such] other law shall to the extent of the inconsistency, be void". Incidentally, both the democratic constitutions of 1960 and 1963 and the military constitutions of 1979 and 1999 have the same provision as the 1963 Constitution, which had been the subject of frequent litigation. In interpreting the provision, the Supreme Court of Nigeria held in *Hope Democratic Party (HDP) v Peter Obi & Ors*[94] that the Constitution is the supreme law of the land and that [its] provisions are superior to every provision embodied in *any* Act or *Law* and are binding on *all persons* and authorities in Nigeria. What is more, the court also held in *Balarabe Musa & Ors v Independent National Commission & Ors*[95] that the supremacy of the National Assembly [to legislate] is subject to the overall supremacy of the Constitution.[96]

So, neither the military nor any other person had the power to make Decree No. 1 of 1966; or Decrees No. 25 of 1978 and No. 24 of 1999, which, respectively, brought the 1979 and 1999 constitutions into force. The military cannot by any act of force overawe the legitimate government and still claim, unabashedly, that the "Constitution

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90 "Illegitimate" means "against the law; illegal" *American Heritage Dictionary* (n 1) 656; "contrary to law; not authorized by law" see *Webster's Dictionary* (n 1) 482.

91 *Oxford Advanced Learner's Dictionary* (n 1) 915 defines "pre-emptive [as act] done to stop somebody taking action especially action that will be harmful to yourself"; and *Webster's Dictionary* (n 1) 790 says that "pre-emptive" means "occurring before, and in anticipation of, a situation developing".

92 "Supreme" means "highest in rank or position" *Oxford Advanced Learner's Dictionary* (n 1) 1205; "highest authority" see *Webster's Dictionary* (n 1) 996 "greatest in power, authority or rank; ultimate, final"; *The American Heritage Dictionary* (n 1) 1293.

93 See fns 48–54 supra.

94 (2011) 18 NWLR (Pt. 1278) 80.

95 (2002) 7 NWLR (Pt. 796) 412; (2003) 10 WRN 1.

96 See *AG of Bendel v AG of the Federation & Ors* (1981) ANLR 85; (1982) 3 NCLR 1; (1981) 1 FNR 179 in which the Supreme Court annulled the Revenue Allocation Act 1981 because it was in breach of constitutional procedure.

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shall not prevail over a Decree".[97] Government and its agencies have always relied on ouster clauses in the Constitution and statutes. But the Nigerian Supreme Court had decided in a long list of cases that an ouster clause cannot protect illegality[98] or nullity.[99] It has been said that:[100] "Now, none of the ouster clauses in statutes can survive the combined effect of sections 1(3), 4(8), 6(6)(a) and 36 of the Nigerian Constitution 1999 which have removed all the obstacles in the way of the citizen to justice."

An example is the case of *Military Administrators, Benue State & Ors v Ulegede & Ors*.[101] Two lawyers in the Ministry of Justice were summarily dismissed on the provisions of the Public Officers (Special Provisions) Act 1984. Based on the facts of the case and the arguments before the lower courts, Ayoola, JSC held that:[102]

> The case was not a case of mere breach of contract of employment but one in which the retirement of the respondents was void because of non-compliance with the provisions of the statute which, it was claimed, conferred power on the first appellant to remove them.

In this article it is argued that the 1963 Constitution was not repealed or suspended; on the contrary, it was the benchmark that the military juntas incorporated Decree No. 1 (in the form of amendment)—not the other way around—and used as their blueprint for governance and proceeded to rule with it.

This article also avers that with the repeal of Decree No. 1 of 1966 and "other Decrees" by Decree No. 26 of 1 September 1979—even though they were void—the 29 suspended provisions of the 1963

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97 Decree No. 1 s 1(2). Also in *Gani Fawehinmi v Sanni Abacha and Ors* (2000) 6 NWLR (Pt. 660) 228; (2001) 51 WRN 29 the Supreme Court declared the detention of the Lagos lawyer as illegal and unconstitutional.

98 "Illegality" is what violates the law. See *Webster's Dictionary* (n 1) 482; or what is "prohibited by law" *American Heritage Dictionary* (n 1) 656. Breach of the fundamental human right of a citizen (e.g. unlawful detention) is a constitutional tort prohibited in Nigeria by s 35(1)(6) of the Constitution 1999 and is null and void.

99 Lord Denning said: "If an act is void, then it is in law a nullity … and proceeding [or act] which is founded on it is also bad and incurably bad"; *MacFoy v UAC Ltd* (1961) 1 All ER 1169; (1961) 3 WLR 1405; (1962) AC 152. The Nigerian Supreme Court agreed. In *Kolawole v Alberto* (1989) 1 NWLR (Pt. 98) 382, the court held that "in the contemplation of the law, an act that is a nullity is as if the act never occurred". Even an ouster clause in a statute or the Constitution will not protect a nullity. *Onuzulike v Commissioner for Special Duties, Anambra State* (1992) 3 NWLR (Pt. 232) 791, 813; *Military Administrator of Benue State & Ors v Ulegede & Anor* (2001) 2 NWLR (Pt. 696) 73, SC; (2001) 51 WRN 1.

100 Emiola (n 1) 46.

101 (2001) 2 NWLR (Pt. 696) 73, SC; (2001) 51 WRN 1.

102 At 16.

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Constitution fell back into their *natural* positions in the Constitution. *Naturale est quidilibet dissolvi eo modo quo ligatur* (It is natural for a thing to be unbound in the same way it was bound).

We agree with Nsongurua Udombana who posited:

> It [the 1999 Constitution] has the imprint of authoritarianism written all over it, with no consideration to the genuine desires of the Nigerian people. There was not even the civility of a Constituent Assembly, let alone a referendum, thereby making the 'We the people' in the preamble a lie and *fraud*. It is an *illegitimate* document and will remain so notwithstanding the number of amendments…[103]

We submit further that we cannot accept the theory of "legitimacy of *coup d'etat by conduct*" because "illegitimacy" is *ab initio* contrary to law.[104] Chief Afe Babalola, a senior advocate of Nigeria, also held the view that "no extent of amendment … can impose the legitimacy and massive acceptability which any Constitution desperately needs". If the preamble to the 1999 Constitution is "a lie, … fraud [and] illegitimate document", then it cannot be made legitimate simply because the people consciously participated in the constitution-making process. Section 1 of the 1963 Constitution (which we consider pre-emptive) forbids seizing power from an elected government by illegal and unconstitutional means.

The current leadership of the nation is challenged. They have a heavy burden of conscience and the moral duty to accept the challenge. Nigerians expect them to demonstrate unalloyed patriotism and rise above ethnic, religious and sectional sentiments—but with their eyes only on the verdict of history. The black peoples of the world look up with the hope of purposeful leadership, which they believe Nigeria can give. Let us not let them down.

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[103] Udombama, 'Constitutional Restructuring in Nigeria: An Impact Assessment' 7.

[104] Professor Udombana himself agreed that Even the architects of the 1999 Constitution committed an illegality ab initio. So did Ogunwewo (n 20) 137.

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