Introduction to the 1979
NIGERIAN CONSTITUTION

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Foreword

In the political history of Nigeria no other process of constitution-making has been as elaborate as that of the Constitution of the Federal Republic of Nigeria, 1979. The process began with the 50 men who assembled at the Conference Hall of the Nigeria Institute of International Affairs on Saturday 18 October 1975 to prepare a draft constitution within 12 months. The CDC (Constitution Drafting Committee) or 'wise men' as this group was called, submitted its report in September 1976. Between this date and the meeting of the Constituent Assembly in August 1977 the Draft Constitution was made available for seminars, conferences, debates and discussions in the mass media all over the country. Even during the meetings of the Constituent Assembly which lasted till June 1978 popular participation in the process still continued. In this sense and many others, the Nigerian 1979 Constitution is very unique.

At every stage in the process the most critical issue was the choice between the parliamentary system of government which Nigeria adopted before military rule began in 1966 and the presidential system based on the United States model. What appears to have tilted the balance in favour of the presidential system is the manner in which executive power is constituted under this system. As the drafters of the Constitution claimed, 'The simple executive' which is a basic element of this system 'has the merit of unity, energy and despatch.'

The general acceptance of this system of government at every stage in the process was, however, accompanied by the fear of executive dictatorship. Though the makers of the Constitution realised that the ultimate sanction against usurpation of power is a politically conscious society jealous of its constitutional rights to choose those who direct its affairs, they also recognised the need for specific constitu-

tional checks to achieve this purpose. These include the power to confirm executive nomination for certain offices, the power to investigate executive actions and inactions, and the power to impeach.

All these checks on the executive give the new Nigerian legislators the status and power which they have never previously possessed. In other words, viewed against the pre-1977 governmental system, the status and powers of Nigerian legislative houses have been greatly increased. In the view of the CDC this is necessary because 'the legislature must be the protector and watchdog of the people's rights against any encroachments from any quarters – be such quarters other branches of government or external interest.'

In the light of the experience since the Constitution became operative, the political maturity required for the use of these weapons has not been evident. Legislative confirmation of executive appointments is based on the presumption that legislators would eschew partisanship and confirm or withhold confirmation on the basis of objective assessment of the individuals. At both state and Federal levels this has not been the case. Confirmation processes have been dominated simply by partisanship. Probity and fitness for public office have been criteria least considered. What is worse, impeachment has become within 2 years the legislature's big weapon to frighten an executive who fails to accept the legislature's leadership in governmental affairs. The most guilty legislatures are those in which the governor's political party is not in control. No wonder some did argue during the process of drawing up the Constitution that an executive presidential system of government is too sophisticated for Nigerians!

On the question of impeachment, the Constitution is in part to blame. Though the grounds for impeachment are narrowly defined as 'gross misconduct in the performance of the functions of his office' what constitutes gross misconduct is left to the accusers. The two-thirds rule of impeachment as laid down in section 132 of the Constitution makes a mockery of the principle of just process. The authors show clearly in Chapter 8 of this book the problems raised by the impeachment clauses.

As the Kaduna example shows very clearly, nothing – not

even the law courts – can stop a legislature that is determined to remove its executive for no just cause.

Another area in which political maturity is required during this formative stage of our Federal development is in the distribution of powers between levels of government. At every stage the distribution of powers between the Federal and state governments was a major concern of the makers of the Constitution. What finally emerged is a formula for the Federal government to usurp many of the powers of state governments. In the words of the authors:

> because of the large number of matters specifically placed within Federal powers by the Constitution and the open-ended effect of the implied powers clause, practically every matter which might be considered within exclusive state power could, in fact, be regulated by the Federal Government if it wished. This means that any limitation on Federal legislature powers in relation to the states may depend on self-restraint by the Federal Government.

So far that self-restraint has not been much in evidence. As long as the concurrent legislative list is seen as a potentially exclusive Federal list by those in power, progress towards the maturity of Nigerian Federalism will continue to be an illusion.

It has been argued elsewhere that the 1979 Constitution is a document which reflects more the sad experiences of the past than the hopes of the future. There are legitimate grounds for this position.

Political stability and national integration have eluded Nigeria for a long time. Various measures in the 1979 Constitution were aimed at recapturing these goals. Some of these measures are found in Chapter VI of the Constitution, particularly those clauses that deal with the election to the highest office – the presidency. As the authors show in Chapter 8 of this book, the makers of the Constitution were concerned with using the presidential election to find a national figure – someone who would rise beyond the sad experiences of regional basis for national power. However the controversy surrounding the first presidential election in

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1979 unfortunately makes it difficult to know whether a national figure can emerge.

Other provisions with the same objectives in mind relate to formation of political parties and composition of state and national cabinet. Again from the experience so far it would appear that the gulf between intentions and achievements is still great, particularly in the case of the political parties.

Many political parties have their roots basically in the regions their leaders represent, and as the 1979 elections have shown not much has changed in the voting behaviour of Nigerians despite the 14 years of military rule. The ethnic content in the voting pattern remains very strong.

The pessimistic view in this short assessment of the working of the 1979 Constitution may be due to the impatience of the assessor. The authors of this book are more patient in their analysis of the various elements of the Constitution. Reading their work is likely to raise more hope for the future.

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Contents

1

Constitutions Generally

INTRODUCTION

Constitutions are often, if not always, initially adopted as the consequence of political upheaval and newly won political independence. The origins of most modern constitutions can be found in the desire for a break with the political past and the need for a new beginning in government. Virtual epidemics of constitution-making have occurred in two historical periods. During the century between 1775 and 1875, many countries in Europe and Latin America, as well as Canada, Australia and the United States, adopted written constitutions for the first time. And in the period from the end of the Second World War until the present, there has been a similar explosion of new constitutions on the world scene. Both periods were times of revolution in which the idea of democracy provided the guiding intellectual thrust. The earlier period marked the breakdown of monarchy under the weight of the Age of Enlightenment and its Social Contract and Natural Law theories. While the post-Second World War period has seen the collapse of colonialism as people in Africa, Asia and other Third World areas have demanded and achieved political independence.

In both periods a major political force was the desire for democracy and self-determination. The ultimate goal was greater participation by the people in governing themselves, and less rule by an elite few. In both periods this political force and its accompanying goal made fundamental changes in the old governmental order necessary and inevitable. The democratic nature of the revolutionary movements during these times caused the following questions to take on impor-

tance in the public consciousness. What is the proper basis for political authority? What organs or institutions should exercise government power? How should power be distributed among the organs of government? What limits should be imposed on governmental power? What are the fundamental rights of citizens? Establishing a new, more democratic system of government to replace a monarchical or a colonial system required answers to these questions. A major purpose of written constitutions was, and is, to provide authoritative answers – to define with precision the parameters of governmental power and individual rights and liberties.

Of necessity, then, constitutions pre-eminently have to do with forms of government. Although scholars have provided many different definitions of a 'constitution', all include the idea that the constitution of a country establishes the basic form of government of that country. Does it really matter what *form* a government takes? Apparently, many people throughout the ages have believed very strongly that it does.

For example, the early Greeks developed an elaborate classification scheme for different forms of government, labelling them as monarchy, aristocracy or democracy, among others. They were greatly concerned with the merits and defects of different forms of government. So were the authors of the Declaration of Independence published by the American colonies when they broke away from Great Britain in 1776. In that Declaration, the American colonies justified their independence on the grounds, among other things, that whenever any form of government becomes destructive of fundamental rights, the people have the right to abolish that government. During the First World War many believed that the war was being fought to make the world safe for democratic government. In the Second World War many soldiers fighting against Germany were motivated by the idea that they were upholding the democratic form of government against fascism and dictatorship; while in the same war, German troops were exhorted to suicidal efforts by Hitler's cry that the evil communist form of government must be destroyed. The intensity and bitterness of the continuing debate since the Second World War between Western democracies and communist governments gives no

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indication that mankind's concern with forms of government has lessened.

As recently as 1980–81, the federal and provincial governments in Canada were embroiled in heated negotiations aimed at changing the Canadian constitution. Their goal was alteration of the distribution of powers between the federal and provincial governments. The issue of the proper form of government for Canada remains among the most important and most pressing political problems of that country.

It appears, then, that throughout history people have believed that it matters a great deal what form their government takes. Indeed, few people today have to be told that a country's constitution is perhaps the most significant element establishing the form of its governmental system.

However, a written constitution is little more than a skeleton of government – a basic frame or foundation on which the governmental system as a whole is built. It creates the organs of government, but it does not make them work. Examined in isolation from the political, cultural and socio-economic forces at work in the society, a constitution seems drab and lifeless. Thus, the system of government of any country cannot be fully understood by merely studying the country's constitution. Such understanding requires a detailed study of the beliefs and ideals of the people; the various societal groups and associations, their desires and demands, and the conflicts between them; and the history of the country and its government.

Nevertheless, a study of any system of government which omitted the constitution would be even less likely to impart full understanding. This is because, among other things, the constitution is the source of the design of the organs of government. The organs of government are the mechanisms whereby the forces generated by popular beliefs, ideals, desires, demands, and conflicts are accumulated and transformed into political power. The organs of government constitute the means by which this political power can, in the form of government action, be given practical effect and brought to bear on society at large. Knowledge of these things is essential to understanding any governmental system.

Therefore the study of a country's constitution should be

viewed as a significant first step in attempting to understand the country's system of government. It is only a beginning – but a highly valuable and even necessary beginning.

Although the constitution of every country is different, there are certain features and functions which may be associated with constitutions in general. These should be considered before beginning the study of the constitution of a particular country. Accordingly, these preliminary matters are discussed in the remainder of Chapter 1. Subsequent chapters deal specifically with the constitution of the Federal Republic of Nigeria.

CONSTITUTION DEFINED

Notwithstanding that lawyers, legal scholars, political scientists, historians and others have been studying and writing about constitutions for centuries, there is today no single, uniformly accepted definition of the term constitution.

Following are some definitions put forth by various authorities:

> the whole system of government of a country, the collection of rules which establish and regulate or govern the government. These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal, taking the form of usages, understandings, customs, or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called.[1]

> a selection of the legal rules which govern the government of [a] country and which have been embodied in a document.[2]

> a frame of political society, organized through and by law; that is to say, one in which law has established permanent institutions with recognized functions and definite rights.[3]

> codes of rules which govern the allocation of functions, powers and duties among the various governmental agencies

> and their officers, and define the relationship between them and the public.[4]
>
> the basic instrumentality for the control of the power process . . . the articulation of devices for the limitation and control of political power.[5]
>
> a true constitution will have the following facts about it very clearly marked: first, how the various agencies are organized; secondly, what power is entrusted to those agencies; and thirdly, in what manner such power is to be exercised.[6]
>
> The constitution . . . is the process by which governmental action is effectively restrained.[7]
>
> the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen.[8]

These definitions indicate that there are three essential aspects to note about the meaning of the term constitution. First, it includes the laws and rules which establish and regulate the government that are contained in a document officially designated as the 'constitution'. Second, it also includes the laws and rules which establish and regulate the government that are *not* contained in the above-mentioned document. Third, the term constitution usually refers to a system of laws and rules which imposes, or purports to impose, definite limits on governmental powers. These three aspects are discussed in subsequent parts of this chapter.

The diversity in the above-mentioned definitions suggests that there is no ideal constitution appropriate for all countries at all times. As every country is different, so are their respective constitutions different. It has been frequently observed that a constitution reflects the beliefs and interests of the dominant groups in society at the time the constitution is adopted. 'A Constitution is indeed the resultant of a parallelogram of forces – political, economic, and social – which operate at the time of its adoption.'[9] As this is so we may expect that the constitutions of different countries will

vary to the extent that the political, economic and social forces vary in different countries. It is inevitable, then, that the constitution of a particular country will be tailored to fit the needs of that country, as perceived by the dominant groups. Thus, it is important to recognise the uniqueness of constitutions and to avoid measuring the worth of a particular constitution by comparing it with a mythical, non-existent 'ideal' constitution.

SOURCES OF THE CONSTITUTION

When considering the sources of any constitution, a question that immediately arises is whether the constitution must be in written form, or whether it may also be unwritten.

In past years the difference between written and unwritten constitutions was the subject of much scholarly writing. Today, however, it is generally recognised that this is not a matter of great significance. As we shall see below, all written constitutions are supplemented by aspects of the constitution that are unwritten; and, as to the major so-called unwritten constitution, the British Constitution, many of its most important features are contained in written statutes passed by Parliament.

Thus, the attempt to distinguish constitutions of different countries on the basis of whether they are written or unwritten is not very helpful to an understanding of those constitutions. It can do little more than inform one whether a particular country does or does not have a single written document officially designated as its constitution. This information is not especially significant or useful since, with the exception of one or two countries, all nations possess a written document officially called the Constitution. The more important point to recognise is that all constitutions consist of a combination of written and unwritten rules. These written and unwritten rules are found in the following sources:

(1) a written document officially designated as the Constitution;

(2) statutes which have to do with the basic organisation of the government, sometimes called 'organic laws';
(3) judicial decisions;
(4) conventions (customs and practices).

The written document

Although the written document officially designated as the Constitution will not contain all the rules of a system of government, it usually contains many of the most important rules. The contents of the document vary in details from country to country. However, there are five general categories of subject-matter which appear in most, perhaps all, written texts of constitutions.

The first category is that of ideals and values. This is usually a statement of the ideals underlying the constitution, and of the general purposes and goals fostered by the constitution. Ideals like freedom, justice and equality are usually specifically enshrined in the written constitution. This part of the constitution is usually non-justiciable, which means that no legal sanction results from failure to fulfil these objectives. Its importance lies in the guidance it provides as to how government *ought* to operate and what government *ought* to be trying to accomplish.

In older constitutions, this material is usually found at the beginning of the Constitution, in a brief Preamble; while in constitutions adopted more recently, the statement of ideals and purposes is likely to be a separate section or chapter within the body of the constitution. An example is Chapter II of the Nigerian Constitution entitled 'Fundamental Objectives and Directive Principles of State Policy'.

A second category concerns the basic structure and organisation of the government. This portion of the Constitution specifies the organs or branches of government. Examples in the Nigerian Constitution are the legislature, the executive, the judiciary, and administrative commissions. It also prescribes the composition and functions of these organs, the qualifications which must be met by members of the different organs, and the procedures to be followed by these organs.

It will usually also specify the relations between the different organs of government, and the relations between those organs and the people.

The third category involves the distribution of powers. Governmental powers may be distributed in two different ways. First, independent powers may be distributed between a national government and other territorial units of government, e.g. states, provinces, cantons, etc. This is typical of a federal system. Second, governmental powers may be allocated among the different branches of government within the national or other units of government, with each branch generally prohibited from exercising the powers allocated to other branches. This is the principle of 'separation of powers'. It refers to the distribution of powers among the executive, the legislature and the judiciary. Any constitution in which a distribution of powers is intended will incorporate one or both of these methods. On the other hand, a constitution may not prescribe a distribution of powers between separate levels of government, or among separate branches. Instead, it may assign all powers to the national legislature, which may then delegate powers to whatever agencies or branches it chooses. This is typical of a unitary system.

The fourth category is fundamental rights. Virtually all written constitutions contain a description of certain basic rights which belong to all people subject to the constitution. For example, Chapter IV of the Nigerian Constitution prescribes the fundamental rights of all Nigerians. These rights are sometimes referred to as human rights, civil rights, civil liberties, fundamental freedoms, individual rights, etc.

The fifth and final category to be noted is that of formal amendment procedures. Almost all written constitutions require special procedures for amendment that are different from the method used to enact ordinary laws. As will be seen, the amendment procedures are of utmost importance in determining the nature of any constitution.

These, then, are the five general categories of subject-matter which appear in most written documents officially designated as constitutions. All are included in the Nigerian Constitution and are discussed at some length in the remainder of this book.

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