

CONSTITUTIONALISM, POVERTY AND INEQUALITY IN AFRICA: A LEGAL SURVEY*

Abstract

Constitutionalism has nexus with the primacy and supremacy of the Constitution in a given political unit. Constitutionalism presupposes allegiance, fidelity, homage, obedience or adherence to the principles and the spirit of the Constitution by all persons and authorities including the parliament. This paper does not merely show the nexus between constitutionalism, poverty and inequality but also surveys the impact[s] of poverty and inequality on constitutionalism in Africa. The researcher used Nigeria as a case study. The research methodology adopted in this paper is doctrinal while the approach is analytical. The researcher found inter alia that equality before the law being one incident of rule of law commands a prominent place in securing fidelity to the principles and the spirit of the Constitution. Also, poverty which basically may be moral poverty, intellectual poverty, or financial poverty has ways of affecting the rule of law and constitutionalism. It is the researcher's conclusion that the promotion of a planned and balanced economic development and regional economic cooperation in Africa are needed to tackle poverty and inequality to a very large extent. It is accordingly recommended inter alia that each State in Africa should control her national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity. Each State in Africa is also advised to direct its policy towards ensuring that there are equal and adequate education opportunities at all levels.

Keywords: Constitutionalism, Poverty, Inequality, Legal Survey, Africa

1. Tracing the Purport / Import of a Constitution

The word, 'constitution' is a noun. The verb, 'constitute' means to assemble, put together, and bring into being. A Constitution therefore, is an assemblage of documents; documents put together or brought into being for the guidance of government and ordering of relations in a nation, society, state, community or organization. The documents that translate into a Constitution may be aspirations, values and general interests endorsed by the people, which may be in writing and in one single volume (written Constitution) or may be in writing but not in one single volume (unwritten Constitution).¹ A Constitution is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.² Elsewhere, it was noted and submitted that: A constitution, being the fundamental system of the law in any sovereign state, it provides definition for the citizenship and institution. It prescribes rights, responsibilities, obligations and duties. It distributes, secures and limits authority and powers, aggregates and articulates aspirations and interests and; outlines procedures for actions, and interactions and; sanctions default. Constitution is the most fundamental system of law in the state; the ultimate authority in the state...constitutions are primarily about political authority and the location of power, conferment, distribution, exercise and limitation of authority and power among the agents of a state. They are concerned with matters of procedure as well as substance. They also include explicit guarantee of the rights and freedom of individual as well as incorporate ideological pronouncements, that is principles by which the state ought to be guided or to which it ought to aspire and statements of the citizens' duties. The constitution states and limits the powers of the organs of government as well as regulates the behaviors of the citizens, be it in relation to them or to the state. Thus, one could reasonably contend that the constitution is a logical instrument of state as well as social control and regulation baring a higher status. It is said to have a higher status in the sense that, it is supposed to be higher than any other body of legal regulations in human society.³

Today the idea of a constitution and constitutional government is widespread all over the world. The idea of modern Constitution began to emerge after the 'Reformation in Europe', particularly in the works of the English philosopher and scientist Thomas Hobbes (1588 – 1679), and the English philosopher John Locke (1632 – 1704), and the French philosopher and writer Jean-Jacques Rousseau (1712 – 1778), all of whom developed the theory that a Constitution is a social contract, whereby, people agree among themselves to give up a portion of the absolute freedom that characterized the pre-social 'state of nature' in return for the security that a government can provide. It was John Locke's work particularly, on the division of rights between the government and the individual, and on the doctrine of separation of powers among the three arms of government, that influenced the 18th Century authors of the American Declaration of Independence, the U.S. Constitutions, and the French

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¹GN Okeke, *Introduction to Consular Immunities & Privileges, Jurisprudence and Constitutional Law* (Enugu: Nolix Educational Publications, 2010) p. 176.

² BA Garner(ed), *Black's Law Dictionary* (8th edn, Minnesota: Thomson West Publishing Co., 2004) p. 330.

³A Olasunkanmi, 'Constitution without constitutionalism: Interrogating the Africa Experience', *Arts and Humanities Open Access Journal* Volume 2 Issue 5 (2018) pp. 272 – 276 at p. 272 < <https://medcraveonline.com/AHOAJ/AHOAJ-02-00069.pdf>> accessed on July 7, 2022.

Declaration of the Rights of Man and the Citizen.⁴ Examples of modern Constitutions of the United Kingdom, Canada, India, South Africa, and the Constitution of Federal Republic of Nigeria 1999 (as amended).

It has been submitted that ‘for there to be a viable legal system within a defined area, there must be in place, certain ultimate principles from which all others are derived but which themselves are self-existent.’⁵ The ultimate principle(s) constitutes the *fons et origo* (supreme law or grundnorm) of the legal system to which every other rule or principle or law must conform for validity. Any law, rule or principle that is inconsistent with the tone and tenor of the *fons et origo* (the ultimate law) should to the extent of that inconsistency be void. For example, the *fons et origo* in the Nigerian legal system can be ascribed to be the Constitution of the Federal Republic of Nigeria, 1999 although the Constitution derives authority and legitimacy from the people of Nigeria. That is the supreme law in Nigeria and all other laws, principles or rules derive validity therefrom; in effect therefore, any law, rule or principle that is inconsistent with the Constitution shall to the extent of such inconsistency be void.⁶ To buttress the supremacy of the extant Nigerian Constitution as the *fons et origo* of the Nigerian legal system, the researcher would at this juncture, allow a decision of the Supreme Court of Nigeria to talk, to wit: It is by it (the Constitution) that the validity of any law, rule or enactment for the government of any part of the country will always be tested. It follows therefore, that all powers; be it the legislative, executive and judicial, must be traced or predicated on the Constitution for the determination of their validity. All these three powers that I have mentioned must and indeed, cannot be exercised inconsistently with any provisions of the Constitution. Where any of them is so exercised, it is invalid to the extent of such inconsistency. Furthermore, where the Constitution was enacted exhaustively on any situation, subject or conduct, anybody or authority that claims to legislate, in addition to what the Constitution had enacted must demonstrate, in clear and unambiguous terms, that it has derived the legislative authority from the Constitution to so do. I go further to say that where the Constitution has set out certain conditionalities for doing a thing, no legislation of the National Assembly (in the absence of clear amendment of the particular provision of the Constitution so stipulating the afore-mentioned conditionalities) or of a State House of Assembly can alter those conditionalities in any way, directly or indirectly, unless the Constitution itself, as an attribute of its supremacy, so expressly authorized, such is the eminent position of the power and authority which the Constitution enjoys. The Constitution is very much supreme to all other laws of the land and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria.⁷

In another decision of the Supreme Court of Nigeria, per Niki Tobi, JSC (as he then was) stated inter alia that: The Constitution of a nation is the *Fons et Origo*, not only of the jurisprudence but also of the nation, it is the beginning and the end of the legal system. In Greek language, it is the alpha and omega. It is the barometer in which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution.⁸

The summary of what appears from the foregoing is that ‘a constitution is incontestably a legal document and it is the *fons et origo* of all rights within the polity’⁹. However, it is instructive that we quickly note that a constitution is not a mere or common legal document. It is, essentially, a document relating to and regulating the affairs of a nation state and stating the functions and powers of the different apparatus of the government, as well as regulating the relationship between the citizens and the state. It makes provisions for the rights of the citizens within the compass of the state.¹⁰ A Constitution is, therefore, a body of fundamental principles according to which a state is organized.¹¹ Its provisions are supreme and have binding force on all authorities and persons throughout the state.¹² Any other law or any governmental policy that cannot find a foothold or place on the Constitution, nor adapt itself to the Constitution is unconstitutional, and null and void to the extent of its inconsistency with the Constitution.¹³

⁴ E Malemi, *The Nigerian Constitutional Law* (Ikeja: Princeton Publishing Company, 2012) pp. 12 – 13.

⁵ A Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans, 1987) p.82.

⁶ *Constitution of the Federal Republic of Nigeria 1999*, s. 1 (3).

⁷ Per Aderemi, JSC in *Tanko v The State* (2009) LPELR-SC.53/2008. Also reported in [2009] 4 NWLR (Pt. 1131) 430.

⁸ *Attorney General of Abia State v Attorney General of the Federation* (2002) 17 WRN 1.

⁹ GA Karibi-Whyte, ‘The Relevance of the Judiciary in the Polity in Historical Perspective’ (Lagos: NIALS, 1987) p. 27. Cited in E Malemi, *op cit*, p. 34.

¹⁰ *Abaribe v The Speaker, Abia State House of Assembly* [2000] FWLR (Pt. 9) 1560.

¹¹ BO Nwabueze, *The Presidential Constitution of Nigeria* (London: Hurst & Co., 1982) p. 7.

¹² J Akande, *Introduction to the Nigerian Constitution* (London: Sweet & Maxwell, 1982) p. 1. See also *The Constitution of the Federal Republic of Nigeria, 1999 (As Amended)*, s. 1.

¹³ See for example the Supremacy in The Constitution of Federal Republic of Nigeria, 1999 (As Amended), s. 1.

2. Interrogating the Concept of Constitutionalism

To provide a legalistic definition of constitutionalism, it can be said to ‘encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations.’¹⁴ In this sense, constitutionalism combines the idea of a limited and accountable government and rests on two main pillars. One is the fact that limitations are imposed on government when it is based on certain core values; the second is the ability of citizens to legally compel government to operate within these limitations. In this broad sense, recent literature on the topic suggests that the modern concept of constitutionalism rests on the following core elements:¹⁵

- (i) the recognition and protection of fundamental rights and freedoms;
- (ii) the separation of powers;
- (iii) an independent judiciary;
- (iv) the review of the constitutionality of laws;
- (v) the control of the amendment of the constitution; and
- (vi) institutions that support democracy.

There are, however, three important points to note about constitutionalism as defined above. First, it is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens. Second, the presence and institutionalization of these core elements do not necessarily guarantee constitutionalism. Nevertheless, their presence makes the prospects for constitutionalism better. In the absence of such provisions, the chances of constitutionalism are very bleak. Finally, it is the cumulative effect of these core elements that enhance the chances for constitutionalism.¹⁶ The concept of constitutionalism somewhat derives from the primacy and/or supremacy of the Constitution in a given political unit. Constitutionalism means attachment, fidelity, homage, or adherence to the principles and spirit of the Constitution by all persons and authorities including the parliament. The fundamental idea behind constitutionalism is the need to ensure that a constitution does not become an ornamental document or a sham that politicians can ignore or violate with impunity. It must provide a solid basis for the respect of the rule of law, democracy, and good governance.¹⁷

In Nigeria for instance, the supremacy of the Constitution is well declared and by parity of reasoning, all persons and ‘the three arms of government must dance to the music and chorus that the Constitution beats and sings, whether the melody sounds good or bad’¹⁸. The Parliament in Nigeria, that is, the National Assembly and the Houses of Assembly of the federating States have the constitutional power to amend the Constitution, but ‘until that is done, they must kowtow to the provisions of the Constitution, whether they like it or not’¹⁹. The bad music of the Constitution refers to constitutional flaws and until such flaws are removed through an amendment of the Constitution by the Legislatures, at both the federal and state levels, such flaws are clothed with supremacy and everybody in Nigeria must dance to the tune, no matter how painful the dance might be.²⁰ This is constitutionalism. Olusankanmi noted that:

Constitutionalism also is a form of political thought and action that seeks to prevent tyranny and guarantees the liberty and rights of individuals on which free society depends. It is based on the idea that government can and should be limited in its powers, and that its authority depends on enforcing these limitations. In this regard, constitutionalism is a political theory concerned with the architectural structure and basic values of the society and the government. It aims to make the world

¹⁴ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1014 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> accessed on 7 July 2022.

¹⁵ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1014 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> accessed on 7 July 2022

¹⁶ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1014 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> accessed on 7 July 2022

¹⁷ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1014 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> accessed on 7 July 2022.

¹⁸ See The Constitution of Federal Republic of Nigeria, 1999 (As amended), s. 1. interpreted in *Attorney General of Abia State v Attorney General of the Federation*, *supra*.

¹⁹ *Abia State v Attorney General of the Federation*, *supra*.

²⁰ GN Okeke, *op cit*, p. 189.

comprehensible and, to some extent, controllable. Historically, it is preoccupied with the problem of power, particularly the power of those who would rule, especially when that rule might be arbitrary²¹

The term ‘constitutionalism’ is used to represent the extent of fidelity or adherence to the spirit and principles of the Constitution in a given political unit. The concept of constitutionalism entails the maintenance of the ideology of a constitution by all segments of government and the public.²² Constitutionalism is basically concerned with the implementation, observance and enforcement of constitutional limitations and values. It should be viewed as a method of limiting political abuse and ensuring that the powers of the State are constrained so that the State cannot act capriciously.²³ Rosenfeld²⁴ maintains that constitutionalism is a ‘three-faceted concept’ as it requires imposing limits on governmental powers, adherence to the rule of law and protection of human rights. Constitutionalism is thus the antithesis of arbitrary rule. An important bulwark of constitutionalism is the existence of an efficient and effective mechanism controlling and compelling compliance with the letter and spirit of the Constitution.²⁵

3. Finding the Nexus between Constitution and Constitutionalism

There is a distinction between a government with a constitution and constitutionalism and a government with constitution without constitutionalism. Every political system has a constitution whether it is a constitutional system or not. In this sense, the constitution is no more than a description of the makeup or composition of a political system. It portrays the way a polity is constituted, that is, how its foundation is set forth, its first principles articulated, its character shaped, and its government organized and operated. The fact that a political system has such a constitution even if it is a formally written document does not mean it meets the standard of constitutionalism. Under the standard of constitutionalism, governments must themselves be bound by rules. To implement this standard, a constitution that reflects the principles of the constitutionalism will serve as a higher law. This higher law establishes and limits government in order to protect individual rights as well as to promote the common good.²⁶ Instances of constitution without constitutionalism can be seen in some African states. The former Apartheid regime of South Africa had a constitution without constitutionalism. Also, General Sani Abacha of Nigeria, Idi Amin of Uganda, Jeane Bedel Bokassa of the Central Africa Empire (now Republic), Marcias Nguema of Equatorial Guinea as well as Gnassingbe Eyadema of Togo had constitutions in one form or the other. But as we all know, these so-called constitutions were devoid of constitutionalism. More importantly, though some of them could be claimed to be legal documents, they were certainly not legitimate. In fact, the so-called constitutions were instruments for terrorizing the poor and the weak, legitimating corruption and privatization of the state, and rationalizing the suffocating of civil society and subservient relationships with imperialism.²⁷

The truth is that the respective Constitutions of many African countries were not compacted through a truly open and democratic process that paid attention to the dreams, pains, and aspirations of African people, their communities, and constituencies. In fact, most of these were directly imposed constitutions or elite-driven processes that treat the people and their ideas with disrespect, if not contempt. The hallmark of this constitution is that they were never subjected to popular debates or referenda. If at any point the constitutions were subjected to public debates, such debates were often brief, carefully monitored and manipulated. The documents, either in draft or final forms, were never made available to the people. If referenda were called, the results were rigged in favour of the state and its custodians. In some cases, the reports of constitutional commissions were simply ignored after elaborate ceremonies⁶ aimed at diverting public attention and convincing donors and the international community that something positive was being done about democracy. In Nigeria, not only were general and presidential elections conducted without a constitution, but also the draft was never widely debated, seen or voted upon by the people. Even after the presidential election, the government continued to keep the constitution a secret and away from the Nigerian people. In an open demonstration of military arrogance and insensitivity to the popular

²¹ A Olasunkanmi, *op. cit.*

²² GN Okeke, *op cit.*, p. 205.

²³ LE Habasonda, ‘Presidentialism and Constitutionalism in Africa: Third Term Phenomenon/Extension of Tenure: the Zambian Experience’ <https://www.google.com/url?q=http://www.zesn.org.zw/wp-content/_protected/publications/publication_107.doc&sa=U&ved=2ahUKEwie_cKf6fTwAhVVgFwKHWYBDv0QFjAAegQIAhAB&usg=AOvVaw07wpTKEk-S-0G5gMK4xFIz> accessed on 7 July 2022.

²⁴ M Rosenfeld, ‘Modern Constitutionalism as Interplay between Identity and Diversity’ in M Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham and London: Duke University Press, 1994) p.23

²⁵ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1012 – 1013 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> accessed on 31 May 2022; <www.saifac.org/docs/reapers/RPS%20NO%2018paf..> accessed on 31 May, 2022.

²⁶ A Olasunkanmi, *op. cit.*

²⁷ A Olasunkanmi, *op. cit.*

will, the General Abdulsalami Abubakar junta refused to release the constitution even after the military ruling council spent three days 'putting finishing touches' to what was supposed to be a peoples' document. In Uganda, Idi Amin turned the state to police state; the constitution remained meaningless throughout his time until his government was overthrown. Gnassingbe Eyadema of Togo was not left out, the constitution was amended to give way for family succession. It is not surprising therefore that constitution in postcolonial Africa has never been taken as sacred. This disdainful attitude to constitution in Africa militates against its being properly employed to serve the course of democracy. A nation's constitution should be its most valued document. Preparing it is a sacred and weighty undertaking that should not be addressed in isolation of the people. Nothing is more important in the political culture and history of a nation than the constitution by which its citizens are ruled.²⁸

However, the constitution does not really occupy a pride of place in the life of the contemporary states in Africa be it under the military or civilian regime. Under a military rule, the constitution is simply ignored or suspended except where it is needed by the military elite to give a similitude of legitimacy to some policies. Almost the same attitude to the constitution is shown by political leaders in Africa. The African elites in their quest for absolute power have no qualms about subverting the constitution and manipulating it to serve the interests of small elites. Consequently, what we have in many African countries has been constitution without constitutionalism.²⁹

4. Some Basic Consequences of Constitution without Constitutionalism

Constitution without constitutionalism gives room for endemic corruption or profiteering by the ruling elites and strong resistance to transparency, accountability and political representations. *Section 15(5) of the Constitution of the Federal Republic of Nigeria 1999* provides that 'the State shall abolish all corrupt practices and abuse of power' yet corruption and abuse of power are currently the order of the day in Nigeria because the government has paid no true homage and shown no genuine allegiance/fidelity to the spirit of the extant Constitution as regards abolition of all corrupt practices and abuse of power. There has been numerous reports and/or verified cases of looting/embezzlement of public funds and abuse of power in Nigeria. For instance, on December 1, 2015, Rtd. Col. Sambo Dasuki was arrested by the State Security Service for allegedly embezzling/looting about \$2.1 billion which was given to him in his capacity as the National Security Adviser for purchase of arms to combat *boko haram*. The retired Army Colonel is accused of awarding phantom contracts for purchasing of 12 helicopters, four fighter jets and other ammunition meant for the Nigerian military campaign against Boko Haram.³⁰ In another instance, there was this hilarious report in Nigeria that 'about ₦36 million was allegedly swallowed by a mysterious snake which no one saw...'³¹ It is equally on record that a Chief Justice of Nigeria was removed from office and replaced with another by the President contrary to the constitutional procedure for such removal as stipulated in *Section 292 of the Constitution of the Federal Republic of Nigeria 1999*.³² There are many other instances of corrupt practices and abuse of power in Nigeria as a consequence of Constitution without constitutionalism. Elsewhere, it was reported that:

A particular Nigerian politician popularized the axiom: 'If this country does not kill corruption, corruption will kill it.' The axiom gained wider currency as a result of the level of impunity with which public officials fritter funds running into billions, without any serious consequence and the resultant retrogression it foisted on the nation's development. The trend of corruption and the failure by Anti-graft Agencies to effectively check the menace, according to an anti-corruption watchdog, Socio-Economic Rights and Accountability Project (SERAP), has hampered the ability of government to meet the needs of citizens. SERAP argued that had the anti-graft agencies recovered the 'missing'

²⁸ A Olasunkanmi, *op. cit.* p. 273

²⁹ A Olasunkanmi, *op. cit.*

³⁰ Dasukigate: Here is a breakdown of the alleged misappropriation of \$2.1 bn by Dasuki and others', available at <<http://venturesafrica.com/dasukigate-here-is-a-breakdown-of-the-misappropriation-of-2-1-bn-meant-for-arms-deal-by-dasuki-and-others/>> accessed on 9 July 2022.

³¹ J Ebirim & A Adesoji, 'Snake allegedly swallows N36 million from JAMB office vault, Nigerians react', *Vanguard Newspaper* (February 17, 2028) <<https://www.vanguardngr.com/2018/02/snake-allegedly-swallows-n36-million-jamb-office-vault-nigerians-react/>>

³² E Okakwu, 'What the law says on removal of Chief Justice of Nigeria', *Premium Times News* (January 25, 2019) <<https://www.premiuntimesng.com/news/headlines/307973-what-the-law-says-on-removal-of-chief-justice-of-nigeria.html>> accessed on 10 July 2022; V Ufuoma, 'My unconstitutional removal as CJN shows Nigeria's judiciary on life support – Onnoghen', *ICIR* (March 19, 2021) <<https://www.icirnigeria.org/my-unconstitutional-removal-as-cjn-shows-nigerias-judiciary-on-life-support-onnoghen/>> accessed on 9 July 2022; I Nnochiri, 'NBA to FG: You can't remove CJN from office without due process', *Vanguard Newspaper* (January 22, 2019) <<https://www.vanguardngr.com/2019/01/nba-to-fg-you-cant-remove-cjn-from-office-without-due-process/>> accessed on 9 July 2022.

funds, the money would have helped the government to invest in public goods and services, and improve the living condition of citizens.³³

Poor management on the part of those at the helm of affair is another consequence of constitution without constitutionalism whereby many opportunists find themselves at the corridor of power because their party is the ruling party. Many of this people are inefficient and could not deliver. Some of them often disgrace the government of the day because as poor as they are they are often overzealous and power drunk. The constitution is not being taken into consideration before choosing them and they see no reason why they should live by that constitution. And constitutionalism which should serve as constraint is absent in the state, what do we expect; there is bound to be maladministration of things in the state which may not pave way for the smooth running of the state.³⁴ Lack of constitutionalism, that is to say, adherence to the rule and regulation laid down in the constitution has led to the emergence of ethnic militias in some countries in Africa, for example in Nigeria; the ethnic militias converse verbally and even openly on the state of nation. Some even went to the extent of engaging in confrontation with the state security forces in pursuance of their goals and objectives; they have different goals and aspirations.³⁵ Constitution without constitutionalism in Nigeria has also extended the tentacle of its consequences to the delicate region of religion in Nigeria. For example, although the Constitution of the Federal Republic of Nigeria 1999 does not expressly proclaim Nigeria to be a secular state, it however, prohibits both states and the Federal Government from adopting any religion as state religion,³⁶ and guarantees to every person the right to freedom of thought, conscience and religion,³⁷ as well as the right to freedom from discrimination on grounds, *inter alia*, of religion.³⁸

The Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,³⁹ stated *inter alia* that:

The right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one's life, fashioned on what one believes, and the right not to be coerced into acting contrary to one's belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy ... Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.

However, despite the aforesaid constitution provisions and position on religion in Nigeria, we see various degrees of flagrant infidelity to and/or departure from these constitutional provisions in words and in deeds which flagrant infidelity has birthed obvious religious intolerance and violence in Nigeria. Another consequence of constitution without constitutionalism is military incursions into government by toppling the government and introducing or reintroducing military government as opposed to civil and/or democratic government. Nigeria has tasted this very consequence, likewise several other African countries.

One other serious consequence of constitution without constitutionalism is the birth of agitations and movements including agitations and/or movements led by indigenous peoples (in countries that has indigenous peoples) for secession and/or restructuring. For example, infidelity to the federal character of Nigeria as prescribed in the Constitution of the Federal Republic of Nigeria has occasioned ill-feelings and suspicions and agitations among the citizenry.⁴⁰ Deriving from the foregoing is a multiplicity of ethnic movements supposedly formed for the various nationalities to fight for their respective demand for self-determination. Notable among these movements are the *Oduduwa Peoples' Congress* ('OPC'), a pan Yoruba movement; the Movement for the Actualization of the

³³A Ochojila, 'Alleged misappropriation of public funds and task before anti-graft agencies', *The Guardian Newspaper of 31 August, 2021* <<https://guardian.ng/features/alleged-misappropriation-of-public-funds-and-task-before-anti-graft-agencies/>> accessed on 9 July 2022.

³⁴A Olasunkanmi, *op. cit.* p. 273

³⁵A Olasunkanmi, *op. cit.* p. 273

³⁶*Constitution of the Federal Republic of Nigeria 1999*, s. 10.

³⁷*Ibid.*, s.38(1).

³⁸*Ibid.*, s.42(1).

³⁹[2001] FWLR (Pt 44) 542. For commentary on this case, see N Tijani 'Physicians, patients and blood: Informed consent to medical treatment and fundamental human rights' in E Chianu (ed) *Legal principles and policies: Essays In honour of Justice Chukunweike Idigbe* (2006) 359.

⁴⁰*Section 318(1) of the Constitution of the Federal Republic of Nigeria 1999* defines federal character of Nigeria to mean the distinctive desire of the people of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation.

Sovereign State of Biafra ('MASSOB'); the Indigenous People of Biafra (IPOB); the Movement for the Survival of Ogoni People ('MOSOP') whose former leader [Ken Saro-Wiwa] along with eight other members thereof, were executed in 1995 by the late General Abacha's regime; the Arewa Consultative Forum ('ACF') of the Hausa/Fulani extraction; and the Ijaw Youth Congress. These ethnic armies have different *modus operandi*, different agenda, and aim for different results.⁴¹ Absence of separation of power, rule of law including equality before the law, lack of independence of the judiciary, lack of proper enforcement of laws, corrupt law enforcement agents, corruption in the judicial system are other consequences of Constitution without constitutionalism.

5. Inequality, Poverty and Constitutionalism

The thriving of poverty in a polity is somewhat occasioned by inequality in the distribution of goods, opportunities and rights. Six important areas of inequality in the distribution of goods, opportunities and rights are as follows:⁴²

1. Inequalities in the distribution of income. The distribution of income among individuals or households at the local or national level, based on classifications such as socio-economic status, profession, gender, location, and income percentiles, is the most widely used measure of the degree of equality or inequality existing in a society.⁴³
2. Inequalities in the distribution of assets, including not only capital but also physical assets such as land and buildings. There is normally a strong positive correlation between the distribution of income and the distribution of assets.⁴⁴
3. Inequalities in the distribution of opportunities for work and remunerated employment. In both developed and developing countries today, the distribution of work and employment opportunities is the main determinant of income distribution and a key to economic and social justice⁴⁵
4. Inequalities in the distribution of access to knowledge. Considered in this context are issues relating to levels of enrolment in schools and universities among children from different socio-economic groups, as well as issues linked to the quality of educational delivery in various institutions and regions. Education, including technical training and adult education, is critical for ensuring access to decent work and for social mobility, and in most societies is a strong determinant of social status and an important source of self-respect.⁴⁶
5. Inequalities in the distribution of health services, social security and the provision of a safe environment. Traditional indicators of well-being such as life expectancy and child mortality rates, broken down by gender, socio-economic status and area of residence, are typically used along with other data to identify and measure inequalities in the distribution of amenities all societies endeavour to provide for their members. As is the case with education, issues relating to the availability, quality and accessibility of health and social services and facilities are critical but are difficult to analyze and measure. As stated in *Article 22 of the Universal Declaration of Human Rights*, 'everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.⁴⁷
6. Inequalities in the distribution of opportunities for civic and political participation. This form of inequality is rarely discussed in international circles, perhaps because of its inherent complexity and sensitivity, and perhaps also because the practice of democracy is usually limited to the holding of elections; those who vote in presidential and parliamentary elections are implicitly considered participants in political life. Involvement in the electoral process notwithstanding, the Forum asserted that inequalities and inequities associated with political institutions and processes were key factors contributing to inequalities and inequities in society more generally.⁴⁸

6. Factors that Promote Constitutionalism

The following factors promote constitutionalism:⁴⁹

1. Procedural Stability: Constitutionalism requires procedural stability. In other words, certain rules and provisions of the constitution must not be subject to frequent and arbitrary changes if constitutional government is to be sustained. These rules include the fundamental objectives and the directive principles of state policy and

⁴¹ EI Orji, 'Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective', *Fordham International Law Journal*, 25(2) (2001) 435 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1819&context=ilj>> accessed on 9 July, 2022.

⁴² Department of Economic and Social Affairs, 'Social Justice in an Open World The Role of the United Nations', *The International Forum for Social Development* (New York, United Nations: 2006) pp. 15 – 19. <<https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>> accessed on 10 July 2022.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Classy Magazine, 'Constitutionalism: Definition, Concepts & Features' <<https://studyhq.net/constitutionalism/>> accessed on 10 July 2022.

fundamental human rights. In addition, the citizens must know the basic rules guiding the formulation of public policies. Citizens must also have adequate foreknowledge of possible consequences of their actions.⁵⁰

2. **Public Accountability:** A traditional cornerstone of democracy is the notion that each political representative and public official is subject to what is known as accountability.¹ Public officers/officials including political leaders are and/or ought to be ultimately responsible to the people for government / official actions, and this means that there has to be accountability in public service.⁵¹ Public offices are sacred trusts. Accordingly, every holder of any public office is and/or ought to be a trustee of the powers/authority of that office and every act [whether of omission or commission] of the holder of any such public office should be for public good. Democracy will be a mirage and/or a mere window dressing if the people cannot hold public officers/official accountable and responsible for their policies, decisions, acts, omissions, and expenditures. It is thus not in doubt that public accountability (otherwise known as public sector accountability) is pivotal to democratic governance.⁵²
3. **Separation of Powers:** Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.⁵³
4. **Ideal Representation:** Ideally, sovereignty and power should reside in the people of every country and it should be through the people that the government of every country derives all its powers and authority.⁵⁴ Accordingly, people in government are but representatives of the people and they (the representatives) must conduct themselves as true representatives of their constituencies. To represent means to be present on behalf of a person who is absent.⁵⁵ They must not be arbitrary in their representation but must truly and duly represent the interests of their respective constituencies. This can be accomplished by having a genuine and working bridges of communication between the representatives and the grassroots and/or people of their constituencies.
5. **Popular Participation and Transparency:** One basic element of democracy is popular participation in the activities of government. The people can only participate rationally in government if they are adequately educated, sensitized, and informed about the activities of government.⁵⁶ For example, section 14(2)(c) of the Constitution of the Federal Republic of Nigeria 1999 states that ‘the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution’.
6. **Equality and Equity:** There are three areas of priority with regard to equality and equity highlighted in the *Charter of the United Nations, the Universal Declaration of Human Rights*, and the International Covenants on Human Rights, and in subsequent texts adopted by the General Assembly, notably the Copenhagen Declaration and Programme of Action and the United Nations Millennium Declaration. They include Equality of rights, Equality of opportunities, and Equity in living conditions for all individuals and households.⁵⁷
7. **Security and Welfare of the People:** The security and welfare of the people shall be the primary purpose of government and this is one of the most fundamental demands (conditions/terms) of the social contract between the government and the people.⁵⁸ Welfare here should encompass basic health care facilities, other basic amenities, equitable distribution of commonwealth / resources of the state and deliberate poverty alleviation programmes. With these, the people will be basically poised and set about to adhere to the prescriptions and the spirit of Constitution, all things being equal.

7. Conclusion and Recommendations

Constitutionalism is a means to an end. Without it, there can be no constitutional democracy. In other words, ‘when the power relationship among the groups in political society becomes regularized under law and subject to well-defined restraints and/or constitutional constraints, then constitutional government exists’. Constitutionalism therefore refers to those factors that restrain or constrain the major actors in a political system from exceeding their powers or constitutionally stipulated limits. Regarding the operation of the state, constitutionalism refers to governance that respects the constitution or a government based on the rule of law or due process. Simply put, the term ‘constitutionalism’ denotes government by the constitution or belief in the idea of a constitutional

⁵⁰ *Ibid.*

⁵¹ UC Kalu and OE Okeke, ‘Public Accountability in Federal States: The Gap between Nigeria and The United States of America’, *International Review of Law and Jurisprudence (IRLJ)* Volume 2 Issue 3 (2020) p. 1. <<https://nigerianjournalsonline.com/index.php/IRLJ/article/download/887/872>> accessed on 11 July 2022.

⁵² *Ibid.*

⁵³ National Conference of State Legislators, ‘Separation of Powers – An Overview’ <<https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>> accessed on 11 July 2022

⁵⁴ See for example section 14(2)(a) of the Constitution of the Federal Republic of Nigeria 1999.

⁵⁵ Classy Magazine, ‘Constitutionalism: Definition, Concepts & Features’ <<https://studyhq.net/constitutionalism/>> accessed on 10 July 2022.

⁵⁶ *Ibid.*

⁵⁷ Department of Economic and Social Affairs, ‘Social Justice in an Open World The Role of the United Nations’, *The International Forum for Social Development* (New York, United Nations: 2006) pp. 15 – 19. <<https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>> accessed on 10 July 2022.

⁵⁸ See for example section 14(2)(b) of the Constitution of the Federal Republic of Nigeria 1999.

government. In other words, it means strict adherence to the spirit of the constitution.⁵⁹ Constitutionalism therefore represents a strict adherence to the provisions of a constitution by both the rulers and the ruled. It emphasizes that the constitution is superior to any other power in the political system.⁶⁰ Mere existence of a written constitution is no guarantee of constitutionalism. This means that while there may exist a codified body of rules to guide the operations of governmental structures and institutions, in reality political functionaries may not ensure strict adherence to them. The goal of constitutionalism is constitutional government.⁶¹ It is the researcher's conclusion that the promotion of a planned and balanced economic development and regional economic cooperation in Africa are needed to tackle poverty and inequality to a very large extent. It is accordingly recommended *inter alia* that each State in Africa should control her national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity. Each State in Africa is also advised to direct its policy towards ensuring that there are equal and adequate education opportunities at all levels. It is further recommended that violation of the constitution should be criminalized and a severe punishment prescribed for any such violation especially corruption and abuse of power.

⁵⁹ Classy Magazine, 'Constitutionalism: Definition, Concepts & Features' <<https://studyhq.net/constitutionalism/>> accessed on 10 July 2022.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*