

IMPEDIMENTS TO THE EFFECTIVE PROMOTION OF CONSTITUTIONALISM  
IN NIGERIA: AN APPRAISAL\*

**Abstract**

The concept of constitutionalism today 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 effectively compelled to govern within its constitutional limitations. Nigeria is a creation of the Constitution, which grew into an internationally recognized independent nation in 1960 after a period of colonialism under the British government, which spanned about a century beginning with the formal annexation of Lagos in 1861. Starting from the first post-independence effort in 1960, Nigeria has had a long history of constitution making process. After nearly three decades of cumulative military rule, it returned to civilian government in 1999 under a presidential system of government. Regrettably, the basis for the promotion of constitutionalism in Nigeria is founded on the 1999 Constitution, which was conceived by a military regime and is fairly unrepresentative of popular participation. This article examined at what point it could be said that Nigeria had practiced constitutionalism and also analyzed various core elements of constitutionalism and found out that Nigeria's constitutionalism is an evolving one with several factors militating against its full entrenchment. Some recommendations that will uplift the promotion of constitutionalism in Nigeria were made, at the same time, comparative benefits and lessons Nigeria can learn from other jurisdictions.

**Keywords:** Appraisal, Constitutionalism, Impediments, Effective Promotion, Nigeria

**1. Introduction**

The concept of constitutionalism is the doctrine that governments must act within the constraints of a known Constitution<sup>1</sup> whether it is written or not.<sup>2</sup> In other words, the term constitutionalism has come to suggest limited governmental action. Rather than merely being a static exercise, constitutionalism is an on-going process in which each new generation engages and necessarily alters in the process of such engagement. Constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with the law. The terms 'Constitution' and 'Constitutionalism' are two different concepts, though intertwined but are not the same. The former is in form of a written document, which regulates the government and the governed, while the latter is the effective practice of the former to the letter. Therefore, having a Constitution alone does not secure or bring about constitutionalism, rather observing the dictates of the Constitution is the threshold upon which constitutionalism stands. Except for a few countries, which have unwritten Constitutions, today almost all the nations in the world have Constitutions. This does not, however, mean that all these countries practice constitutionalism and that is why constitutionalism is far more important than a Constitution, though a basis for promoting constitutionalism.<sup>3</sup>

**2. Approaches to Constitutionalism**

There are two main approaches to constitutionalism, which are traditional and modern approaches.<sup>4</sup>

**Traditional Approach**

Ihonvbere<sup>5</sup> and Shivji<sup>6</sup> construe constitutionalism in a traditional perspective as a liberal concept, which rests on two pillars, namely, limited government and individual rights. Constitutionalism implies also the reservation of a

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<sup>1</sup> A Constitution has also been defined as rules which set out the framework of government, postulates how it ought to operate and makes declaration about the purposes of the states and the society and the rights and duties of citizens but no real sanction is provided against violation of particular provisions of the Constitution.

<sup>2</sup> DB Mosota, 'Constitutionalism and the Rule of Law under the New Constitutional Order in PLO Lumumba, MK Mbonyeni and SO Odero, 'The Constitution of Kenya: *Contemporary Readings*' (2010) p.78.

<sup>3</sup> CJ Friedrich, 'Constitutions and Constitutionalism' (1968) *3International Encyclopedia of Social Sciences*, pp.318-319.

<sup>4</sup> AMB Mangu, 'Federalism, Constitutionalism and Democracy in Africa' Paper for the 8th World Congress of the International Association of Constitutional Law (IACL) Mexico (2010) p.13.

<sup>5</sup> JO Ihonvbere, 'Towards a New Constitutionalism in African,' (2000) Centre for Democracy and Development, *Occasional Paper Series*, no.4, p.13.

<sup>6</sup> IG Shivji, 'State and Constitutionalism: A New Democratic Perspective,' in *State and Constitutionalism: An African Debate on Democracy*, ed. IG Shivji, *South Africa Political Economy Series*, Harare, 1991, p.28.

large private domain and retained rights for every individual devoid of arbitrariness whenever exercised, to protect individuals and society generally.<sup>7</sup>

### Modern Approach

Proponents of modern constitutionalism are of the considered view that the concept is more concerned with values.<sup>8</sup> Rosenfeld thinks of the concept of constitutionalism as a three-faceted concept consisting of three general features, namely, limited government, adherence to the rule of law and protection of human rights.<sup>9</sup> The modern concept of Constitutionalism, therefore, rests on two main pillars. Firstly, there is the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined core values. Second, there is the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable.<sup>10</sup>

### 3. Elements of Constitutionalism

The following are some of the essential features of constitutionalism, which are:

#### Popular Sovereignty

Popular sovereignty envisages the fact that the public is the source or fountain of all governmental authority.<sup>11</sup> The legitimacy of any governmental power is derived from the consent of the public. In other words, the government acquires its mandate from the people. The source of all sovereignty lies essentially in the nation.<sup>12</sup> The most obvious one is election of representatives. The public is entitled to elect representatives who represent it. When the public loses confidence in its representatives or where the latter fail to represent the interest of the public, representatives maybe recalled before the expiry of their term of office.<sup>13</sup> In some liberal democratic countries like United States America, United Kingdom, France, Germany, etcetera, the principal role of the public is to control the activities of the government and to exercise a sort of veto power, which goes beyond mere participation.<sup>14</sup>

#### Separation of Powers

The concept of separate of power envisages the doctrine of checks and balances of governmental actions.<sup>15</sup> The French Philosopher Baron De Montesquieu propounded the doctrine of separation of powers.<sup>16</sup> Nwabueze summarized the purport of the postulation of Montesquieu as concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute power is by its very nature arbitrary, capricious and despotic.<sup>17</sup> In other words, for a country to practice constitutionalism, the powers of the various organ of her government must be clearly delineated by its Constitution.<sup>18</sup> In the United States of America<sup>19</sup>, France<sup>20</sup> and Germany<sup>21</sup> the three organs and their respective powers and duties are enshrined in the Constitution.<sup>22</sup>

#### Responsible and Accountable Government

In the democratic nations or countries, people perceive their government as their own servant. The government is there to serve their interest or act as the steward of their interest. The governments assume office in the name

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<sup>7</sup>*Ibid.*

<sup>8</sup> G Carpenter, 'Public Law: Constitutional Law' in WJ Hosten, et al (eds) *Introduction to South African Law and Legal Theory*(1997) 949.

<sup>9</sup>J Rosenfeld, *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994) p.39.

<sup>10</sup>*Ibid.*

<sup>11</sup>CFRN, *op cit*, s. 14(2) (a) provides that sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.

<sup>12</sup>French Declaration of Human Rights, 1789, art. 3.

<sup>13</sup> CFRN, *opcit*, ss.69 and 110. Referendum is the other mechanism by which the sovereignty of the public is manifested or expressed.

<sup>14</sup>SE Finer, *Comparative Government* (Penguin, 1970) pp. 30-40.

<sup>15</sup>In Nigeria, sections 4, 5 and 6 of the 1999 Constitution contain the division of powers amongst organs of government, which are the Legislature, the executive and the Judiciary respectively.

<sup>16</sup>BD Montesquieu, *L'Esprit Des Lois* (translated as '*The Spirit of Laws* ') (1748) chapter II, pp.3-6. The English version of the work can be obtained at [www.efm.bris.ac.uk/het/montesquieu/](http://www.efm.bris.ac.uk/het/montesquieu/) accessed on 13 June 2021.

<sup>17</sup> BO Nwabueze, *The Presidential Constitution of Nigeria* (London, Hurst & Co Publishers Ltd, 1982) p.32.

<sup>18</sup>BO Nwabueze, *Constitutional Democracy in Africa* (Ibadan: Spectrum Books Ltd, 2004) p.243.

<sup>19</sup>U.S. Constitution, *opcit*.

<sup>20</sup>French Constitution, 1958, *op cit*.

<sup>21</sup> German Basic Law, 1949, art. 77(2).

<sup>22</sup>CFRN, *op cit*, s. 4 (8).

and on behalf of the public for the benefit of the public. In France, the French Declaration of the Human Rights recognizes the right of the society to ask a public official to account for his/her administration.<sup>23</sup> As government assumes office in the name and on behalf of the public, it is directly accountable or responsible to the public.<sup>24</sup>

### **Rule of Law**

Rule of law denotes a government of laws and not of men. According to Dicey,<sup>25</sup> the first component of rule of law is related to the principle of legality. If a certain behavior is not categorized as a criminal act by the constitutionally mandated lawmaking organ, it cannot be treated as a criminal act and not punishable. Secondly, for an act to be punishable, the act must be classified or identified as a criminal act by the legislature through the law-making process enshrined in a Constitution and any other laws. Finally, once a certain behavior is classified as a criminal act, the accused should be tried and punished by the ordinary courts.<sup>26</sup> According to Dicey, the mere recognition of rights in a Constitution alone does not secure or ensure the rights of an individual. The rights recognized by a Constitution and other laws are to be protected or defended through the medium of courts whenever these rights are infringed.<sup>27</sup>

### **An Independent Judiciary**

It is the third organ of government responsible for the interpretation of the law particularly the Constitution and judicial powers are vested in the courts.<sup>28</sup> From the concept of separation of powers, this function is exclusively performed by the judiciary. Judicial independence is the hallmark of liberal democracy.<sup>29</sup> Courts play a vital role in ensuring and respecting the rights of individuals. An independent judiciary is the cornerstone of a free society and rule of law.<sup>30</sup> A government is obliged to act according to laws set by the legislature. However, where there is failure to adhere to the laws, set by the legislature, an independent judiciary shall check such events.<sup>31</sup>

### **Ensure and Respect Individual Rights**

The incorporation of the rights of individuals in a Constitution and other laws is essential, but not an end by itself. It is a means to an end. It must be seen that these rights are duly respected and protected. In Nigeria, the Constitution, in its chapter IV, makes provisions for the fundamental Rights<sup>32</sup> and the enforcement of those rights in case of violations.<sup>33</sup> However, the said Constitution also allows some permissible derogations, where violations of those rights in some cases may be justifiable.<sup>34</sup>

## **4. Promotion of Constitutionalism in Nigeria**

There are several factors, which can be categorized as institutional, structural and other changes for the promotion of constitutionalism, which can be summarized as follows:

### **Independent Judiciary as a Promoter and Defender of Constitutionalism**

Judiciary operates as either a guardian of the Constitution, the protector of human rights or an impartial enforcer of the law. Because of the important role that judges in a constitutional system firmly rooted on constitutionalism have to play, it is inevitable that the prospects for deepening constitutionalism on the continent would require more serious measures to enhance the judicial role. Three main issues are critical to this, which are enhancing and strengthening judicial independence and competence, expansion of the scope for judicial intervention and review, and judiciary as active agents of constitutional change and development. If the judiciary is to play an effective role in promoting constitutional governance in Nigeria, it must liberate itself from being

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<sup>23</sup>French Constitution, *op cit*, art. 15.

<sup>24</sup>CFRN, *op cit*, ss. 80-84, 125, 140, 149, 152, 162, 172, 185, 194, 209 and 290. The following sections of the Constitution attest to the fact that public officers in Nigeria are accountable and responsible to the public and these provisions are put in place to checkmate their excesses.

<sup>25</sup>AV Dicey, *Introduction to the Study of Law of Constitution* (London and New York, Macmillan, 1995) p.188.

<sup>26</sup> Ordinary courts refer to courts established in accordance with a country's Constitution. It may not include any extra-judicial or extraordinary court not recognized by the Constitution of the land.

<sup>27</sup>CFRN, *op cit*, s.46.

<sup>28</sup>*Ibid*, s.6.

<sup>29</sup> AG Robert and AS William, *The Constitution, the Courts and the Quest for Justice* (Washington DC: American Enterprise Institute Press, 1999) p.25.

<sup>30</sup> PH Russel and DMO Brien, *Judicial Independence in the Age of Democracy* (Charlottesville: The University Press of Virginia, 2001) p.25.

<sup>31</sup> CFRN, *op cit*, s.4 (8).

<sup>32</sup>CFRN, *op cit*, ss. 33-44.

<sup>33</sup>*Ibid*, s.46.

<sup>34</sup>*Ibid*, s.45.

perceived as the handmaiden of the executive, act boldly and decisively to enforce both the letter and spirit of the law.

### **Constitutional Recognition of a Right to Free and Fair Elections and other Ancillary Rights**

An examination of the legal regime of election administration in Nigeria has revealed that the *grundnorm* for the conduct of elections in Nigeria consists of the Constitution of the Federal Republic of Nigeria, 1999 as amended, the Electoral Act 2010 as amended, case law and guidelines regulating the conduct of institutions and agencies involved in elections. One of the major challenges in Nigeria today is the problem of countering the resurgence of the ruling party dictatorship and abuse by using their stooge, that is, the Independent National Electoral Commission,<sup>35</sup> to conduct sham and fraudulent elections as a convenient cover up behind which to practice their dictatorship. This poses a serious threat to entrenching the promotion of constitutionalism and the rule of law in Nigeria. One important way of reducing the risks of fraudulent elections will be to recognize and entrench a right to free and fair elections in the Constitution itself. Constitutional provisions must recognize the basic rights and duties of political parties and guarantee a right to free and fair elections and a right to equality of treatment of all the political parties.

### **Entrenchment of Constitutional Key Principles and Institutionalization of Accountability**

The 1999 Constitution provide for some accountability and transparency measures and mechanisms.<sup>36</sup> In many situations, these measures and mechanisms have been introduced through ordinary legislations.<sup>37</sup> These have often not worked well mainly because the legal safeguards to protect them from being abused or manipulated by the governments are weak or absent. The tenacity of the single party mentality within the new dominant parties that are entrenched in power coupled with weak and ineffective civil society organizations in Nigeria has been a formidable obstacle to holding governments accountable. In order to ensure that the institutions of accountability are not only proactive and reactive, there is need for the Constitution to lay down the basic principles of an effective whistleblower legislation, not only a policy as we currently have it since assumption of the present administration.

### **Reduction of Excessive Presidential Powers**

One of the major factors necessary for the promotion of constitutionalism is by standing firm against executive lawlessness, which has been made possible by the excessive powers conferred on the president and the Governors at both the federal and state levels respectively without the presence of any effective checks on the exercise of these powers. A constitutional provision must specify that all political appointments at all levels especially of senior government officials must be based on clearly defined and objectively verifiable criteria with emphasis on experience, expertise and qualifications which limit the scope for partisan political considerations. To enhance the practice of constitutionalism, there is need for devolution of power as the current practice in Nigeria allows the Federal Government taking more than what it can chew, in that, some of the provisions or functions contained in the Exclusive Legislative List<sup>38</sup> should be taken to the Concurrent Legislative List<sup>39</sup> where the state Governments can exercise such powers effectively.

### **Addressing Poverty through Effective Recognition of Socio-Economic Rights**

The present constitutional dispensation in Nigeria does not specifically address the issue of equitable distribution of the nation's resources nor is there any attempt to liberate the masses from the scourges of poverty, oppression and discrimination. Whilst no constitutional design or principle can, on its own, eradicate poverty and unemployment, it can nevertheless do two things that may considerably improve the conditions of the poor. First, it can reduce the endemic corruption that is a major cause of failure to deliver goods and services paid for by the government through the constitutional entrenchment of accountability principles and institutions. Second, ensure that government resources are used judiciously and equitably for the common benefit of all. Other factors include but not limited to cross-systemic fertilization of constitutional law ideas, strong civil society organizations, and active Nigerian Bar, among others.

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<sup>35</sup>Referred to as INEC.

<sup>36</sup>*Ibid*, ss. 52(1), 94(1), 140(1), 149, 152, 185(1), 194 & 290(1).

<sup>37</sup>Such as Economic and Financial Crimes (Establishment) Commission Act 2004, Corrupt Practices and Other Related Offences Act, 2000 and Money Laundry Act, Cap. M18 Laws of the Federation of Nigeria, 2004, Code of Conduct Bureau and Tribunal Act, Cap. C15 Laws of the Federation of Nigeria, 2004, etcetera.

<sup>38</sup>CFRN, *op cit*, Part 1, Second Schedule.

<sup>39</sup>*Ibid*, Part II, Second Schedule.

## 5. Challenges to the Promotion of Constitutionalism

There are many impediments to the promotion of constitutionalism in Nigeria, which can be classified as constitutional, social and political, among others. Generally, the following are some of the noticeable impediments:

### Absence of True of Judicial Independence

There can be no constitutionalism in terms of respect for the Constitution and the values and principles that underlie it if there are no secured review mechanisms, whether by ordinary courts or other specialized courts or bodies, that can independently enforce the provisions of the Constitution, while checking and controlling any abuses of its provisions. The judiciary, as the guardian of constitutionalism, ensures that the organs of government do not stray into the sphere of each other, and that powers and authority are exercised within the prescribed constitutional boundaries. The responsibility of ensuring that the standards and procedures laid down in a Constitution are observed rests with the courts<sup>40</sup> through the power of judicial review, vested in the courts.<sup>41</sup> It is important to stress that both legislative and executive powers are generally susceptible to abuse and must therefore be checked and restrained in order to forestall arbitrariness and promote constitutionalism.<sup>42</sup> By giving the power of judicial review to the courts, the Constitution ensures obedience to its provisions by all persons and authorities since any violation of its provisions will be an illegality.<sup>43</sup> Furthermore, the Constitution's supremacy is assured since any derogation from it will be declared void because it is unconstitutional.<sup>44</sup>

Since transition to civil rule in 1999, however, the courts have played a much more pronounced and critical role in settling varieties of disputes and becoming a bulwark for constitutional democracy and guarantee of fundamental rights, which Nigerians labeled as the last hope of the common man.<sup>45</sup> The courts in Nigeria, particularly the Supreme Court, have risen to the occasion by saving the country's from total collapse. This is evident from several decisions of the courts reviewing legislative and executive actions that are contrary to the provisions of the Constitution. The courts have made radical pronouncements in landmark cases on some constitutional issues, which have gone a long way in strengthening, fostering and promoting constitutionalism in Nigeria.<sup>46</sup> However, while the exercise of the power of judicial review by the courts has so far been quite encouraging and commendable, the attainment of optimal performance by the courts has been impeded by several intractable factors, some of which include interference from the other organs of government,<sup>47</sup> lack of courage to decide a case in line with laid down laws and precedents,<sup>48</sup> complaints of judicial neutrality and favouritism in election cases,<sup>49</sup> problem of financial autonomy contrary to the provisions of the Constitution,<sup>50</sup> absence of true judicial reforms,<sup>51</sup> weak and inactive National Judicial Council in charge of regulation and welfare of judicial officers, problem of corruption in the judiciary,<sup>52</sup> which always leads to denial and access to justice,<sup>53</sup> problem of judicial philosophy such as rigid and conservative approach to constitutional

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<sup>40</sup> IT Mohammad, 'Judicialism and Electoral Processes in Nigeria: What the Supreme Court Did and What the Supreme Court May Do', Being a paper presented at the 2012 Felix Okoye Memorial Lecture, Organized by Nigerian Institute of Advanced Legal Studies, University of Lagos, held at the Nigerian Institute of Advanced Legal Studies, University of Lagos, on 18th September 2012.

<sup>41</sup>CFRN, *op cit*, ss.4(8) & 6(6)(a).

<sup>42</sup>BO Nwabueze, *The Presidential Constitution of Nigeria* (London: C.Hurst & Company Publishers Ltd., 1982) p. 309.

<sup>43</sup>SI Nchi, *Separation of Powers under the Nigeria Constitution* (Jos: Greenworld Publishing Co. Ltd., 2000) p. 148.

<sup>44</sup>CFRN, *op cit*, ss. 1, 4(8) & 6(6).

<sup>45</sup> T Mamman and PC Okorie, 'Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy in Nigeria'. Available at <http://www.ialsnet.org/meetings/constit/.../mamman> accessed 13 June 2021.

<sup>46</sup> J Amupitan, 'The Role of the Courts in Strengthening Democracy at the Local Government Level in Nigeria, available at <http://www.ialsnet.org/meetings/constit/.../Amupitanjoash.pdf>.> accessed 13 June 2021.

<sup>47</sup>A Aguda, *The Judicial Process and the Third Republic* (Lagos: F & A Publishers, 1992) pp. 35 - 36.

<sup>48</sup>Lord Reid "The Judge as Law Maker", available at [www.oppapers.com/subjects/thejudge](http://www.oppapers.com/subjects/thejudge)>accessed 13 June 2021.

<sup>49</sup>I Nnochiri, 'Corruption in Nigerian Judiciary: How Safe is 2011 General Elections?' Vanguard, July 18, 2020.

<sup>50</sup>CFRN, *op cit*, s. 81(3) & 121 (3).

<sup>51</sup>E Essien and M Udofia, 'Judicial Reforms and Democracy in Nigeria' E. Essien (ed.) Law: All-Round Excellence Essays in Honour of Professor Peter Umana Umoh (London) (Lagos: Toplaw Publishments Ltd, 2012) p. 13.

<sup>52</sup>A Oyeboode, 'The Judiciary, Corruption and Democratization' in A Gboyega (ed), *Corruption and Democratization in Nigeria*. (1996). Y Osibajo, 'Impact of Corruption on Socio-Economic Development in Nigeria.' Being a speech delivered at the Fourth Gani Fawehinmi Annual Lecture, organized by the Ikeja branch of the Nigerian Bar Association in Lagos on January 15, 2008.

<sup>53</sup>B Okafor, 'Prospects and Problems of Access to Justice Through the Multi-Door Court' (2014) ABUAD Law Journal Vol. 1 NO. 1 p. 41.

and statutory interpretations instead of flexible, functional, progressive<sup>54</sup> and purposive approach<sup>55</sup>, and problem of *locus standi*.<sup>56</sup> From the above premise, it can be safely concluded that judicial independence is not yet a reality but a mere aspiration in Nigeria today.

### **Problem of Disobedience to Court Orders by the Executive**

Without doubt, accessibility to court by litigants is one thing, while the impartiality of the judge is another. Respect and obedience to the judgment and orders of the court is yet another important consideration. It is a notorious fact that judgments and orders of courts are not self-executing and the judiciary does not have its own body or institution charged with the responsibility of enforcing its judgments.<sup>57</sup> The implication is that the judiciary inevitably depends on the executive for the enforcement of its judgments. The executive branch, without doubt, is the greatest violator of court orders.<sup>58</sup> This being the case, there is no guarantee that when an order is made against the executive branch, the same will be treated as sacrosanct. On the contrary, the unfortunate and regrettable experience has been regular disobedience of the executive to lawful and subsisting court orders.<sup>59</sup> Often, government chooses the orders to obey. It obeys those it is comfortable with and disobeys those, which are in conflict with its interest, thereby constitutes a remarkable challenge to the development, realization and promotion of constitutionalism.

### **Weak Institutional Infrastructure and Autonomy**

A major deficiency in the promotion of constitutionalism is one of enforcement. Since the enforcement of violation of the provisions of the Constitution largely depends on the domestic machinery of the executive, Nigeria has erected seemingly weak institutional infrastructures to promote constitutionalism. The institutional infrastructures include the judiciary,<sup>60</sup> the National Human Rights Commission,<sup>61</sup> the Public Complaints Commission,<sup>62</sup> the Legal Aid Council,<sup>63</sup> Economic and Financial Crimes Commission,<sup>64</sup> Independent Corrupt Practices and Other Related Offences Commission,<sup>65</sup> among others. Regrettably, the various institutional mechanisms are not strong enough or capable of providing adequate and effective platforms for meaningful promotion of constitutionalism. This is especially so because many of these institutional mechanisms are not independent and do not have the financial and logistical capability to meaningfully function as they ought to. Judiciary and these extra-judicial bodies are in a more dangerous position as they are being controlled, directly or indirectly, by the executive through funding, composition of membership and provision of operational guidelines, among others. Government interference or influence becomes not a mere possibility but a reality as these institutions depend on the executive for their survival, therefore, weak in enhancing the promotion of constitutionalism contrary to their establishments.

### **Weak Oversight Capacity of the Legislature**

The legislature epitomizes an aspect of the sovereign expression of the constituent representative authority of the people, whose interest is to project and protect through the discharge of the legislative functions of law making;

<sup>54</sup>AE Davies, 'The Independence of the Judiciary in Nigeria: Problems and Prospects' in (1990) 10 African Study Monographs 3 at pp. 125 – 136, noting that Nigerian Judges are in most cases unable to interpret the laws to accord with the progressive aspiration of the people.

<sup>55</sup>L Uzoukwu, 'Addressing the Legitimacy of the 1999 Constitution through the Reform Process' being a paper presented at the British – Nigerian Law Week 23 – 27 April, 2000, Abuja, Nigeria. *Abubakar v. Yar'Adua* (2008) 36 NSCQR (Pt. 1) 231

<sup>56</sup>*Nafiu Rabiu v. Kano State* (1980) 8 – 11 SC 130; *A-G, Abia State v A-G, Federation* (2002) 6 NWLR (Pt. 763) 264 at 485 – 486. *A-G, Ondo State v A-G, Federation* (2002) 9 NWLR (Pt. 772) 222 at 340; *Orhiunu v. Federal Republic of Nigeria* (2005) 1 NWLR (Pt. 906) 39 at 55 and *A-G, Abia State v. A-G Federation* (2003) 4 NWLR (Pt. 809) 124 at 230. See also *Buhari v INEC* (2008) 36 NSCQR (Pt. 1) 475 at 599 – 602; CA Ogbuabor, 'The Supreme Court and Presidential Election Petitions in Nigeria: The Impregnable Reign of Literalism.' (2010) 6 Nigerian Bar Journal 123 – 164; ON Ogbu, 'The Doctrine of Substantial Compliance in Election Petitions in Nigeria: The Imperative of a New Judicial Approach' (2010) 6 Nigerian Bar Journal, pp. 29 – 48.

<sup>56</sup>*Adesanya v. President of the Federal Republic of Nigeria* (1981) ANR 1, *Fawehinmi v President F.R.N* (2007) 14 NWLR (pt.1054) 275, *Olagunji v. Yahaya* (1998) 3 NWLR (Pt. 542) 501; *Ogbuehi v. Governor, Imo State* (1995) 9 NWLR (Pt. 417) 53 and *Okafor v. Asoh* (1999) 3 NWLR (Pt. 593) 35.

<sup>57</sup>CFRN, *op cit*, s.5, it is the responsibility of the executive branch to enforce the law, including judicial decisions.

<sup>58</sup>M Mutua, 'Human Rights: A Political and Cultural Critique' (2002) p.2, CA Odinkalu, 'Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa' (2003) 47 Journal of Africa, pp. 1-37.

<sup>59</sup>This is amplified by the cases of *Military Governor of Lagos State Government v. Chief Emeka O. Ojukwu* [1986] 1 NWLR 621; *Lakanmi & Kikelomo Ola v. Attorney General Western State* (Supra).

<sup>60</sup>CFRN, *op cit*. s. 6.

<sup>61</sup>National Human Rights Commission Act, Cap. N46, Laws of the Federation of Nigeria, 2004.

<sup>62</sup>Public Complaints Commission Act, Cap. P37, Laws of the Federation of Nigeria, 2004.

<sup>63</sup>Legal Aid Act, Cap. L9, Laws of the Federation of Nigeria, 2004.

<sup>64</sup>EFCC Act, *op cit*.

<sup>65</sup>Corrupt Practices and Other Related Offences Act, 2000.

control and protection of the public finance; oversight functions; and representation of the constituencies. Barnett observed the government, in formulating policy, and the legislature, in legitimating that policy, are accountable to the electorate on whose trust power is held.<sup>66</sup> The legislature performs vital roles in the practice of constitutionalism. Indeed, the law making, and budgeting or appropriation functions constitute veritable tools for checking the excesses of the executive. However, in Nigeria, these functions are merely performed to rubber stamp the actions of the executive, instead of checking their excesses and corrupt practices.<sup>67</sup> In fact, the role of the legislature as the watchdog over public finance is part of its oversight functions over the executive in the management of the capital and resources of the Nigerian state that is meant to ensure good governance, accountability and probity.<sup>68</sup> From 1999 till date, the Legislature has not really demonstrated the importance of its oversight functions in that the legislature is not only covering corrupt practices of the administration but also in collaboration with excesses of the executive in mismanaging the nation's resources by the executive.

### **Absence of Credible Electioneering Process**

There is no gainsaying that our electioneering process is fraught with so many irregularities and fraudulent practices. This has made the constitutional provision that guarantees a representative democracy, a mockery. People's votes do not always count and voter apathy, tiredness and disenchantment are now the order of the day. A first observation on the democratization in Nigeria is the flawed electoral system and rigged elections that produced the elected officials in the executive and legislature to operate the Constitution, and thereby impacting negatively on the operation of the constitution. A second observation is the weak political parties and political system, the apparent undemocratic means by which representatives for elective posts are selected. A third observation is the operation of the governments at all levels within the federation of Nigeria, which are all riddled with abuse of governmental powers, absence of accountability, poor observance of constitutional provisions, thereby engendering and fostering impunity, corruption and wastage of national resources.<sup>69</sup> It would be recalled that a number of elections conducted by INEC particularly in the 2007, 2011, 2015 and 2019 general elections were nullified by the courts as they failed the free and fair test. Some of the grounds for nullifying these elections include illegal substitution of names, violence, thuggery, ballot snatching, ballot stuffing, multiple thumb printing, falsification and allocating of votes, inconclusive elections, *etcetera*. Militarization of electioneering process is also a new trend witnessed under our democratic dispensation. While some have argued that such a move is necessary to ensure a free and fair election and to also act as a check to electoral violence that has bedeviled our electoral processes, others have maintained that no free and fair election could be secured in such a tense and war-like situation<sup>70</sup>.

### **Lack of Due Regard for Fundamental Rights**

This has been another major challenge to constitutionalism in Nigeria. The governments at all levels have no due regard for fundamental rights. The militarization against civilians over peaceful protest against fuel subsidy removal; unlawful extra-judicial killing of citizens, indefinite detention of suspects,<sup>71</sup> global acquisition of citizens' asset<sup>72</sup> and other human right abuses are rampant. Under the current democratic dispensation just like past regimes, there appears to be no respect for right to personal liberty of the citizenry particularly those suspected to have committed crimes. There are inmates who have spent over a decade in prison custodies all over the federation without arraignment in any law court.<sup>73</sup> It has been judicially noticed that the Nigerian police are no respecter of fundamental rights. A formidable impediment to optimal promotion of constitutionalism in Nigeria with respect to fundamental rights is also located in the various constitutional limitations and

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<sup>66</sup> H Barnett, *Constitutional & Administrative Law* (5th edn, 2005) p.5.

<sup>67</sup> JD Barkan, 'African Legislatures and the Third Wave of Democratization', Preliminary Draft of 12/30/08, at pp.2-3, Prepared for Yale/World Bank Workshop on Governance and Development in Africa and the Middle East to be held at Yale University, January 30-31, 2009.

<sup>68</sup> O Oyewo, 'Constitutionalism and the Oversight Functions of the Legislature in Nigeria', being a paper presented at the African Network of Constitutional Lawyers Conference in April 2007 held at Nairobi, Kenya. See also I Ibrahim and MA Mustapha, *Combating Corruption in Nigeria: The Role of the Legislature Examined*, at <http://www.unilorin.edu.ng> accessed on 5 July, 2021.

<sup>69</sup> In *A-G Ondo State v A-G Federation & 35 Ors* (2002) 14 WRN, the Supreme Court adumbrated the dangers of corruption on Nigeria's constitutional democracy and practice of constitutionalism.

<sup>70</sup> 'Osun Election, the Accusation, the Security', *This Day*, August 17, 2020; 'Nigerians Condemn Militarization of Election' *PM News*, March 30, 2021.

<sup>71</sup> AO Yekini, 'Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in *Lufadeju's Case*', *LASULAW Journal*, vol. 2&3, 2012.

<sup>72</sup> For instance, the Lagos State Government in 1972 published a gazette wherein the government purportedly acquired all the lands from Badagry to Ojo (almost a quarter of the state land mass) and other similar areas in the state; *Provost Lagos State College of Education v. Edun* [2004] Vol. 4 M.J.S.C.

<sup>73</sup> Yekini, *op cit*.

qualifications imposed on these rights,<sup>74</sup> which provide a veritable foundation upon which any law invalidating fundamental rights may be justified. These rights and other human rights constitutionally guaranteed are not sacrosanct or absolute but are expressly and specifically limited. Admittedly, there may be no absolute right without qualifications, but the constitutional provisions limiting the rights guaranteed<sup>75</sup> are somewhat imprecise and as such, constitute a real drawback in the effort to promote constitutionalism. The above event made worst in that many of the human rights guaranteed in international human rights instruments are not sacrosanct or granted in absolute terms. Rather, the various instruments create instances where it is legitimate and legally sustainable for the rights to be violated. Although virtually all the rights granted by the Universal Declaration of Human Rights, 1948 are not qualified,<sup>76</sup> the same thing cannot be said of the two Covenants<sup>77</sup> which elaborated the provisions of the Declaration. The African Charter on Human and People's Rights also contains derogation clauses.<sup>78</sup> With the characteristic overzealousness of the Nigerian security agents, especially the police, many of whom are ill-trained and ill-motivated, these constitutional derogatory provisions are often abused.<sup>79</sup>

### **Lack of Accountability, Good Governance and Corruption-Free Leadership**

In the area of accountability, transparency and good governance, the aggregate of opinion of academic writers is that the government has not discharged its responsibilities. Corruption has been the prevalent factor that is debarring the country from attaining that lofty height of good governance thereby retarding the effective practice and promotion of constitutionalism.<sup>80</sup> However, the question being raised now is, whether in the face of numerous anti-corruption legislations and policies, the poor record of adherence/enforcement, prosecution, conviction and punishment under the anti-corruption laws, any appreciable progress has been made in combating corruption in the governance and management of the resources and economy of Nigeria? Despite high-profile corruption allegations, neither meaningful prosecution nor conviction was carried out by the Federal Government even the one carried out were either struck out for lack of evidence or withdrawn by the prosecution for exchange of political support for the government of the day. This lack of transparency and accountability is likewise applicable to the legislative and judicial arm of government.

### ***Locus Standi***

The promotion of constitutionalism in Nigeria is too often thwarted by the doctrine of *locus standi*. *Locus standi* means legal standing or the capacity, based on sufficient interest in a subject-matter, to institute legal proceedings in the pursuit of a certain cause.<sup>81</sup> The courts have always insisted that unless a person has the *locus standi*, he is a meddling interloper and as such, a suit at his instance will be incompetent and unmaintainable.<sup>82</sup> *Locus Standi* is inextricably interwoven with the issue of jurisdiction. Accordingly, where there is want of *locus standi*, the court will have no jurisdiction to entertain the matter.<sup>83</sup> Consequently, where there is need to protect the Constitution and ensure constitutionalism, the issue of *locus standi* or sufficient interest is not only relevant but paramount. Thus, for a person to sustainably activate the judicial process to redress an infraction of the provisions of the Constitution, he must show that he is an interested person, one whose right has been, is being, or is in imminent danger of being violated or invaded. Where a public injury or public wrong or infraction of the provisions of the Constitution, affecting an indeterminate number of people is involved, to be competent to sue, a plaintiff must show that he has suffered more, or is likely to suffer more, than

<sup>74</sup>CFRN, *op cit*, section 45(1), provides that noting in sections 37, 38, 39, 40 and 41 of [this] constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health ; or (b) for the purpose of protecting the rights and freedom of other persons.

<sup>75</sup>*Ibid*, ss.33-36.

<sup>76</sup> Articles 9 and 12, however, seem to contemplate permissible derogation by the use of the expression "arbitrary". Also, Article 29(2) recognizes permissible limitations in the enjoyment and exercise of the rights guaranteed in the Declaration.

<sup>77</sup> Covenant on Civil and Political Rights (1966) and Covenant on Economic, Social and Cultural Rights (1966). Both covenants were adopted on December 16, 1966.

<sup>78</sup>*Ibid*, article 6.

<sup>79</sup>United Nations Human Rights Council Report on its Ninth Session, U.N. Doc. A/HRC/9/1-A/HRC/9/27 (Feb. 9, 2008). The reports were discussed in Adejwon Soyinka, On Death Row, Tell Magazine, April 20, 2009, p.22.

<sup>80</sup>DA Ijalaiye, 'Democratic Governance in Nigeria: A Critical Appraisal' in Law, Politics and Development: The Challenges of an Emerging Mega City: Essays in Honour of Babatunde Raji Fashola, SAN, (Lagos, NBA Ikeja Branch, 2010); DA Ijalaiye, : Executive and Legislative Lawlessness: A Challenge to the Rule of Law in Nigeria, *op cit*; MA Belgore, 'Rule of Law and Democratic Governance in Nigeria: Challenges and Prospects', University of Abuja Pre-Convocation Lecture, Feb., 2, 2008; O Oyelowo, 'Constitutions, Good Governance and Corruption: Challenges And Prospects For Nigeria', *op cit*.

<sup>81</sup>*Abraham Adesanya v. The President of the Federal Republic of Nigeria* [1981] 2 N.C.L.R. 358; *Adeniga v. Odemeru* [2003] F.W.L.R. (pt 158) 1258; *Attorney General, Kaduna State v. Hassan* [1985] 2 N.W.L.R. (pt 8) 483; *Akilu v. Fawehinmi* [1989] 2 N.W.L.R. (pt 102) 122.

<sup>82</sup>*Odeneye v. Efunuga* [1990] 7 N.W.L.R. (pt 164) 618; *Abraham Adesanya v. The President of the Federal Republic of Nigeria*, [1981] 2 N.C.L.R. 358.

<sup>83</sup>*Akinbinu v. Oseni* [1992] 1 NWLR 97.



the multitude of individuals who have been collectively wronged. Thus, although there is now a commendable relaxation of the rigid, restrictive and constrictive interpretation of the doctrine of *locus standi*,<sup>84</sup> the doctrine remains a formidable impediment in the promotion of constitutionalism in Nigeria.

Other factors impeding the promotion of constitutionalism include but not limited to, weak political parties and political system, aberrational behavior of Nigerian politicians, persistent intra and inter institutional conflicts, among others.

## 6. Conclusion and Recommendations

Constitutionalism encompasses all the political rules and obligations that bind both rulers and the electorate. As governmental powers are defined and limited by law, the actions of government organs must be in strict accordance with the law. Accordingly, constitutionalism cannot survive without compliance with the rule of law. Put differently, it is not enough to have a perfect Constitution, if such a thing even exists anywhere in the world. The vital issue is the extent to which the Constitution is respected and implemented. The trouble with Nigeria is simply and squarely a failure of leadership. It is on this failure from which pervasive corruption, political power struggle, civil strife, and economic mismanagement, so prevalent in Nigeria today, flow. The 1999 Constitution, even before it was amended, contained numerous provisions capable of entrenching genuine constitutionalism in Nigeria. The key challenge to the success of these provisions is their effective implementation. Looking at the future of constitutionalism in Nigeria, there seems to be no better method of both promoting and sustaining the momentum of constitutionalism as well as restraining actual and potential governmental lawlessness than through the vigilance of the civil society organizations.<sup>85</sup> Eternal vigilance is required to maintain, promote and sustain constitutionalism. A Constitution is only as good when it strongly manifests the will of the people to defend it. A robust civil society will not only enable the democratic transition to start, but will help to resist eventual reversals, contribute in pushing transitions to their completions and finally help to consolidate and deepen constitutionalism. To ensure that the good people we elect today do not become the tyrants and dictators of tomorrow, the public must be ready to protest against any actual or threatened violations of the Constitution. In fact, the creative intervention of the judiciary depends as much on the willingness and vigilance of the civil society, especially the media and the activist quality of the Bar.<sup>86</sup> The legal profession plays a vital role in the promotion and defence of constitutionalism because it is the Nigerian Bar that chooses cases that come before the courts and prepare all the necessary arguments. The judicial role in legal and constitutional review can also be enhanced when there are vibrant civil society organizations that are ready to speak up for the weak, the poor and other voiceless members of society through *amicus curiae* representation in court. Civil society in general and the legal profession in particular are the watchdog and advocates for the observance of the rule of law, and those who articulate the diverse and intricate legal and social issues that the judges need to consider in deciding cases. Mention must be made of the important role that legal scholars, such as academics, researchers and others who contribute to the dissemination of legal knowledge in accredited journals, books and newspaper commentaries and internet blogs can play in influencing legal developments. Legal scholars, therefore, need to be more vocal in defending the Constitution and respect for constitutionalism.

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<sup>84</sup>This relaxation is exemplified by the decision of the Supreme Court in the celebrated case of *Akilu v. Fawehinmi*, (*supra*) p.122.

<sup>85</sup>Constitutional Reform in Nigeria's Fourth Republic: Challenges to Civil Society Organizations, a Paper Presented at a General Meeting of Citizens Forum for Constitutional Reform, held at Dayspring Hotel, Abuja on 24<sup>th</sup> September 2005.

<sup>86</sup>Citizens Forum for Constitutional Reform 'The Position of Citizens Forum for Constitutional Reform on the 1999 Constitution of the Federal Republic of Nigeria' (2001). Available at <http://www.citizensforumonconstitutionalreforms/1999constitution/pfd> accessed on 13 June 2021.