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The Paradox of Underdevelopment amidst Oil in Nigeria: A Socio-Legal Explanation

By

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TABLE OF CONTENTS

<i>Acknowledgements</i>	v
<i>Declaration</i>	vii
<i>Abstract</i>	viii
<i>Table of Legislation</i>	ix
<i>Table of Cases</i>	xiii
<i>List of Tables and Figures</i>	xvi
Introduction	1
Chapter 1: Development, Corruption and Rule of Law: Evolving A Conceptual Framework	7
1.1 Introduction	7
1.2 Development	7
i. Critique of Development	13
ii. A Paradigm Shift	18
1.3 Corruption	23
i. Conception of the Public	24
ii. Consequences of Corruption	27
iii. Causes of Corruption	30
iv. Where the Gap Lies	32
1.4 Rule of Law	36
i. Rule of Law as Means	37
ii. Max Weber and Liberal Legalism	43
iii. Departing from Liberal Legalism	48
1.5 Conclusion	51
Chapter 2: Underdevelopment Amidst Oil Wealth: Exploring the Paradox of Want in the Midst of Plenty	53
2.1 Introduction	53
2.2 Human Development Rank	53
2.3 Extent of Underdevelopment	54
i. Poverty Profile	54
ii. Education	57

iii. Health	60
2.4 Oil in Nigeria	64
i. Brief on the Oil Industry	65
ii. Crude Oil Production and Export	69
iii. The Gas Sub-Sector	71
iv. The Extent of Oil Wealth	72
v. Distribution of Oil Revenue	77
2.5 Conclusion	83
Chapter 3: Prioritising Development in State Policy	84
3.1 Introduction	84
3.2 Development as Human Right	85
3.3 Development in Development Policies	93
i. The Four National Development Plans	93
ii. Structural Adjustment Programme	106
iii. Vision 2010	108
iv. National Economic Empowerment and Development Strategy (NEEDS)	111
3.4 Law as an Aiding Instrument	115
3.5 Conclusion	124
Chapter 4: The Enemy Within: Corruption and its Impact on Development	126
4.1 Introduction	126
4.2 The Level of Corruption	126
4.3 Cases of Corruption	131
i. The Gowon Regime	132
ii. The Second Republic	136
iii. The Babangida Regime	142
iv. The Abacha Regime	146
v. Obasanjo Administration	149
vi. Yar'Adua Administration	155
4.4 Impact of Corruption on Development	157
4.5 Conclusion	164

Chapter 5: Rule of Law under the Nigerian Constitutions: An Analytical Overview	166
5.1 Introduction	166
5.2 An Overview of Nigerian Law	167
5.3 The Rule of Law Principles	172
i. Supremacy of the Law	172
ii. Equality before the Law	176
iii. Trusts over Public Funds	181
iv. Code of Conduct	185
v. Restraint on Executive Power	187
A. Legislative Check	188
i. Control of Funds	188
ii. Impeachment	192
B. Judicial Check	197
5.4 Conclusion	201
Chapter 6: Absence of Rule of Law in Practice	202
6.1 Introduction	202
6.2 Rule of Law under the Military	202
i. Subordinating the Constitution	203
ii. Suspending the Legislature	207
iii. Muzzling the Judiciary	209
iv. Effects on the Rule of Law	215
v. Specific Cases	219
6.3 Rule of Law under Civilian Rule	224
i. The Judiciary vis-à-vis the Executive	225
ii. The Legislature vis-à-vis the Executive	236
6.4 Conclusion	254
Conclusions	256
Bibliography	269

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Mamman Lawan (Yusufari)
December 2008

DECLARATION

I hereby declare that this thesis is my original work. I also confirm that it has not been submitted either in part or in full for any Degree or Diploma to this or any other university.

Mamman Lawan
December 2008

ABSTRACT

The trend in development discourse is to explain underdevelopment in terms of bad governance which lack of rule of law brings about. Development in this sense is understood as economic growth while rule of law is limited to an institutional version which is market-oriented. In this thesis, development is examined from a people-centred perspective. Abject poverty, dysfunctional educational and health systems sitting side by side with reasonably sufficient oil wealth is the problematic premise which the thesis seeks to explain. While acknowledging that it could be explained from a range of disciplines and perspectives, this thesis offers a socio-legal explanation in terms of public corruption spurred by absence of rule of law in practice.

Corruption is high in Nigeria though national law has criminalised it and the country has ratified international law frowning at it. Among its myriad upshots is depleting resources for development. It is a dependant variable; and this thesis links it to absence of rule of law in practice. But because the orthodox rule of law privileges the market, it is inappropriate in explaining corruption in the public realm. The thesis therefore departs from it and instead proposes a rule of law version which would ensure management of resources for human development. It constitutes the following elements: supremacy of the law; equality before the law, trusts over public funds; code of conduct for public officers; and restraint on executive powers.

The thesis argues that the Constitutions in Nigeria have made adequate provisions for this version of rule of law. However, the provisions have either been suspended or substantially breached over the years. For a large part of its existence, Nigeria was under military rule which is antithetical to rule of law through its subordination of the constitution, sacking of the legislature, and muzzling of the judiciary. Despite the existence of the Constitution and democratic institutions during civilian regimes, the rule of law provisions remained largely unimplemented. In both regimes, the executive arm of government, unto which public funds are entrusted, enjoyed absolute powers. This situation, the thesis argues, explains the development-impeding corruption.

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LIST OF TABLES AND FIGURES

Table 2.1: Nigeria's Human Development Ranking (1990-2008)

Table 2.2: Nigeria's Crude Oil Production and Export (1970-2007)

Table 2.3: Value of Nigeria's Oil Exports (1970-2007)

Table 2.4: Nigeria's Collected Gross Oil Revenues (1970-2006, Million =N=)

Table 4.1: Nigeria's TI Corruption Perception Index (CPI) (1996-2008)

Table 4.2: TI Corruption Perception Index for Selected Countries (1995- 2008)

Table 4.3: Public Officers Convicted for Corruption

Table 4.4: Utilisation of Repatriated Abacha Loot

Figure 1: Budget Spending on 5 Millennium Dev. Goals Sectors (2003-2005)

Figure 2: Law of Development

INTRODUCTION

Nigeria¹ is one of the major oil-producing countries of the world and mainly an oil economy. Ownership of the oil is vested in the state by law. As a valuable and selling commodity, oil has been a source of enormous wealth for the country. However, as Aristotle (1980: 7; 1962: 196) argues, wealth is not an end in itself but a means to good life which, historically by the social contract,² is states' *raison d'être*. 'Good life' in contemporary terms translates to human development which has as basic constituents access to food, shelter, clothing, education and health. Countries endowed with resources such as oil therefore have a means to achieve, and they do achieve, at least a satisfactory level of human development (UNDP 1990-2008).

In the case of Nigeria, the oil wealth has not brought about satisfactory level of human development. The country suffers from the paradox of want in the midst of plenty.³ Over 70% of its population lives below the poverty line; and its rates of illiteracy, maternal mortality, and infant mortality are among the highest in the world. By the assessment of UNDP, Nigeria's development ranking has consistently been low; a situation describable as underdevelopment. It is the only oil-producing country performing so badly. Even not-so-endowed countries like Botswana and Ghana perform better.

I argue in this thesis that Nigeria's underdevelopment can hardly be attributed to want of development policy. Development has been a human right, albeit non-justiciable, under the Nigerian Constitution since 1979. Moreover, development is the common objective of seven Development Plans drawn up by successive governments since independence in 1960. Yet underdevelopment stares us in the

¹ A country situated in West Africa, Nigeria was created by the British colonial government in 1914. It is a federation of 36 States plus a Federal Capital Territory in Abuja. It has a land mass of 923,768 sq. km (356,668 sq. miles) and a population of about 140 million (Census 2006). It is Africa's most populous country and the largest black nation in the world. It is multi-ethnic with three major ethnic groups of Hausa/Fulani, Igbo and Yoruba. Christianity and Islam are its two major religions.

² Thomas Hobbes, John Locke and Jean-Jacques Rousseau are said to be the three great modern political philosophers who inaugurated the modern social contract tradition (Morris 1999: ix).

³ The phrase "paradox of plenty" referring to developmental failures of oil rich countries is now popular. See Karl (1997).

face. Why has development eluded Nigeria despite the priority it receives and despite the country's huge oil resources? This is the main research question which I seek to address in this thesis through a library-based enquiry.

The question can be approached from a range of disciplines and perspectives. For instance, political analysts may link the problem to Nigeria's ethnic/religious divide with its attendant crises and nepotism. Underdevelopment theorists (*dependentistas*) would instead link it to colonialism and imperialism which ensure Nigeria's 'development of its underdevelopment and underdevelopment of its development' (Frank 1971, 1995, 1995a; Rodney 1972; Amin 1990). Economists would argue that it is not unconnected to the 'resource curse thesis': over-reliance on the oil sector for revenue generation; creation of class interests and their influence; rent-seeking and consequent urban drift; anxiety to 'sow the oil' (i.e. diversify) before reserves were depleted, or to the 'Dutch disease' (Auty 1993; 2001; Collier 2008).⁴ It is difficult, if not impossible, to provide a single answer to the question because underdevelopment could be linked to a number of factors re-enforcing one another (Collier 2008).⁵

In this study, I will offer a socio-legal explanation to this paradox of underdevelopment amidst oil wealth. The thesis I advance is that corruption spurred by absence of rule of law in practice is a factor explaining it. According to Transparency International (TI), Nigeria is one of the countries perceived to be the most corrupt in the world (TI 1996-2008). Nigerians too have acknowledged that corruption is pervasive in the country (Vision 2010 1997: 9; Oko 2002; NEEDS 2003: xiv). A large part of the oil resources, at some point

⁴ 'Dutch Disease' is a popular phrase in the mineral sector. There are two competing accounts of its origin: one is that it refers to the mutation of the Dutch economy during the tulip boom of the 16th century; the other is that it derives from the impact of natural gas development and export in the 1960s. 'Dutch Disease' theory states that large windfalls in one sector tend to drive up the exchange rate, making exports of other sectors more expensive and imports cheaper. In the process, capital resources are drained from agriculture and manufacturing and sucked into non-tradable parts of the economy (Shelley 2005: 35). See generally Auty (1993; 2001).

⁵ For instance, Collier (2008: 17-75) explains underdevelopment in the "bottom billion" (i.e. world's poorest countries whose total population is about 1 billion people) in terms of 4 traps: conflict, natural resource, landlocked with bad neighbours, and bad governance in a small country. A country could be stuck in one or more of these traps; and in the latter case, it could be either simultaneously or sequentially. Nigeria features conspicuously in Collier's analysis particularly under the natural resource trap.

70%, has been lost through corruption thereby divesting the nation of the necessary resources to finance development. The more there is corruption, the less is left for public education and health and the more people are impoverished. This explains why on a general note, highly corrupt countries like Nigeria are underdeveloped and less corrupt ones like Botswana are developing.

The negative impact of corruption on development is not an unexplored area of scholarship (Hassan 2004; Smith 2007; Hope & Chikulo 2000; Mbaku 2007, TI 1997; Theobald 1990; Mauro 1995; Rose-Ackerman 1999). However, there is paucity of scholarship explaining corruption from a legal perspective. Explaining it is necessary because it is a dependent variable (UNDP 1997: 37; Hope & Chikulo 2000: 1). It is insufficient to explain underdevelopment simply in its terms. The engagement of legal literature with corruption has mainly been in the ability (or lack of it) of legal systems to tackle it (Ali & Isse 2003; Lambsdorff 2005; Brown & Shackman 2007). Of more interest to this study is the question: what rule of law explanation is there for corruption? Unfortunately, literature on absence of rule of law as contributory factor to corruption hardly exists. The nearest effort in this regard is linking corruption to 'total exercise of power' without elaborating how power came to be so exercised (Hope in Hope & Chikulo 2000: 19; Mbaku 2007: 72-74; Smith 2007: 189). On the nexus between underdevelopment, corruption and absence of rule of law, scholarship is virtually non-existent.

This thesis is an attempt to fill this gap in the context of Nigeria. I shall argue that development-impeding corruption is a symptom of absence of rule of law in practice. By rule of law, I mean a concept which would ensure honesty, transparency and accountability in the management of public resources, resulting in their utilisation for human development as public good. I identify five variables for this concept of rule of law as follows: supremacy of the law; equality before the law; trusteeship over public resources; code of conduct for public officers; and restraint on executive powers. The non-observance of these variables would leave the executive arm of government as custodians of public resources with unchecked powers and would result in corruption. I argue that these constitute principles which have been adequately provided for in Nigerian

Constitutions especially the 1979 and 1999 Constitutions. However, it is one thing to provide for these principles, and another to implement them.

This study attempts to demonstrate that the rule of law principles have not been implemented. They have either been suspended under military regimes or most of them breached under civilian ones. Their suspension began in 1966 when the country experienced its first military coup. Since then, the military have ruled for a total of about 30 years out of the 48 years of Nigeria's existence as an independent nation. Military regimes are inherently antithetical to the rule of law; and by their actions, undermine it. Throughout the period of military rule, the Constitution has been partly suspended, partly modified, and wholly submerged by decree; the legislature sacked; the judiciary muzzled; and effective checks and balances absent resulting in the military becoming absolutely powerful. In this situation, monopoly of power, discretion and non-accountability became inevitable consequences and corruption flourished.

Civilian rule holds more promise for rule of law in practice because the rule of law principles are in place. Though Nigeria had tasted civilian rule previously and has been enjoying it for 9 consecutive years now, the principles have not been implemented fully to avert corruption. In particular, I shall show that the legislature has over the years not only failed to check the excesses of executive power, but has been complicit in the corruption which has been shackling development. In fact, the checking powers turned out to be abused, particularly during the 8-year rule of Olusegun Obasanjo. The judiciary on its part has been relatively good as could be seen in a number of decisions handed down against the executive. However, few of such decisions border on corruption, public accountability and development so its impact is not much felt. Executive power during civilian rule therefore remained as good as absolute and corruption continued unabated.

It is pertinent to make the point that the discussion in this thesis is situated within the parameters of formal law. It is by virtue of the formal law that (i) oil became a public commodity; (ii) oil resources became entrusted to the executive arm of government; and (iii) development became a duty upon the state and a

corresponding right for the citizens. The choice of this law is not oblivious of informal norms which often compete for authority with formal precepts especially in non-Western societies. But in Nigeria, though customary and Islamic laws are recognised by the Constitution as parts of the legal system, they apply at personal and regional levels. It is the secular formal law which governs public administration and which applies throughout the federation.

The study consists of six main chapters and concluding reflections. Chapter 1 deals with key concepts running through the thesis i.e. development, corruption and rule of law. Its purpose is to explore these through a literature review limiting our discussions to meanings and variables relevant and appropriate to the thesis. Thus development is discussed in both its meanings as economic growth and human development settling for the latter. Corruption is found in both private and public circles, the latter being the relevant aspect to the thesis. Again, it has several causes and consequences. I focus on its impact on development and absence of rule of law as a contributory factor. Rule of law is a wide area featuring under the theory of liberal legalism. I trace the theory to Max Weber's theory explaining the growth of Western capitalism and I show how I depart from it.

Chapter 2 deals with underdevelopment amidst oil wealth. On one hand, it examines the level of human development in Nigeria as measured by UNDP; examines the extent of underdevelopment viewed from three selected variables i.e. poverty, education and health; concluding that Nigeria is one of the most underdeveloped countries of the world. On the other hand, the chapter brings to fore the extent of the country's oil wealth by presenting quantitative data on level of production and earning highlighting the fact that Nigeria has got enough resources to achieve a satisfactory level of human development.

Chapter 3 is devoted to an examination of the concept of development in Nigeria's policies. It shows how development is prioritised as human right within the Fundamental Objectives and Directive Principles of State Policy under the Constitutions; the attention it receives in various Development Plans; and how law is invoked as an aiding instrument under the Plans. The chapter

argues that the commitment to development in the policies has not been unsatisfactory and therefore underdevelopment in the country must be attributed to something else.

Chapter 4 locates that “something else” in the high level of corruption prevalent in the country. It examines the level of corruption as measured by Transparency International; discusses how endemic corruption has been in various governments that ruled the country; and shows how corruption adversely affected development. It argues that the higher the level of corruption in a country, the lower the level of development in that country of which Nigeria represents an example.

But why is Nigeria so yoked by corruption? Chapter 5 argues that Nigerian Constitutions have adequate provisions on rule of law consistent with the checking of corruption. It explores the elements which constitute the rule of law, which if adhered to would ensure good management of public resources and hence achievement of human development. Thus the chapter argues that underdevelopment in Nigeria cannot be attributed to corruption spurred by lack of adequate rule of law provisions.

In Chapter 6, the corruption is linked to the absence of rule of law in practice. It argues that this absence has provided a fertile ground for corruption to thrive in the country. Dividing the period of Nigeria’s existence into military rule and civilian rule, the chapter demonstrates that rule of law was suspended under the military and most of its principles breached under civilian rule. The military acquired absolute powers through tampering with the constitutional legal order enabling them to rule with virtually no iota of restraint. Under civilian rule, legislative and to some extent judicial checking powers against the executive were left dormant. The chapter attempts to establish that one of the consequences of this state of affairs is corruption.

CHAPTER 1

DEVELOPMENT, CORRUPTION AND RULE OF LAW: EVOLVING A CONCEPTUAL FRAMEWORK

1.1 Introduction

There are three key concepts running through this thesis i.e. development, corruption and the rule of law. Each is central to the thesis. Whilst the poor state of Nigeria's development has prompted the present research, it is the intricate interface between development, corruption and the rule of law that informs and underpins the analysis and arguments.

Cognizant of diverse understandings of these concepts, this chapter aims to contextualize the discussion by familiarizing ourselves with their meanings and theoretical underpinnings through a review of the relevant literature.

1.2 Development

In crude terms, development could mean progress. It is a state of better human life which human beings always strive for. It is the end man seeks to achieve through various means. At the societal level, it is positive "progressive social change" (Merryman 1977: 463, n. 16 & p. 471). In modern times, development became the *raison d'être* of states. The social contract envisages that the state shall have a developmental duty towards its citizens. According to Aristotle (1962: 196), the purpose of a state "is not merely to provide a living but to make a life that is good".

However, the role of the state in development became unstable at least from the end of the Second World War. The conference of the victorious allies (excluding USSR) led by the United States at Bretton Woods impacted on the idea of development not only as it affected the powerful conferring countries but also other countries. This is because the African Caribbean and Pacific countries were colonies of the powerful

nations at that time. A leading advocate of state-led development, John Maynard Keynes, made inputs to the conference and the state emerged as an indispensable agent of development. The International Monetary Fund (IMF) and the World Bank were established as global development institutions (Rapley 2002: 7).

Although the colonies obtained independence later at various times, development continued to be inextricably linked to the powerful nations and the IMF and the World Bank they created. In fact, the developed countries thought it appropriate to assist the poor countries of the world (largely the former colonies) to achieve development. This was a development project idea mooted out by President Harry Truman of the United States in the course of his inaugural address on 20th January, 1949 where he said:

More than half the people of the world are living in conditions approaching misery. Their food is inadequate, they are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat to both them and to more prosperous areas. For the first time in history humanity possesses the knowledge to relieve the suffering of these people.... I believe that we should make available to peace loving peoples the aspirations for a better life ... what we envisage is a program of development based on the concepts of democratic fair dealing ... Greater production is the key to prosperity and peace. And the key to greater production is wider and more vigorous application of modern scientific and technical knowledge (Quoted in Escobar 1995: 3).

President Truman also said that “We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas” (Quoted in Allen & Thomas 2000: 5). What came to be popularly known as *‘development theory’* thus emerged and its thrust as could be gleaned from the speech was the growth of the underdeveloped world through state agency and with the instrumentality of macroeconomic policies. Keynes’s idea contrasted with classical political economists’ like Adam Smith, Thomas Malthus, and David Ricardo whose prescription for state’s role in the economy was minimal (Rapley 2002: 7).

It has been argued that it was development theory as launched by Truman which invented 'development' and 'underdevelopment' as North-South dialogical terms (Cowen & Shenton 1996; Esteva 1992).

Development was perceived as economic development as measured by growth in Gross Domestic Product (GDP) and Gross National Product (GNP) per capita. High GDP and GNP mean a good economy while a bad economy is indicated by low GDP and GNP. It was based on the economic growth yardstick that the World Bank defined almost two-thirds of the world as poor and underdeveloped in 1948 for having an annual per capita GNP below \$100.00 (Escobar 1995: 23). Nigeria seemed to have been influenced by this trend in drawing its four National Development Plans between 1962 and 1985. Though they emphasised economic growth in their approach, the overall objective of the plans was to improve people's standard of living. They saw economic growth as a necessary means for human development.

Within a decade of the practice of the development theory, there was less optimism that the approach would yield fruitful results. The situation in India particularly was not encouraging and questions began to emerge as to why the theory failed (Leys 1996: 9). There might be non-economic reasons for the failure. They were glossed over and industrialization was given as the trump: industrial capitalism breeds competition among manufacturers such that only strong ones survive. With less competition, there is less pressure to lower prices. Non-industrialised countries importing finished goods will have to export more of their primary (mostly agricultural) goods to maintain a balance. Competition is high at the level of primary production thereby leading to low prices. The need for increased primary production would then mean depleting resources meant for development (Rapley 2002: 13). What then was the appropriate path to development? The answer was thought to be in modernization.

Thus the modernisation theory was born and it postulated that developing countries must transit from traditionalism to modern industrial capitalism and liberal democracy so as to be equipped with the conditions that hurled the developed nations into their enviable state. (Allen & Thomas 2000: 30). It is in this transition that the developed world would come in handy through education,¹ aid programmes and technology transfer. Due to the Keynesian influence, the state became central in this endeavour because it was seen as an embodiment of the collective will of the people and therefore in a better position to tailor the economy to serve human needs.

This theory, constructed by sociologists and political scientists, notably Talcott Parsons, sprang from a US behavioural revolution “set out to observe, compare, and classify human behaviour in the hope of making general inferences about it” (Rapley 2002: 15). This was how underdeveloped countries were classified as ‘traditional’ requiring ‘modernization’ as key to development. Such countries must change from traditional subsistence-driven mode of production to a scientific commercial-oriented mode of production. Coupled with liberal democracies, neoliberalism would be achieved and hence economic development. According to Bernstein, modernization theory as a path to development simply means “following in the footsteps of the West”, which, in effect, is to say “if you want what we have (and have achieved), then you must become like us, and do as we did (and continue to do)” (quoted in Allen & Thomas 2000: 30).

Modernization theory was based on some other theories. For instance, Emile Durkheim and Max Weber theorize that modernization is contingent upon change in people’s values and behaviours. Durkheim’s theory of social order and stability explains the development of a modern society from a traditional past. Originally a ‘segmental society’ characterized by ‘mechanical solidarity’, a traditional society had to capitulate to population pressures by increase in social division of labour

¹ This was to be achieved by training in Western institutions through scholarship schemes for instance.

thereby leading to a complex and integrated modern society with a cohesion Durkheim calls 'organic solidarity' (Durkheim 1984).

Weber on the other hand seeks to explain the dominance of capitalism only in Western Europe through its peculiar culture of 'rationalisation'. Diligence, hard work and discipline and the desire for capital accumulation which characterized Western Europe was lacking in the traditional leisurely societies. Weber explains how religion under the doctrine of Calvinism fashioned a work ethic which corresponded to the spirit of capitalism.² This is of course in addition to the role of the modern legal system in the emergence of capitalism. The rationality of law facilitated the growth of the market system; and this growth encouraged further rationalisation of the law which in turn led to the development of a centralized nation-state. Thus the changes were mutually causative (Weber 1992; Trubek 1972, 1992).

Closely connected to modernisation theory is a *historical approach* to development given by Rostow (1990: 4-9). It identifies five stages of growth which all societies must tread: (1) the traditional society where structure is developed within limited production functions, based on pre-Newtonian science and technology, and on pre-Newtonian attitudes towards the physical world; (2) the preconditions for take-off which arise generally from colonial and imperial practices; (3) the take-off when, mainly stimulated by technology, forces making for economic progress expand and come to dominate the society; (4) the drive to maturity when the nature of the economy changes as a result of improvement in technique, growth of new industries and the internationalization of the economy; and (5) the age of high mass-consumption which is a post-maturity stage where society's attention shifts "from supply to demand, from problems of production to problems of consumption, and of welfare in the widest sense" (ibid: 73). Rostow admits that his theory is about economic history but by looking at societies from the economic dimension, it by no means suggests that economy is the basis of political, social and cultural

² Calvinism encouraged the pursuit of success in all sphere of human activity as a sign of salvation.

superstructures. He accepts, on the contrary, that “societies are interacting organisms” (ibid: 2).

By the 1980s, it became apparent that modernisation theory did not work well as many of the developing countries became enmeshed in debt and balance of payments crises. The gap between developed and developing countries kept on widening. For instance, the former which accounted for 26 per cent of world population had 78% of world production of goods and services; 81% of energy consumption; 70% of chemical fertilizers; and the latter as debtor was paying its creditors (i.e. the former) each year an average of \$30 billion more than it had received as loan (Escobar 1995: 212-213).

The World Bank and IMF now lay the blame on state’s domination of development. As a recipe therefore, they prescribed the structural adjustment programmes (SAP) for the countries. This was a right-based development approach of less state more market. Rather than being a state-led project, development should be a market-led exercise. There is now a shift towards Smithian/Ricardian economics which prescribes minimal role for the state in development. So the economy in the developing countries should be deregulated; public enterprises privatized; fiscal austerity measures taken, public workforce downsized; currency devalued; etc. Essentially, SAP sought “to increase the powers and freedoms of entrepreneurs and investors, and make the state leaner and reduce its presence in the economy” (Rapley 2002: 66). Nigeria also adopted SAP in 1986 but like in many other countries, it did not perform as expected (Olukoshi 1993; Rapley 2002: 73).

The meaning of development as economic growth did not change. The only major distinction between pre-SAP and post-SAP periods is the state agency in the former and market agency in the latter. Up till 1990, the World Bank’s concern was economic growth. For instance, its 1990 *World Development Report* had poverty as its theme and therein, the Bank stated that “Reducing poverty is the fundamental objective of economic development. It is estimated that in 1985 more than one

billion people in the developing world lived in absolute poverty. Clearly, economic development has a long way to go” (World Bank 1990: 24).

i. Critique of Development

The concept of development as it emerged is not without critiques. Scholars like Escobar (1995) see it as “a historically produced discourse” through which the space called “Third World” was created and made an object of scholarship and subject to hegemonic power and experimentation. It is a colonization of reality because the discourse moves on unperturbed by the reality of the deteriorating conditions of most people. He says new tools have emerged, courtesy of Foucault’s insight on the dynamics of discourse and power in the representation of social reality, for analyzing “how certain representations become dominant and shape indelibly the ways in which reality is imagined and acted upon” (ibid: 5). Development in short is an invented discourse meant to serve hegemonic purposes:

Development was a response to the problematization of poverty that took place in the years following World War II and not a natural process of knowledge that gradually uncovered problems and dealt with them; as such, it must be seen as a historical construct that provides a space in which poor countries are known, specified, and intervened upon (ibid: 44-45).

He therefore suggests for a search for an alternative regime of development representations through concerted social action and political movements. Third World’s solution, he argues, lies not in “development alternatives but in alternatives to development, that is, the rejection of the entire paradigm altogether” (ibid: 215).

Sklair (2002) critiques modernization theory. Like other development theories, he sees it as embryonic theory of the global. He attacks it on two major grounds: taking development to be revolving round attitudes and values only (by its distinction between traditional and modern societies) may not be correct because there may be material interests behind certain traditional and modern attitudes and

values; and the theory “tends to ignore the role that class and other interests play in the promotion or inhibition of development” (ibid: 31).

Webster (1990, 1995) argues that though change in technology, capital investment and market demand are necessary for development, there is evidence to show lack of necessity for drastic change in value systems and social institutions. For instance, the theory’s use of the term ‘traditional’ to cover various societies having different structures such as tribal, feudal and bureaucratic set ups is too blanket. Quoting Eisenstadt (1970), he stresses the need for a historical analysis of the pre-capitalist forms to be able to appreciate the subsequent change they will undergo:

The process of modernisation may take off from tribal groups, from caste societies, from different types of peasant societies, and from societies with different degrees and types of prior orientation. These groups may vary greatly in the extent to which they have the resources, and abilities, necessary for modernisation (1990: 115).

Similarly, it cannot be true to argue, as did the theory, that modernization and traditionalism are mutually exclusive. There is evidence to show that modernization does not necessarily mean abandonment of tradition. For instance, the Islamic *traditional* pilgrimage to Mecca got *reinforced* by the *modern* technology of transport and its cost has encouraged the culture of saving among intending Muslims (ibid). But there is some strength in the theory for directing “attention to the entrepreneurial and/or innovative personalities who seem to be so important in the developmental process” (Sklair 2002: 31).

Some critics deplore mimetic approaches such as dictated by the theory. Franz Fanon (2001) is a typical example and he insists that Third World countries should

not pay tribute to Europe by creating states, institutions and societies which draw their inspiration from her. Humanity is waiting for something other from us than such an imitation, which would be almost an obscene caricature. If we want to turn Africa into a new Europe... then let us leave the destiny of our countries to Europeans. They will know how to do it better than the most gifted among us.

But... if we want to bring it up to a different level than that which Europe has shown it, then we must invent and we must make discoveries (ibid: 254).

Dependency theorists (*'dependentistas'*) on the other hand critique development from a different perspective. Influenced by Marxism, they link underdevelopment of the Third World to the capitalist development of the West. The West, they argue, is responsible for the underdevelopment of the Third World because it depleted the economy of the Third World in its favour particularly during colonial rule. With the abolition of slavery which fuelled industrial revolution in Britain, colonies became the source of the new industries' raw materials and markets for finished goods. The economies of the colonies were in short tailored to serve the economy of the West and that was how the latter developed and the former got underdeveloped (Rodney 1972).

According to Frank (1971, 1995), underdevelopment is a necessary product of capitalist development and of the internal contradictions of capitalism itself. He identifies the contradictions as "the expropriation of economic surplus from the many and its appropriation by the few, the polarization of the capitalist system into metropolitan centre and peripheral satellites, and the continuity of the fundamental structure of the capitalist system throughout the history of its expansion and transformation, due to the persistence or re-creation of these contradictions everywhere and at all times" (1971: 211).

The first contradiction is traceable to Marx's discovery of surplus value created by labour but enjoyed by capital, and generating development and underdevelopment simultaneously. The second and most important contradiction was also introduced by Marx in his analysis of the imminent centralization of the capitalist system. Polarization into metropolitan centre and peripheral satellites as a characteristic of capitalism was described as "a paradox of trade and a contradiction of riches ... thriving on what ruins others and being ruined by what make others thrive" (ibid: 214). The following summarizes the consequences of the polarization:

It is the characteristic of capitalism that the development of some countries takes place at the cost of suffering and disaster for the peoples of other countries. For the soaring development of the economy and culture of the so-called 'civilized world', a handful of capitalist powers of Europe and North America, the majority of the world's population, the people of Asia, Africa, Latin America, and Australia paid a terrible price. The colonization of these continents made possible the rapid development of capitalism in the West. But to the enslaved peoples, it brought ruin, poverty, and monstrous political oppression (quoted in Frank 1971: 214).

Expropriation of economic surplus by the metropolitan denies the satellites access thereto and it is this denial that keeps the satellites underdeveloped. The combination of the contradictions therefore "reinforces the processes of development in the increasingly dominant metropolis and underdevelopment in the ever more dependent satellites [thereby making] development and underdevelopment the opposite faces of the same coin" (ibid: 214-215). And it is this combination that suggests the third contradiction of continuity and change which Frank describes as the determinant factor which must be understood in order to combat the underdevelopment of the greater part of the world today. He therefore rejects references to autarchic, closed, reclusive, feudal and subsistence economies of the satellites as causes of their underdevelopment. It is only through a historical, holistic and structural approach to development that the Third World could "understand the causes and eliminate the reality of their development of underdevelopment and their underdevelopment of development" (Frank: 1995a: 37).

Frank (1995a) also critiques Rostow's capitalist evolutionist approach to development process for its tendency of placing the Third World in a stage believed to be original or traditional. There is nothing original or traditional about underdevelopment and neither the past nor the present of the Third World resembles the past of the developed countries. The latter, he says, "were never *underdeveloped*, though they may have been *undeveloped*" (ibid: 28). Consecutive evolutionist approach to development in itself is problematic. Its adoption by the West is said to be responsible for its unsatisfactory and unbalanced development

(quantity without quality) which the Third World is exhorted to avoid by pursuing unification, industrialization and social welfare concurrently (Franck 1972, 1992).

According to Esteva (in Sachs ed. 1992), development has been a campaign emblem for consolidating and eternalizing US's hegemony; a weapon for transmogrifying others into a belittling "inverted mirror of other's reality", impeding thinking of their own objectives, undermining confidence in themselves and their own culture, clamouring for top-down management, and converting "participation into a manipulative trick to involve people in struggles for getting what the powerful want to impose on them" (ibid: 8).

Having been an evident failure as a socio-economic endeavour, the time was seen as ripe to liberate minds from the dominion of development. With the failure of the US-led superior technology to free people from the shackles of misery; with the end of the Cold War which has been fuelling the development ideology; with the ever-widening gulf between the rich and poor of the world; and the realization that development was originally misconceived,³ the four pillars of development have broken; its idea grown obsolete; and "time to dismantle [the] mental structure" of its still-pervading talk to give way "for fresh discoveries" is ripe (Sachs 1992: 1).

For Baxi (2003), development represents a global ritual of the "periodic reinvention of impoverishment" and it "constitutes a mode of legitimation of power". He bemoans the rampant "redescription of conditions of extreme poverty" yet "the richer the articulation of world impoverishment in the global developmental discourse, the less concerted is the ensuing international social action" (ibid: 455).

Optimists about the idea of development are however quick to point at some success at least in Asia. With the conspicuous rise of the four East Asian 'Tigers' (Taiwan, Singapore, Hong Kong and South Korea) and more recently economies of

³ According to Sachs (1992), it was the success of development that should have been feared and not its failure as its success would have rendered the world a monoculture.

Indonesia and Malaysia, and some recorded industrialization in Latin America, the theories lacking faith in capitalist development (like the dependency theory) accusing it of eternalising the centre/periphery dichotomy may be proved wrong. The countries may not be of the same grade with the developed countries, but they have certainly graduated from Third World classes to something higher – neither at the centre nor in the periphery. Thus to scholars like Allen & Thomas (2000), “the idea of development has been of leading importance over the past half century and remains salient today. While there have been recurrent disappointments, it can be claimed that there have also been successes” as could be seen in the case of the ‘Asian Tigers’ in economic terms (ibid: 5).

But Amin (1990) strongly rejects that these countries are what could be called ‘semi-periphery’ on the way to ‘catching up’. In fact, they are “the real peripheries of tomorrow”. If it took two or three decades for Germany to catch up with Britain in the 19th century, how long would it take Brazil to catch up with the United States? The ever-increasing unfavourable conditions imposed by polarization within the capitalist system pose insurmountable challenges to the catching up bid. Social problems arise due to unequal income distribution brought by internal polarization. Solving these problems will inevitably clash with the logic of market expansion (ibid: xi). Frank (1995a) too argues that the most important industrialization achieved in Latin America was recorded during the periods of the World War I, the Depression and World War II when the continent’s contact with the capitalist West was weakest.

ii. A Paradigm Shift

At the turn of the millennium, it was realized that growth in GNP per capita does not necessarily mean development. For instance, the black Americans had a higher GNP per capita than the poor people of China or Jamaica yet the latter’s life expectancy (a better development yardstick) was much higher than the former’s (Sen 1999). GNP per capita in a country is also blind to income distribution. A

country having slow income growth but a fair distribution pattern is more likely to develop in the long run than a country where the income, though high, is concentrated in the hands of few (Seers 1972, 1995). To think “that growth is *the* path to better living” is therefore an “illusion” (Korten 2001: 44).

Thus development became a process wherein “people increase their human, institutional, and technical capacities to produce the goods and services needed to achieve sustainable improvements in their quality of life using the resources available to them” (Korten 2001, 165). It is inevitably a normative concept meaning the creation of conditions necessary for the realization of human personality. Its evaluation therefore must take into account the three criteria of reduction in poverty (which is a relative concept); unemployment (not necessarily lack of a paid employment); and inequality. Added to these criteria are: literacy; political participation; and belonging to a truly independent nation i.e. one whose decisions are not predetermined by other governments (Seers 1972, 1995).

Development thus came to be understood as a people-centered process; no longer dominated by economic analysis even within the World Bank. In its *World Development Report, 1999/2000*, the Bank acknowledges “that development must move beyond economic growth to encompass important social goals - reduced poverty, improved quality of life, enhanced opportunities for better education and health, and more” (World Bank 2000: III).⁴

The United Nations Development Programme (UNDP) adopted the term ‘human development’ since 1990. Development as conceptualised by the UNDP though similar to the World Bank’s, is more comprehensive. In its first *Human Development Report* in 1990, it conceptualizes development as that which revolves around the human being, hence its preference for the terms ‘Human Development’ rather than simply ‘development’. It states that “Human Development is a

⁴ Similarly, Korten (2001: 165) says development is a process wherein “people increase their human, institutional, and technical capacities to produce the goods and services needed to achieve sustainable improvements in their quality of life using the resources available to them.”

development paradigm that is about much more than the rise or fall of national incomes. It is about creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests. People are the real wealth of nations. Development is thus about expanding the choices people have to lead lives that they value. And it is thus about much more than economic growth, which is only a means —if a very important one —of enlarging people’s choices” (UNDP 2008).⁵

Drawing from philosophers like Aristotle, it emphasises the point that wealth which economic growth seeks to achieve is merely a means to the end of creating an enabling environment for people to achieve longevity, health and creative lives. Attention must therefore be paid to the link between economic growth and human development. Development must be seen as a process which enlarges people’s choices particularly leading a long and healthy life, acquisition of knowledge, and access to resources needed for a decent standard of living, as well as participation in the socio-economic and political life of the society. There are therefore two sides of human development: formation of human capabilities⁶ and putting the acquired capabilities to use.⁷ Thus human being is both the means and end of development; and development is both a *process* of enlarging people’s choices as well as “the *level* of their achieved well-being” (UNDP 1990).

Development so conceived is distinguishable from economic growth because the latter, though necessary, is inadequate for achieving the former. Countries like Algeria, Gabon, Oman or Saudi Arabia had higher income, but lower human development index (HDI) rankings than Costa Rica, Chile, Jamaica or Sri Lanka. It is also different from human capital formation or human resource development because they view human being as primarily a means to development (ibid).

⁵ See <http://hdr.undp.org/en/humandev/> accessed 20th July 2008.

⁶ I.e. improvement in health, knowledge and skills.

⁷ I.e. in general participation in the society.

UNDP therefore looks beyond GDP to a broader definition of well-being by considering three dimensions of human development: living a long and healthy life⁸, being educated⁹ and having a decent standard of living.¹⁰ Based on these dimensions, UNDP started issuing yearly Human Development Reports in 1990 wherein it assesses countries' level of human development using three categories: High, Medium, and Low Human Development Indices. Countries in the first category have a Human Development Index (HDI) value of 0.800 and above; those in the second category have a HDI Value between 0.500 and 0.799; and those in the last category have a HDI Value below 0.500.

In 2000, the United Nations adopted the Millennium Declaration whereby leaders of 189 nations agreed to pursue eight Millennium Development Goals (MDG): eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a global partnership for development. These goals provide countries around the world with a framework for development, and time-bound targets by which progress can be measured. Most of the goals and targets were set to be achieved by the year 2015 on the basis of the global situation during the 1990s.¹¹ Nigeria was among the adopting nations.

This shift of paradigm makes development synonymous with freedom (Sen 1999). Sen identifies five types of freedoms as follows: i. political freedoms, ii. Economic opportunities, iii. Social facilities, iv. Transparency guarantees, and v. protective security. These freedoms are interconnected. For instance, the freedom of political participation and dissent requires some measure of social facility in the form of education and health. Similarly, people having limited economic opportunities are prone to poverty and attendant social deprivations. For example, 'premature' death

⁸ Measured by life expectancy.

⁹ Measured by adult literacy and enrolment at the primary, secondary and tertiary level.

¹⁰ Measured by purchasing power parity, PPP, income.

¹¹ See <http://www.un.org.millenniumgoals/index.html>.

could be caused by avoidable exposure to risk. And lack of transparent social intercourse breeds mutual mistrust and consequently hampers profitable transactions. The removal of unfreedoms like poverty, illiteracy, disease, denial of political liberty, etc. is what constitutes development. The success or otherwise of development is measured by whether or not people's freedoms are enhanced and it is the freedoms that determine people's capabilities for initiatives and influence on the larger society. Freedom therefore is "both the primary end and ... the principal means of development" (ibid: xii); serving both *constitutive* and *instrumental* roles in development.

As is evident in its Vision 2010 and National Economic Empowerment and Development Strategy (NEEDS) and its being part of the 2000 United Nations Millennium Declaration, Nigeria now expressly emphasises human development. For instance, in the Vision 2010 Report, it has been stated that "to equate annual budgets, rolling plans and perspective plans with the Vision 2010 exercise is to miss the point. Budgets and rolling plans will only constitute sub-sets of Vision 2010, which will go beyond the realm of economics to encompass every facet of our national life" (Vision 2010 1997: 34).

This thesis is not concerned with the North-South development debate. Nor does it see development as economic growth. Throughout, development is used in the sense of human development unless where otherwise indicated. Underdevelopment is used as antonym for development in the same sense. It is concerned with the reality of today when more than 1 billion people live on less than \$1.00 a day; more than 850 million are malnourished; more than 1 billion lack access to safe water; about 115 million school-age children are out of school; and more than 10 million children die every year before their 5th birthday (UNDP 2005). The thesis looks at these realities in the context of Nigeria. However, it limits its scope to the three variables of poverty, education and health. It is underdevelopment understood through the lenses of these three variables that the thesis argues is caused by high level of corruption in Nigeria.

1.3 Corruption

Corruption is a social menace found in both public and private circles. For the purpose of this work, we are concerned with public corruption otherwise known as official corruption. The World Bank and Transparency International (TI) define it as the abuse of public office for private benefits (World Bank 1997: 8; TI 1996). The *Black's Law Dictionary* (Garner 2004: 371) gives a similar definition of corruption as "The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others." Hope (2000: 18) succinctly puts it "as partisanship that challenges statesmanship". But broadly, he describes it to mean:

The utilization of official positions or titles for personal or private gain, either on an individual or collective basis, at the expense of the public good in violation of established rules and ethical considerations, and through the direct or indirect participation of one or more public officials whether they be politicians or bureaucrats (ibid).

According to Underkuffler (2005), approaches to the idea of corruption could be categorized into three broad theories: (i) Shell theories which define corruption as violation of law or violation of duty; (ii) Substantive theories which define corruption as betrayal or violation of public interest; and (iii) Economic theories which view corruption in economic terms i.e. whether economically evil or good. These traditional theories, she argues, do not adequately define corruption. Corruption is more than violation of established rules; more than a breach of public duty. To say that A is corrupt is a statement not only of what A has done, but of what A has become. Corruption is capture by evil so that if A is corrupt in one case, we believe he will act so in every case. This idea of capture by evil, she argues, drives our understanding of corruption in law. It drives our understanding of corrupt judges for instance who, once corrupt, we believe will act in a similar manner in every other case. "It drives our understanding of corruption as a systemic effect and

systemic influence, which presents institutional dangers that are greater than other crimes, and that requires purgation rather than simple law enforcement”.

i. Conception of the Public

Definitions of corruption like the above ones are based on the conception of the public domain as separate from the private domain. This conception is strongly influenced by Max Weber’s theory of rational-legal bureaucracy. The bureaucracy “is run by hierarchically ordered corps of officials who are recruited and promoted according to objective criteria such as educational qualification and professional experience; who are paid a regular salary which is graded according to rank and qualifications; and who are allocated fixed jurisdictional areas governed by clearly laid down rules and procedures. The core characteristics of this type of bureaucracy are impartiality, impersonality, and above all, the strict separation of incumbent and office” (Theobald 1990: 2). This form of bureaucratic organisation does of course exist now in all areas of human activity. But it is in the state apparatus where it first emerged. The development of the nation-state in the 19th century resulted in the consolidation of modern public administration; the appearance of the career public servant who allegedly makes decisions on the basis of neutral, universalistic criteria and scrupulously segregates public affairs from private interests (ibid: 3).¹²

Weber was obviously thinking of administrators and not elected politicians when he formulated his ideal type. But the fact that politicians once elected occupy public office and are required to perform their duties according to laid down rules and procedure makes them inclusive in his typology. In the case of Nigeria for instance,

¹² It has been argued that what administrators do is politics and not administration as is simply put. “All bureaucratic decisions are political in the sense that they are made by individuals who are located within a context of (invariably hierarchical) authority and power, and whose behaviour cannot but be influenced by interests, ambitions, fears, frustrations, the desire for status, achievement or the need for a quiet life, not to mention the complexities of informal group interaction. Hence the image of the civil servant meticulously working through established rules and procedures to reach an objective decision is, to say the least, simplistic” (Downs 1967 in Theobald 1990: 13). However, the difference between administration and politics may be one of degree and not of kind and the degree to which administrative roles are politicized is central to the understanding of corruption (Theobald 1990: 18).

the Constitution provides formal qualifications for vying for elected posts (sections 65; 106; 131; 177 of 1999 Constitution); binds elected politicians to a code of conduct in the discharge of their duties (Fifth Schedule, Part I of 1999 Constitution); and unambiguously mentions them in the definition of public officers (section 19, Fifth Schedule, Part I of 1999 Constitution).

It may be argued that the idea of public office is a Western conception. In Africa for instance, the line of distinction between the public and private is thin if at all it exists. Nepotism, patronage and bribery in the form of gift-giving are socially approved. A public officer who denies himself, his kith and kin favours which he could afford to render by virtue of his office may be blame-worthy. However, it is difficult for such arguments to hold in modern day societies. The development of the modern state is not limited to the Western countries. One of the effects of globalizing processes such as colonialism is such that hitherto 'primitive' societies have transformed into 'civilized' ones with all characteristics of modern states. In Chapter 5, we shall see for instance how formal law brought by the British colonial administration displaced customary law as the dominant law governing state practice in Nigeria. Though the practices of nepotism, patronage and gift-giving may still exist, they are by no means lawful or approved of at least at the level of formal public administration.¹³ Theobald (1990: 9-10) is therefore correct when he says that "in the light of the formal acceptance by virtually every government in the world of the desirability of efficient and honest government it seems difficult to avoid using public office as the yardstick against which corruption is measured".

Obviously, public corruption could take many forms. Money does not need to exchange hands before an act is categorized as corruption. Provided an act is done or omitted to be done consciously by a public officer in violation of established rules and procedure and for his or someone else's private benefit, it qualifies to be corruption. For instance, it is corruption for an electoral officer to commit an electoral fraud e.g. in the form of rigging elections, or for a public officer to grant a

¹³ I shall elaborate this point in Chapter 4.

public scholarship to an undeserving acquaintance, or for a university lecturer to award undeserved examination score to a candidate even when no financial reward is taken in return. Because corruption is so wide, I shall limit my discussion about it as it affects public funds. As we shall see in Chapter 5, the arm of government which is in charge of these funds is the executive therefore the bulk of the discussion on corruption revolves it. Mention is also made of corruption in the legislative circles because the constitution gives it certain financial powers such as authorization of withdrawal of monies by the executive. Although the judiciary in Nigeria is far from being corrupt-free, corruption in that institution is not covered in this thesis because it neither holds public funds (apart from its allocation to cover running costs etc.) nor does it have financial powers.

Even when limited to public funds, corruption could take mainly three different forms. First is petty corruption which involves small scale corruption routinely taking place between members of the public and minor public officers such as the police, customs or judicial officers. Second is grand corruption which takes place at a higher level. It involves larger amount of money and more senior public officers. It is manifested in kickbacks or embezzling public funds. It is most prevalent in public works contracts such as building roads, schools, hospitals, etc. and in privatization of public enterprises. Third is state capture or looting. It involves “scams whose figures are so huge that when they are successfully concluded they have macroeconomic implications fairly quickly – they cause banks to collapse, inflation to rise, the exchange rate to decline” (Hassan 2004). All these forms of corruption are pernicious to development. Though all are prevalent in Nigeria, most of our discussion in the thesis will be focused on the second and (occasionally) third forms.

Corruption is an ubiquitous problem. Neither developing nor developed countries are immune from it. In the UK for instance, there was the cash for honours scandal

which rocked the Blair government in its twilight.¹⁴ There was also the corruption scandal from the Saudi Arabian contract with the BAE Systems (British Aerospace) on arms.¹⁵ In the US, it has been reported that between 1994 and 2002 approximately \$240 billion in government contracts, representing as many as 484 major offshore contracts, involved bribes to foreign officials (Brown and Shackman 2007).¹⁶ Thus corruption is a universally prevalent practice varying in degree and subtlety. But as evidence shows, it is more prevalent in developing countries (Theobald 1990). The annual assessment by TI corroborates this evidence.

ii. Consequences of Corruption

It is often argued that where corruption helps to surmount bureaucratic red-tapism and inefficiency in a public system, it is not necessarily anti-development or it can even promote development¹⁷ (Nye 1967; Theobald 1990: 6, 116-125; Robinson 1998; Smith 2007: 185-187). In any case, its negative effects have far outweighed the positive ones, if any. Among its negative consequences, corruption increases operational costs and reduces profits and benefits; it creates distrust of public officers and hence constitutes social obstacle to execution of projects; it weakens government by making policy-makers timid in taking bold steps to curb excesses of citizens or to reform the system; it discourages payment of taxes and the practice of saving schemes for social development (Gbefwi in Ayua & Guobadia 2001: 639-640; Hope in Hope and Chikulo 2000: 23; Theobald 1990: 125-130; Smith 2007: 182-185).

Corruption also leads to loss of image and prestige of a nation; weakens the moral fibre of the people; lowers ethical standards in governance; widens gap between the rich and the poor; burdens the poor and consequently increases social instability and

¹⁴ This issue led to an unprecedented interviewing of the Prime Minister by the Police. See <http://www.telegraph.co.uk/news/uknews/1555961/Blair's-cash-for-honours-secret.html>.

¹⁵ The government suppressed this issue in the name of national security as the UK is in alliance with the Saudi government in the fight against terrorism. But recently the High Court blamed the Serious Fraud Office for the suppression (*The Guardian* [UK] of 11/4/08).

¹⁶ For more examples of corruption in developed countries, see for instance Theobald (1990: 46-75).

¹⁷ I.e. it can 'grease the wheels'.

insecurity; deters foreign and domestic investment and reduces rate of economic growth; undermines confidence and trust in government and public institutions; skews national strategies and plans; brings inequality, inflation and crime; makes state repressive; affects political stability; lowers GDP per head; and exacerbates budgetary problems and often forces unplanned resource reallocation (Nye 1967; Mauro 1995; Robinson 1998; Rose-Ackerman 1999: 2-3, 9-25; Hassan 2004; Lambsdorff 2005; Hope in Hope and Chikulo 2000: 23-26; Senior 2006: 168-180; Mbaku 2007: 102-109; Smith 2007: 180-185).

Among the various consequences of corruption identified above, this thesis is more concerned with its impact on development. The cumulative effect of all its consequences could be said to be adverse to development. But there are ways in which it directly affects development. For instance, resources which would otherwise be used in development are lost through corruption. It diverts public investment away from essential development aspects such as education and health into capital intensive projects such as airports, stadia where bribes and kickbacks are more plentiful. In a statistical comparison of 90 countries, it was found that there is “negative, significant and robust relationship between corruption and government expenditure on education” (Mauro 2002 in Smith 2007: 180). Smith (2007: 180) further confirms why this is so when he says that “there are fewer opportunities for bribery within educational projects compared with high-technology purchases made from oligopolies by government’s investing in large-scale capital expenditure, such as defence procurements and construction projects.” It is no wonder then that the Nigerian political office holder would often dodge legitimate demands from the electorate in his constituency for basic necessities of life such as water and drugs and instead embark on providing them with “the most modern television station in Africa” (Achebe 1984: 24-25).

The Utstein Anticorruption Resource Center finds that corruption impedes development and perpetuates and exacerbates poverty in a variety of ways which include:

- a. Diverting resources and benefits towards the rich and away from the poor;
- b. Disturbing the pattern of public spending and investment by encouraging large capital-intensive projects to maximize bribe receipts;
- c. Imposing an additional unofficial 'tax' which the poor are least able to pay;
- d. Reducing tax revenues to government which reduces public services that benefit the poor;
- e. Undermining social and political stability with consequences that leave the poor more insecure;
- f. Reducing economic growth which reduces the opportunities for the poor to escape from poverty;
- g. Perpetuating social exclusion and preventing the poor from acquiring the capability to challenge inequalities of power and resources; and
- h. Depriving the poor of their rights and entitlements (Hassan 2004).

Barring the dependency theory,¹⁸ there is no gainsaying the fact that Africa's underdevelopment is to a large extent linked to corruption. The impact of corruption on development in Africa has been described in the following words:

That corruption adversely affects the development process in developing countries is no longer in doubt.... The corruption/development nexus is of special concern in poor countries such as are found in Africa. Those who pay and receive bribes can expropriate a nation's limited wealth. However, even countries endowed with natural resources (some of which are also found in Africa) may fail to develop under a regime of systemic corruption...Nigeria and the former Zaire (under Mobutu) are classic examples of this latter observation (Hope and Chikulo (2000: 2).

Real examples of how corruption expropriates a nation's wealth abound. For instance, the World Bank has reported that an estimated total of \$160 million had been taken as bribes by civil servants in Mozambique, an equivalent of 90% of the government's budget (Gbefwi in Ayua & Guobadia 2001: 640). In Zimbabwe, the

¹⁸ Discussed herein under section 1.2

government lost a total of US\$3 million in 1991 and more recently about 5 per cent of the country's annual economic output (equivalent to US\$300 million) owing to corruption. In Mali, the former Head of State, Moussa Traore, looted over US\$2 billion, an amount equal to the size of the country's foreign debt in 1992. In Kenya, corruption in state enterprises has been costing the country an average of US\$104.5 million annually. And within six years in the mid 1990s, the Chief Executives of the country's 56 state firms misappropriated US\$627 million, an amount equivalent to 1.2 times the amount the country received in official development assistance in 1994 (Hope in Hope and Chikulo 2000: 24). In Chad, a survey in 2004 discovered that less than 1 per cent of money released by the Ministry of Finance meant for rural health clinics actually reached the clinics – over 99 per cent had been lost to corruption (Collier 2008: 66). We shall see detailed examples from Nigeria in Chapter 4.

iii. Causes of Corruption

Some of the consequences of corruption might as well be said to constitute its causes. For instance, lower GDP, inflation and inequality could belong to either side. But just like the consequences, the causes of corruption too are multifaceted and there is hardly any agreement on them. For instance, corruption may be attributed to the size of government or country. Where a government or country is large, bribes to public officers would be on the increase as it would be difficult to establish decent administration and to monitor the officers. It may be argued however that whether or not power is centralized is what is crucial in the level of corruption. For instance, evidence has been reported that federal states (like Nigeria) are more corrupt than centralized ones (Lambsdorff 2005). According to Montinola and Jackman (2002), the size of government does not systematically affect corruption, but membership of the Organisation of Petroleum Exporting Countries (OPEC) does because of the states distinctive "high degree of direct engagement in national economic issues".

Corruption is also said to be caused by higher regulatory barriers to market entry; vague and lax government regulations; highly diversified trade tariff (as opposed to uniform rates); low level of competition among private firms sometimes spurred by government's restrictions on economic freedom; recruitment not based on merit; poor wages and salaries; lack of commitment to religion; personal dishonesty; non-free media; trade restrictions; high fiscal burdens; high level of government intervention; unethical leadership; expanded role of state activity; nepotism towards family, friends; etc. (Lambsdorff 2005; Hope and Chikulo 2000: 13; Hope in Hope and Chikulo 2000: 20; Senior 2006: 127-159; Montinola and Jackman 2002; Mbaku 2007: 64-68). One could hardly single out one factor causing corruption. Similarly, unambiguous evidence of causal linkage between variables and the concept of corruption is hard to come by. But one cannot doubt the fact that a combination of many factors would reinforce one another to result in corruption.

Though the above causes of corruption are relevant, this thesis does not seek to link the development-impeding corruption it complains about to any of them. It is more interested in the linkage between corruption and the rule of law arguing that absence of rule of law in practice is responsible for the high level of corruption. A study close to this area is the relationship between corruption and institutions. For instance, the impact of the press and the judiciary on corruption is not an uncovered field. It is commonly agreed that a free press could deter corruption through exposing it (Brunetti & Weder 2003 in Lambsdorff 2005). This suggests that where the press is gagged and inhibited for any reason from performing its duty as watchdog of the society, a situation favourable to corruption is created.

Similarly, lack of de facto prosecutorial independence is seen as increasing corruption which means de jure independence could exist side by side with corruption as the more the corruption, the more willingness of the executive to pay lip service to the independence. The impact of democracy on corruption has also been studied. It has been reported for instance that moderate levels of democracy do not decrease corruption. In fact, there is conclusion that corruption in medium-

democratic regimes is even higher than in totally authoritarian regimes. Only after a certain threshold is passed, where rates of electoral participation are high, do democracies inhibit corruption (Montinola and Jackman 2002; Manow 2005 in Lambsdorff 2005).

iv. Where the Gap Lies

The literature on corruption does not seem to focus on the relationship between corruption and rule of law. But there are studies on the relationship between corruption and law or legal institutions. Admittedly, in the treatment of corruption vis-à-vis rule of law some law and legal institutions will certainly feature. The judiciary for instance cannot be ignored in any discussion of rule of law or institutions. The World Bank recognises it as an important institution impacting on corruption. It once reported that the predictability of the judiciary (in sticking to established laws) significantly influences the level of corruption in 59 countries (The World Bank 1997 in Lambsdorff 2005). Brown and Shackman (2007) find “unambiguous results” that law and order (which they sometimes call rule of law) reduce corruption in both the short-run and long-run. If the legal and judicial systems are so weak that they could hardly detect, prosecute and punish corruption (as its most obvious cost), then the level of corruption will be high. Conversely, a strong legal system will reduce corruption because of its potential cost. This argument follows that of Ali and Isse (2003) who state that:

The level of corruption depends on the extent to which the laws of the land are binding and enforced. Corrupt officials are rational welfare maximizers. They weigh the pecuniary benefits from corruption against its cost. The personal cost of corruption is the loss of a job and the jail-time if caught and persecuted [sic]. Individuals will act corruptly so long as the perceived gains from corruption outweigh the costs. The probability of detection is lower the more lackadaisical the judicial system is. Judicial laxity reduces the opportunity cost of being corrupt. Hence, countries with strict laws and efficient judicial systems tend to be less corrupt and vice versa.

Hope (in Hope & Chikulo 2000: 21) also mentions rule of law in his analysis of causes of corruption. But it is similar to the World Bank's argument because he refers to "lack of rule of law and administrative predictability" as contributing to corruption. The predictability and rule of law he says "are characterized by policies and regulations developed and implemented according to a regular process which is institutionalized and which provides opportunity for review" (ibid). However, he comes close to what I mean by rule of law when he states earlier that:

The first factor contributing to corruption in Africa is that of the total exercise by the ruling elite of all power attached to national sovereignty. This exercise of state power has led to the supremacy of the state over civil society and, in turn, to the ascendancy of the patrimonial state with its characteristic stranglehold on the economic and political levers of power, through which corruption thrives for it is through this stranglehold that all decision-making occurs and patronage is dispensed. As a matter of fact, in some African countries no distinction is made between public and private interests and government officials simply appropriate state assets. These are kleptocratic or 'vampire' states where the rulers and their associates loot their country's wealth as they wish (ibid: 19).

The problem with his approach is that he does not tell us how the ruling elite come to exercise "all power attached to national sovereignty". He seems to look at the state as a whole without appreciating the separate power units and the extent to which each unit wields or does not wield power. With such a holistic view, he emphasises the chasm between the state and the civil society. In short, he merely mentions this contributing factor without going behind it let alone locating it within a rule of law context. Even if he does, his version of rule of law seems to be the orthodox market-oriented version because of his conflation of rule of law and administrative predictability.

Mbaku (2007: 72-74) also identifies among his structural factors explaining corruption the poorly constrained state i.e. the absence of effective constraints on the state which makes it possible for civil servants and politicians as custodians of the state to engage in corruption and rent seeking. In situations like this, he says

drawing from Scott, the government becomes uncontrolled, responsible to no one, and thus free to be self-aggrandizing. But he links the failure to adequately constrain the state to 3 factors as follows: (1) a poorly compacted or inappropriate constitution which does not impose the necessary constraints on government; (2) absence of an effective civil society to serve as a check on the exercise of government agency; and (3) the existence of a noncompetitive political environment (as in absence of political parties, labour unions and other nongovernmental organisations that can effectively challenge the ruling coalition). He conspicuously omits the judiciary and legislature as ‘constraining’ institutions.

Similarly, Smith (2007) links corruption to institutional causes. He makes a similar argument to the above when he says a “major cause of corruption is weak constitutional controls over public spending” (ibid: 189). However, he limits his institutions to the media, pressure groups and organized interests. He also adds the cost-benefit analysis of corruption (as made above by Shackman, 2007 and Ali and Isse, 2003) that “the institutional breeding-ground for corruption often also includes weak sanctions against those exposed as corrupt, and weak commitment to eradicating corruption on the part of political leaders. When the system of justice does not act as deterrent, corruption is likely to flourish.” Again, he says “weak political competition makes corruption possible because public accountability is enfeebled, the concealment of corruption easier, the oversight of bureaucracy less effective, and the threat of electoral sanctions less credible” (ibid: 189-190).

It is the World Bank that directly links corruption with rule of law. It needs to be pointed out however that such linkage is far from being causal, i.e. it does not see corruption as caused or contributed by weakness or lack of rule of law. Its interest lies more in the effect of corruption on the economy and rule of law and how to combat the menace. It announced its involvement in 1996 when it declared that “the international community simply must deal with the cancer of corruption, because it is a major barrier to sustainable and equitable development” (Shihata 1991 in Santos 2006). It saw corruption as having long-term effects on investment climate

and peoples' welfare, weakening of public institutions, and ultimately decreasing economic growth. It has a devastating effect on the rule of law which is substituted by the rule of whoever has the influence or the ability and willingness to pay (ibid). The Bank then reverts to building the rule of law as strategy to manage and reduce corruption. This would entail legal reforms in civil service, criminal law, administrative law, and judicial reform which will, in turn, ensure predictability of conduct of government officials by acting in accordance with previously established and publicized laws.

What is the purpose of the Bank's anti-corruption crusade? The answer seems to lie in the Bank's concern on the negative effects of corruption on the use of its resources in developing countries. The Bank has interest in ensuring that its financial aid is used for specified purposes agreed upon in advance with recipient countries. Thus to promote rule of law to increase effectiveness of development aid would be consistent with the Bank's overall objective of economic development (ibid).¹⁹

In any event, the Bank is not concerned with how lack of rule of law brings about corruption as we indicated above. This is a central area of inquiry in this thesis in the context of Nigeria. The thesis looks at corruption not only as it impacts on development, but as a symptom of lack of rule of law in state practice. Assuming the Bank dwells on the causal relationship between corruption and rule of law, its approach would hardly be relevant to this thesis because its version of rule of law, as we shall see shortly, is institutional and instrumental and its end target is the market. This would still leave us with the task of devising a version that would be

¹⁹ The United Nations' initial fight against corruption was also market-targeted. Its first declaration was "UN Declaration Against Corruption and Bribery in International Commercial Transactions" (General Assembly Resolution No. A/RES/51/191 of 16th December 1996, 51st Session) in order to "promote social responsibility and appropriate standard of ethics on the part of private and public corporations, including transnational corporations, and individuals ... to enhance fairness and competitiveness in international commercial transactions". When corruption affects a country's own resources, like Nigeria's oil wealth drained through corrupt practices, what happens? Evidently, it is the country's own business. But it (the UN) later came up with Convention Against Corruption, 2003.

more appropriate to matters affecting a country's own resources like Nigeria's oil wealth.

1.4 Rule of Law

Rule of law is an old concept. It has been accepted as an important ideal by various civilizations ranging from ancient Greek, Roman Empire, Medieval Ages to the contemporary liberal world. Yet there is no common definition of it. It means different things to different people. "There are almost as many conceptions of the rule of law as there are people defending it" (Tamanaha 2004: 3). For example, Dicey (1959: 187-203) uses it in three senses: it may positively mean supremacy of the law over all persons and authorities; the equal subjection of all classes of people to the law as administered by ordinary courts; or in a negative sense, the protection of individuals' rights against government's arbitrariness.²⁰

Dworkin (1985: 11) calls the negative meaning of rule of law a 'rule-book' conception, one of "two very different conceptions of the rule of law". He argues that it is a narrow conception because it does not stipulate the content of the law (his rule-book) which its partisans say is important but a matter of substantive justice which is an independent ideal. The other conception is the 'rights' (substantive) conception which assumes that citizens have moral rights and duties with respect to one another, and political rights against the state which must be recognised in positive law for judicial enforcement on the demand of individual citizens.

Raz (in Cunningham 1979: 5) says that "The rule of law" means literally what it says: the rule of the law. Taken in its broadest sense, this means that people should

²⁰ However, there is another version of liberal rule of law which posits that the existence of rule of law excludes the need for a Bill of Rights. This is because by satisfying the 3 requirements of rule of law (generality, equality, and certainty), legislators would hardly make oppressive laws (Hayek in Tamanaha 2004: 71). This point is similar to the Federalist Papers' which saw no need for entrenched human rights because the US Constitution is already designed in a protective way (Tamanaha 2004: 55).

obey the law and be ruled by it. In political and legal theory, however, it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase “government by law and not by men”²¹. Aristotle speaks in terms of rule of law when he says “he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetite” (1962: 226, Book III xvi).

i. Rule of Law as Means

Rule of law is so malleable that it could be invoked for as many purposes as possible. It has been said that “The rule of law means whatever one wants it to mean. It is an empty vessel that everyone can fill up with their own vision” (quoted in Trebilcock and Daniels 2008: 13; Tamanaha 2006: 1, 130). It is said to be an unclear and ambiguous term. Whenever it is invoked, one or several of its possible interpretations are advanced as if they were obvious (Santos in Trubek & Santos 2006: 257). The International Commission of Jurists (1961: 11) recognises rule of law as a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish “social, economic, educational and cultural conditions under which the individual may achieve his dignity and realize his legitimate aspirations.”

It is not surprising therefore that rule of law found relevance in development circles. In 1992, the World Bank invoked it as a necessary element in its ‘governance’ agenda. It defines governance as “the manner in which power is exercised in the management of a country’s economic and social resources for development” (World Bank 1992: 3).²¹ It therefore exhorts transition economies and developing

²¹ Other donors use the concept of ‘good government’ (which could touch on multi-party democracy, press freedom, etc.) instead. The Bank, unlike the other donors, is restricted under its Charter from introducing political reforms or even question the political regime of the recipient country” (Faundez 1997: 6).

countries to imbibe good governance as a recipe for development. It says that “good governance is central to creating and sustaining an environment which fosters strong and equitable development, and it is an essential complement to sound economic policies” (ibid: 1). The Bank identifies lack of an adequate legal framework as one of the symptoms of bad governance (World Bank 1992: 4).²² The role of a legal system in good governance is to provide the rule of law in order to create the stability needed “for economic actors – entrepreneurs, farmers, and workers – to assess economic opportunities and risks, to make investments of capital and labour, to transact business with each other, and to have reasonable assurance or recourse against arbitrary interference or expropriation” (ibid: 28). Clearly, rule of law here is invoked as a means of protecting private proprietary interests and ensuring effective enforcement of private contracts.

What then does rule of law entail? According to the Bank, it entails the following five (5) critical elements which every legal system must provide:

(a) *Rules known in advance*: since economic policies are implemented partly through rules, governments need to ensure that the rules are known in advance. Rules here include legislation, decision of courts, guidelines and regulations. Having rules known in advance implies three sub-elements: the existence of a coherent set of rules, their communication with accuracy, clarity, and effectiveness and the nonretroactivity of laws. The Bank has been concerned with the communication and coherence aspects of the rules. For instance, it has observed that communicating rules through publication of official gazettes has ceased in many developing countries and it started to assist these countries to restart the process and to introduce other means of communication. The Bank states that “peoples’ knowledge of their rights helps both to limit the arbitrary behaviour of government officials and to create the climate of predictability which is associated with the rule of law” (ibid: 32).

²² See for instance the World Bank’s World Development Reports 1996 (focusing on transition from a centrally planned economy to a free market economy) and 1997 (which applied the 1996 prescription for transition economies to the developing countries).

(b) *Rules actually in force*: rules need to be applied in reality and not merely for them to be provided in books. When laws are left in abeyance, an analysis of why they do not apply would be better instead of enacting new ones. Some aspects of enforcement of rules have a clear bearing on economic development and have received the Bank's attention over the years particularly in improving tax collection and changing security laws to enable lenders recover debts. For instance, in Sri Lanka, the Bank caused a change in the law which required lenders to obtain the leave of courts before they move against a mortgaged property. The law was based on historical concerns about the need to protect debtors from unscrupulous lenders. Now this leave is unnecessary because it "did not match the need of a modern economy" (ibid: 34, Box 9).

(c) *Rules applied consistently to all*: laws are not made for private citizens only. The state too is expected to exercise power according to law; government officials too should be subject to law just as private individuals are, and that their actions should derive from and be limited by specific legal authority. Legality and legitimacy cannot be established without the proper and consistent application of rules by government and its officials. It is only then that a predictable atmosphere would be created. This does not divest government of discretion. But discretionary power in law is always not absolute. It must be exercised based on reasons that are applied consistently, fairly and impartially and be related to a framework of purposes, policies, principles and rules. These limitations to exercise of discretionary power need to be respected as well (ibid: 34-35).

(d) *An effective, independent mechanism for dispute resolution*: for a proper functioning of an economy and for conducting efficient private economic activities, it is necessary to have confidence in the enforceability of agreements in any legal system. This in turn requires an independent and credible judicial system that would ensure that private contracts are respected and that the law is applied uniformly. Without an independent, credible and efficient judiciary, the rule of law loses its conflict-resolving and confidence-inspiring function. "Unreasonable delays,

uncertainty, and high costs in enforcing agreements between private parties all tax economic actors inequitably and damage economic efficiency. It is also evident that a strong judiciary is not only vital in enforcing contracts but is a shield against arbitrarily exercised executive power” (ibid: 35-37).

(e) *Clear rules and procedure for amendment of rules*: the needed climate of predictability and stability in a legal system would not be provided if rules are constantly or arbitrarily repealed, amended, or waived. Ad hoc decisions whereby laws are enacted, amended or invalidated without known and established procedure create a perception of arbitrariness and subjectivity. Laws of this nature invited disobedience and cause a general lack of credibility for the entire legal system. It is important therefore that procedures for amending or repealing laws to exist and be made known publicly. How this would be achieved is however outside the mandate of the Bank. It is the prerogative of the country concerned to decide how the legislative process is organized and how the legislature is constituted and by whom (ibid: 38).

As acknowledged by the Bank, two main dimensions emerge from the various definitions of rule of law. One is instrumental, which focuses on the formal elements necessary for a legal system to exist. The other is substantive, which refers to the content of the law and concepts such as justice, fairness and liberty (ibid: 30). The Bank’s version of the rule of law is institutional and instrumental. It takes the form of formal legality which simply requires law to be general and announced in advance, applied equally, and to be certain without necessarily bothering about its contents (Tamanaha 2004: 34-35; Santos in Trubek & Santos 2006: 258; Tamanaha 2006: 130). It is what Dworkin refers to as the “rule-book conception”. According to Tamanaha (2006), this instrumental conception of law is a threat to the rule of law because “individuals and groups within society will endeavour to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends” (ibid: 1). In this sense, rule of law could also be

compatible with repression and totalitarianism as Raz (in Cunningham 1979: 4) argues:

A nondemocratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that the nondemocratic system will be better than those Western democracies. It will be an immeasurably worse legal system, but it may excel in one respect: in its conformity to the rule of law.

From 1999 onward, the World Bank expanded its version of rule of law with the incorporation of socio-political concerns by introducing the Comprehensive Development Framework (Faundez 2000: 2-3; Rittich in Trubek & Santos 2006: 203; Santos in Trubek & Santos 2006: 266).²³ For instance, it recognised human rights as relevant to development (World Bank 1998, in Pahuja 2006: 3) and acknowledged that the causes of poverty are as much political and social as they are economic (World Bank 2000; Faundez 2000: 3; World Bank 2002). Its legal reform agenda now includes “judicial reform, decentralization, labour standards, equal opportunities, gender equality, land tenure systems, criminal law and the protection of the environment” (Faundez 2000a: 31).

The IMF too followed suit. It combined economic and political concerns in its content of law in development by invoking among others, “an aggregate governance index” which has six measures five of which relate directly to the rule of law. There is also an independent rule of law measure and it is defined as “the protection of persons and property against violence or theft, independent and effective judges, [and] contract enforcement” (Pahuja 2006: 4). With the UNDP, rule of law has been more politically-oriented as it underscores constitutional reform, entrenched bill of rights, and strong protection of human rights as necessary

²³ The World Bank’s World Development Report 1999/2000 titled “*Entering the 21st Century*” illustrates the expansion of the governance agenda and some of the implications of the new approach to development when it acknowledges “that the causes of poverty are as much political and social as they are economic” (Faundez 2000: 3).

preconditions for development (Daniels & Trebilcock 2004 in Pahuja 2006: 2). The World Bank, IMF and UNDP versions now stand integrated.²⁴

The invocation of the rule of law as strategy for economic development closely followed the law reform agenda of the World Bank and IMF as part of the structural adjustment programme (SAP) introduced by them in the 1980s. In withdrawing the state from the development arena and advancing the market,²⁵ law was seen as a relevant instrument. Legal reforms were made condition for loans and they “were narrowly tailored to introduce fiscal reform, ending exchange-rate controls, liberalizing trade, securing property rights, ending subsidies, and privatizing state-owned enterprises” (Santos in Trubek & Santos 2006: 267). Trubek & Santos (2006: 2) shed more light:

Rather than [being] an instrument for state policy, law was understood as the foundation for market relations and as a *limit* on the state. ... Attention shifted from the establishment of an administrative to the core institutions of private law, the role of the judiciary in protecting business against the intrusion of government, and the need to change local laws to facilitate integration into the world economy. ... Neoliberal law and development thought focused primarily on the law of the market: relatively little concern was shown for law as a guarantor of political and civil rights or as protector of the weak and disadvantaged.

This was the second phase of liberal legalism otherwise known as the “New Law and Development Movement”. The end of the Cold War and the consequent triumph of the free market economy; the rise of multinational corporations; and, to a lesser extent, the emergence of the human rights regime are factors which led to this new interest in the role of law in development (Trubek et al. 1994: 409; Lawrence 1994: 672; Miller 1996: 1 in Rose 1998: 94; Faundez 1997: 6). It has become necessary for the West to have influence over the legal systems of Third World countries in order to have access to their markets and natural resources

²⁴ Pahuja (2006: 5-8) argues that the integration spreads economic imperialism; expands the field of surveillance within the Third World; instrumentalises law and rights to expressions of normative orthodoxy or hegemony thereby negating the possibility of political contestation.

²⁵ It was this market-friendly approach to economic policy reform in developing countries that is known as the ‘Washington consensus’ (Faundez 1997: 8).

(Trubek et al. 1994: 475 in Rose 1998: 94). Thus legal reform programmes especially in the area of trade and investment laws went underway in several developing countries including Nigeria (Rose 1998: 107).

ii. Max Weber and Liberal Legalism

The whole rule of law (or law) and development idea is not without an underpinning theory. In our discussion of development above, we have seen that Max Weber had influenced the concept of development. He did not stop there. He also touches on the role of law in development. Amongst classical socio-legal theorists, he is perhaps the most focused on law and he has greatly influenced the present state of the law and development paradigm.²⁶ Weber's search for the reasons of the success of capitalism in the West led him to identify legal 'rationality' as the trump card. He constructs a typology of law on the basis of varying types of legal thought (reflected in their procedures rather than content). For instance, the lay magistrates and a tyrant are both irrational, their methods of arriving at a decision not being guided by a systematic form of general rules. He calls the former *formal irrationality*, and the latter *substantive irrationality*. A *formal rationality* on the other hand could be the English common law or continental codified legal systems, while *substantive rationality* is the canon law (Weber 1978: 62-63 in Hunt 1978: 105; Rheinstein 1954: xlviii-l; Trubek 1972A: 727-731; Anleu 2000: 23).

According to him, the highest form of legal rationality is achieving calculability and predictability spurred by the "integration of all analytically derived legal propositions in such a way as to constitute a logically clear, internally gapless system of rules, under which, it is implied, all conceivable fact situations must be capable of being logically subsumed" (Weber 1978: 62 in Hunt 1978: 106; see also

²⁶ Weber himself studied law during the height of German historical jurisprudence. He was interested in the relationship between legal development and economic history, which distinguishes his approach from idealist legal theory, on the one hand, and economic determinism, on the other. He taught commercial law and legal history at the University of Berlin (Anleu 2000: 21; Hunt 1978: 94-95).

Anleu 2000: 25). He argues that logically *formal rational law* is peculiar to the West (Trubek 1972a: 723)²⁷ and it transited from *substantive rational law*. Its counterpart is his purposive rationality of economic conduct which modern capitalism constitutes for its rational choice of means to achieve the end of profit (Rheinstein 1954: xlviii & lviii). The relationship between law and capitalism lies in ‘calculability’ and ‘predictability’ which law provides and on which capitalism rests. Thus his conception of law is institutional and instrumental and it is what influenced the World Bank in its adoption of rule of law in development. In fact, it has been said that the Bank’s architect of rule of law, Ibrahim Shihata, expressly refers to Weber’s theory of the role of law in the economy (Santos in Trubek & Santos 2006: 270, note 56).

It was this same Weber’s theory which influenced a liberal legalist movement popularly termed as “Law and Development Movement” which held sway in the 1960s and 1970s. The Movement drew heavily on Weber’s concepts, theories, “as well as on his comparative historical studies of the role of law in the rise of capitalism” (Trubek 1972a: 721). It immediately followed and sought to facilitate the development project launched by President Harry Truman. It came up with a model which sought to specifically explain the relationship between legal systems and development in the Third World (Trubek and Galanter 1974).²⁸ It saw law as a necessary instrumental element in development and *ipso facto*, legal development was also necessary. “Legal development would enlarge the sphere of liberty and simultaneously guarantee that governments would act in accordance with the wishes of the citizens. Moreover, law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals” (ibid: 1074).

²⁷ One of Weber’s problems was how to reconcile the rise of capitalism in England which had no legal system as formally rational as that of Germany, where capitalism emerged later. For a detailed discussion of the ‘England problem’ see Hunt (1978: 122-128).

²⁸ There is a general model of the relationship between law and society, and together, the two models form the basic elements of liberal legalism (Trubek and Galanter 1974: 1071).

The central argument of the Movement is that with its predictability derived from uniform application, and its protection of proprietary rights through laws of contract and property, modern law encourages economic activity and attracts foreign investment (Greenberg 1980). More directly, modern law is seen as an effective and penetrating instrument through which the state could consciously achieve economic development goals. In the political arena, not only is modern law essential in creating a strong state and facilitating public participation, but also in checking the state's use of arbitrary power through an independent judiciary and techniques like judicial review (Tamanaha 1995; Greenberg 1980).²⁹ It was Trubek and Galanter (1974) who called the paradigm "liberal legalism".³⁰

Thus a legal system is seen as "an integrated purposive entity which draws on the power of the state but disciplines that power by its own autonomous and internally derived norms" (Trubek & Galanter 1974: 1072). The orientation of the liberal legalists shows state-centrism and legal fetishism. There was a bias against informal law; belief in the instrumental utility of formal law; and assumption that legal professions could represent public interests. "Customary law is regarded as too unpredictable to reassure investors, yet not flexible enough to develop the new law needed for an industrial economy—because it lacks instrumental orientation to law—and because it remains too responsive to traditional values" (Greenberg 1980: 131).³¹ These views cumulatively led to focus on legal reform in the belief that legal changes would spur social and political change. They further led to the assumption that any activity which would change legal institutions in the Third

²⁹ Trubek (1972) says this "core conception of modern law" has three major characteristics: (1) it is primarily a system of universal and uniform rules through which modern societies achieve order and applied by specialized agencies in contrast to the traditional system where norms vary according to place or tribe; (2) it is a conscious purposive human action unlike folk law which is shaped by history and custom. Modern law is not only purposive, it could be an instrument for achieving identified goals; and (3) it is part of, yet autonomous from, the state. The state constitutes and is constituted by the law. Its power is enhanced and legitimated by the law through its rationality and universality and the law in turn needs state's backing to affect a social order.

³⁰ Greenberg (1980) calls it "legal diffusionism"; Trubek (1972) calls it "legal modernism"; Gardner (1980) refers to it as "legal imperialism."

³¹ Modern law was to be imported in the Third World with minor modifications to take care of local circumstances and as a concession to customary law (Greenberg 1980: 131). An example of this importation/modification in Nigeria is provided in Chapter 5.

World into the model of those of the US was worthy of pursuit (Trubek & Galanter 1974; Franck 1972: 769).

The view is similar to the American legal realism which also sees law as instrumental (Tamanaha 2006: 60-76). Realists, according to Karl Llewellyn (1931)

want to check ideas, and rules, and formulas by facts, to keep close to facts. They view rules, they view law, as a means to ends; as only means to ends, as having meaning only insofar as they are means to ends (quoted with emphasis in Gardner 1980: 15).

In addition to the influence of Weberian analysis on European capitalism, the success of the American and Japanese capitalism served as case studies for this instrumental conception of law. After independence, the US facilitated capitalism “through land grants, tax law, protective tariffs, direct industrial subsidy, and repeal of feudal land law, while preserving and extending a pluralistic political democracy”; and Japan imported European legal codes (Greenberg 1980: 131). This contrasted sharply with Third World legal features: untitled land which cannot fetch credits from lending institutions; non-recognition of executory contracts (for being speculative) in states governed by the Shari‘a; blockage of land transactions for courts’ want of jurisdiction thereon; lack of bankruptcy laws; lack of codification of existing laws; and general lack of adequate provisions on commerce, finance, labour, social welfare, obligations and property. There was no such institutions as planning, import control, central banking, exchange control, limitations on repatriation of profits, income taxation, etc. (Greenberg 1980: 132-133).

Not only should American law be exported to the Third World, legislators’ and lawyers’ conception of law must be changed from merely a set of formalistic rules to a more result-oriented rules. In addition to providing legal experts to help raise the level of legal competence, “a stress on legal process and skills of analysis as distinct from rule-learning, and a readiness ... to recognize the need of working with the materials and the experts from other bodies of thought in order to deal

adequately with real problems” was identified as the most valuable contribution the American system could make to legal education in the Third World (Merillat 1966: 76). Thus a reform of the system of legal education in the Third World was necessary for lawyers to take their rightful place as social engineers and “not merely adversary advocates” (Franck 1972:778; Trubek 1972; Tamanaha 1995; Gardner 1980: 4).³² It is these newly trained lawyers that are expected to steer law and legal institutions in a developmental direction under the leadership of national political elites with assistance from the West (Greenberg 1980: 131).

Clearly, invocation of rule of law in development is not a new idea. It is just use of the term that began in the 1990s. The old approach of the liberal legalists and neoliberal approach of the development institutions are not fundamentally different from one another because they have same theoretical underpinnings (Faundez 1997: 12; Rose 1998: 128; Faundez 2000a: 37-38; Tshuma 2000: 24; Trubek in Trubek & Santos 2006).³³ Perry (1999: 26) describes the neoliberal approach more appropriately as building upon the Weberian thoughts of the law and development movement, suggesting that, in the context of a market economy, the Western liberal democratic paradigm offers a (if not the) model for legal reform (Perry 1999: 26).

In any case, the existence of liberal legalism has been a fact. It is something else if the paradigm has succeeded or not. The success or failure may largely depend on many factors. For instance, the Law and Development Movement was said to have failed, “answers carried abroad came back as questions” and a “new field of service” became a “new field of inquiry” (Gardner 1980: 12). Its alleged ethnocentrism and naivety were held to be largely responsible for the failure (Paul

³² In a form of caveat, Franck (1972: 788-790) warns against arrogating to law powers it does not possess. Law in itself is a mere implement and the legal profession does not have “any divine right to a central role in development, not even in legal development” (p.789). Though law, unlike lawyers, is indispensable, it is neutral – neither pro- nor anti-development. If this position is ignored, law may be focused on instead of socio-economic or political factors.

³³ Faundez (1997) however stresses that despite this similarity, the old and new approaches differ in the sense that the old approach regarded “the state as the centre which would initiate and promote the process of economic development”, while the new approach emphasises a market-friendly state, though not in the sense of the *laissez-faire* liberalism but where law merely facilitates market transactions (p. 13).

2003; Chibundu 1997; Trubek and Galanter 1974; Adelman & Paliwala 1993: 11; Merryman 1977: 479; Gardner 1980: 9).³⁴

iii. Departing from Liberal Legalism

Not only has liberal legalism been in existence, it has been the orthodox version of law/rule of law in the field of development. Unfortunately, it is limited to the service of private property. It is not for the protection of public property (like Nigeria's oil revenue) for public good. For instance, by the Articles of Agreement of the World Bank,³⁵ the Bank cannot intervene in the political affairs of member countries. Article IV section 10 of the Articles provides as follows:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

And under Article I, the purposes of the Bank revolve around economic development.³⁶

³⁴ This Movement was not without critiques. Fitzpatrick (1993) for instance wonders how a law which once oppressed a people would now turn against its origin to support them. He therefore argues that "the blithe advocacy of law in the cause of development is flawed in its very foundation" (p. 27).

³⁵ Available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>

³⁶ The purposes are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries; (ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources; (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories; (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first; (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years,

The Bank expatiates by giving five (5) aspects of governance which are beyond its mandate: it cannot be influenced by the political character of a member-country; it cannot interfere in the partisan politics of a member; it must not act on behalf of developed countries to influence a borrowing member's political orientation or behaviour; it cannot be influenced in its decisions by political factors that do not have a preponderant economic effect; and its staff must not build their judgements on the possible reactions of a particular Bank member or members (World Bank 1992: 5). But the Bank insists that since its general mandate is to promote sustainable economic and social development, its governance agenda may encompass good order and discipline in the management of a country's resources (World Bank 1992: 5).

The Bank's position may look promising especially that it has expanded its governance agenda to include socio-political concerns. But the fact that its mandate is still restricted to issues relevant to economic development (World Bank 1997) clearly leaves it with a truncated function.³⁷ Its rule of law still privileges the market. At the time it expanded the governance agenda, it still maintained that what an appropriate legal system does is to "provide stability and predictability, which are essential elements in creating an economic environment where business risks may be rationally assessed and the cost of transactions lowered" (World Bank 1994: 23).

As stated in the previous section, the Bank does not look at the causal link between corruption and rule of law. This is notwithstanding the fact that it identifies absence of elements constitutive of rule of law as greatly hindering development,

to assist in bringing about a smooth transition from a wartime to a peacetime economy. The Bank shall be guided in all its decisions by these purposes.

³⁷ Indeed Dicey and Hayek argue that social welfarism (which has a common goal with state-led human development) undermines the liberal rule of law mainly for its expansion of administrative action which is hardly subjected to judicial review. Since definition and enforcement of individual rights by the courts was the source of rule of law according to Dicey (1959: 187-203), this development is dangerous. Again, in its bid to achieve substantive justice as opposed to the liberal formal justice, social welfarism would seek to particularize law and this goes against the liberal rule of law requirement that laws should be general, applied equally and be certain (Tamanaha 2004). But Raz (in Cunningham 1979: 6) argues that "it is humanly inconceivable that law can consist only of general rules, and it is very undesirable that it should."

discouraging and distorting trade and investment, raising transaction costs and fostering corruption (ibid). Even when it employs rule of law as a remedial concept to corruption, its direct involvement is when its aid is involved in a particular country. Otherwise it can only advise, encourage and support governments that wish to fight corruption. The Bank does not mince words in stating its limits:

[T]he Bank Group will help any of our member countries to implement national programs that discourage corrupt practices ... The Bank Group cannot intervene in the political affairs of our member countries. But we can give advice, encouragement and support to governments that wish to fight corruption (quoted in Miller-Adams 1999: 123).

The market-oriented approach of the Bank's rule of law together with its roots in earlier liberal legalism nay development theory should not be surprising. Both emerged within a capitalist context. Both were influenced by the post-World War II ideological conflicts (Trubek and Galanter 1974; Greenberg 1980; Carty 1992; Chibundu 1997). That is why for both development theory and liberal legalism, development was limited to capitalist growth. Explaining the origin of the Law and Development Movement, Trubek and Galanter (1974) for instance, tell us the circumstance under which the liberal version of rule of law was thought to be useful for the development of Third World countries:

Legal development assistance began in a period when Cold War rhetoric and Cold War policy were ascendant. The American elite and policy makers saw the "rule of law" as one of the major features that distinguished the United States from Communist nations. It was understandable that in this context United States development assistance was pictured as furthering the rule of law, and ... legal development assistance as one way for the United States to fulfill its pledge to further "freedom" in the developing countries (ibid: 1085-1086).³⁸

³⁸ Gardner (1980: 6) is of a similar view that liberal legalism was conditioned "by Cold War concerns" and "strident anticommunism."

The second phase of liberal legalism³⁹ started when the world was still bi-polar so it could not have been divorced from the ideological conflict. It was the concern of foreign investors in the Third World which was upper most rather than local needs and the reforms were biased towards commercial and investment laws (Faundez 1997: 7; Perry 1999: 30). Of course the emergence of the rule of law in development⁴⁰ happened within a different context. The Cold War was over when the good governance agenda together with its rule of law were mooted out by the World Bank. Yet, rule of law was invoked to serve the capitalist economy more. Although the concept could be used for a more comprehensive purpose, the Bank's focus seems to be more on the protection of private property, such protection seen as recipe for the needed growth of capitalism. The inclusion of socio-political concerns under the concept does not seem to make much difference because it does not extend to governments' management of public resources.

Despite this shortcoming of liberal legalism, its idea that the presence or absence of rule of law is crucial in development is relevant to the thesis. However, since the thesis has to do with oil resources as public property, corruption as public wrong and development as public duty, I must depart from it. Fortunately, as stressed earlier, rule of law is not a close-ended concept. One could adapt it to suit particular circumstances. This is what I set out to do in proposing rule of law within the Nigerian constitutional framework though retaining some of its traditional elements.

1.5 Conclusion

Development, corruption and rule of law appear to be inextricably linked concepts, particularly in the case of Nigeria. Development is the state's *raison d'être*. It requires funds which the state raises through various means. In Nigeria, oil is the major source of funds. Custody of these funds is placed in the executive arm of government. To ensure a proper management of these funds, rule of law principles

³⁹ I.e. legal reforms driven by structural adjustment.

⁴⁰ I.e. the last phase of liberal legalism

are put in place. However, non-observance of these principles in the day-to-day practice of state inevitably leads to corruption which ultimately affects development. Thus the socio-legal phenomena of corruption and absence of rule of law in practice can explain underdevelopment and this is what this thesis aims to do by looking at the nexus between the three concepts.

In the dominant literature, the three concepts discussed particularly development and rule of law appear to be subjects of a North-South dialogue which falls outside the scope of this study. They are products of the development institutions particularly the World Bank. What is most relevant in the discussion on development is the shift from its perception as economic growth to its aim as supporting human development. This is the concept I use though limiting its variables to poverty, education and health. The centre-periphery critique of development resembles the divide between the rich corrupt officials in the cities and their impoverished victims in the villages and city slums. But I do not explore this point because it would expand the scope of my concept of underdevelopment as an effect of corruption. My next task is to establish not only that Nigeria is underdeveloped but that it is inexcusably so because of its endowment with reasonable oil resources. This is the task I shall take up in the next chapter.

CHAPTER 2

UNDERDEVELOPMENT AMIDST OIL WEALTH: EXPLORING THE PARADOX OF WANT IN THE MIDST OF PLENTY

2.1 Introduction

This chapter presents the basis of the main question which the thesis seeks to answer, i.e. why Nigeria suffers from the paradox of underdevelopment amidst oil wealth. Its purpose is to highlight the existence of this startling paradox of want in the midst of plenty in the country. It will highlight the paradox by presenting data and laying out Nigeria's human development position on the one hand and the level of its oil wealth on the other arguing that the presence of oil resources has not led to development. It initiates the discussion by presenting Nigeria's human development rank as assessed by the United Nations Development Programme (UNDP) and examines its level of underdevelopment using the three variables of poverty, education and health. A further section outlines the levels of oil wealth in the country and its distributive mechanism between the federal, state and local governments.

2.2 Human Development Rank

As stated in the previous chapter, development, until recently, has been assessed in terms of economic growth *simpliciter* i.e. measuring a country's Gross Domestic Product (GDP) and/or Gross National Product (GNP) per capita. But focus shifted to human development especially from 1990 when UNDP started its Human Development Reports. Since the start of the Reports, Nigeria's ranking has consistently remained in the low human development index (HDI) category. It is the only oil producing country in this category. For instance, in 1990 it ranked 107th with HDI value of 0.322 out of 130 countries surveyed; the 24th lowest in the low HDI category. Since then up till now, the ranking has not significantly improved and in most cases it became worse. It is not near achieving the Millennium Development Goals. Nigerians have not denied the fact that the overall quality of life for the average Nigerian, as measured by the HDI, is low (Vision 2010 1997: 81-82, figure 2). Countries which compete with

Nigeria in oil production like Venezuela, Algeria and Indonesia; others which produce much less oil like Malaysia, or which produce no oil at all like Ghana, have for instance since 2001 maintained a Medium Human Development Index according to the UNDP ranking.¹ Table 2.1 below gives Nigeria's ranking between 1990 and 2008.

Table 2.1: Nigeria's Human Development Ranking (1990-2008)

YEAR	TOTAL	HDI RANK	HDI VALUE	CATEGORY
1990	130	107	0.322	LOW
1991	160	129	0.242	LOW
1992	160	128	0.241	LOW
1993	173	142	0.246	LOW
1994	173	139	0.348	LOW
1995	174	141	0.406	LOW
1996	174	137	0.400	LOW
1997	175	141	0.393	LOW
1998	174	142	0.391	LOW
1999	174	146	0.456	LOW
2000	174	151	0.439	LOW
2001	162	136	0.455	LOW
2002	173	148	0.462	LOW
2003	175	152	0.463	LOW
2004	177	151	0.466	LOW
2005	177	158	0.453	LOW
2006	177	159	0.448	LOW
2007/2008	177	158	0.470	LOW

Source: Compiled from UNDP Human Development Reports 1990-2007/2008

2.3 Extent of Underdevelopment

Nigeria's low rankings in the Human Development Index as indicated above are a reflection of the extent of its poverty and the dysfunctional state of its educational and health systems. Although poverty encompasses all the three indices, I shall discuss them separately and my concept of human development is limited to them. They are examined in detail hereunder.

i. Poverty Profile

Poverty is a multifaceted and a multidimensional term. It means a situation of inadequate standard of living; insufficient income to provide for basic

¹ High oil producing countries like Kuwait, Qatar and United Arab Emirates though with little population compared with Nigeria, have achieved the High Human Development Index. See the UNDP Human Development Reports 2001-2007/2008.

necessities of life like food, shelter, health and education. According to the World Bank, there is a minimum level of income or consumption necessary to meet basic needs and it is what it calls 'poverty line'. This varies according to time and place. For instance in Nigeria, N395 per capita per month was selected based on 1995 prices as the poverty line that could consume minimum Food and Agriculture Organisation (FAO) recommended calories per person per day and a minimal basket of non-food items (World Bank 2005).

Poverty is a challenge to the modern world. It has been estimated that there are more than 1 billion people living on less than \$1.00 a day; more than 850 million malnourished; more than 1 billion lacking access to safe water; about 115 million school-age children out of school; and more than 10 million children dying every year before their 5th birthday (UNDP 2005). World Bank's 1990 *World Development Report* had poverty as its theme and therein, it identified reducing poverty as the fundamental objective of economic development. It decried that in 1985 more than one billion people in the developing world lived in absolute poverty warning that economic development has a long way to go (World Bank 1990: 24). Much of the world poverty is located in Africa, Asia and Latin America.

Nigeria has a fair share of the world poverty. With a present per capita income of \$290 (it varies from time to time), it is one of the 20 poorest countries in the world. Since the 1990s, the population living below this poverty line in Nigeria has been over 70% (\$1 a day) and over 90% (\$2 a day).² The Nigerian Federal Office of Statistics (FOS) stated that 15% of the population was poor at independence in 1960; rising to 28% in 1980; reaching 66% in 1996 (FOS 1996 in Garba 2006). Another survey finds that the percentage of Nigerians living in "absolute poverty" were 38% in 1985, 43% in 1992, and 47% in 1996

² UNDP covers 1994 up to 2005. It started including this criterion in its 1998 Report which erroneously reflects 28.9% as the population living on \$1 a day. That Report and the one for 2001 do not provide the percentage living on \$2 a day. The period 1994-2005 is covered in the Reports of 1998-2007/2008. Period covered is the most recent date of the data used by UNDP and therefore normally predates the Report. From the start of the Reports in 1990 until 1996, UNDP used the indices positively (e.g. rate of people **with access** to water) and from 1998, the language became negative (e.g. rate of people **without access** to water).

(Aigbokhan 2000). This means that Nigerians were better off before the oil days and that poverty increases with the increase of oil resources.

General Yakubu Gowon, Nigeria's former Head of State, acknowledged this startling paradox when he referred to development efforts as "war on want in the midst of plenty" (3rd Plan: Forward). Two of the country's Development Policies have lamented this paradox. Vision 2010 says about 50% (sic) of Nigerians lives below the poverty line despite the country's vast resources; only 40% of the population has access to safe water; about 85% of the urban population lives in single rooms with about 8 occupants per room; most Nigerians consume less than one-third of the minimum required protein and vitamins intake due to low purchasing power; etc. (Vision 2010 1997: 92-93). NEEDS too laments that "more than two-thirds of the Nigerian people are poor, despite living in a country with vast potential wealth. Although revenues from crude oil have been increasing over the past decades, our people have been falling deeper into poverty. In 1980 an estimated 27 percent of Nigerians lived in poverty. By 1990, 70 percent of the population had income of less than \$1 a day – and the figure has risen since then" (NEEDS 2003: pp. xiii-xiv).

Poverty is more severe in rural areas where social services and infrastructure are virtually non-existent and majority of Nigerian population lives in the rural areas. Most of the rural populace live on small-scale agriculture for food and income. They cultivate tiny plots of land and depend on rainfall rather than modern irrigation systems. 44% of male farmers and 72% of female farmers cultivate less than 1 hectare per household. The poorest among them eke out a subsistence living often going short of food particularly during pre-harvest period. A high proportion of rural dwellers suffer from malnutrition and other poor nutrition-related diseases (IFAD 2007).

From the 1980s, urban poverty started increasing by the days. For instance, while the number of poor in rural areas fell from 26.3 million to 22.8 million between 1985 and 1992, urban poverty rose from 9.7 million to 11.9 million. The depth of poverty in rural areas declined from 19% to 16% while in urban areas it increased from 9% to 12%. The depth and severity of extreme poverty

increased in urban areas more than seven-fold compared with a two-fold increase in rural areas. Extreme poverty increased nationally from 10 to 14 million with a tripling of headcount in urban areas (World Bank 2005).

Certain parts of the country are worse hit by poverty than others. For instance, the percentage living below poverty line in the Northern states in 1980 ranged between 32% and 38% while in some parts of the Southern States it was as low as 13%. By 1985, poverty had become pervasive in all the parts of the country though the North still maintained a disproportionate share (FOS 1996 in Garba 2006). Apart from regional characteristics, poverty is strongly influenced by education, age and nature of employment. Survey indicates that 79% of extreme urban poor and 95% of rural poor had only primary school education or even less (World Bank 2005).

ii. Education

The importance of education cannot be over-stated. It is a priceless commodity in itself and as indicated above, it strongly influences people's level of poverty. As will be shown in the next chapter, education is a human right under the Nigerian constitution. Yet and despite the country's oil resources, Nigeria does not invest well in the education of its citizens. For instance, its education expenditure between 1995 and 1997 was 11.5% of the total government expenditure and 0.7% of GNP. The 2003 budget allocated 1.83% to education, a far cry from the 26% UNESCO minimum standard. This low investment is reflected in the country's literacy level as well as the quality of education generally. UNDP puts Nigeria's adult illiteracy rate in 1990 as 49%. The rate fluctuated between 49% and 42.9% between 1990 and 1995 and since 1999 it dropped below 38% further going down to 33.2% in 2002 and 2003 respectively. The adult illiteracy rate of 30.9% in 2005 is the lowest Nigeria ever recorded (UNDP 1992-2007).³

³ The Human Development Report 2006 does not provide the adult literacy rate for 2004.

There are more children out of school in Nigeria than any other country in the world. There are over 8 million of them 60% of which are girls (Godwin 2007). According to the UNESCO Institute for Statistics, a person is considered illiterate if he/she cannot read and write with understanding a simple statement related to his/her daily life. It has been estimated that by 2005, 36% of girls and 28% of boys in Nigeria were not in primary school; 75% of girls and 71% of boys not in secondary school; and 20% of children enrolled into primary school do not complete it.⁴ General adult (i.e. 15 years plus) illiteracy rate was 54.6% in 1991 and 30.9% in 2004. Male adult illiteracy in 1991 was 32.7% and 21.8% in 2004. Female adult illiteracy is higher with 56.3% in 1991 and 39.9% in 2004. Among the youth (15-24 years old), general illiteracy rate was 28.8% in 1991 and 15.8% in 2004. Male illiteracy rate among the youth was 18.6% in 1991 and 13.0% in 2004. For the female youth, those who were illiterate in 1991 were 37.5% and 18.7% in 2004 (UNESCO 2007). Similar data is provided by the World Bank.⁵

In Algeria, as at 2002 only 5% of girls and 2% of boys were out of school; 4% of enrolled children do not complete primary school; general adult illiteracy was 29.1% (male 20.4%, female 39.9%); and youth illiteracy 9.9% (male 5.9%, female 13.9%). In Gabon, only 16% adult (male 12%, female 20%) and 4% of the youth (male 3%, female 5%) were illiterate as at 2004. In Indonesia, estimate in 2005 shows only 6% of girls and 3% of boys were out of primary school; 42% of girls, 41% of boys not in secondary school; and 101% of children complete primary school. Its adult illiteracy rate in 2004 was only 9.6% (male 6%, female 13.2%) and youth illiteracy rate was 1.3% (male 1.1%, female 1.5%) (UNESCO 2007).

Nigerians themselves are under no illusion as to the backwardness of their educational system. They have acknowledged that the current literacy rate of about 57% lags behind the average for developing countries, is far below the average in developed countries and is certainly below the minimum 75%

⁴ In addition to poverty leading to child labour, cultural factors too contribute to low school enrolment.

⁵ <http://devdata.worldbank.org/edstats/SummaryEducationProfiles/CountryData/GetShowData>, visited 13/11/07.

required for economic take-off; recent budgetary allocations to education (which stood at about 12% of the 1997 Federal Government budget) also fall below what is needed to make any meaningful impact on education; fall far short of the allocation of approximately 40% in the 1950s and 1960s in the defunct Eastern, Western and Northern regions; and are below the UNESCO prescribed minimum of 26% of the national budget (Vision 2010 1997: 63).

Describing Nigeria's education system as one which currently experiences deep crisis and which is in poor shape, Vision 2010 Committee Report laments that:

Only about one-half of school age children are in school at all levels. At the primary level, schools still lack teachers and basic infrastructure such as buildings, teaching aids, equipment, textbooks and furniture. ... The secondary system also suffers from similar problems (1997: 62).

At the tertiary level, education has experienced phenomenal expansion without proportionate increase in funding and facilities. The system suffers from problems such as outdated, dilapidated or non-existent infrastructure; poorly stocked libraries, inadequate laboratories and equipment, poor conditions of service prompting brain drain, low staff-student ratio and poor quality of teaching as well as low quality of graduates, especially in science and technology (ibid: 63).

There is paradoxically more oil wealth but less educational facilities for the teeming millions. Quite clearly, the educational system is "deteriorating at an alarming rate" perhaps worse than the position in the 1980s. The above description of primary schools in Nigeria is best exemplified in the richest state in the country, Rivers State (richer than some West African countries).⁶ Human Rights Watch visited eleven primary schools in the state and found that the physical structure of some of them had collapsed altogether and others were about to collapse; many others were virtually empty shells of schoolhouses, and nothing was being done to maintain or provide them with basic equipment; many blocks of 'classrooms' were large halls without any partitions in between where classes sit packed alongside each other, leaving teachers to shout above

⁶ Rivers State is the richest state in Nigeria. It is the largest oil-producer among the oil-producing Niger Delta states. It is, *ipso facto*, the recipient of the largest 13% derivative revenue pursuant to section 62 of the Constitution. Its annual budget is larger than that of most West African countries with small population, e.g. it budgeted \$1.3 billion in 2006 (Human Rights Watch 2007: 3-4).

each other; most of the schools did not have blackboards forcing teachers to write their lessons on painted wall surfaces; most of the schools had neither textbooks nor any other form of teaching materials; only one of the schools visited had desks; none of the schools had outhouses, running water or electricity and some even claimed to be running short of chalk (Human Rights Watch 2007: 50-52).

A donor agency official who had spent several years working in Rivers State stated that:

[Teachers] are so demoralized, the basic facilities are not there. Very basic things that the local governments could deliver if they wanted to. They always complain about money, but it isn't about money; it's a question of will... They bring proposals here and there, asking for millions to achieve simple objectives. The students have the zeal, but the guidance – money is not the real issue – it's people waking up to their responsibilities (ibid: 52-53).

With the state of tertiary education also described above by Vision 2010, it will not be surprising that since the start of the yearly World University Rankings in 2004, none of the Nigerian universities featured among the world's best 200 universities. In 2007, the best Nigerian university was ranked as 44th among the contending universities of Africa, outperformed by South Africa, Kenya and Ghana. When at last Africa made the list of best 200 universities in 2007, it was the University of Cape Town, South Africa which ranked as the 200th (The Times Higher Education 2004, 2005, 2006 & 2007; *The Guardian*⁷ Editorial 25/5/07).

iii. Health

Health, it is said, is wealth. Like education, it is a human right under the Nigerian constitution. It is also an end in itself. Again, the health of an individual or a nation affects its productivity. Health is not measured by absence of disease. The common indicators are access to health services, access to safe

⁷ *The Guardian* newspaper is also published locally in Nigeria. It can be accessed at <http://www.guardiannewsngr.com/>. All references to it in this work are to the local one except where otherwise stated.

water, infant mortality rate, maternal mortality rate, etc. These considered, Nigeria could hardly pass a health test, for the picture is gloomy. Its population without access to health services in 1989 was 54% with the lowest of 28% in 1991 and it rose to 49% in 1995;⁸ population without access to safe water in 1990 was 52% rising to 64% in 1993 with its lowest at 38% in 2000 only to rise to 40% in 2002 (UNDP).⁹ According to the Millennium Development Goals Report 2006, the population lacking safe water in urban area as at 2004 was 25-50% while in the rural area it was over 50%.

In 2000, the Nigerian health system ranked 187th out of 191 countries evaluated (WHO); life expectancy declined to 43.4 years in 2004 from 47 years in 1990 (UNDP 2006).¹⁰ In 2005, it rose to 46.5 (UNDP 2007). According to WHO (2006) survey, male life expectancy at birth was 47 years while that of female was 48 years in 2005 in contrast to that of Algeria which is 70 and 72 years respectively. And healthy life expectancy¹¹ as at 2002 was 41 years for male and 42 years for female in contrast to that of Algeria which is 60 and 62 years respectively. As at 2005, 194 die out of every 1,000 under five children while in Algeria it is 39 out of every 1,000. Nigeria's per capita total expenditure on health in 2004 was \$52.7 while that of South Africa was \$748; Gabon \$264.2; and Algeria \$166.9.

The World Bank estimates that over 50,000 women die during child birth every year. The figure represents 10% of the world's maternal deaths in child birth whereas the country represents only 2% of the world population as at year 2000. One in five children will die before his/her 5th birthday; about a million children die of preventable causes every year; only 18% of children are fully immunized by their first birthday; malaria kills more than any other disease, and yet less than 5% of the population uses insecticide treated nets that are proven to be effective in preventing malaria; governments at all levels spend less than 5% of

⁸ The period 1989 to 1995 is covered by UNDP Reports 1992 to 1998. Subsequent Reports used various indices under the health index like rate of undernourished people, rate of diseases etc.

⁹ The period between 1990 and 2002 is covered by the Reports of 1992 to 2005.

¹⁰ In contrast life expectancy in Malaysia, which attained nationhood at the same time as Nigeria, has now reached 70 years.

¹¹ This indicator measures the equivalent number of years in full health that a newborn child can expect to live based on the current mortality rates and prevalence distribution of health states.

public expenditure on health, despite being signatory to the 2000 Abuja Declaration to increase this to 15%; health per capita expenditure is US\$9.44 (World Bank 2005).¹²

Nigerian authorities themselves admit that “all is not well with Nigeria’s healthcare system” with a life expectancy of 51.9 years (below the average of 62 for developing countries); infant mortality rate of 84 per 1,000 live births (higher than the average of 70 for developing countries); maternal mortality rate of 800 per 100,000 live births (higher than the average of 384 for developing countries) (Vision 2010 1997: 64). In six years time, four of which were within a democratic rule which benefited immensely from the Iraq-war-spurred oil windfall from 1999, the country still recorded one of the highest infant mortality (77 per 1,000) and maternal mortality (704 per 100,000) rates in the world; had only about 10 percent of the population having access to essential drugs; had fewer than 30 physicians per 100, 000 people; had more than 5 million adults live with HIV/AIDS; had about 30 percent of children under five were underweight; and had about 40 percent of children who had never been vaccinated (NEEDS 2003: 29-30).

Recently, President Yar'Adua lamented on the high rate of maternal and infant mortality in the country.¹³ He stated that over 145 women and 2,300 children die daily in Nigeria as a result of complications arising from childbirth. He said the high maternal and neonatal death figures in Nigeria were alarming; second to India in the world. Calling on all sectors of the economy to collaborate with the health sector to achieve the desired result in providing qualitative healthcare for Nigerians, he observed that the present public health system cannot lead to the optimum or help to achieve the Millennium Development Goals (MDGs) on health (*GovWatch* November 2007).

¹² These and similar issues were the subject of discussion at the Nigerian National Health Conference held in Abuja in November 2006.

¹³ He talked through the former Minister for Health, Prof. Adenike Grange, in an address at the opening session of the 41st Scientific Conference and Annual General Meeting (AGM) of the Society of Gynaecology and Obstetrics of Nigeria (SOGON) in Benin on November 15, 2007.

In 1983 when the military seized power from the Shagari civilian administration, they described Nigerian health services as being “in shambles”, hospitals as “mere consulting clinics, without drugs, water and equipment”. The situation today is worse though Nigerian oil fortune has greatly increased. Because of additional 13% of oil revenue which the oil-producing states enjoy, those states are richer than others. Yet their development is not any better. In a study conducted by the Human Rights Watch (2007) in some local governments in Rivers State more than a dozen primary health care centres visited in five local government areas lacked basic supply of medicines and other equipment; did not have access to reliable water supply; did not have toilet facilities or electricity; some were housed in dilapidated buildings nearing collapse “and others had simply been abandoned by their demoralized staff”. The few centres having access to “the most basic amenities were located within the walls of local government secretariats” (ibid: 44). A staff in a comprehensive primary health centre in Etche local government said:

Our facilities are not adequate at all. We are lacking many things. We have beds but no mattresses; the patients must bring their own. We have no toilet; patients will use the toilets of the people who live nearby to here. We have no running water. The pump is there but it is out of use for two years. We have no light; we are not even wired [to the power lines running through town nearby]... When it rains the place will flood – the environment of this clinic is one of our major problems (ibid: 43).

The problem cuts across Rivers State because as a recent survey shows, four out of ten households in the state reported that they had no access to health services. A resident of Akuku/Toru local government was asked whether he had visited the government-run primary health centre near his house and he replied: “why would we go there? There is nothing inside of that building – no staff and no medicine. So why would we go there?” (ibid: 46).

With the pathetic developmental crisis in Nigeria as could be seen from the forgoing discussion, it will be no exaggeration to say that the country is underdevelopment incarnate. A situation where over 70 per cent of the population lives below the poverty line; where health facilities are inaccessible to the majority of the people and maternal mortality rate is second highest in the

world; and where educational institutions are in shambles and a large portion of children are out of school really calls for a rethink in a country that has not been afflicted by war in recent history nor ravaged by a natural disaster. Not only has Nigeria enjoyed relative peace, it has been endowed with huge oil resources earning for it enormous wealth that could be used for development.¹⁴ It is to the extent of the oil wealth that we shall now turn.

2.4 Oil in Nigeria

The purpose of this section is to show that Nigeria has got reasonably sufficient resources to provide for the development of its people. These resources are derived largely from oil which the country is endowed with. It is the 9th largest oil producer in the world and the 6th among members of the Organisation of Petroleum Exporting Countries (OPEC). Oil is a highly marketable commodity and over the years, Nigeria has earned enormous wealth from it. It will be shown from the brief on the oil industry below that though multinational corporations have dominated the exploration and production of oil due to lack of indigenous technical competence, ownership of the oil has been vested in the state. The state has been in firm control of the oil industry and it has ensured a continued flow of the lion's share in the oil proceeds. Thus unlike many other African countries, lack of resources could hardly be a major developmental problem for Nigeria. I shall present data from 1970 because the first few years after independence are "take off" period.¹⁵ Between 1967 and 1970, there was civil war and it naturally obstructed development. But from 1970 Nigeria has been enjoying peace and flow of oil wealth.

¹⁴ Though Nigeria has suffered from a number of ethnic and religious crises and some disturbances in the Niger Delta region where the oil is situated, the worst that has happened is a slight reduction in the levels of production and export. For instance, between 2007 and 2006 there was a decrease of production by 7.62% and a decrease of exports of 3.13% "due to the persistent hostile environment that characterised the operational Regions" (NNPC 2007).

¹⁵ The first and only Nigeria's Prime Minister, Alhaji Sir Abubakar Tafawa Balewa, while addressing members of the Overseas Development Institute in London in 1962 on Nigeria's First Plan said that it was to serve Nigeria's "take off stage." See Balewa & Epelle (1964: 138).

i. Brief on the Oil Industry

Oil in Nigeria was discovered in commercial quantity in Oloibiri, Eastern Nigeria (now in Bayelsa State) in 1956 by an Anglo-Dutch Consortium, Shell D'Arcy (later Shell-BP).¹⁶ Two years later, the first export took place. Ownership of the oil was vested in the Crown by the Minerals Act of 1958. Other oil multinationals like Mobile, Safrap (later Elf), Agip, Gulf, Texaco, etc. got various concessions at various times and since then, have been major actors in the Nigerian oil industry. Under the concession agreements,¹⁷ the companies got right to explore and prospect for oil within given acreages at their own expense and risk subject to payment of fixed annual rents plus royalties assessed by the tonnage of oil extracted.

At independence in 1960, Nigeria succeeded a promising oil industry under the firm grip of multinational companies. However, its lack of technological know-how and managerial skills necessitated maintenance of status quo. Arrangement was made for the continuous flow of petroleum profit tax into the government coffers.¹⁸ But ownership of the oil and similar natural resources remained vested in the state.¹⁹ It was vested in the central Government (substituting the Crown)

¹⁶ It was the German Bitumen Company which started Exploration in 1908 but it later abandoned it. Shell BP got the second concession to exclusively explore and prospect for oil in the whole of Nigeria in 1937. It got the concession under the Colonial Mineral Oil Ordinance of 1914 which restricted granting of concessions to British subjects or companies only. It began exploration and gradually limited its areas of operations until it finally settled for the Niger Delta area relinquishing the remaining acreage to the government. Shell alone accounts for over 50% of oil production in Nigeria.

¹⁷ There are 4 regimes of oil development contracts: concession agreement, participation or joint venture agreement, production sharing agreement, and risk-service agreement (Gidado 1999).

¹⁸ This tax was introduced by the Petroleum Profits Tax Ordinance of 1959 which provided for a 50-50 profit sharing formula between the government and the multinational companies. Now under the Petroleum Profits Tax Act, 85% profits tax (PPT) is charged on upstream activities, and 35% (general company income tax rate) on gas. The Federal Inland Revenue Service (FIRS) collects this tax. It also collects a 5% VAT on most supplies of goods and services to oil companies and a 2% education tax levied on the profits of oil companies under the Education Trust Fund Decree.

¹⁹ Ownership of oil and similar natural resources was vested in the central Government (substituting the Crown in whom the ownership was vested before independence) by the Minerals Act of 1958 (S. 3, paragraph 1) Laws of the Federation of Nigeria (Revised Edition) 1958 Cap. 120, Ss. 3 and 10, Cap. 121, S. 3 (1). The 1963 Constitution (S. 69 and Part 1, item 25 of its Schedule) merely vested in the Federal Government the exclusive power to legislate on mines and minerals, including oil fields, oil mining, geological surveys and natural gas. S. 40 (1) 1979 Constitution vested ownership in the state.

by the Minerals Act of 1958.²⁰ Meanwhile, additional oilfields were discovered and production capacity increased, save during the 1967-1970 Biafra war when production was obstructed.²¹

The need to check the powers of multinational companies in the global oil industry was one of the objectives of the creation of the Organisation of Petroleum Exporting Countries (OPEC) in 1960.²² As an observer country, Nigeria attended the OPEC Conference in 1964 and even prior to its being a member in 1971, it had started adopting OPEC's terms in its oil industry. For instance, OPEC Resolution No. XVI.90 of 1968 obligated members to acquire 51% of the equity interests of multinational companies operating in their countries by 1982 and to participate actively in all aspects of oil operations. The resolution coincided with the international pressure to permit countries to exercise permanent sovereignty over their natural resources.²³

Nigeria promulgated the Petroleum Decree of 1969 repealing the Mineral Oils Ordinance of 1914. The Decree vested the entire ownership and control of all petroleum in, under or upon any land in the state. Oil under the territorial waters of Nigeria or found in, under, or upon any land which forms part of the continental shelf is also owned by the state. It also reviewed the terms of the existing concessions and instead of the single grant, introduced three types of grants: Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL), and Oil Mining Lease (OML).²⁴

²⁰ S. 3, paragraph 1, Laws of the Federation of Nigeria (Revised Edition) 1958 Chapter 120; Ss. 3 and 10, Chapter 121, s. 3 (1).

²¹ E.g., at the height of the war in 1968, production plummeted to about 51.9 million barrels.

²² It was Venezuela, Saudi Arabia, Iran, Iraq and Kuwait that first formed the Organisation. These founding-member countries together with Algeria, Indonesia, Libya, Nigeria, Qatar, and United Arab Emirates now form the 11-member OPEC. Ecuador joined the Organisation in 1973 but got its membership suspended in 1992, while Gabon joined in 1975 and withdrew in 1995.

²³ The United Nations General Assembly had for instance passed Resolution 1803 (XVII) 1968 titled "Declaration of Permanent Sovereignty over Natural Resources".

²⁴ An OEL gives non-exclusive right of geological and geophysical survey with a drilling not exceeding 300 feet and is normally for a renewable one year. An OPL gives exclusive right to carry away and dispose oil discovered in the covered area. It used to be for seven or five years but Petroleum Act 1969 leaves the duration at the discretion of the Minister but must not exceed five years for land and territorial waters, and seven years for continental shelf areas. An OML gives right similar to that of an OPL save that it used to be for 30 years (for onshore area) or 40 years (for offshore area) before the 1969 Act limited it to a general 20-year period, renewable for an unspecified period subject to the Minister's approval. By Paragraph 1(a) of Schedule 4 to the Act however, this review does not affect the duration of pre-1969 concessions.

The Decree also provided that only Nigerian citizens or companies incorporated in Nigeria may be granted rights to OEL, OPL or OML. The Petroleum (Drilling and Production) Regulations of the same year directed the oil companies to indigenise their workforce by 70% within seven years and the balance within the shortest possible time. Already, the Companies Decree of 1968 had required the oil companies to register as Nigerian companies thereby giving government more control over them.

The 1970s witnessed growth of the oil industry as well as government's participation therein. The government established state-owned oil company, Nigerian National Oil Corporation (NNOC) in April 1971, shortly before the country joined OPEC in July of the same year. In addition to marketing government's share of the oil to foreign consumers, NNOC was granted right to also explore and prospect for oil like other companies. Its area covers all areas not covered by existing rights and all such areas as might be relinquished to the government from time to time.²⁵ The grant is not limited by time. The company was expected to develop its own manpower; to encourage indigenous private participation in supporting services; to construct and lay pipes for the delivery of oil and allied resources; to diversify into areas like petrochemicals and fertilizers; etc.

Nigeria acquired a 33.33 % participation interest in Nigerian Agip Oil Company in April 1971. In addition to the participation drive, an earlier concession agreement had made provision to that effect. As a condition for resumption of operations after the Biafra war, the government also acquired a 35% interest in Safrap on the same date.²⁶ Two years later, it acquired 35% interest in Shell BP, Gulf and Mobil respectively. By July 1979, Nigeria through the state-owned oil company had acquired up to 60% participation in each of the following companies: Agip, Elf, Gulf, Mobil, Pan Ocean, Shell BP, and Texaco. Its participation in Shell BP rose to 80% following nationalisation of British

²⁵ This contemplates Paragraph 12 of the Schedule to the 1969 Petroleum Act by which half of an OML area shall be relinquished ten years after the grant of the Lease. There might also be a voluntary relinquishment by a lessee as was done by Shell BP in the course of its exploration.

²⁶ Safrap was suspended for its alleged support to the seceding Biafra (Onoh 1983: 114).

interest in the company in August 1979. These measures ushered in the regime of participation or joint venture agreements²⁷ between the government and the multinational oil companies thereby marking “the end of the concession era” (Gidado 1999: 124).

In 1975, the Ministry of Petroleum Resources was created and two years later it was merged with NNOC to give birth to the Nigerian National Petroleum Corporation (NNPC). NNPC has wider powers than NNOC and it oversees all the contracts entered into by the government and the multinational oil companies. It underwent several structural changes over the years.²⁸ Its oil production capacity through its subsidiary, the Nigerian Petroleum Development Company (NPDC), increased having established its own seismic crew in 1978 and a second one in 1983, making at least ten offshore commercial discoveries by 1986. By 1990, joint venture production accounted for 96% of total crude oil production and out of this, NNPC’s equity share was about 1.7 million barrels per day (Khan 1994: 23).

State ownership of the oil and other natural resources is reflected in the 1999 Constitution. The vesting provision is s. 44 (3) which states that “the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National assembly.”²⁹ Section 1 of the Petroleum Act 1969 contains similar provisions. The Exclusive Economic Zone Act 1978 also vests in the Federal Government exclusive rights over the exploitation of natural resources of the sea-bed, the subsoil and superjacent waters of the Exclusive Economic Zone.

²⁷ These agreements are merely joint operating agreements (non-equity participation) and do not make the government shareholder in the company lest being entitled to dividends. Equity participation was taken by the government in oil services companies such as Baroid drilling and Chemical Ltd, Dresser Nigeria Ltd, Baker Nigeria Ltd, etc. (Gidado 1999: 135 et seq.).

²⁸ For instance, following the recommendation of the Irikefe Commission of Inquiry (set up to investigate an allegation of N2.8 billion fraud said to be made in the course of crude oil sales. The allegation was not established however) in 1980, NNPC was found to be too large to be effectively managed and so among other measures, nine subsidiaries were created for it and a Ministry of Petroleum and Energy created. It has also been restructured recently by the Yar’Adua government.

²⁹ This was s. 40 (1) of the 1979 Constitution.

ii. Crude Oil Production and Export

The level of production is determined largely by demand and of course the technological capacity for more exploration and development. Above all however is the availability of the explorable resource. The growth of Nigeria's oil production is quite impressive. Average production rate was 5000 barrels per day in 1958. Production of about 1.8 million barrels in 1958 rose to about 16.8 million barrels in 1961; about 43.9 million barrels in 1964; and about 116.5 million barrels in 1967. Quantity exported followed a similar growth pattern. As at 1965, there were 3 billion barrels of proven oil reserves.

It was in the 1970s that Nigeria launched itself as one of the important oil producers of the world having regard to its scale of production. It was from 1970 that daily average production exceeded 1 million barrel. Yearly production rate increased to about 558.8 million barrel in 1971; hitting 823.3 million barrel in 1974; with a slight reduction to 766 million barrel in 1977; and then it picked up to 841.2 million barrel in 1979. As a result of more exploration spurred by high global demand, Nigeria recorded 20.2 billion barrels of proven crude oil reserves in 1975. The bulk of quantity produced was exported throughout the period. Oil exports rose to over 90% of total exports in 1979 (Bienen 1988: 227).

Production decreased in the 1980s with an average 2.3% share of the total world daily production as opposed to the 3.8% share in the mid 1970s. Between 1981 and 1988, yearly production was in the region of 450 to 540 million barrels. This was due to the economic slump of the decade. Large-scale production resumed towards the end of the decade and it has largely been seeing a steady increase since then with a level of 828 million barrels – 918 million barrels between 2000 and 2005.³⁰ Table 2.2 gives details of the levels of production and export from 1970 to 2007.

³⁰ Except in 2002 when production slightly came down to about 725.8 million barrels.

Table 2.2 Nigeria's Crude Oil Production and Export (1970-2007, million barrel)

Year	Daily average production	Total production	Daily average exports	Total exports
1970	1,083.1	395,835,825	1,050.8	383,446,359
1971	1,531.2	558,878,882	1,486.4	542,545,131
1972	1,815.7	665,283,111	1,756.1	650,640,779
1973	2,054.3	750,452,286	1,978.1	725,017,584
1974	2,255.0	823,320,724	2,179.4	795,710,044
1975	1,783.2	651,509,039	1,713.3	627,638,981
1976	2,066.8	758,058,376	2,013.2	736,822,998
1977	2,085.1	766,053,944	2,030.2	744,413,355
1978	1,897.0	692,269,111	1,827.1	667,357,065
1979	2,302.0	841,226,770	2,210.1	818,726,943
1980	2,058.0	752,223,285	1,960.2	700,138,614
1981	1,439.6	525,500,562	1,228.4	447,814,027
1982	1,287.0	470,687,221	1,002.8	366,410,179
1983	1,235.5	450,974,545	935.2	341,360,910
1984	1,388.0	507,998,997	1,094.1	400,428,085
1985	1,498.9	547,089,595	1,333.3	453,758,591
1986	1,466.6	535,296,671	1,221.2	445,673,729
1987	1,323.0	482,886,071	1,065.2	388,815,449
1988	1,341.3	490,440,000	1,110.5	406,443,000
1989	1,716.3	626,449,500	1,525.9	556,953,500
1990	1,726.7	630,245,500	1,550.0	565,750,000
1991	1,893.1	690,981,500	1,610.0	587,650,000
1992	1,957.0	716,262,000	1,585.0	580,110,000
1993	1,905.2	695,398,000	1,557.0	568,305,000
1994	1,820.9	664,628,500	1,590.0	580,350,000
1995	1,842.6	672,549,000	1,665.0	607,725,000
1996	1,863.1	681,894,600	1,812.9	620,135,000
1997	1,876.7	855,736,287	1,855.5	767,949,757
1998	1,939.0	806,443,999	1,832.8	706,265,498
1999	1,781.5	774,703,222	1,705.1	678,111,479
2000	2,053.6	828,198,163	1,986.4	714,356,161
2001	2,017.6	859,627,242	2,009.4	780,093,703
2002	1,801.7	725,859,986	1,798.2	663,326,494
2003	2,166.3	844,100,267	2,163.5	791,016,260
2004	2,356.8	911,044,764	2,356.0	871,286,594
2005	2,365.9	918,972,465	2,326.0	843,533,331
2006	2,233.9	869,196,506	2,248.4	817,388,227
2007	2,059.3	803,000,708	2,144.1	791,826,522

Sources: NNPC Annual Statistical Bulletins 2005, 2006 & 2007; OPEC Annual Statistical Bulletins 2004, 2005, 2006 & 2007.

There are a total of 606 oilfields in the Niger Delta out of which 355 are onshore while 251 offshore. Average daily production today is 2.5 million barrel. It is planned that production level will hit 4 million barrels per day by 2010. A 2003 estimate shows recoverable crude oil reserves of 34 billion barrels. It is planned that reserves would hit 40 billion barrels by 2010 (NNPC 2006a). Nigeria is now the largest oil producer in Africa. It is second only to Venezuela in OPEC outside the Middle East and they virtually compete in exports.

iii. The Gas Sub-Sector

Production of crude oil goes along with associated gas. Thus the more crude oil produced, the more quantity of gas produced. This means therefore that Nigeria is rich in natural gas also. Non-associated gas also exists independent of associated gas. Estimated reserves of natural gas as of 1994 stood at between 3-3.4 trillion cubic metres making Nigeria eighth in the world. Associated gas represents about 80% of the total natural gas reserves. However, until recently, over 90% of it was flared by the multinationals in the course of crude oil production. The cost of exploiting natural gas as an alternative energy source (it requires liquefaction before being used) was thought to be far higher than the benefit especially that local demand was insignificant. But by the Associated Gas Re-injection Decree of 1979, the government sought to halt gas flaring and instead devised ways by which it could be utilised commercially. Penalties against offending companies were hardly enforced and so large-scale flaring still continued into the mid 1990s when 76% of total production was flared. As at 2006, about 40% is flared with only 12% re-injected (NNPC 2006a).

As a means of foreign exchange earning, a proposal for the exportation of liquefied gas to places like Europe, US and Japan where there is high demand thereof was approved earlier under the Fourth National Development Plan (1975-80). The government thus embarked on the Liquefied Natural Gas project aimed at constructing a plant at Bonny with a total capacity of 8 billion cubic metres per year. After being on the drawing board since 1976, a joint venture agreement between NNPC on one hand and Shell, Agip and Elf on the other hand led to the formation of Nigeria Liquefied Natural Gas Ltd in 1985 to see to the realisation of the project.

The project was to be completed by 1990 according to plan but it was only in 1999 that the first export of liquefied gas was made. In effect, Nigeria has strengthened its foreign exchange earning by getting an additional or alternative energy source. The Nigerian Gas company, a subsidiary of NNPC, is the local marketer and distributor of liquefied gas. As at 2006, there were 159 trillion

cubic feet of proven natural gas reserves in Nigeria making it one of the top ten in the world (NNPC 2006a).

iv. The Extent of Oil Wealth

Oil has been a highly marketable international commodity since World War I (Yergin 1993). While its uses increased with time, its supply was low. With high demand and low supply, prices are bound to be high. The demand and of course the price become higher when supplies are affected by disturbances in some oil producing countries. This is often followed by increased production in unaffected producing countries. The Arab/Israeli war of 1973; the Iranian revolution of 1979; the Iraqi invasion of Kuwait in 1989; the 1990-91 Gulf War; and the 2003 US invasion of Iraq together with its aftermath are instances.

For Nigeria and other sister countries, these instances witness periods of windfalls. The greater participation of the oil-producing states in their respective oil industries meant greater benefits for them the bulk of which hitherto went to the multinational oil companies. For resources to serve as springboard for development, it is not always necessary for such resources to be constant. There is evidence of windfalls being a source of developmental transformation. For instance, profits from copper in the 17th century Sweden; coffee funds in Brazil; Witwatersrand's gold fields in South Africa; and the windfall from Drake's circumnavigation in the late 16th century Britain have provided springboard for development in the respective countries (Gelb 1988: 33). Similarly, the \$19 billion given by the U.S. to Western Europe under the Marshall Plan between 1945 and 1950 for the reconstruction of the latter after the Second World War contributed in no small measure to the latter's development and has been seen as a model in development circles (Escobar 1995: 33). Unfortunately, neither the constant flow of normal proceeds for oil sales nor the three windfalls brought about development in Nigeria.

Nigeria being an oil economy, it has earned so much oil wealth since production started in 1956. Oil is now Nigeria's main foreign exchange earner. It was from 1970 that oil export revenue for Nigeria started outweighing export revenue

from other sectors, agriculture being hitherto the main sector.³¹ Percentage of oil export revenue for the year was 57.48% of total (oil and non-oil) export revenues³² and it steadily grew to 96.13% in 1980;³³ 97.01% by 1990;³⁴ dropped to 75.77% in 2000³⁵ but rose again to 94.15% in 2007.³⁶ Total oil export value as percentage of the total (oil and non-oil) export value for the period 1970-2007³⁷ is about 93.05%.

Value of oil exports in 1974 hit an unprecedented level of about \$9 billion coming down to about \$7.7 billion the following year. Except for 1978, the value kept on increasing with about \$11.5 billion recorded for 1977. Nigeria's external reserves by the end of 1974 rose to about N3.54 billion from N438.4 million for 1973. This level was sustained until 1978 when it dropped to N1.349 billion (Onoh 1983: 79).

Oil price per barrel rose from about \$3.4 in 1973 to about \$41 by end of 1981. External reserves bounced back in 1979 with over N3.250b reaching N5.648b in 1980 (Onoh 1983: 79). The 1979 Iranian Revolution led to a rise in oil prices such that Nigeria recorded about \$15.6b and \$25b export values for 1979 and 1980 respectively. Production slowed down in the early and mid-1980s and price for the Nigerian oil plummeted to \$35.50 per barrel in early 1982 yet the value had been impressive save during the second half of the decade when the barrel price came down to about \$10. The reduction of external reserves during the first half of the decade to \$4.5b and then to \$3b (Onoh 1983: 96) must therefore be explained by some other economic factors.

³¹ Total oil revenues between 1959 and 1968 stood at (Nigerian) £92.4million. The breakdown is as follows: 1959 £0.3m; 1960 £1.3m; 1961 £7.1m; 1962 £8.5m; 1963 £5.0m; 1964 £12.3m; 1965 £13.4m; 1966 £18.7m; 1967 £27.0m; 1968 £15.8m. The highest oil revenue as percentage of the total (oil and non-oil) revenues was 16.6% for 1967 closest to it being 10.1% for 1968 (Pearson 1970: 72-73 Tables 6.1-6.3). The value of oil exports for 1969 was \$422m which was less than 50% of the value of total exports (\$891m) (OPEC 2004).

³² Value of total exports for 1970 was \$1.249b. See Table 2.3 for value of oil exports in 1970.

³³ Value of total exports for 1980 was \$25.934b. See Table 2.3 for value of oil exports in 1980.

³⁴ Value of total exports for 1990 was \$13.673b. See Table 2.3 for value of oil exports 1990.

³⁵ Value of total exports for 2000 was \$26.449b. See Table 2.3 for value of oil exports in 2000.

³⁶ Value of total exports for 2007 was \$61.500b. See Table 2.3 for value of oil exports in 2007.

³⁷ Nigeria's value of total (oil and non-oil) exports between 1970 and 2007 is \$614.600b.

As the country approached the 1990s, export values rose following a rise in production and prices spurred by the 1989 Iraqi invasion of Kuwait and the 1990-91 Gulf War which followed the invasion. Since then, except for 1998, the annual export value has been between \$11 billion and \$14.8 billion; entering the new millennium with a fortune in the region of \$20 billion hitting over \$32 billion in 2004. At the beginning of 2004, a barrel was about \$30 outside OPEC's desired \$22-28 price band hitting \$46.61 by October (OPEC Annual Report 2004; NNPC Annual Statistical Bulletin 2004). Nigeria's benchmark price for the year was \$25, a situation which enabled it to save over \$3.2 billion as excess revenue for the year and to raise foreign reserve to \$12.4 billion. The external reserves as at end of 2005 stood at \$32 billion. Nigeria put the benchmark price for a barrel of oil at \$30 in 2005 and the average price for Nigerian oil was \$55.18. \$11 billion was saved as excess crude oil revenue.

2006 benchmark price was \$33 but the market price fluctuated between \$65 and \$68 per barrel though OPEC put it at \$61.08, more than 20 per cent higher than 2005 (OPEC Annual Report 2006). The outbreak of Israeli/Hezbollah war on 12 July 2006 heightened tensions already created by Iran's nuclear enhancement ambition and oil prices instantly rose to about \$75. The ceasefire brokered by the UN resolution effective 14 August brought the prices downwards by \$1.81 to \$73.82 per barrel. It was expected that excess oil revenue in Nigeria for 2006 would exceed the \$33 billion which the government projected. OPEC's Reference Basket (ORB) for 2007 was \$69.08 per barrel. But the price rose to \$85.07 per barrel in the final quarter of the year from just \$54.63 in the first quarter (OPEC Annual Report 2007).

In the first quarter of 2008, the price of oil per barrel reached over \$100. When tensions heightened again over Iran's nuclear programme in the second half of the year, the price per barrel hit more than \$130. Nigerian barrel of crude oil (Bonny Light) in particular sold at \$127.99 in May 2008, \$138.74 in June, and \$141.86 in July respectively (Central Bank of Nigeria [CBN] 2008). The rise in the value of oil means added income for Nigeria. Between 1970 and 2007 alone, Nigeria's total value of oil exports stood at \$571.911 billion. Table 2.3 below provides a breakdown of the values within the periods.

Table 2.3: Value of Nigeria's Oil Exports (1970-2007, Million \$)³⁸

Year	Value	Year	Value	Year	Value	Year	Value
1970	718	1981	17,291	1992	11,642	2003	22,184
1971	1,375	1982	11,883	1993	10,859	2004	33,309
1972	1,803	1983	9,941	1994	11,040	2005	47,642
1973	3,049	1984	11,534	1995	11,512	2006	52,523
1974	8,997	1985	12,568	1996	14,888	2007	57,900
1975	7,744	1986	4,770	1997	14,391		
1976	9,444	1987	7,024	1998	8,754		
1977	11,561	1988	6,267	1999	12,453		
1978	9,452	1989	7,470	2000	20,040		
1979	15,624	1990	13,265	2001	17,188		
1980	24,931	1991	11,792	2002	17,083		

Source: OPEC Annual Statistical Bulletins 2004, 2005, 2006 and 2007.

In contrast, Venezuela's total value of oil exports for the period 1970 to 2007 stands at \$595.114 billion just \$23.203 billion greater than Nigeria's and about 80.94% of its (Venezuela's) total (oil and non-oil) export value.³⁹ Whereas Venezuela started oil production on a large scale (over a million barrel per day) since 1946, Nigeria's oil discovery was only in 1956 and its steady large scale production was only from the 1970s. Venezuela's production was higher in the 1960s and early 1970s and a reduction thereof could be explained, among other reasons, by the quotas imposed on OPEC members. Indonesia's total value of oil export for the period (1970-2007) is \$311.533 billion, representing about 54.47% of Nigeria's. Although its production dates back to 1893, its large scale production also started in the 1970s and on the average has been producing half of Nigeria's quantity since then.

An interesting distinguishing feature of Indonesia is that its other exports far outweigh the oil export. Value of oil exports account for only 23.51% of the value of total exports⁴⁰, a point which confirms how well it utilised its oil revenue in diversifying its economy (Bienen 1988). Algeria's performance has been impressive over the years. It recorded a total oil export value of \$358.699 billion for the period between 1970 and 2007, which is about 62.72% of

³⁸ Figures are as provided by the latest bulletin. E.g., the 2004 figure was given as \$32,337 million in the 2004 bulletin but all subsequent bulletins gave \$33,309 million. Similarly, the figure for 2005 is as provided by 2006 and 2007 bulletins. It varies from that of 2005 (i.e. \$46,770 million).

³⁹ Venezuela's total oil and non-oil export value for 1970-2007 is \$735.209 billion

⁴⁰ Indonesia's value of total oil and non-oil exports between 1970 and 2007 is \$1324891 billion.

Nigeria's value of oil exports within the same period. With Algeria's total oil and non-oil exports value standing at \$558.156b between 1970 and 2007, it means its oil export value is 64.26% of the total exports value.

The Federal Office of Statistics was right when it said that the “performance of the oil & gas sector is the most influential single force that propelled [Nigeria's] economic growth” (FOS 2004). From the early 1970s, oil revenues⁴¹ started accounting for over half of total collectible revenues reaching over 80% in 1974. Since then, the revenue has been hovering between 70% and 80% on the average. The oil sector's contribution to Gross Domestic Product (GDP) was about 25% in the early 1990s and hovered around 30% to 32.8% between 1999 and 2002. Unprecedented wealth was recorded during each of the oil boom periods of 1974/1975, 1979/1980, 1991-1993 and 2003. The oil revenue during each of these windfalls went over 80% of the total revenue collected. Between 1970 and 2006, the Nigerian government has collected a total oil revenue of =N96, 341 869 million. Table 2.4 below gives details of the oil revenue vis-à-vis total collectible revenue between 1970 and 2006 indicating percentage of the former in the latter.

Table 2.4: Nigeria's Collected Gross Oil Revenues (1970-2006, Million =N=)

Year	Oil	Total	%	Year	Oil	Total	%	Year	Oil	Total	%
1970	166.6	634.0	26.3	1982	7814.9	11433.7	68.3	1994	160192.4	201910.8	79.3
1971	510.1	1168.8	43.6	1983	7253.0	10508.7	69.0	1995	324547.6	459987.3	70.5
1972	764.3	1405.1	54.4	1984	8269.2	11253.3	73.5	1996	408783.0	523597.0	78.1
1973	1016.0	1695.3	59.9	1985	10923.7	15050.4	72.6	1997	416811.1	591151.0	70.5
1974	3724.0	4537.4	82.1	1986	8107.3	12595.8	64.4	1998	324311.2	463608.8	69.9
1975	4271.5	5514.7	77.4	1987	19027.0	25380.6	75.0	1999	724422.5	949187.9	76.3
1976	5365.2	6765.9	79.3	1988	19831.7	27596.7	71.9	2000	1591675.8	1906159.7	83.5
1977*	6080.6	8042.4	75.6	1989	39130.5	53870.4	72.6	2001	1707562.8	2231532.9	76.5
1978	4555.8	7371.0	61.8	1990	71887.1	98102.4	73.3	2002	1230851.2	1731837.5	71.1
1979	8880.8	10912.4	81.4	1991	82666.4	100991.6	81.8	2003	2074280.6	2575095.9	80.5
1980	12353.3	15233.5	81.1	1992	164078.1	190453.2	86.1	2004**	3354.8	3920.5	85.57
1981	8564.4	13290.5	64.4	1993	162102.4	192769.4	84.1	2005**	4762.4	5547.5	85.85
								2006**	5287.6	5965.1	88.64

Source: CBN Statistical Bulletin- Public Finance Statistics, Vol. 14 Part B, 12/31/2004.

*CBN Statistical Bulletin Nos. 1&2, vol. 1, 1990⁴²

** CBN Statistical Bulletin December 2006, Vol. 17.

⁴¹ This means a total of petroleum profit tax, royalties, proceeds of exports and domestic sales.

⁴² Referred to in Ikein & Briggs-Anigboh (1998), Table 6.2, page 140 and Appendix B, page 346. The 2004 CBN source gives the figures as 1749.8 for oil and 3711.6 as total. The former is just 47.1% of the latter. The figures do not agree with the trend during the time and therefore doubtful. The fact that the other source is more in tune with the trend and that the figures are repeated at least twice in the book lends more credence to it.

It may be argued that the oil wealth is not anything to go by considering Nigeria's population of about 140 million people (NPC 2007). For instance, it has been argued that Nigerian situation is "miserable and pathetic" because its annual earning is less than the annual budget of the city of New York which has a population of about 6 million people.⁴³ Of course compared to the developed countries Nigeria cannot be said to be rich. But affluence is relative. With the available resources, Nigeria is certainly not poor to be so underdeveloped. It does not see its population as a diminishing factor either (Vision 2010 1997). Indonesia had a population of over 206 million people as at 2000.⁴⁴ Yet it fares better though its oil earnings are far less than Nigeria's. Nigeria's underdevelopment is therefore not in any way excusable.

v. Distribution of Oil Revenue

Though control of the oil resources lies in the federal government, the oil revenues derived therefrom had all along been shared between or among the tiers of government according to formulae which varied from time to time. Under the 1960 Independence Constitution, each Region was entitled to 50% of the proceeds of any royalty received by the Federation in respect of any minerals (which included oil) extracted in that Region; and of any mining rents derived by the Federation during a particular year from within that Region (s. 134 [1] [a] [b]). This was the derivative principle.⁴⁵ The Federation was required to pay into a Distributable Pool Account (DPA) 30% of the proceeds of any royalty it received in respect of any minerals extracted in any Region; and of any mining rents it derived from within any region ([2] [a] [b]). The periods for calculating any proceeds were to be prescribed by Parliament ([4]). The Constitution *deemed* the continental shelf (off-shore) of a region to be part of that region for the purposes of calculating mineral revenues ([6]). From the amount standing to

⁴³ This was the argument of a commentator, Franklin Otorofani, to a news item in Nigerian newspaper, *Thisday*, of 27/11/06 that the Group Managing Director of NNPC, Engr. Funso Kupolokun, said Nigeria earns \$36 billion annually from oil. See <http://www.thisdayonline.com/ncomments.php?id=64341#60950>, visited 27/11/06.

⁴⁴ See <http://www.bps.go.id/sector/population/table1.shtml>, visited 28/11/06.

⁴⁵ This is a principle by which places from which the source of revenue is derived are entitled, ipso facto, to a special share of the revenue in addition to the general share. It applied to agricultural products and with the discovery of oil, it got extended to mineral resources.

the credit of the DPA, the Federation was to pay to the Regions at the end of each quarter sums equal to the following fractions (s. 135):

- (a) Northern Nigeria – forty ninety-fifths;
- (b) Western Nigeria – twenty-four ninety-fifths; and
- (c) Eastern Nigeria – thirty-one ninety-fifths.

The 1963 Constitution contained same revenue allocation provisions under its sections 140 and 141 save that Mid-Western Region had been created by then and it got a share of six ninety-fifths from the DPA and the share of Western Nigeria was reduced to eighteen ninety-fifths.

On the verge of the 1967-1970 civil war, the federal military government introduced a new revenue sharing formula. Oil was located in the minority areas of the Eastern Region which threatened to secede from Nigeria. As a strategy to avert the war, the federal government split the region, among others, into three states in May 1967 giving the minorities autonomy in a way⁴⁶ and drew up a sharing formula which prioritised factors like equality of states and population. States were now to contribute their revenues to the DPA to be shared out on the basis of the new criteria. By this formula, 15% of mining rents and royalties went to the Federal Government (FG), 35% to DPA, and 50% continued to be on derivation basis. The formula was reviewed in 1970 after the war giving 5% to FG; 50% to DPA; and 45% on derivation basis. It was made retroactive from April 1969 (Ikein & Anigboh 1998: 137).

In 1971, the Federal Government distinguished between onshore and offshore oil revenue retaining for itself 100% of the latter.⁴⁷ In 1975, the onshore derivation share was reduced to 20% while FG was to put in both its onshore and offshore revenue into the DPA (Human Rights Watch 2005). Another

⁴⁶ This was when, under the States (Creation and Transitional Provisions) Decree No. 14 of 1967, 12 states were created from the four regions (Mid-Western state was created in 1963) then existing. The East was split into East-Central, South-Eastern and Rivers States. East-Central still left under Col. Ojukwu (the secessionist leader who was the Governor of the Eastern Region) was the state mainly for the Igbos. The other two were for minorities. Onshore oil then was produced in Rivers and there were high offshore oil prospects in the South-Eastern State.

⁴⁷ This was vide the Off-Shore Revenues Decree No. 9 of 1971 (Ikein & Anigboh 1998: 138).

government (Murtala Mohammed's, which came through a palace coup in 1975) created 7 more states.⁴⁸ Mohammed was assassinated in a failed coup attempt after six months in office and his successor, Colonel Obasanjo, handed over to Shehu Shagari as elected President in October 1979. The applicable sharing formula then gave FG 76% of the revenue, the states 21%, and local governments (LGs) 3% (Human Rights Watch 1999). The derivation principle had been dropped at this stage.⁴⁹

The 1979 Constitution required that all revenues collected by the federal government shall be kept in an account called the Federation Account and be distributed among federal, state, and local governments (now reflected in the Constitution) of the federation according to a formula to be worked out by the National Assembly (s. 149). The Constitution did not make provision for derivation. The democratic dispensation afforded opportunity for debates especially that it was the legislature which was to work out a sharing formula. After long and heated debates, the existing system was reviewed. By the Allocation of Revenue (Federation Account etc.) Act,⁵⁰ a new formula gave the FG 58.5%; the States 31.5%; and the LGs 10%. Out of the FG's share, 2.5% was for the Initial Development of the Federal Capital Territory (FCT) Abuja, and 1% was for Ecological problems. The share of the States constituted 3.5% as derivation. Offshore revenue still went to the FG.⁵¹

⁴⁸ Four in the North, two in the West, and one in the East, making a total of 19 states.

⁴⁹ Derivation was rejected by the Aboyade Technical Committee on Revenue Allocation inaugurated in 1977. Though its Report was rejected by the Constituent Assembly for being esoteric, the FG (military) used its formula in the April 1979 budget and in the first supplementary estimates of September 1979 (Ikein & Anigboh 1998: 146, 150 & 166).

⁵⁰ No. 1 of 1982, Cap 16 Laws of the Federation of Nigeria 1990. This Act has a chequered history. After barely a month in office, the new civilian regime set up the Okigbo Presidential Commission on Revenue in November 1979 which, after much debates, recommended 53% for FG; 30% for States; 10% for LGs; and 7% for Special Fund (2.5% for Initial Development of FCT; 2% for Special Problem of Mineral Producing Areas; 1% for Continuous Ecological Problems; and 1.5% for Revenue Equalization Fund) rejecting the derivation principle. The FG, among other adjustments to the recommendation, reintroduced the derivation principle allocating 3.5% to it. After heated debates on a 1981 Bill, an Act, which provided for the FG 58.5%; States 31.5%; LGs 10%, fixing 5% as derivation out of States' share, emerged. Non-oil producing States in particular were not satisfied. The Supreme Court finally declared this 1981 Act unconstitutional for procedural irregularities. Its substantial contents, with a reduction of the derivation share to 3.5% (making the general share of States larger by 1.5%), were resubmitted as Bill to the National Assembly and after the necessary procedures, it became the 1982 Act (Ikein & Anigboh 1998: 162-208).

⁵¹ Human Rights Watch Report 1999 erroneously says the formula gave the FG 55%; the states 30.5%; LGs 10%; and the remaining 4.5% was left as special account to accommodate oil-

The Act continued to operate and in 1992, it was amended by the Babangida regime vide the Allocation of Revenue (Federation Account etc.) (Amendment) Decree.⁵² By s.1 of the Act as amended by the Decree, the amount standing to the credit of the Federation Account shall be distributed by the federal government as follows:

- (a) The Federal Government - 48.5%;
- (b) State Governments - 24%;
- (c) Local Government Councils - 20%; and
- (d) Special Funds - 7.5% as follows:
 - i. Federal Capital Territory - 1%;
 - ii. Development of oil-producing areas⁵³ - 3%;
 - iii. General ecological problems - 2%;
 - iv. Stabilisation Fund - 0.5%, and
 - v. Mineral producing states based on derivation - 1%.

The allocations to local government councils were paid directly into their respective accounts. An agency, the Oil Mineral Producing Areas Development Commission (OMPADEC⁵⁴), was created for the development of the oil producing areas. For the purposes of applying the derivation principle, the Decree abolished the dichotomy between on-shore and off-shore oil and other mineral resources. Similarly, the dichotomy as it affected oil production was abolished with respect to the OMPADEC allocation (s. 4A [3] [6] of the Decree).

caused ecological hazards (1%), derivation principle (2%), and direct development of oil-producing areas (1.5%).

⁵² No. 106 of 1992

⁵³ These are Bayelsa, Delta, Rivers, Akwa-Ibom, Edo, Cross River, Imo and Ondo States.

⁵⁴ The Commission was mired in crisis such that it did not achieve its objectives. The creation of a similar body but for the whole country, the Petroleum (Special) Trust Fund (PTF) by Abacha in 1994 rendered the Commission moribund. Obasanjo scrapped PTF and created the Niger Delta Development Commission (NNDC) in 1999.

Nigeria returned to civilian rule in 1999 as a federation of 36 states, 774 local governments and a federal capital territory in Abuja.⁵⁵ Like its predecessor, the new 1999 Constitution provided that the federation shall maintain an account to be called the Federation Account into which shall be paid all revenues collected by the federal government.⁵⁶ Any amount standing to the credit of the Account shall be distributed among the federal, state, and local governments of the federation according to a formula to be determined by the National Assembly. Any formula shall take into account equality of states, population, land mass, revenue generation etc. provided that the derivation principle shall constantly be reflected as being not less than 13% of the revenue accruing to the Federation Account directly from any natural resources (s. 162 [1] [2] [3]).⁵⁷

The Constitution became silent on the on-shore and off-shore dichotomy and the National Assembly did not make law relating to allocation of revenue as it is empowered to do under the Constitution. However the Constitution provided that pending the enactment of an Act by the National Assembly, the system of revenue allocation in existence for the 1998 financial year shall continue to apply (s. 313). Thus subject to the provisions of the Constitution, Decree 106 of 1992 was to continue to apply as an existing law saved by the Constitution (s. 315 [4] [b]).

A dispute arose between the federal government and eight littoral states as to whether or not the derivation principle applied to natural resources derived from both on-shore and off-shore of their respective territories. Resolving the dispute, the Supreme Court in the case of *Attorney-General of the Federation vs. Attorney-General Abia State and 35 others*⁵⁸ decided *inter alia* that application of the derivation principle for the purpose of calculating the revenue accruing to the federation account is limited to natural resources extracted onshore only

⁵⁵ Additional states and local governments were created at different times during Babangida and Abacha regimes. E.g., Babangida created 11 states between 1989 and 1991. Abacha created 6 states and 183 LGs in 1996. This was ostensibly to ensure that oil revenue trickled down.

⁵⁶ Proceeds from the personal income tax of the personnel of the armed forces, the Police, the ministry of foreign affairs, and residents of FCT Abuja are excluded by the provision.

⁵⁷ This derivation principle was adopted from Abacha's 1995 draft Constitution which added that the percentage shall cover any special developmental agency that might be created.

⁵⁸ (2002) 6 N. W. L. R., PART 764, PAGE 542

because the seaward boundary of a littoral state is the low water mark of the land surface thereof; and that providing for Special Funds (e.g. the 1% to the FCT) in any given revenue sharing formula is unconstitutional. The Court also held that the use of the figure 13% in working out the derivation principle since May 1999 had no legal basis because neither was Decree 106 modified by the President (as empowered by s. 315 [2] of the Constitution) nor did the National Assembly make law specifying that figure. It was just “a rule of the thumb or a gentleman’s agreement”.

The decision did not favour oil-producing States especially Akwa Ibom, Bayelsa, Cross River, Rivers and Ondo who virtually do not have onshore oil deposits. The political crisis which followed it necessitated a legislative intervention to render it ineffectual. The Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act of 2004 was thus passed providing that the two hundred-metre water depth isobath contiguous to a state of the federation shall be deemed to be part of that state for the purposes of computing revenue accruing to the Federation Account derived from that state pursuant to the provisions of s. 162 (2) of the 1999 Constitution; and accordingly, “for the purpose of the application of the derivation principle, it shall be immaterial whether the revenue accruing to the Federation Account from a State is derived from natural resources located onshore or offshore (s. 1[1] & [2]).”

The decision also necessitated an Executive Order to review the existing formula. Thus a new formula of May 2002 gave FG 56%, States 24%, and LGs 20%. This was further reviewed in July following an outcry giving the FG 54.68%, States 24.72%, and LGs 20.60%. In March 2004, State allocation was increased to 26.72% and that of FG reduced to 52.68%. Another formula proposed in September 2004 went to the National Assembly. It recommended 53.69% for FG, 31.10% for States, and 15.21% for LGs. 6.5% as Special Funds was built into FG’s share to be applied thus: Ecology 1.50%, Solid Mineral Fund 1.75%, National Reserve Fund 1.50%, and Agricultural Development Fund 1.75% (Shuaib 2006). To the credit of the Federal Ministry of Finance

during the Obasanjo administration, the statutory allocations from the Federation Account to the various governments were periodically publicised.

The debate on oil revenue share did not seem to be settled by the dichotomy-abolition Act. It was one of the topical issues at the National Political Reform Conference in 2005. The oil-producing states demanded for control of their oil resources through an upward review of the 13% derivation to 25% for now and to 50% within the next 5 years. The conference recommended for a jack up to 17% only. In protest, delegates from those states staged a walk out. A further jacking up to 18% recommended by the National Assembly Committee on the Review of the 1999 Constitution did not come to light as the entire review was rejected by the National Assembly in May, 2006.⁵⁹ The Yar'Adua administration has created a Ministry on the Niger Delta region in September 2008 and it is hoped this will douse some fire. But the inter-governmental revenue sharing formula is also far from settled. For instance, in August 2006, the Federal House of Representatives inaugurated a committee on the pending proposal and public views emanating from the public hearings it organised across the country indicated that the issue was not yet settled.

2.5 Conclusion

This chapter attempted to demonstrate the paradox of want in the midst of plenty. Of course despite the oil wealth, Nigeria is not rich compared to the developed countries of the world. But its state of underdevelopment can certainly not be explained in terms of lack of resources. In the available oil resources, it has possessed one necessary ingredient for development which has over the years been fairly distributed between the tiers of government. Nigeria's underdevelopment is more perplexing having regard to the place of development in state policy: the state has over the years prioritised development such that one could not attribute the paradox to neglect of development in state policy. It is this prioritisation that I shall attempt to demonstrate in the next chapter.

⁵⁹ The recommendation was seen as a 'bribe' to the oil-producing states to get their support for the intended constitutional amendment whose main agenda was to secure term elongation for president Obasanjo who was serving his second and last term. And it was mainly in opposition to the term elongation that the entire review exercise was rejected.

CHAPTER 3

PRIORITISING DEVELOPMENT IN STATE POLICY

3.1 Introduction

The previous chapter explores the paradox of underdevelopment amidst oil resources in Nigeria. The central question of this thesis being why this paradox, I seek to show in this chapter what is not an answer to the question before proposing an answer in subsequent chapters. It may be suggested that it is one thing to have oil wealth sufficient enough to finance development and it is another thing entirely to have state commitment to development. Could it then be argued that the governments in Nigeria have over the years neglected development in state policy?

The purpose of this chapter is to demonstrate that development has not been neglected in Nigeria. It argues that Nigeria has never treated development with levity; in fact it has received priority in state policy. Interestingly, even military interventions in governance were justified on developmental grounds.¹ Development is so important that it has become a human right under the Constitution. There has also been a succession of Development Plans for the country since 1962, each of which made development its ultimate objective. Thus explanation for the paradox must be located elsewhere. I shall hereunder look at development as human right under the constitutions; development as treated in 7 successive development policies; and how law was invoked as an aiding instrument in the policies.

¹ For instance, during the military coup of 31st December 1983 which ousted Shagari's civilian administration, Brigadier Sani Abacha in nationwide radio broadcast justified intervention due to the harsh developmental conditions caused by the ineptitude and corruption of the ousted regime. He said the military was discharging its "national role as the promoters and protectors of [the] national interest" (in Ojo 1987: 27-29). See excerpts of the speech in chapter 4. The Head of State reiterated these points in a speech he delivered the following day (reproduced in *West Africa*, 9 January 1984, pp. 56-7).

3.2 Development as Human Right

Human rights speak the same language as human development. What international human rights law has been championing through the International Bill of Human Rights² is the enrichment of the lives and freedoms of people. For instance, Article 55 (a) of the UN Charter enjoins the promotion of “higher standards of living, full employment, and conditions of economic and social progress and development.” Similarly, Article 25 of the UDHR guarantees for everyone “the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” ICESCR also guarantees the right to health, housing and education among others for everyone (Articles 11, 12 & 13). These are the concerns of development as well.

Development as a whole became a human right with the Declaration on the Right to Development³ which the United Nations General Assembly passed in 1986. In its preamble, the Declaration recognised that development is a comprehensive economic, social, cultural and political process aiming at the improvement of the well-being of people based on their active participation therein and in the fair distribution of benefits resulting therefrom. It also invoked the UN Charter, the UDHR, the ICCPR and the ICESCR and other international instruments relevant to development in declaring the right to development. The Declaration clearly provides that “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized” (Article 1).

² Meaning a total of the United Nations Charter; the Universal Declaration of Human Rights (UDHR), General Assembly Resolution 217, U.N. Doc. A/810 (1948) at 71; the International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); and the International Covenant on Economic, Social and Cultural Rights (ICESCR), General Assembly Resolution 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

³ UN General Assembly (UNGA) A/RES/41/128, 4 December 1986.

The Declaration also places a duty upon states to create national and international conditions favourable to the realisation of the right (Articles 3 & 4) calling for taking measures at national level in order to ensure equal access for all people to basic resources, education, health services, food, housing, employment and the fair distribution of income (Article 8). It also declares that all human rights and fundamental freedoms are indivisible and interdependent and therefore equal attention should be given to their implementation (Article 6 [2]). It is germane to state that though the right to development has been welcomed as a giant step worth developing (Baxi 1998), it is not without criticisms. Donnelly (1985) for instance does not see it as a human right. He argues that at best, International Human Rights law “treat development as a goal rather than a right” (ibid: 483).

The linkage between human rights and development got fortified at the turn of the millennium. According to UNDP (2000), human rights and human development share a common vision and a common purpose; the former as intrinsic part of the latter and the latter a means to realising the former. Human rights are seen as both instrumental to, and constitutive of development. For instance, the freedom of expression requires some measure of social facility in the form of education and health. Similarly, freedom from poverty could remove the shackles of disease and illiteracy. Development requires individual agency and individual capability is in turn greatly influenced by surrounding social factors. Expanding freedom therefore is both the primary end and the principal means of development (Sen 1999).

Domestic human rights laws especially in developing countries have greatly been influenced by the International Human Rights law. For Nigeria in particular, the substance of the UDHR civil and political rights later concretised in ICCPR⁴ found expression early enough under the 1960 Independence Constitution.⁵ Since then, subsequent Constitutions have maintained them.⁶ And

⁴ The ICCPR came into force since 23 March 1976.

⁵ Chapter III of the Constitution contained the right to life; freedom from inhuman treatment, slavery and forced labour; right to personal liberty; right to fair hearing; right to private and family life; freedom of conscience; of expression; of assembly and association; of movement; from discrimination; and from compulsory acquisition of property. They are covered between

ever since, the rights have been justiciable.⁷ However, socio-economic rights of the UDHR such as the rights to adequate standard of living, health⁸ and education⁹ (later translated into the ICESCR)¹⁰ did not receive similar treatment. They did not find mention in the Constitution until 1979. Even then, they are not provided unequivocally as ‘rights’. They are put as “Fundamental Objectives and Directive Principles of State Policy”.

Notwithstanding their aspirational nature, it can be argued that the effect of the provisions is to create rights in favour of the citizens. From a jurisprudential point of view, duty presupposes right except where such duty is an absolute one.¹¹ To the extent therefore that the socio-economic variables are state duties, they are citizens’ rights. And they are indeed state duties as stated by the 1999 Constitution: “It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the [fundamental objectives and directive principles of state policy] provisions of ... [the] Constitution” (s. 13).¹²

Not surprisingly, the liberal rule of law focuses exclusively on civil and political rights as they affect the liberal agenda. Under it, Babangida and Obasanjo administrations for instance which followed liberal legal reforms could be hailed as upholders of rule of law despite their ‘unequal’ attention to socio-economic rights. And a military dictatorship, like the Abacha regime, would be labelled violator of human rights¹³ in general terms notwithstanding the significant

sections 17 and 30. Their inclusion was mainly to allay the fears of minorities as recommended by Sir Henry Willink’s Commission which was appointed to enquire into those fears and means of allaying them.

⁶ See Chapters III of the 1963 and IV of the 1979 and 1999 Constitutions respectively.

⁷ Ss. 31 (1); 32 (1); 42 (1); & 46 (1) of the 1960, 1963, 1979 and 1999 Constitutions respectively.

⁸ Article 25 of the UDHR

⁹ Article 26 of the UDHR

¹⁰ Articles 11, 12 and 13 of ICESCR provide for the right to adequate standard of living, health, education respectively.

¹¹ Duty and right or claim are jural correlatives. But certain duties are absolute. For instance, although a judge has a duty to try a suspect, that suspect does not have the right to be tried. Yet the state can be said to have such right against the duty-holding judge. See Dias (1985: 23-27).

¹² Same as 1979 Constitution.

¹³ The Abacha regime was notorious for trampling civil and political rights. For instance it was tough on labour organisations, NGOs such as National Democratic Coalition (NADECO) and Movement for the Survival of the Ogoni People (MOSOP). It was the conviction by a Tribunal and subsequent execution of Ken Saro-Wiwa and 8 other Ogoni leaders by the regime that led to

attention it paid to human development through programmes such as the Petroleum Trust Fund (PTF).¹⁴ Suffice it to say, civil and political rights are relevant to development. For instance, freedom of expression and the press (s. 39 [1] & [2]) affords citizens the opportunity of being watchdog to government. Through it, people could call government to account in the event of failure to discharge its developmental duties or in case of abuse of rule of law. However, for this right to be meaningful, information on the activities of government should readily be available to citizens. Law on freedom of information in Nigeria has been in the pipeline since the time of President Obasanjo. It is hoped that when it materialises, things would improve.¹⁵

It may be argued that socio-economic rights seem to be more in tandem with human development for their provision of the right to adequate standard of living, right to health and right to education among others. For the purpose of this study, socio-economic rights count and are non-negotiable. In fact, development should primarily be defined by their standards and then secondarily by the standard of other rights (grub first!!).¹⁶ What does the Nigerian Constitution say on these socio-economic rights? The starting point shall of course be the declaration of the Constitution that “the security and welfare of the people shall be the primary purpose of government” (s. 14 [2] [b]). Accordingly:¹⁷

- The state shall –

the suspension of Nigeria from the Commonwealth in 1995. See <http://www.thecommonwealth.org/Internal/34493/140633/timeline/> for instance.

¹⁴ The PTF headed by former Head of State, General Muhammadu Buhari, did creditably well in several areas of human development such as providing educational equipment, water, health facilities, roads, etc. during the Abacha regime. See <http://www.highbeam.com/doc/1G1-20812410.html> for instance.

¹⁵ It appears that a law on freedom of information is unpopular with the government. A Freedom of Information Bill was initiated during President Obasanjo’s tenure. President Yar’Adua is now in his second year in office and it has not yet become law. When it is passed by the National Assembly, the President is required to signify his assent or that he withholds assent to passed Bills within 30 days. The legislature can make it law by passing it again with 2/3 majority if he signifies withholding assent (see s. 58 (1), (2), (3), (4) and (5) of the 1999 Constitution).

¹⁶ This is not suggesting that civil and political rights should be traded off for socio-economic rights. I recognise that this is a controversial area.

¹⁷ Except s. 16 (1) (a) of the 1999 Constitution which is new, all other provisions were contained in the 1979 Constitution with same wordings under same section numbering.

- (a) “harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy” (s. 16 [1] [a]); and
- (b) “control the 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” (s. 16 [1] [b]);

- The State shall direct its policy towards ensuring that –

- a) the material resources of the community are harnessed and distributed as best as possible to serve the common good (s. 16 [2] [b]);
- b) suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sick benefits are provided for all citizens (s. 16 [2] [d]);
- c) all citizens have the opportunity of securing adequate means of livelihood (s. 17 [3] [a]);
- d) there are adequate medical and health facilities for all persons (s. 17 [3] [d]);
- e) there are equal and adequate educational opportunities at all levels (s. 18 [1]);
- f) government strives to eradicate illiteracy by providing, as and when practicable, free, compulsory and universal primary education; free secondary education; free university education; and free adult literacy programme (s. 18 [3] [a], [b], [c] & [d]).

Promising as they appear, the above socio-economic rights are made non-justiciable under the Constitution. Judicial powers conferred on the courts do not

extend to any issue or question as to whether any act or omission or as to whether any law or any judicial decision is in conformity with the rights (s. 6 [6] [c]).¹⁸ This is in contrast to the South African position where socio-economic rights are justiciable.¹⁹ Suffice it to say, enforceability of rights helps in the building of rule of law. In fact, rule of law in England is traceable to the definition and enforcement of individual rights by courts. Such defined and enforced rights are the source, rather than the result of English constitutional law (Dicey 1959: 203).

As it stands, civil and political rights and socio-economic rights are two sets of rights in the Constitution distinguishable in terms of enforceability. The former are negative rights (as they mainly protect the individual from the state) called “fundamental human rights” while the latter are positive rights (because they require the state to take developmental measures) simply called “human rights”. This distinction was recognised by the courts as could be seen in the case of *Uzoukwu v. Ezeonu II*²⁰ where the court stated that:

There is a clear distinction between “Fundamental Human Rights” and “Human Rights”... Fundamental rights ... are fundamental because they have been guaranteed by the fundamental law of the country, that is, the Constitution. There are certain rights pertaining to a person, which are neither fundamental nor justiciable in the courts. These may include, for instance, rights given by the Constitution under the Fundamental Objectives and Directive Principles of State Policy contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1979.

The bifurcated approach to human rights under the Constitution can hardly be justified.²¹ The traditional justification that implementation of fundamental

¹⁸ It is the same section 6 (6) (c) in the 1979 Constitution.

¹⁹ Chapter 2 on Bill of Rights in the Constitution of the Republic of South Africa 1996 (as amended in 2003) contains both civil and political and socio-economic rights. S. 26 guarantees the right to access to adequate housing; s. 27 guarantees right to access to health care services (including reproductive health care), sufficient food and water, and social security; s. 29 guarantees the right to basic (including adult basic) education, and to further education as reasonably and progressively made available and accessible by the state. By virtue of s. 38, all the rights are justiciable. Bilchitz (2007) covers the enforcement of these rights nicely.

²⁰ (1991) 6 NWLR Part 200, 708 CA.

²¹ The Vienna Declaration of the World Conference on Human Rights states that “All Human Rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights in a fair and equal manner, on the same footing and with the same emphasis”

human rights is costless while that of human rights is costly is not always plausible. Implementation of the former requires institutional structures the running of which entails costs as well. In any case, with the adequate oil resources, Nigeria cannot feign impecuniosity as to leave implementation of socio-economic rights merely aspirational. In the face of the startling paradox of want in the midst of plenty, enforceability of socio-economic rights would go a long way in righting some wrongs. Had they been enforceable over the years, the paradox would perhaps have been lessened. The enforceability of civil and political rights not only enriched the substance of the rights, but also enhanced the enjoyment of those rights at least to those privileged to enjoy them. It is a privilege to enjoy the rights because it implies one's reasonable standard of living. As rightly pointed out by Justice Bhagwati in *Minerva Cotton Mills*,²² civil and political rights will be meaningless to people shackled by poverty, disease and illiteracy:

To the large majority of people who are living in almost subhuman existence, in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of individual freedom and liberties, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and well to do, and the only solution for making these rights meaningful to them was to remake the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life, so that the preconditions of fundamental liberties for all may be secured.

While a constitutional amendment is desired to elevate the socio-economic rights to enforceable rights, such amendment is not absolutely necessary in order to reap the benefits of those rights. Courts could interpret relevant enforceable civil and political rights to include relevant socio-economic rights. For instance, the right to life could be interpreted to include the right to health. Similarly, the right to dignity of human person could be interpreted to mean the right to adequate standard of living. There is evidence of this judicial activism from India for instance and Nigeria could borrow leaf. In the case of *Tellis v. Bombay Council*,²³ the court expanded the meaning of the right to life to cover the right

²² (1980) AIR S.C. cited in Ipaye (2001)

²³ 1987 LRC (Con.) 3351 cited in Osinbajo in Ipaye (2001)

to means of livelihood. Similarly, in *Mohini Jain v. State of Karnataka*,²⁴ the Supreme Court considered that the right to education is included in the idea of the right to life since there cannot be a meaningful and successful life without education in this modern age. It therefore declared invalid a state law which permitted medical colleges to charge high admission fees.

The need for such judicial activism in Nigeria is fortified by the fact that the African Charter on Human and People's Rights which contains similar socio-economic rights²⁵ has been domesticated in the country.²⁶ More so, the Charter did not bifurcate between civil and political rights on one hand and socio-economic rights on the other hand. It declared categorically in its preamble that the former cannot be dissociated from the latter and that the satisfaction of the latter is a guarantee for the enjoyment of the former. Interestingly, the Nigerian Supreme Court in the case of *Gani Fawehinmi v. General Sani Abacha*²⁷ has held that want of procedural rules of enforcement under the Charter cannot be a bar to its local invocation²⁸ nor can a domestic law free a country from its international obligation such as obligations assumed by ratification of international human rights instruments.

Although enforceability of a right is important to its enjoyment, the quality of being a right cannot be said to be dependent upon that enforceability. Otherwise, several human rights such as the right to development would lose their status of being human rights. Thus development as human right under the Constitutions shows that development has acquired an important position in state policy.

²⁴ (1992) A.I.R. 1858, 1864 (App 6) Sup. C.J. cited in Ipaye (2001)

²⁵ For instance, Article 16 of the Charter provides for the right to health; Article 17 recognises the right to education; and Article 22 imposes a duty on the state to ensure the right to development.

²⁶ It is domesticated under the African Charter on Human and People's Right (Ratification and Enforcement) Act, Chapter 10, Vol. 1, Laws of the Federation of Nigeria 1990.

²⁷ (1996) 9 NWLR, Part 475, Page 710.

²⁸ This same point was made in the case of *Ogugu vs. State* (1994) 9 NWLR, Part 366, 1.

3.3 Development in Development Policies

Nigeria has always had a development policy. Between 1962 and 2003, there have been 7 development policies. These could be grouped into three phases: the first phase deals with four identical National Development Plans which emphasise economic growth. The state is a key player in this phase, for the policy is based on Keynesian economics. The second phase represents the period of structural adjustment when the state was rolled back and the market pushed forward. This was initiated by the World Bank based on the Smithian/Richardian free market economics. The last phase represents a shift from emphasis on economic growth to a more result-oriented human development. In all these phases, development was a priority.

i. The Four National Development Plans

The first of the four plans was the First National Development Plan (1962-1968).²⁹ It aimed to achieve economic growth and to provide employment opportunities and improved social services. It had as its fundamental objective “the achievement and maintenance of the highest possible rate of increase in the standard of living and the creation of the necessary conditions to this end, including public support and awareness of both the potential that exists and the sacrifices that will be required” (Second Plan 1970: 10).³⁰

The Plan had a total capital expenditure amounting to £676.5 million.³¹ It was a ‘take off’ Plan meant to enable Nigeria “be in a position to generate from a diversified economy, sufficient income and savings of its own to finance a steady rate of growth with no more dependence on external sources for capital

²⁹ It was first in independent Nigeria, drawn up 2 years after independence. Development planning began with the ‘Ten-Year Plan of Development and Welfare for Nigeria, 1946-1956’ at the behest of the Colonial Office in London. There were Regional pre-independent plans extended to 1962 when the First Plan was drawn up (Okowa in Ake 1985: 80-81). I could not lay my hands on a copy of the First Plan. I shall therefore rely on secondary sources here.

³⁰ It was the decision of the National Economic Council in 1959 to have for Nigeria a National Development Plan with the stated objective. The First Plan did not mention this objective.

³¹ £300m of it was expected from foreign aid. Nigerian money was denominated in Pounds (£) until 1973 when it was replaced with Naira (N). In Naira, the total capital expenditure was N831.7m.

or manpower than is usual to obtain through the natural incentives of international commerce” (First Plan: 5, in Obi 1980: 72). This objective of the Plan was restated by the Prime Minister, Sir Abubakar Balewa, in a speech to the members of the Overseas Development Institute in London in late 1962 when he said “the Plan ... is the first of three or four such plans which we hope will take Nigeria to that point at which she will be able herself to generate the bulk of the resources she needs for development; to provide the bulk of the skilled manpower that is essential, and to supply the main dynamic of development herself” (Balewa in Balewa & Epelle 1964: 138).

The Plan therefore emphasised income-generating projects in its early years giving priority to agriculture, industry and technical education, while projects in the social and administrative sectors were left for its later years. It planned to invest 13.6% of its expenditure in agriculture and 86.4% in non-agricultural sector though it ended up with an actual investment of 9.8% for the former and 90.2% for the latter (Okowa in Ake 1985: 82-3 & Table 5.5).³² The Plan aimed to achieve a GDP minimum growth rate of 4% per annum as against the 3.9% per annum recorded in the preceding ten years; to invest 15% of the country’s GDP annually; and to raise per capita consumption by 1% per annum.

However, Nigeria’s first military coup in January 1966 scuttled the Plan before it reached the end of its lifespan. The military then came up with the Second National Development Plan (1970-1974).³³ Under its five principal national objectives, the Plan sought to establish Nigeria firmly as:

³² There was a huge imbalance in the public sector investment between rural and urban areas. For instance, 76.2% allocation on health went to urban areas with 3.9 for rural; 90.8% on social welfare urban, 9.2% rural; 58.5% on water supply urban, 39.6% rural (Okowa in Ake 1985: 83, Table 5.6).

³³ The Plan was launched by Gen. Gowon after the end of the civil war. It was meant to facilitate the reconstruction, rehabilitation, and reconciliation efforts which followed the war; and to increase government’s participation in the growing economy particularly in the booming oil sector. Of the four Plans, it was the only one that was not obstructed by a change in government. Coming at a time when the oil industry was waxing stronger with an average daily production of 1,085 barrels, the Plan placed less reliance on foreign aid. In contrast to the First Plan which sought for about 44% of its capital expenditure abroad, the Second Plan expected foreign finance to the tune of 20% only. In its emphasis on self-reliance, it declared that Nigeria will accelerate its development pace “through the use of her own resources instead of relying unduly on external aid” (Second Plan:33). It aspired to put Nigeria in a position where it would “finance a steady rate of growth with no more dependence on external sources for capital or manpower than is usual to obtain through the natural incentives of international commerce” (ibid: 37).

- (i) A united, strong, and self-reliant nation;
- (ii) A great and dynamic economy;
- (iii) A just and egalitarian society;
- (iv) A land of bright and full opportunities for all citizens; and
- (v) A free and democratic society (Second Plan 1970: 32).

The commitment to establish “a just and egalitarian society” meant “reducing inequalities in inter-personal incomes and promoting balanced development among the various communities in the different geographical areas in the country” (ibid: 33). It emphasised that “the quality of life in a community depends partly on the level of social services which, collectively, the public sector can provide as social goods” recognising that “education and health facilities are at present the most important of such social services” save that the level of their availability must “be related to what the economy can bear” (ibid: 34). It underscored the contribution of people to development but acknowledged that in general, government accepted “as a basic objective of policy the primary responsibility for the mental and physical care of all the citizens” (ibid: 35). As one of its “specific and ordered priorities”, the Plan sought to rapidly improve “the level and quality of social services provided for the welfare of the people” (ibid: 36). It also stated that Nigeria “will actively support all concerted measures to minimize the great international disparities in living standards and technological attainments” (ibid: 78).

The Plan emphasised agricultural output and social infrastructure. It sought to expand export crop production in order to increase and diversify the country’s foreign exchange earnings and, in addition, to significantly increase the production of agricultural raw materials to support manufacturing activities. Its total capital expenditure was N3.0 billion, later reviewed upwards to N5.3 billion. It earmarked 12.8% of its total capital expenditure to agriculture with the non-agricultural sector carrying the lion’s share of 81.2%. GDP was expected to

increase from N3 billion in 1969-70 to N4 billion in 1973-74. Annual growth rate was expected to be 7% on average.

Education got treated as both a consumer good and capital good i.e. it “should be provided for its own sake, as a means of enriching an individual’s knowledge and developing his full personality” as well as to “prepare to undertake specific tasks and employment functions which are essential to the transformation of their environment” (ibid: 235). It stated that “because education plays a most important role in the creation and improvement of human capital, its relevance and importance to development is now very well recognised in development planning. Therefore Nigeria cannot afford to leave education to the whims and caprices of individual choice” (ibid). It underscored the major focus of educational policy in Nigeria which has been the ultimate provision of formal education to every child of school-going age to at least primary school level, on the ground that universal education is very vital in improving people’s receptiveness to new ideas and in “the creation of an adequate stock of skills needed in the process of social and economic development” (ibid).

The Plan set as two general objectives “the restoration of facilities and services damaged or disrupted by the civil war” and “the development and expansion of education at various levels in order to achieve higher enrolment ratios as well as improved quality at these levels while at the same time, reducing the educational gap in the country by “levelling upwards”” (ibid: 237). To realise these objectives, the federal and state governments allocated £6.460m and £27.478m respectively for primary education; a total allocation of £28.400m for secondary education; a total of £12.291m for technical education; £13.195m for teacher training; a total allocation by all states concerned of £0.730m for adult education; a total of £41.018m for university education; and a total of £6.250m for student financing (ibid: 239).³⁴

³⁴ See Tables 1-4 on pages 240-246 of the Plan for details of the educational programmes of the federal and state governments respectively. The Plan recorded achievement in education. Primary school enrolment increased from 3.5 million in 1970 to 4.5 million in 1973; in secondary school enrolment from 343,000 in 1971 to 649,000 in 1974; and in university enrolment from 14,500 to 25,000 (Arnold 1977: 66). Twenty new Federal Government Secondary Schools, four Colleges of Technology, nine Trade Centres, and three federal Schools

On health, the Plan recognised that a “healthy population is an economic asset since the assured supply of a strong and healthy labour force is an essential factor in development. Health services must therefore keep pace with the growing needs and resources of the people, for if they lag too far behind, the whole community is bound to suffer. For this reason, development in the health sector must be geared to targets which will ensure that health services and amenities are within easy reach of the people” (ibid: 247). The Plan therefore designed its programmes to re-establish health services disrupted during the civil war and to develop and expand existing medical and health services with the greatest emphasis given to preventive measures designed to reduce to the minimum the incidence of deadly diseases in various communities (ibid: 248). Its specific policies included expanding programmes for the maintenance of environmental sanitation; instituting measures to control communicable diseases; developing medical manpower; re-organising hospital services; creating and developing research facilities and activities; and maintaining good health standards (ibid: 248-249).

The health sector therefore got a total allocation of £53.811m from the federal and state governments out of which £10.130m was in respect of capital expenditure to be undertaken by the federal government and the balance of £43.681m was allocated among the states. The federal government’s programmes included epidemic control; establishing drug quality control laboratory; expanding drug manufacturing laboratory; building new chemistry laboratory and providing equipment; expanding federal training schools; and expanding medical schools and teaching hospitals. The states generally concentrated on curative aspect of the health service and training of health personnel of all categories (ibid: 249-250).³⁵

of Arts and Science were established. The Federal Government took over the University of Nigeria (Ihonvbere & Shaw 1998: 74).

³⁵ See Tables 1 and 2 on pages 251 and 252-254 of the Plan for details of the health programmes of the federal and states governments respectively. The rural-urban imbalance was repeated in the Second Plan. Urban area took 43.1% on health leaving rural with 6.6%; on labour and social welfare, urban got 66.1% while rural got 28.2%; urban got 60.8% on water and sewerage while rural got 14.7% (Okowa in Ake 1985: 84, Table 5.8).

The Third National Development Plan (1975-80)³⁶ was also launched by Gen. Gowon at a time when Nigeria was hugely in oil money.³⁷ The Plan therefore was built on a solid foundation. It was “undoubtedly the most ambitious development effort ever attempted in Nigeria” (Third Plan: Forward). It stated that the primary objective of planning was to achieve a rapid increase in the standard of living for Nigerians. It shared the Second Plan’s philosophical framework of unity, self-reliance, justice, egalitarianism, equal opportunities, freedom and democracy. But it added specific short term objectives thus: increase in per capita income; more even distribution of income; reduction in the level of unemployment; increase in the supply of high level manpower; diversification of the economy; balanced development; and indigenisation of the economy (ibid: 29).

With a total expenditure of N32b, the Plan sought a radical transformation of the economy. Thus the Federal expenditure focused on the economic sector. Between 1970 and 1974, Nigeria recorded an average GDP growth rate of 8.2% and the Third Plan aimed at a growth rate of 9.0% which, if maintained, would raise Nigeria’s GDP (which stood at N14.411b in 1974-75) to N22.692b in 1979-80. GNP per capita in 1975 was approximately N295; and the Plan aimed to raise it, over the next 20 years, to N700. With a GDP rise by 9% annually and a 2.5% population increase annually, a 6.5% increase in per capita would be achieved annually thereby achieving the N700 GNP per capita by 1995. This would mean doubling the standard of living of the average Nigerian in twelve years (ibid: 29).

³⁶ Like its predecessors, the Plan sought considerable reduction of Nigeria’s dependence on the external sector in general and on the petroleum sector in particular (Third Plan: 30). But in areas where expatriate services were necessarily required, the Plan permitted employment from wherever they were available and payment to them of the going rates at the time of employment (Third Plan: 403).

³⁷ The five years which preceded the Plan (1970-74), which happened to be the period of the Second Plan, saw a surge in oil revenues due to the oil boom caused by the 1973/74 Yom Kippur War (there was a four-fold increase in the price of oil during this time) and Nigeria’s increased participation in the oil industry. In the five years, a total of \$15,942m was earned as oil export revenue alone. Total oil revenue for the period stood at N6181.0m. Until 1970, the highest oil revenue as percentage of the total (oil and non-oil) revenues was 16.6% for 1967. In 1970, it became 26.3% reaching an astonishing level of 82.1% in 1974. See chapter 2 for details.

The Plan had recognised that development had gone beyond growth in per capita income. It acknowledged that it is possible to record a high rate in per capita income while the masses of the people continue to be in abject poverty and lacking in basic necessities of life. Therefore it made it an important objective “to spread the benefits of economic development so that the average Nigerian would experience a marked improvement in his standard of living (ibid: 29).

Thus an attempt was made to touch on developmental aspects directly affecting the welfare of the ordinary people. The States were therefore to be sufficiently funded to provide social amenities in order to achieve this objective. The 70% of the population living in the rural areas having not benefited relatively from the economic growth of the Second Plan period, the Third Plan declared in its preamble that the guiding principle was the Federal Government’s total commitment “to the provision of equal opportunities for all Nigerians regardless of their place of birth, origin or abode” (ibid).

The Plan reiterated the continued recognition of education as a very powerful instrument for social change in a process of dynamic nation-building and therefore set the following as the objectives of its educational programme: expanding educational facilities to equalise individual access to education; reforming the content of general education to make it more responsive to the socio-economic needs of the country; consolidating and developing the system of higher education in response to manpower needs; streamlining and strengthening the machinery for educational development ; rationalising the financing of education to make the system more adequate and efficient; and making an impact in the area of technological education (ibid: 245).

The Plan sought to achieve its educational objectives by focusing on all the levels of education. It emphasised primary education by introducing the Universal Primary Education (UPE) programme. It was to give free and universal primary education from September 1976 and this would be made compulsory from 1979. Primary school enrolment was expected to rise from 5 million to 11.5 million by 1980. Secondary education was to “be rapidly

expanded to permit the fullest possible enrolment of primary school leavers as well as ensure adequate input for expanded tertiary and higher education levels” (ibid: 246). Government aimed to encourage children to remain in the formal school system until they attain the age of fifteen. There was a policy to build a system of 5-year technical secondary education to exist side by side with secondary schools. This would be followed by post-secondary technical education in the form of specialised institutions “to permit a more rounded training of various categories of technical manpower” (ibid: 247). Secondary school enrolment of 0.5 million in 1975 was to be trebled by 1980 and 800 new secondary schools to be opened during the period.

Teacher education, adult and non-formal education, special education, provision of supportive educational services, were all part of the educational policy. Tuition and boarding fees in secondary and tertiary schools were to be reduced and scholarship to be provided to students in need. The Plan was to concentrate on consolidating and expanding the then six existing universities and to establish four additional ones. University student enrolment was to be increased from 23,000 to 53,000 by 1979-1980. Admission policy was to be overhauled to permit expanded student intake (ibid: 248-250).

The Plan allocated N2.5b to education out of which N300m went to primary education, N200m for teacher training, N966.741m for secondary education, N277.326m for technical education, a total of N251.856m (federal and states) for higher education, total of N6.95m for adult education, total of N201m for student financing, total of N20.363m for educational services, and total of N5.573m for special education (ibid: 250-258).

On the health sector, the Plan recognised that the problems were “so tremendous that the situation would require the application of appropriate policies and measures as well as massive physical inputs to the development of the sector” (ibid: 261).³⁸ It therefore took as specific objectives the development and expansion of training institutions to ensure adequate supply of doctors and Para-

³⁸ The problems included manpower shortage, inadequate distribution of facilities, inadequate preventive services and poor management and utilisation of institutions.

medical staff. In particular, a doctor/population ratio of 1:14,000 was targeted against 1980 as opposed to the 1: 22,000 recorded in 1972. Annual admission of students into medical colleges was expected to be increased to 3,000 by 1980. The development and expansion of hospital services, comprehensive health coverage for the nation, disease control, efficient management and utilisation of institutions, creating facilities for medical research and planning were also to be embarked upon (ibid: 263-266). During the Plan period, it was planned that the country would turn out 500 doctors, 200 pharmacists, 2,000 nurses, 1,500 midwives, and 100 laboratory technicians.

The health sector got a total allocation of N759.928m, 41% (N314.16m) of which was to be spent on federal programmes while 59% (N445.768m) to be spent on state programmes. The federal government earmarked N200m for the expansion of Teaching Hospitals while the states allocated various amounts of money for their respective expansion programmes.³⁹ Federal allocation for basic health services was N51m and states too made various allocations on the sub-sector.⁴⁰ Training received N24.2m and N45.85m from federal and state governments respectively. Supporting health programmes such as pharmaceutical and drug manufacturing laboratories, medical stores, etc. received N26.96m and N37.333m from federal and state governments respectively (ibid: 266-271).

With the available oil resources, it was hoped that “the full implementation of the plan should ensure a radical transformation of the Nigerian society” (ibid: Forward). However, Gen. Gowon was toppled in July 1975, three months after the launching of the Plan. But the new regime, Gen. Mohammed’s, accepted the Plan in principle. Gen. Obasanjo later reviewed the Plan and among other things, increased the federal allocation to health from N314m to N1, 700m before he handed over to Shehu Shagari as elected President in 1979.⁴¹

³⁹ For details of the allocations made by the states see pages 267-269 of the Plan.

⁴⁰ For details of the allocations made by the states see pages 269-270 of the Plan.

⁴¹ Gen. Obasanjo took over in February 1976 after an abortive coup that killed Gen Mohammed. However, in his 1976-1977 budget speech, he cautioned that “with a population of some 72 million people and oil production of under 2,000,000 barrels a day [sic], our resources from oil are not enough to satisfy the aspirations and general needs of our people for development and social services” (quoted in Arnold 1977: 76-77).

The Fourth National Development Plan (1981-85) was drawn up by Shagari's new government. Though there was a glut in the oil market, the Plan cannot be said to have come at bad times.⁴² It recognised that it was coming "at a time when the country's production of crude oil which is the main source of government revenue and foreign exchange earnings has virtually stabilised" (Fourth Plan 1981: 38). Thus like previous Plans, it sought to harness the country's resources for development. Its overriding aim was also to bring about improvement in the living conditions of the people. Its specific objectives were therefore stated to be: increase in the rural income of the average citizen; more even distribution of income among individuals and socioeconomic groups; reduction in the level of unemployment and under-employment; increase in the supply of skilled manpower; reduction of the dependence of the economy on a narrow range of activities; a balanced development of the different sectors of the economy and the various geographical areas of the country; increased participation by citizens in the ownership and management of productive enterprises; greater self-reliance; development of technology; increased productivity; and the promotion of a new national orientation conducive to greater discipline, better attitude to work and cleaner environment (ibid: 37).

The Plan envisaged a capital investment of N82b over its period (ibid: 1). In order of priority, it focused on agriculture with an allocation to the tune of N5, 588.9m; education as both capital and consumer good with an allocation of N7, 533.5m; power (N3, 278.7m), water supply (N2, 940.4m) and telecommunications (N2, 000.0m); transportation (N10, 504.1m); housing (N2, 661.7m) and health (N3, 066.6m). It sought "to diversify the economy away from the overdependence on the petroleum sector" (ibid: 37-39). Building on the previous Plan, it sought for a greater participation of Nigerians in the ownership and management of productive enterprises (ibid: 443).

⁴² The 1979 Iranian Revolution led to a rise in oil prices such that Nigeria recorded about \$15.6b and \$25b export values for 1979 and 1980 respectively. Despite low production in the early and mid-1980s coupled with the fall in the price of Nigerian oil to \$35.50 (from \$41 in 1980) per barrel in early 1982 the export value for 1981 was \$17,291; in 1982 \$11,883; and \$9,941 in 1983. See chapter 2 for details.

The Plan called for the establishment of a benchmark for population censuses; sought for a decline in fertility rate through a voluntary use of family planning services and an increase in formal education. During the Plan period, the delivery of health care was to be improved to strengthen the downward trend in child, infant, and maternal mortality and morbidity rates; efforts to prevent illegal immigration were to be intensified; and the government was to attempt to encourage trained and skilled personnel to remain in the country. To combat urban-rural drift, the government was also to pursue a policy of integrated urban and rural development (ibid: 361-365).

On education, the Plan based its direction on the broad objectives and policies of the National Policy on Education which were as follows:

- (1) The inculcation of national consciousness and unity;
- (2) The inculcation of the right values for individual and society survival;
- (3) The training of the mind in the understanding of the world; and
- (4) The acquisition of appropriate skills to enable individual to live in and contribute to national development (ibid: 256-257).

But in general, the Plan sought to raise the quality of education at all levels in order to make beneficiaries more useful to society. It was to focus on primary, secondary, technical, teacher, higher, adult and non-formal, and special education. Educational and inspectorial services were to be provided (ibid: 257-258). Unlike in the previous plan, there was “complete absence of Federal Government in Primary Education” under the Fourth Plan because the 1979 Constitution vested responsibility for that mainly on the Local Governments (ibid: 259). Seven new universities of Technology and one conventional university with emphasis on postgraduate studies at Abuja and an open university were to be established during the Plan period (ibid: 260). Some States⁴³ were to establish state universities with bias in technological education (ibid: 262).

⁴³These were Anambra, Bendel, Cross River, Imo, Ondo, Gongola and Rivers States.

The total capital investment on education by the federal, state and local governments was N7, 703.079m, approximately 9.3% of the total capital investment. It was said to be “one of the largest allocations ever made to education in the development Plan of any developing country and attests to the very high priority placed by all governments in the federation on education” (ibid: 259). Primary education received a total allocation of N256.299m from 13 states and a total of N1.059b from all the local governments. Secondary education was allocated N202.680m by the federal government and a total of N1.748b by all the states. Technical education got N400.20m from federal government and N736.649m from the states. Teacher education got N189.050m from federal government only. University education received N1.250b from the federal government only. The only allocation to adult education was N19m from the federal government. Also it was only the federal government which made allocations to student financing (N273m), educational services,⁴⁴ and library development (N11m).⁴⁵

On health, after the Plan recounted the major problems of the sector,⁴⁶ it proceeded to state its general policy as the pursuit of “the goal of providing a comprehensive health care system offering promotional, protective, restorative and rehabilitative services to an increasing proportion of the population.” To this end, a National Comprehensive health care system was to be provided and developed at three levels: (1) Primary or Basic Health Care to provide basic services in health centres, clinics and out-patient departments of rural, sub-urban and urban hospitals; (2) Secondary Health Care to provide health care and referral services in hospitals; and (3) Tertiary Health Care to provide specialist services in teaching hospitals and institutions (ibid: 277).

In order to achieve the above policy objective, the Plan sought to:

⁴⁴ The total amount allocated has not been specified to this sub-sector under the Plan. But allocations to certain projects have been mentioned and they totalled N32.5 million. See page 261 of the Plan.

⁴⁵ For details of all the allocations, see pages 259-263 of the Plan.

⁴⁶ Such as shortage of manpower, maladministration of institutions, inefficient and poor management of facilities, imbalance between curative and preventive services, etc. (see pages 275-276 of the Plan).

- (1) establish and implement the comprehensive health services scheme with the Basic Health Service Scheme (BHSS) as its centre piece;⁴⁷
- (2) create and train four new categories of personnel⁴⁸ and increase the number of professional and technological personnel at least by 50% by 1985;
- (3) develop and expand hospital services;
- (4) control preventable and other diseases;
- (5) improve management and utilisation of institutions;
- (6) create and expand facilities for medical research and health planning;
- (7) procure drug supplies and logistics (ibid: 277-280).

The Plan projected a total capital expenditure of N3043.885m on the health sector. Out of this amount, the federal government was to spend N1, 200m (39.43%), the state governments N1573.576m (51.68%), and Local governments N270.309m (8.88%). The federal and state governments earmarked N158m and N486.938m for the BHSS respectively, N635m and N712.570m respectively for hospital programme, N240m and N156.484m respectively on training programme, and N167m and N217.584m on supporting programme (e.g. laboratories and medical centres). Local governments were to undertake projects to mainly lay the required infrastructure for the execution of the BHSS (ibid: 280-282).

Shagari was overthrown by the military on 31/12/1983 and Major-General Muhammadu Buhari emerged as Head of State.

⁴⁷ The BHSS had objectives which included the provision of adequate and effective primary health care for the entire population with the target of achieving 80% coverage by 1985 and 100% by 2000; and the correction of imbalances among preventive programmes such as immunisation, health education, maternal and child health, family planning, environmental health services and nutrition, etc.

⁴⁸ This is in order to reduce the concomitant pressure on existing manpower while implementing the BHSS. These categories were community health aids, community health assistants, community health supervisors, and community health officers.

ii. Structural Adjustment Programme

The Buhari regime was silent on the Fourth Plan.⁴⁹ The economy was already in bad shape so the regime stiffened austerity measures taken by the Shagari government.⁵⁰ It continued negotiations with the IMF for an Extended Fund Facility (EFF) loan to the tune of \$2.5 billion which Shagari applied for in 1982. The negotiations were however stalemated when the regime refused to accept IMF's prescription of Structural Adjustment Programme (SAP). The essential features of SAP included: cessation of non-statutory transfer to state governments; wage and employment freeze; privatisation of public enterprises; review of interest rates on loans; trade liberalisation; withdrawal of subsidies on social services including consumer goods especially petroleum; devaluation of the Naira; review and curtailment of public expenditure; dismantling import licensing regime (Awosekun 1985: 212; Okigbo 1993: 78). Like the Shagari government, the Buhari regime favoured state intervention/regulation insisting that leaving the economy to market forces would worsen Nigeria's situation (Olukoshi in Olukoshi 1993: 6).⁵¹

It was during this deadlock that the Buhari regime was replaced through a palace coup in August 1985 which brought Gen. Ibrahim Babangida to power. To exhibit its self-acclaimed humanitarian disposition, the regime invited national debate on the IMF issue. The issue was widely debated and general opinion favoured calling IMF's bluff. Consequently, the regime decided, in December 1985, not to take the loan. However, it interpreted people's rejection of the loan

⁴⁹ The document containing the regime's programmes of action, known as the Blue Book, mainly concentrated on measures to resuscitate the economy for, the regime saw itself as a corrective one.

⁵⁰ Foreign travel allowances were cut; public sector down-sized; recruitment suspended; new projects and wages frozen; public expenditure curtailed; and state governments prohibited from taking external loans. The Shagari government had introduced similar measures through its Economic Stabilisation Act of 1982. The \$2.5 billion IMF loan which Shagari applied for in 1982 was part of the government's stabilisation package. See Awosekun (1985).

⁵¹ This stand of the regime led to the boycott of Nigeria by Western lending and financial institutions who wanted a clean bill of health from IMF in favour of Nigeria before they could negotiate deals with the country. IMF was willing to issue such a bill subject to Nigeria's wholesale adoption of its SAP. The Buhari regime was adamant. To mitigate the effect of this cross-conditionality, the regime resorted to servicing its external debt to among others win the confidence of the Western institutions. It also introduced the policy of counter-trade whereby crude oil was exchanged for raw materials, spare part, and consumer goods from countries like Brazil, USSR and Italy (Olukoshi in Olukoshi 1993: 6-7).

as acquiescence to whatever measures necessary for economic recovery and growth. Thus in its 1986 budget proposals, the regime came up with a 'home-grown' SAP with all the features of the IMF prescription. It was launched in June, 1986. This was the second phase of the development policy.

It would be correct therefore to say that "Nigeria has finally joined the league of Third World states that have been implementing the orthodox adjustment programmes of the IMF and the World Bank" (ibid: 8). The measure saw a turning point in the history of Nigeria's development in that it resulted in a paradigm shift from Keynesianism to neoliberalism advocated by the IMF and the World Bank. The paradigm shift from 'left' to 'right' did not however affect government's trusteeship over oil resources. Oil was still state-owned and the state oil company, NNPC, remained public. Sectors where development matters most, i.e. social services like education, health and water were not fully privatised.⁵² In any case, the idea of the shift was to facilitate economic growth which would in turn improve people's standard of living. So development was still government's business.

To be sure, SAP was not about sectoral planning like previous development plans. But the regime came up with development projects apparently to appease the ordinary citizens. The Directorate of Foods, Roads, and Rural Infrastructure (DFFRI) was established with a N2b capital expenditure in order to improve rural food production and facilitate movement of the products to urban markets. The Peoples Bank and Community Banks were established to give credit access to the country's rank and file. To tackle the problem of unemployment among the country's teeming youths, National Directorate of Employment was set up.

⁵² Private hospitals and schools have existed for long. Recently, there were moves to privatise federal government-run unity secondary schools. After pressures however, the government retreated and invited for bid in a Public Private Partnership (PPP) project to manage the schools. See Haruna (2007).

After a short-lived Interim National Government (ING) established by Babangida, the military returned to power with Gen. Sani Abacha as Head of State.⁵³

iii. Vision 2010 (1997)

Though it had created the Petroleum (Special) Trust Fund which used excess crude oil money in development projects, the Abacha regime came up with a development policy only through the Vision 2010 Committee in 1997. It was what launched Nigeria into the third phase of development policy. Against the background of the unanimous conviction of Nigerians that development in the country lay far below its potential and the aspirations of its people, the Committee was established “to develop a blueprint of measures and action plans which when implemented can ensure the realization of Nigeria’s widely acknowledged potential by the time the nation is 50 years old as an independent country in the year 2010” (Vision 2010 Report 1997: 5).⁵⁴

The development process adopted by the Committee was “people-centred, broad-based, self-reliant, market-oriented, highly competitive and private sector-driven, with the government as the proactive enabler.” It made the well-being of all the people to be the overriding purpose of governance and the economy at all times (ibid: 30). Unlike previous Plans which were imposed on people, the Vision adopted a bottom-up approach having consulted Nigerians and actively sought for and utilised their inputs (ibid: 6).

The overall vision of the Vision was to help Nigeria become “a united, industrious, caring and God-fearing democratic society, committed to making the basic needs of life affordable for everyone, and creating Africa’s leading

⁵³ Babangida cancelled the June 12 1993 Presidential election after a protracted transition programme, established the ING headed by Chief Ernest Shonekan in August 1993 and “stepped aside”. ING lasted for 82 days only.

⁵⁴ No doubt, the potential of the country was enormous. Babangida “stepped aside” at a time when oil revenue generation had fully recuperated from the shock of the second half of the 1980s. That was when (1990-1993) the export value hovered between \$13 and \$11b per annum; with total oil revenue steadily growing to N162102.4m in 1993 from N71887.1m in 1990. The year the Committee was inaugurated recorded \$14.391b oil export value and N416811.1m total oil revenue.

economy” (ibid: 7, 18, 49). The Vision was markedly different from previous plans in the sense that it did not have a capital expenditure to be allocated to various developmental sectors. Its task was rather to design “a blueprint of measures and action plans” to be implemented by government. This point was made clear by the Head of State during the inauguration of the Committee when he said “to equate annual budgets, rolling plans and perspective plans with the Vision 2010 exercise is to miss the point. Budgets and rolling plans will only constitute sub-sets of Vision 2010, which will go beyond the realm of economics to encompass every facet of our national life” (ibid: 34). It therefore set sectoral targets and underscored certain behavioural traits as recipes for attaining the overall vision.⁵⁵

Average annual GDP growth rate during the Vision’s period was planned at 10% as against the 3.3% rise recorded in 1996. A less than 5% rate of inflation was to prevail towards the end of the Vision period as against the 30% rate in 1996. The exchange rate of the Naira would be improved; manufacturing which as at 1996 accounted for 6% of GDP would contribute about 24% to the GDP by 2010 and GNP per capita to rise to \$1,600. Although it planned to increase daily oil production from 2.2 million barrels to 4 million barrels; increase oil reserves from 22 billion barrels to 40 billion barrels; and develop the gas sub-sector (ibid: 22, 94-95), the Vision hoped for less reliance on oil (ibid: 20).⁵⁶

The percentage of people living below poverty line (said to be more than 50%) would be reduced to not more than 20% by 2010; the rural populace, constituting 62% of the country’s population, would have their standard of living improved, health facilities, access to water and land, educational opportunities provided, thereby reducing rural-urban drift (ibid: 23). Urban growth would be controlled and managed; and full employment of all able-bodied persons would be attained; women would be fully integrated into national development all by 2010. The Vision underscored the relevance of good governance, tackling corruption, effective maintenance of law and order,

⁵⁵ See pp. 71-77 of the Report where it underscores core values as a way of achieving the set targets. They include honesty, accountability, transparency, discipline, industry, equity and social justice, religion and morality, co-operation, nationalism and patriotism, etc.

⁵⁶ It planned that oil’s contribution to GDP should decline to less than 20%.

free media, excellent labour management and industrial relations, among others, in achieving its objective (ibid: 25-29).

An achievement of about 100% primary school enrolment was targeted by 2010 as against the 88% in 1996; and at least 26% of government budgets at all tiers (the minimum UNESCO standard) was to be devoted to education (ibid: 67). The Vision acknowledged that previous government interventions in agriculture like Obasanjo's Operation Feed the Nation (OFN), Shagari's Green Revolution, and Babangida's DFRRI "have been ineffective, due largely to corruption and diversion of resources meant for the sector." It was now planned to achieve a substantial sectoral turnaround in order to achieve food security, production of raw materials for industries, and raising of foreign exchange earning (ibid: 21).

On health, the Committee noted that less than 5 per cent of the federal budget was allocated to health services annually in the previous decade. Health facilities were inadequate and also poorly maintained. Nigeria had a life expectancy of 52 years in 1993, compared with 62 years for developing countries. Infant and maternal mortality rates of 84 per 1,000 and 800 per 100,000 live births respectively were high, compared with average rates of 70 per 1,000 and 384 per 100,000 respectively, for developing countries. During the Vision period, preventive health-care services were to receive more emphasis. Adequate funding was to be provided to restructure and upgrade primary, secondary and tertiary health care facilities in line with international standards (ibid: 20, 69).

The Committee made recommendations and urged for faithful implementation thereof (ibid: 31). The recommendations were not fully implemented when General Abacha suddenly died in June 1998. Olusegun Obasanjo was sworn in as elected President in May 1999 after a one-year transition period manned by Gen. Abdulsalam Abubakar.

*iv. National Economic Empowerment and Development Strategy (NEEDS)
(2003-2007)*

Obasanjo's return heralded hopes for a developmental revolution given the legitimacy of his government, his experience, and the huge petrodollars accruing to the country.⁵⁷ Obasanjo himself spoke of this hope during his inaugural speech when he said that he understood the yearnings of Nigerians for better conditions of living. Thus in 2001, a process for the collection of information from various groups, to determine the needs and ambitions of people, began culminating in the drafting of an Interim Poverty Reduction Strategy Paper. This input together with the Constitution; the Kuru Declaration 2001;⁵⁸ Vision 2010 Report; and additional national consultations were what served as basis for NEEDS produced by government in 2003. It was expected to cost about \$4.5b through 2007. It coincided with the Millennium Development Goals (MDG)⁵⁹ and it was intended to facilitate achieving them.

This Policy was unique in one major respect:⁶⁰ it coordinated action at federal and state levels as the states were expected to have the equivalent of NEEDS at their level called SEEDS.⁶¹ It charged that previous initiatives did not lead to progress largely because poverty and inequality reigned; public sector was weak and inappropriate; economy was poorly managed; and environment for private

⁵⁷ Average daily crude oil production was about 2.0 million barrels; export value for 1999 was over \$12 billion steadily rising to over \$22 billion at the time NEEDS was drawn up in 2003. Total oil revenue for 1999 was N724422.5 rising to N2074280.6 in 2003. See chapter 2, Tables 2.1, 2.2 and 2.3.

⁵⁸ It was a Declaration whereby all public officers, elected and appointed swore to abide by certain codes of values embodying Nigeria's development objectives and human capital needs (NEEDS 2003: 4).

⁵⁹ The Millennium Development Goals were derived from the United Nations Millennium Declaration, adopted by 189 nations in 2000. Leaders from every country agreed to pursue eight goals: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a global partnership for development. These goals provide countries around the world with a framework for development, and time-bound targets by which progress can be measured. Most of the goals and targets were set to be achieved by the year 2015 on the basis of the global situation during the 1990s. See <http://www.un.org.millenniumgoals/index.html>.

⁶⁰ The Policy though prides itself as different in four respects: it has people's input; it coordinates action at federal and state levels; it is feasible; and it holistically addresses Nigeria's social and economic challenges. This cannot however be true at least as against Vision 2010 which though lacked the federal and state coordination element.

⁶¹ i.e. State Economic Empowerment and Development Strategy (SEEDS)

sector growth was hostile (NEEDS 2003: xiii-xv). It lamented the paradox of poverty amidst natural and human resources stating that it is something it must address (ibid: xiii-xiv).

NEEDS therefore proposed “to make poverty a thing of the past in Nigeria” and to make Nigeria “Africa’s largest economy and a major player in the global economy” (ibid: ix). It adopted four strategies in this pursuit: reorientation of values; reduction of poverty (which requires “acting on several fronts”); creation of wealth; and generation of employment. These would in turn require an effective macroeconomic framework which entails empowering people; promoting private enterprise;⁶² and changing the way government works.⁶³ These were what the Policy called the “three pillars” on which, it said, its success rested (ibid: xv).

Direct human development activities lay in empowering people and NEEDS proposed to, among others, do the following:

- Create about 7 million new jobs “by making it easier for private enterprises to thrive, by training people in skills relevant for the world of work, and by promoting integrated rural development in collaboration with the states (through their SEEDS programmes)” (ibid: xvi, 34). Most of the jobs were expected to come from the private sector and the government was expected to create for it an enabling environment to prosper; empower people with relevant skills to prepare them for the jobs; and promote integrated rural development (ibid: 44).
- Make housing affordable to people by making it easier for developers to buy lands on which to build affordable houses; cutting the cost of building by encouraging the use of local building materials; training architects to design low-cost housing; and enabling construction companies and lower governments to provide low-cost housing (ibid: xvi). The production of houses will, as a matter of policy, be the

⁶² This is the subject of Part Three, consisting of Chapters 5-7 of NEEDS. See pages 52-83.

⁶³ This pillar is covered under Part Four, consisting of Chapters 8-11. See pages 86-118.

responsibility of the private sector, state and local governments. Except in the federal capital territory, the federal government will assist housing producers only through grants (ibid: 43).

- Strengthen skill-base through increase in schools enrolment, improving colleges and providing better-trained teachers. More funds will be spent on vocational and entrepreneurial skill courses; building and equipping technical schools; training on information and communication technology at all levels; and providing distance learning programmes for specific segments of the population. Autonomy in universities will be promoted; their courses changed to reflect priority demands; science and technology mainstreamed; staff professional development ensured; wages linked to performance; and students will be mobilised to imbibe good values (ibid: xvi-xvii)
- Review health care services in order to have a system which can deliver effective, good-quality and affordable services. Health education will be emphasised and the creation of a National Health Insurance Scheme and a Blood Transfusion Service prioritised. Manufacture of essential drugs and reagents will be supported. Obstetric and reproductive health will receive targeted support to reduce maternal and infant mortality (ibid: xvi).
- Specially target vulnerable groups like women, people living with HIV/AIDS, victims of violence, crime, unemployment and loss of income (ibid: xvii, 40-42, 44).
- Promote peace and security through a national action plan which will reform the security sector; reorient the police; improve administration of justice; protect and promote human rights; establish conflict-detecting system; and allocate more fairly revenues and responsibilities between federal and state governments (ibid: 95-99).

NEEDS recognised that education is a right under the Constitution and a “vital transformational tool and a formidable instrument for socioeconomic development”. It identified as its overall policy thrust providing access to compulsory universal basic education; establishing and maintaining enhanced quality and standard; enhancing the efficiency, resourcefulness and competence of teachers and other educational personnel; strengthening technological and scientific base; and providing an enabling environment for the participation of other stakeholders in educational development. NEEDS went further to specific educational goals and key strategies. E.g. for the goal of access to education, it targeted increase in the percentage of literate and numerate primary school graduates to 100 percent; increase adult literacy rate to 65 percent; ensure the establishment of sustainable programmes of physical development in tertiary institutions; etc. (ibid: 34-38).

It stressed that the goal of its health component was to improve health in order to reduce poverty. Thus preventive and curative health care will be emphasised as strategy. Its policy thrust here included improving government’s stewardship over policy formulation, health legislation, regulation, etc.; strengthening the national health system and improving its management; improving the availability and management of health resources; improving physical and financial access to good-quality health services; fostering effective collaboration and partnership among health actors; etc. NEEDS identified several strategies for achieving its health goals. They included redefining the role of the Ministry of Health as well as reorganising, restructuring and strengthening its capacity; refurbishing primary health care facilities and making them operational; rehabilitating the National Drug Production Laboratory; developing and implementing a plan for combating malaria, tuberculosis and responding to HIV/AIDS; etc. (ibid: 38-43).

Promotion of private enterprise would involve creating a business-thriving environment. It is only then that the private sector would become the desired engine of Nigeria’s growth. Government would therefore stabilise the value of the Naira; diversify the economy away from oil; privatise, deregulate, and liberalise public industries; simplify import and export procedure; improve

infrastructural facilities like transport, power, and telecommunication; promote local industries and use of local resources; improve agriculture; and promote other auxiliary sectors like tourism, entertainment and financial services (ibid: xvii-xx, 52 et seq).

The Policy having identified the private sector as the engine of growth, it placed the government in the role of development facilitator. It therefore sought to restore trust in government by changing the way the government works. Budget discipline at all levels of government will be ensured; “due process” will be followed in the award of government contracts to prevent nepotism, favouritism, and corruption; massive anti-corruption campaigns will be intensified through the established Independent Corrupt Practices and Other Related Crimes Commission (ICPC) and Economic and Financial Crimes Commission (EFCC) and corrupt practices duly punished; ethical values in governance will be promoted; government will lead by example and with transparency; and the bureaucracy will be reformed to ensure effectiveness (ibid: xx-xxi, 58).

By 2007, the Policy hoped to achieve a 7.0% growth in real GDP; 9.5% growth in non-oil sector; 25.0% reduction in poverty incidence; 7 million new jobs; 6.0% growth in agricultural sector; 7.0% growth in manufacturing sector; 70.0% in manufacturing capacity utilisation; 3.0% of GDP as maximum public deficits; 60.0% of budget as recurrent expenditure; 40.0% of budget as capital expenditure; \$10,687 as external reserve; 65.0% adult literacy rate; 5.0% HIV/AIDS prevalence rate; 60.0% immunisation coverage; 70.0% of population with access to safe water; 65.0% of population with access to adequate sanitation; 10,000 megawatts power generation; 4,000 kilometre (rehabilitated and new) roads (ibid: xxiv-xxv, Table 2). From what we saw in Chapter 2, it is clear that the Policy did not meet all its targets.

3.4 Law as an Aiding Instrument

It has been suggested that it is important for any development policy to take cognisance of the institutions under which it is to occur (Hazlewood 1970: 6).

Law is one such institution under which development occurs. Fortunately, it has been recognised as an aiding instrument in Nigeria's development policies.

The National Development Plans have invoked law to facilitate achieving their objectives. For instance, during the First Plan, several development institutions were created through law. These included the Nigerian Industrial Development Bank; various chambers of commerce, and the Lagos Stock Exchange. The Insurance Bill of 1962 also initiated the establishment of the National Insurance Company of Nigeria.⁶⁴ The Central Bank of Nigeria Act (Amendment) Decree⁶⁵ was also promulgated to make the Bank the source of Marketing Board finance, to formalise the existing practice of close consultation between the Bank and the Federal Ministry of Finance and to give the Bank additional powers of credit control (Second Plan: 15). A Companies Decree was promulgated requiring all foreign companies with business in Nigeria to be locally incorporated (ibid: 19).

At a time when the economy was dominated by foreign interests, the 2nd plan made local control of the economy a strategy for reducing poverty and the achievement of its overall objectives. This found expression in government's indigenisation policy and law was to facilitate its implementation (ibid: 31, 33, 34, 37, 289). As we saw in chapter 2, government acquired varying participation interests in all the multi-national oil companies operating in Nigeria beginning from April 1971. In February 1972, it promulgated the Nigerian Enterprises Promotion Decree⁶⁶ under which it created the Nigerian Enterprises Promotion Board "to advance and develop the promotion of enterprises in which citizens of Nigeria shall participate fully and play a dominant role".⁶⁷ The Decree "exclusively reserved for Nigerian citizens or associations";⁶⁸ certain enterprises listed in its Schedule 1⁶⁹ such that as from 31st March 1974⁷⁰ "no person, other

⁶⁴ It was Decree No 22 of 1969 which finally promulgated the establishment of the Company.

⁶⁵ No 50 of 1968.

⁶⁶ No. 4 of 1972

⁶⁷ Section 1 (1) & (2) of the Decree

⁶⁸ Section 4 (1) of Decree No. 4 of 1972

⁶⁹ There are 22 enterprises listed: advertising agencies and public relations; pool betting and lotteries; assembly of radios, tape recorders, television sets, etc.; blending and bottling of alcoholic drinks; blocks, bricks and ordinary tiles manufacture; bread and cake making; candle manufacture; etc.

⁷⁰ The Decree referred to "appointed day" which it interpreted under s. 16 (1) as 31st March 1974.

than a Nigerian citizen or association, shall be the owner or part owner of any such enterprise in Nigeria”;⁷¹ and on or after the commencement of the Decree,⁷² no alien enterprise shall be established in Nigeria.⁷³ The enterprises listed under the schedule were thought to be those which Nigerians could manage themselves.

In enterprises where Nigerians did not have competence to manage, the Decree allowed aliens to participate on certain conditions. The enterprises were listed under Schedule 2 of the Decree.⁷⁴ It provided that no alien shall, from 31st March 1974,⁷⁵ be the owner or part owner of any such enterprise where (i) the paid-up share capital of the enterprise did not exceed £200,000, or (ii) the turnover of the enterprise did not exceed £500,000; and (iii) if the said capital or turnover exceeded the stated respective amounts, where the equity participation of Nigerian citizens or associations in the enterprise was less than 40 per cent. And no alien enterprise shall be established on or after the commencement of the Decree as respects any of the said enterprises, or continue to be operated otherwise than as permitted under the Decree.⁷⁶

The Third Plan continued with the indigenisation policy. Law was to continue to legalise the said policy and therefore the Nigerian Enterprises Promotion Decree continued to be the enabling law (Third Plan: 29, 30). Thus as a condition for the award of public contracts under the Plan, private firms were required to employ certain number of Nigerian professionals and technical personnel in proportion to the level of the contract award. The Plan allocated N1

⁷¹ Section 4 (1) (a) of the Decree.

⁷² i.e. 23rd February 1972

⁷³ Section 4 (1) (b) of the Decree. For the purpose of this subsection, an enterprise shall be deemed to be alien “unless the entire capital or proprietary interests, whether financial or otherwise, in the enterprise in so far as it concerns any of the enterprises in Schedule 1 ..., is also owned and controlled by Nigerian citizens or associations” (Section 4 (2) of the Decree).

⁷⁴ There are 33 enterprises listed here: beer brewing; boat building; bicycle and motorcycle tyre manufacture; bottling soft drinks; coastal and inland waterways shipping; construction industries; cosmetics and perfumery manufacture; departmental stores and supermarkets; etc.

⁷⁵ Again, the Decree referred to “appointed day” which under s. 16 (1) meant 31st March 1974.

⁷⁶ Section 5 (1) (a) (i) (ii) & (b) of the Decree. It needs to be made clear that while section 4 sanctioned the outright purchase by Nigerian citizens of alien enterprises listed in Schedule 1, section 5 permitted acquiring equity participation by Nigerian citizens in alien enterprises listed in Schedule 2. See Nigerian Enterprises Promotion Board (1973), “Buying and Selling Under the Nigerian Enterprises Promotion Decree 1972”, page 5. The marginal note “Enterprises partially barred to aliens” to section 5 bears testimony to this distinction.

million for the establishment of a Nigerianisation Enforcement Agency under the auspices of the Federal Ministry of Economic Development and Reconstruction with the objective of evolving and enforcing programmes of indigenisation (ibid: 384). It was during the Plan period that the 1972 NEP Decree was repealed and replaced with the NEP Decree of 1977. This new Decree reclassified enterprises into three: enterprises in schedule 1 (now much longer) were reserved for Nigerians exclusively; aliens could have interest in enterprises listed in schedule 2 provided equity participation for Nigerians was not less than 60%; and aliens could have interest in enterprises listed in schedule 3 (highly specialised industrial enterprises such as shipbuilding and motor vehicle manufacturing) provided equity participation for Nigerians was not less than 40% (Ogowewo 1995).

Law had a major role to play under SAP and it was indeed invoked. The Babangida regime promulgated a number of Decrees to facilitate it. For instance, it promulgated the Second-Tier Foreign Exchange Market Decree of 1986⁷⁷ establishing the Second-tier Foreign Exchange Market (SFEM). Its purpose was to devalue the Nigerian currency (Naira). It was through SFEM that all routine foreign exchange transactions, including all government imports, were to be channelled (Budget 1986). It was meant to gradually absorb the unofficial parallel foreign exchange market which existed. SFEM and “downward adjustments to the official exchange rate” of the Naira were a “two-pronged action” meant “to correct the continued over-valuation of the Naira” (ibid).⁷⁸ Through SFEM (later FEM), the Naira was to float under the management of the Central Bank. Each week the Bank announced in advance how much US dollar foreign exchange it would put in the market. Banks bid for that supply and the marginal rate at the bidding session determined the exchange rate for that week (Okigbo 1993: 77). SFEM was important because a market-determined foreign exchange rate was the focal point of SAP (Faruqee in Husain & Faruqee 1994: 254).

⁷⁷ This Decree became the Second-Tier Foreign Exchange Market (SFEM) Act, Chapter 405, Volume XXII, Laws of the Federation of Nigeria 1990.

⁷⁸ The proof that the Naira was overvalued lay in the existence of two parallel exchange rate systems: the official rate of N1 = \$1,005 and the unofficial rate of N4-N5 = \$1 (as at December 1985). The appropriate rate was argued to be somewhere in-between (Okigbo 1993: 76-77).

The government also promulgated the Privatisation and Commercialisation Decree⁷⁹ which enabled the privatisation and commercialisation of public enterprises. Under it, public enterprises were categorised into four main groups: i. to be fully privatised;⁸⁰ ii. to be partially privatised;⁸¹ iii. to be fully commercialised;⁸² and iv. to be partially commercialised.⁸³ A Technical Committee on Privatisation and Commercialisation (TCPC) was established to carry out the privatisation exercise. The NEP Decree of 1977 was repealed and replaced with the NEP Decree⁸⁴ in 1989 in order to remove most of the restrictions on ownership and control of enterprises. The Act did away with the classification of enterprises in the 1977 Decree and created a short list of enterprises under one schedule.⁸⁵ These enterprises were exclusively for Nigerians. In enterprises outside the list foreigners were free to have a total ownership and control (Ogowewo 1995).

Legal reform on civil justice also went underway in order to ensure effective enforcement of contractual obligations. The Federal High Court Civil Procedure Rules were reviewed in 1992. The states also reviewed their respective High Court Civil Procedure Rules in succession. Lagos state set the pace and was followed by other states.

The paradigm shift from ‘left’ to ‘right’ did not however affect government’s developmental duties. Sectors where development matters most, i.e. social services like education, health and water were not fully privatised.⁸⁶ In any case, the idea of the shift was to facilitate economic growth which would in turn

⁷⁹ No. 25 of 1988. The Decree was incorporated into the revised laws of Nigeria as Privatisation and Commercialisation Act, Chapter 369, Volume XXI, Laws of the Federation of Nigeria 1990.

⁸⁰ 13 insurance companies; 10 manufacturing firms; 2 hotels; 4 transportation companies; and 15 agricultural and agro-allied firms.

⁸¹ 27 commercial and merchants banks; 23 major manufacturing firms in various sectors like building, printing, oil, shipping and airline.

⁸² There were 10 major enterprises here.

⁸³ There were 14 major enterprises here.

⁸⁴ Which became the NEP Act, Chapter 303, Vol XVIII, Laws of the Federation of Nigeria 1990.

⁸⁵ The Schedule contains 40 enterprises which include bread and cake making, hairdressing, laundry and dry-cleaning, ice-cream making, office cleaning and singlet manufacturing.

⁸⁶ Private hospitals and schools have existed for long. Recently, there were moves to privatise federal government-run unity secondary schools. After pressures however, the government retreated and invited for bid in a Public Private Partnership (PPP) project to manage the schools. See Haruna (2007).

improve people's standard of living. So development was still government's business.

Vision 2010 identified 13 Critical Success Factors in order to achieve its developmental goals (Vision 2010 Report 1997: 38-39). Five of them have legal contents. These are: norms and standards;⁸⁷ anti-corruption;⁸⁸ openness;⁸⁹ law and order;⁹⁰ and good and stable governance.⁹¹ It regrouped the first three into value system which includes honesty, integrity, hard work and respect for constituted authority. The other two factors are regrouped under governing system (ibid: 40).

It underscored 12 core values apparently seen as commonly acceptable. Against each core value, it identified certain elements as constitutive thereof. Among them is honesty and accountability. Truthfulness and integrity; recognition of integrity and reward for honesty; and sanctions against crime and corruption are the elements set against this value. It underscores how the level of efficiency in public (and private) sector depends largely "on how accountable the entire citizenry is for its actions and behaviour". A situation where some people live beyond their legitimate income discourages accountability in others. Honesty and integrity must be rewarded while dishonesty, corruption and other criminal behaviours must be sanctioned (ibid: 69).

There is also the value of openness and transparency. How could a public office for instance be accountable to people without being open and transparent? The two values are therefore two sides of a coin. Governance is better when people have easy access to information; when government on its own discloses

⁸⁷ These are generally shared. According to the Report, they include ethics, sense of justice, discipline, integrity, God-consciousness, industry, social responsiveness and selflessness (Vision 2010 1997: 39)

⁸⁸ This means fighting social evils such as bribery, inflation of contracts, nepotism, advanced fee fraud ("419"), extortion, kickbacks, etc. (Vision 2010: 39).

⁸⁹ It embodies accountability, transparency, justice, freedom of information and expression (Vision 2010: 39).

⁹⁰ This refers to a situation where lives and property are secure. See Section II of Chapter 3 (page 59) where the Report dwelt on the subject under "Where We Are" on Political and Socio-cultural direction. It says law and order promotes social justice, harmony and economic progress (Vision 2010: 39).

⁹¹ The report insufficiently relates this aspect to "political stability" which it says "is an essential prerequisite for the achievement of a meaningful economic development" (Vision 2010: 39).

information on decisions affecting the public; and when freedom of expression and other rights of the people are respected. The value reinforces accountability because the more informed and able to express themselves people are, the more empowered they become to call government to order whenever it goes astray.

Under the core value of discipline, leadership by example; the rule of law; respect for constituted authority; and sanctions against indiscipline are identified as constitutive elements among others. Already, the Vision recognises that respect for human rights, constitutional government, the rule of law and transparency and accountability in the exercise of power are crucial to development (ibid: 54). Similar ideals and involving the community in legal reforms; ensuring an independent judiciary; and improving access to timely and fair justice have been recognised as necessary in order to achieve an effective and efficient judicial and law enforcement systems (ibid: 78).

The primary economic objective of the Vision is liberalisation. So “deregulating and liberalising the economy” featured as a strategy for achieving it. Thus like under SAP, law was to facilitate the liberal agenda through either creating a new law or reviewing existing law. For instance, in order to use natural resources to diversify the economy, the Vision identified as a strategy reforming “land ownership laws to make land readily and speedily accessible to both local and foreign investors”. Similarly, the Vision says implementing supportive regulations in the area of intellectual property, consumer protection, anti corruption, etc. is one other strategy (ibid: 102). It also identified legal reforms as necessary to achieve economic growth.⁹²

In developing an efficient and competitive financial system that caters for the long-term needs of the economy, reviewing, updating and implementing existing provisions in the relevant laws designed to ensure professionalism and probity of owners, operators and regulators was the first strategy (ibid: 103). The Vision adopted as a strategy establishing Nigerian Urban and Regional

⁹² Legal reforms came under “Other Issues” of the Visioning Process in Chapter 1 of the Vision 2010 Report (see pages 42-43 of the Report). The detail of these critical success factors is found in Chapter 3.

Planning Commission in line with the provisions of Decree 88 of 1990 in order to invest in critical sectors of the economy in both urban and rural communities. Similarly, the Vision sought to enact a new pensions law in order to make Nigeria a preferred country for investments by both local and foreign investors; and increase the level of domestic savings as a source of sustainable funds for development (ibid: 104).

NEEDS rested its vision on three main pillars as indicated earlier.⁹³ It is in the second and third pillars that NEEDS found roles for law. One specific measure in promoting private enterprises is improvement of security, the rule of law and the timely enforcement of contracts. Reduction of policy-related costs and risks such as a weak legal system is also another specific measure (NEEDS: 53, 55). For instance, at institutional and administrative level, judges and lawyers would be trained in specialised areas, dissemination of decisions broadened, facilities and equipment in courthouses improved, alternative dispute resolution system created, and commercial courts established (ibid: 56, Box 5.1).

To support competition under which private enterprises grow, NEEDS stated that government will enact consumer protection and competition laws (ibid: 55) to protect consumers from monopolistic and unfair trade practices which are direct upshots of market deregulation and privatisation. It will also prevent unfair trade practices that may hinder the growth of weaker firms (ibid: 56, 57-58). Government will also implement the Comprehensive Tax Reform Bill in order to eliminate multiple taxation and fiscal harassment, improve collections and remove barriers to the growth of a vibrant private sector.

In changing the way government works, legal reforms were needed to ensure transparency and accountability of public institutions. Among the reform agenda was tackling corruption and improving transparency in government accounts and joint venture oil companies (ibid xiii-xiv, 10-11). It was in line with this that the government established by law the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and Other

⁹³ Under section 3.3 of this Chapter. The pillars are empowering people, promoting private enterprises and changing the way government works.

Related Crimes Commission (ICPC) to enforce anti-corruption laws. The work of the Commissions was to be complimented by reforms in the administration of justice and the police (ibid: 87-88, 101).⁹⁴ It also established the Extractive Industries Transparency Initiative aimed at encouraging the NNPC and other oil companies to fully disclose revenue and cost of operations. The policy also stated that government was pushing forward a Public Procurement (i.e. due process) Commission Bill for enactment into law (ibid: 101).

Law has been invoked to give effect to government's monetisation policy as one way of reducing incentives for corruption. Under the Certain Political, Public and Judicial Office Holders Act, 2002,⁹⁵ official benefits such as cars, housing, utilities, domestic assistance and drivers were monetised in order to reduce cost of governance and prevent abuse (ibid: 92).⁹⁶ In another instance, NEEDS provided that Fiscal Responsibility Bill will be enacted into law in order to strengthen and make more transparent budget processes at all tiers of government. It also sought to eliminate conflicts and delays in enacting appropriation bills into law by the legislature by addressing the legislature's role in the budget process (ibid: 90).

NEEDS also planned to improve security and administration of justice in order to secure life and property. Among measures taken were improving the judiciary and police; protecting and promoting human rights; and punishing corrupt practices among security operatives (ibid 95-99). In improving the judicial system, NEEDS planned to take 3 measures:

- (i) Partner with the private sector in designing and implementing measures such as setting up of a Law and Economy Group to articulate necessary reforms in commercial laws. This was aimed at creating a legal environment conducive to capital inflow and competition.

⁹⁴ Though NEEDS created a whole chapter on "Tackling Corruption and Promoting Transparency and Accountability" (i.e. Chapter 10), it merely repeated what it said earlier on the subject (see pp. 87-88).

⁹⁵ The Act took effect July 1 2003. It was extended by circular to cover all federal civil servants from October 1 2003.

⁹⁶ Benefits and maintenance of houses are often inflated to the detriment of the public purse.

- (ii) Increase access to civil justice by simplifying legal proceedings and the law itself, lowering cost of litigation, reducing delays and evolving African model of alternative dispute resolution system.
- (iii) Create an effective criminal justice system by eliminating delays in trials, getting rid of corrupt officers, training of supporting staff, equipping libraries, and introducing computerised recording system.

3.5 Conclusion

This chapter highlighted the fact that development has no doubt, received attention in Nigeria's state policy. It is as important as a human right as the Constitution enunciated. In the development policies, development has received attention, though in the four Plans economic development was clearly a principal means. The trend has been for Nigeria to "bend its energies towards the achievement of the most rapid rate of economic development feasible as a means of raising the quality of the life of the people. Emphasis has been placed on growth as a pre-condition for a meaningful distribution of the fruits of development" (Second Plan: 32-33). But these fruits of development did not come. Lamenting the state of development in the 1980s and against the backdrop of the development policies amidst huge oil wealth, the ILO (1981: v) in a report titled *First Things First* stated thus:

There is still much acute poverty in Nigeria. The most obvious constraint on alleviating this used to be financial – the national income was too low. Then, in the 1970's, this obstacle had apparently been removed by the rapid acceleration in the value of oil exports. The National Development Plans took advantage of the greatly increased revenues of stimulated economic growth with big investment projects, mostly in the cities. The assumption was that, in due course, the increases in income would trickle down to the poor. Since the overall rate of economic growth has apparently been fast in the past two decades, there should be by now signs of substantial improvements in the living condition of the majority of the Nigerian people. These are not evident. Indeed...large numbers are worse off in numerous respects, especially in the rural areas but also in the big new slums of the cities (in Ihonvbere & Shaw 1998: 107).

If in addition to the huge oil resources development has received priority in state policy as shown in the foregoing discussions, where then lies an explanation to Nigeria's paradox of want in the midst of plenty? In other words, why has development eluded Nigeria despite availability of resources to finance it and being a priority in state policy? I shall argue that corruption is a major explaining factor. There is an inextricable link between corruption and development such that where it exists at a high level, a combination of resources and commitment to development though necessary, cannot translate to development. Nigeria is one such country where corruption is at a high level and the next chapter is devoted to an examination of corruption and its impact on development in the country.

CHAPTER 4

THE ENEMY WITHIN: CORRUPTION AND ITS IMPACT ON DEVELOPMENT

4.1 Introduction

This chapter sets out to link the paradox of underdevelopment amidst oil in Nigeria to the prevalence of corruption in the country. The previous chapter has demonstrated that Nigeria's underdevelopment cannot be attributed to lack of commitment to development by governments in state policy. An explanation must therefore lie elsewhere. I shall argue in this chapter that corruption is a factor explaining this state of underdevelopment. Corruption has impeded development in Nigeria because through it, a significant part of the oil resources which would have aided development has been drained. The chapter will start with a discussion on the levels of corruption in the country. This will be followed by an examination of selected cases of corruption in the various governments that ruled the country. And finally, it will examine how corruption adversely affected development in the country.

4.2 The Level of Corruption

In Nigeria, corruption is at a high level. It is prevalent in its various forms. It appears to be the order of the day. But this does not mean that it has been accepted as normal in the country. In fact, it has always been an offence. For instance, sections 98 and 104 of the Criminal Code applicable to the Southern States and sections 115 and 116 of the Penal Code applicable to Northern States have respectively criminalised it. Again, the 1999 Constitution makes it a fundamental objective and directive principle of state policy for the state to abolish all corrupt practices and abuse of power (s.15). More anti-corruption laws have been enacted recently. They are the Corrupt Practices (and Other Related Offences) Act, 2000; the Economic and Financial Crimes Commission Act 2004; and Money Laundering (Prohibition) Act 2004. Nigeria is also a

signatory to, and has ratified the United Nations Convention Against Corruption, 2003.¹

Though corruption has existed in Nigeria for long, I shall look at its level as assessed by Transparency International (TI) between 1996 and 2008.² The assessments indicate that Nigeria is perceived to be among the most corrupt nations in the world. In both 1996 (the first time Nigeria was included in the TI assessment) and 1997, its level of corruption was the highest in the world. It again recorded this unenviable position of the nation perceived to be the most corrupt in 2000. For five (5) times within the period, it was the second nation with the highest level of corruption in the world. It took a 3rd position (sharing the position with Cote D'Ivoire and Equatorial Guinea) and 4th position (sharing the position with Tanzania) once each. Sharing with 8 other countries, it occupied the 5th position once. Its position in 2007 was 9th which it shared with Angola and Guinea-Bissau. Its last and so far best position is the 16th out of 180 in 2008. Table 4.1 below gives details of Nigeria's TI Corruption Perception Index (CPI) between 1996 and 2008.

¹ Doc. A/58/422 adopted by the UN General Assembly on 31/10/2003. Nigeria signed it on 9/12/2003 and ratified it on 14/12/2004. See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

² Transparency International is an anti-corruption non-governmental organisation established in 1993. It is based in Berlin, Germany and has offices across the world. Through its annual Corruption Perception Index (CPI) which it started in 1995, it assesses the level of official corruption in individual countries as perceived by international businessmen, financial journalists and the general public. Countries are scored between 0 and 10. 0 represents entirely corrupt while 10 means corrupt-free. Its work is a "poll of polls" because it uses existing surveys conducted by various organisations giving the extent of variation amongst them. Minimum number of surveys used for a country ranged from 2 to 4 and maximum ranged from 7 to 10. A high variance number indicates a high degree of disagreement among the surveys while a low number shows a high concordance. Nigeria was first assessed in 1996.

Table 4.1: Nigeria's TI CPI (1996-2008)³

Year	Rank	Total	Score	Surveys	Variance
1996	54	54	0.69	4	6.37
1997	52	52	1.76	4	0.16
1998	81	85	1.9	5	0.5
1999	98	99	1.6	5	0.8
2000	90	90	1.2	4	0.6
2001	90	91	1.0	4	0.9
2002	101	102	1.6	6	0.6
2003	132	133	1.4	9	0.4
2004	144	145	1.6	9	-
2005	152	158	1.9	9	-
2006	142	163	2.2	7	-
2007	147	179	2.2	8	-
2008	121	180	2.7	7	0.5

Source: Compiled from TI Corruption Perception Indices 1996-2008

Nigeria's improvement in position reflects its improvement in score. But that is not to suggest that it is purely commensurate to the level of combating corruption. The inclusion of more nations (among which might be war-torn countries like Angola, Afghanistan and Somalia) in the assessment would improve Nigeria's position without a significant improvement in its score. For instance, between its 1st position in 2000 (one of the worst positions) and its 9th position in 2007 (its best position until 2008) is a difference of only one (1) point. But while there were ninety (90) countries involved in the 2000 assessment, countries assessed in 2007 were one hundred and seventy nine (179).

Nigeria's high level of corruption as reflected in the CPI is fortified by the fact that the surveys used by TI for its assessment in each year were multiple. Except in four occasions, they exceeded four (4) in all other assessments. In some instances it was as high as nine (9). And except in 1996 when the degree of variance among the surveys was as high as 6.37, in all other years the number was below 1.0. This clearly shows that various surveying organisations are in agreement several times that Nigeria's level of corruption is one of the highest

³ The first column indicates the year of the report. The data used by TI is normally for few previous years. The second column indicates the corruption ranking of Nigeria among other countries. The third column indicates the total number of countries assessed in a particular year. The fourth column is Nigeria's score out of a maximum of 10. The fifth column is for the number of survey used by TI as working data. The final column reflects the degree of variance of opinion among the surveys used. The higher the number, the more the disagreement, the lower the number, the more the agreement among the surveys on the countries level of corruption. Variance figures from 2004 to 2007 are unavailable.

in the world. Comparing Nigeria's scores for 1996 and 1997, TI (1997) declares as follows:

Comparing the scores for 1996 and 1997 it may ... appear that the perceived level of corruption is strongly decreasing. It should be noted however, that the 1997 is much more precise with a variance of only 0.16 points. This means that there is even a stronger agreement that Nigeria scores lowest among the 52 countries ranked.

Nigeria is the only oil-producing country where the level of corruption is so high. Assessment for the Middle East oil-producing countries did not start until 2003 except for Jordan which was first included in 1998. The evidence shows that their level of corruption is low. For instance, United Arab Emirate's score has been 6.0 on the average; Qatar 5.9 (6.5 in 2008); Kuwait 4.8; Jordan 5.0. The only countries which came close to Nigeria are Indonesia and Venezuela. Venezuela's least score was 1.9 in 2008 while its highest score was 2.8 in 2001. Indonesia's least score was 1.7 in 1999 and 2000 respectively and its highest score was 2.72 in 1997. Even when it became the nation perceived to be the most corrupt in the world in 1995, its score was 1.94, a score which Nigeria only reached in 2006, 2007 and 2008.

The level of corruption in less-endowed countries like Malaysia, Botswana and Ghana is far better than Nigeria's. Botswana and Ghana are not only less-endowed but are sister African countries. Perhaps this explains why these countries have been able to achieve Medium Human Development Index (the Middle Eastern countries achieved High Human Development Index) as assessed by the United Nations Development Programme (UNDP).⁴ Table 4.2 below gives details of the scores of the 5 last mentioned countries.

⁴ Nigeria's level of development compared to other countries has been covered in Chapter 2.

Table 4.2: TI CPI for Selected Countries (1995-2008)⁵

Year	Botswana	Malaysia	Ghana	Venezuela	Indonesia
1995	-	5.28	-	2.66	1.94
1996	-	5.32	-	2.50	2.65
1997	-	5.01	-	2.77	2.72
1998	6.1	5.3	3.3	2.3	2.0
1999	6.1	5.1	3.3	2.6	1.7
2000	6.0	4.8	3.5	2.7	1.7
2001	6.0	5.0	3.4	2.8	1.9
2002	6.4	4.9	3.9	2.5	1.9
2003	5.7	5.2	3.3	2.4	1.9
2004	6.0	5.0	3.6	2.3	2.0
2005	5.9	5.1	3.5	2.3	2.2
2006	5.6	5.0	3.3	2.3	2.4
2007	5.4	5.1	3.7	2.0	2.3
2008	5.8	5.1	3.9	1.9	2.6

Source: Compiled from TI CPI 1995-2008

Undoubtedly, Nigeria has, on a number of occasions, been perceived as either the most or one of the most corrupt nations in the world; a country of great opportunities but held down by corrupt practices. Perhaps in defence, it may be argued that by the TI assessment, Nigeria is merely *perceived* to be very corrupt and not *actually* so. Moreover, the assessment is carried out by a foreign organisation relying on surveys made by equally foreign organisations. However, such arguments collapse when viewed against the fact that Nigerians too share this perception. All military coups have been explained in terms of corruption of the previous governments. The poverty-stricken followership has generally been cynical about the normally-affluent leadership. There cannot be a better confession to corruption than what former President Obasanjo once said:

There was corruption! corruption! and corruption! everywhere and all the time! Corruption was not only rife, it had eaten so deeply into the marrow of our existence that looters and fraudsters had become our heroes, and it seemed we could no longer place any faith in honesty and decency and hard work (Inaugural Speech 1999).

Recent Development Plans have also recognised how deep corruption has eaten into the Nigerian polity. For instance, Vision 2010 laments that “corruption appears to have become a way of doing things, though it is resented by a

⁵ Data on Botswana and Ghana for the period 1995-1997 are unavailable because they started to be included in the TI assessment from 1998.

significant number of people who are hopeless in the face of weak and selective application of sanctions” (1997: 9). Similarly, NEEDS states as follows:

Nigeria’s legacy of mismanagement and corrupt governance has encouraged many people to seek ways of sharing the national cake instead of helping bake it. By 1999 corruption was practically institutionalized. Government was widely regarded as provider of large contracts, distributed by officers in power to people wealthy enough to buy their influence. This was particularly so in the oil industry. Over time, the judiciary became intimidated, as the rich and powerful manipulated laws and regulations to their advantage (NEEDS 2003: xiv).

What else could be said? Just in case the ‘confession’ leaves one still unsatisfied, a look at the numerous cases of corruption which cut across the various regimes (military or civilian) which ruled since independence would make Nigeria’s TI CPI position hardly deniable. Some of these cases have been duly and formally established; some remain unproven allegations; while a large number might be hidden. Exposing some of these cases indicates that despite the pervasiveness of corruption, there does appear some resistance to it. But as appears from what follows these cases, the absence of rule of law in practice leaves room for continuation of corrupt practices undermining development in the country. It is to some of these cases that we shall now turn.

4.3 Cases of Corruption

Corruption is so pervasive in Nigeria that writing about its cases could be a difficult task. Where would one begin from? Cases of corruption have been reported in pre-independent Nigeria. Certain public officers were formally investigated and indicted (Sklar 1963).⁶ The First Republic has also been

⁶ For instance, Alhaji Adegoke Adelabu, who was chairman of Ibadan District Council in 1956 and at the same time a Minister in the Federal Government, was found guilty along with three other councillors of corruption by the (E.W.J.) Nicholson Commission of Inquiry (Sklar 1963: 300); in the Eastern Region, a Commission of Inquiry into Bribery and Corruption headed by Chuba Ikpeazu found a Minister of Finance, Mazi Mbonu Ojike, guilty of corruption while he was Minister of Works in 1954 when he influenced award of a contract for the construction of Onisha market to Borini Prono & Co. in return for a kickback (Sklar 1963: 158-161); in 1956, the Sir Stafford Foster-Sutton Tribunal of Inquiry also found Dr. Nnamdi Azikiwe as the Premier of Eastern Region to have grossly abused his office when he influenced the transfer of securities belonging to the Region’s Marketing Board to the Region’s Finance Corporation and their subsequent investment in the African Continental Bank Limited for which he was the

accused of corruption (Osoba 1996). In fact corruption was one of the reasons cited by the military when it toppled the government (Joseph 1987: 71-72; Agedah 1993: 13, 15). But the military did not launch formal inquiry into the allegations let alone securing convictions. The military turned out to be no less corrupt. In fact, large scale corruption was first witnessed in the 1970s during the Gowon regime. And for the first time after independence, key perpetrators were formally tried and convicted by a succeeding regime. The Gowon regime shall therefore be our starting point. This approach we feel is sufficient to achieve the main purpose of the chapter which is showing the extent of corruption and how it has affected development.

i. The Gowon Regime (1966-1975)

Gowon seized power from Major-General Aguiyi-Ironsi in July 1966, six months after the first military coup. Although cases of corruption have been reported during the civil war which broke out later (Osoba 1996),⁷ it was after the war in the 1970s that allegations of corruption in the Gowon regime became more glaring. The federal government initially dithered but later challenged the public to expose any such cases. One of the first such exposures was Mr Godwin Dabo's exposure of the Federal Commissioner for Communications, Mr. Joseph Tarka, who he accused through an Affidavit (sworn to in a Lagos High Court) of "abuse of office and corrupt self-enrichment". The government was initially silent but due to press pressure, the Head of State asked the Commissioner to resign (Jakande in Oyediran 1979: 117). It was only then that the government, in accepting the resignation, said it had not been "unmindful of the concern displayed in the past fortnight over this and other similar incidents in the past.

principal shareholder (Sklar 1963: 186); and in 1962, the Coker Commission of Inquiry found that as the leader of the Action Group and the Premier of Western Region, Chief Obafemi Awolowo had expended public funds (multi-million pounds) in financing the party's campaigns for the 1959 general elections (Sklar 1963: 457-458).

⁷For instance, some commanders misappropriated the salaries and allowances for several months of their soldiers killed in the war; military procurement contracts were grossly inflated; inflated contract fees for same goods or services or none at all were paid several times; public properties in occupied territories were looted as in the looting of millions of pounds sterling from the Central Bank Benin in 1968 (Osoba 1996).

No responsible government can be indifferent in matters of this nature” (in Agedah 1993: 29). That was all the government did.⁸

Another case was one involving the governor of Benue-Plateau and a member of the Supreme Military Council, Joseph Gomwalk. In an affidavit sworn to in Jos High Court, Mr Aper Aku accused the governor among others of “corrupt use of power” by awarding N5.3 million contracts to a company wherein his relations had interest and “without going through the proper procedure” of reference to the Tenders Board and the State Executive Council. Contrary to standard practice, about 90 per cent of the contract sums had been paid when the actual work had gone only half way.

The governor’s response was simply that he and his relatives had a right to “legitimate ownership of property”; payments were made irrespective of work done to enable government to arrange with banks regular payments to contractors; he had contributed to the unity of the country; and that he did not deserve to be portrayed as a corrupt person. Gowon declared him innocent of the charges. Not only that, he saw allegations of this nature as mere character assassination against his lieutenant; mischievously giving the government a bad name and an indirect way of attacking him personally (Jakande in Oyediran 1979: 117).⁹ Posterity was to prove Gowon wrong as many cases of corruption were subsequently proven before formal bodies of inquiry.

Gowon’s government was replaced in a coup of 29 July 1975 by the Murtala/Obasanjo regime. The new regime focused on stamping out corruption in the public service. It instituted Assets Investigation Panel under the Corrupt Practices Decree of 1975 to look into allegations of corruption in order to bring to book those found guilty of abusing their powers. Those investigated were key public officers like State governors and Federal Commissioners.¹⁰

⁸ The accusations that the Commissioner did engage in corrupt practices were later confirmed by four separate probe panels: those headed by Sunday Adewusi, Col. A.A. Ochefu, Umaru Shinkafi, and Major-General Joe Garba respectively.

⁹ We shall see later in draft chapter 7 how this matter affected rule of law in Nigeria.

¹⁰ There is no evidence that General Gowon was personally corrupt. He was on a foreign official trip when the coup took place. He lived in the UK and studied at the University of Warwick up

The outcome of the investigations was revealing. Out of the 12 governors then existing, only two were not found to be corrupt. As General Mohammed stated himself, “All the ex-military governors and the former Administrator of East Central State with the exception of two (Brigadiers Mobolaji Johnson and Oluwole Rotimi)¹¹ were found to have grossly abused their offices and guilty of several irregular practices. Clearly, this investigation has revealed that they had betrayed the trust and confidence reposed in them by the nation. Those of them who wore uniforms betrayed the ethics of their professions and they are a disgrace to their professions. They should be ashamed of themselves” (in Agedah 1993: 36). Cash and value of properties seized from the ex-governors alone totalled over N10 million.

The governor of Benue-Plateau, Joseph Gomwalk, who Gowon summarily declared innocent of corrupt charges, was among the ex-governors found guilty of corruption. The Justice Alfa Belgore Commission of Inquiry found among others that the ex-governor “who hardly had N630 in his bank in 1967” when he was appointed state governor, had by 1975 illegally acquired property and shares running into several thousands of Naira. He was made to forfeit two houses on Naraguta Avenue Jos, a house at Langtang Road Jos and three other properties in Jos and Lagos. The Belgore Report had this to say on the governor: “It is a tragedy of unequalled proportion to find that a graduate, a former administrative officer, clothed in the uniform of Police Commissioner and functioning as a military governor with all the powers of the legislature and executive in his hands, was acting as a common criminal with hardly anybody to challenge him” (in Agedah 1993: 37)

to PhD level. He returned to Nigeria after a number of changes in government during the Babangida era.

¹¹ According to the African Concord of 1 April 1991 (page 28) however, “Even the two governors spared by the Federal Government were still indicted by the probe panels initiated by their successors... The new administration in Lagos [for example] accused Johnson of influencing the award of N25 million contract for a design of the state’s proposed secretariat and parliamentary building project to a firm which acted as middleman. The administration said the firm, Messrs Conterno International, were neither a firm of architects nor engineers” (in Agedah 1993: 38).

Similarly, a former governor of North Central state, an Assistant Commissioner of Police, was found to have illegally earned N264,000 and also illegally acquired properties which included two houses at Rahab Road, Kaduna and another in Gombe all of which he was forced to return. The (Mrs S.O.) Akaiku Board of Inquiry in Kwara State also found the ex-governor of the state guilty of corruption. He was indicted for his dubious involvement in the negotiation and investment of N3.88 million state funds in the United Match Company, Ilorin in 1973. He was compelled to forfeit two properties both on Umaru Audu Road Ilorin in lieu of N59, 361 which he illegally acquired. The governor of former South Eastern state was also found guilty of overspending a total of N3,261,074.38 (N1,906,238.70 from capital budget and N1,354,835.68 from recurrent budget) during the 1971/72 financial year; and wrongly allocating to himself 4 acres of state land paying N3,240 instead of N13,000. Governor of Mid-Western state was found guilty of many corrupt practices¹² that his multi-million Naira Palm Royal Motel, a house at Eguadase Street in Benin City together with his 10 farms located in different parts of the state were all seized by government (Agedah 1993: 36-37).

The probe panel which investigated a Brigadier former military governor of North-Eastern State found that between 1968 and 1973, the state had a total unvouchered expenditure of about N4 million. Between 1972 and 1973 alone, the state made expenditure in excess of N2 million without corresponding receipts. There were other unvouchered expenditures totalling about N5 million incurred by the governor during the financial year which ended 31 March 1974. He was also made to forfeit properties to the government (Agedah 1993: 38).

The civil service during the Gowon era also had a share in the widespread corruption. In an unprecedented purge, over 11,000 public officers were either dismissed or summarily retired from work (Asiodu in Oyediran 1979: 73, 89-90). As the various reports indicated, the scale of corruption during the Gowon era

¹² These included receiving N39,000 contrary to official advice as compensation for a piece of land acquired from him in Isiokor village in Benin West Division as part of the University of Benin; purchasing for the state an unseaworthy ship named *MV Emotan; establishing and using the Mid-West Farms Management Board to develop his own farms; etc.

was unprecedented. One could not agree more with Obasanjo when he commented in his book 'Not My Will' that:

Corruption became unchecked in almost all facets of national life and virtually became a way of life. Officials abandoned their offices with impunity to attend to their private businesses; the attitude of workers at all levels was to the say the least, lethargic. There was general indiscipline all around as if nobody was in charge of the affairs of the nation. Everybody, except the few self-disciplined ones, did as he liked. There was absolute lack of political motivation. The political leader, General Gowon, was not only weak, but was also by then, apparently tired, fed up and seemed to have given up in helplessness and desperation feeling that he had done his best and could do no more ..." (in Agedah 1993: 33).

ii. The Second Republic (1979-1983)

The Murtala/Obasanjo regime handed over to Shehu Shagari as elected president in October 1979.¹³ The new regime did not escape the corruption monster notwithstanding the fact that it was a constitutional democracy. In fact, it could be argued that it had outdone the Gowon regime in corruption. The democracy meant having more people at the corridors of power since in addition to the legislative houses at both federal and state levels (which never existed during military regimes) elected executive officers had to appoint more hands if only to settle party loyalists.

Instead of being strength, the democracy turned out to be a weakness. Public accountability which Shagari stressed at the beginning vanished as public property was literally turned into a booty. It has been recorded for instance that "the manner employed in the lifting of crude oil from the Nigerian shore during the Shagari years was not only suspect but it clearly left the flanks open for dubious characters to have a field day, even with the knowledge of certain personnel in government. Lifting crude oil was, to say the least, as easy as munching meat-pie, since all that was required was a note to the NNPC from the presidency or someone up there in the corridors of power" (Agedah 1993: 18).

¹³ General Murtala was assassinated in a failed coup in February 1976 and his Second-in-Command, General Obasanjo, took over power. Obasanjo stuck to a transition time table already drawn leading to the handing over.

Contracts were over-inflated, poorly executed or not executed at all despite receipt of the contract sum; ‘kickbacks’, ‘10 per cents’ were taken. There were cases where contractors received money to supply furniture to houses which had not been built, to clear bush in obscure places, to supply fertilizers to ghost farmers, etc. And there was the 1982 N50 million contract awarded by the Ministry of Housing and Environment to ghost contractors. There were fraudulent cases of payment of large sums of money to ghost workers; outright stealing of government property; illegal transfer of public money into private accounts; and resorting to destruction of files or arson to destroy evidence¹⁴ (Falola & Ihonvbere 1985: 107-108). The President had realised how over-inflation of contracts for instance was eating deep into public resources and he promised to use the recommendations of a committee on the issue in costing projects in the Fourth National Development Plan:

We have observed that since the era of the so-called ‘oil boom’ in this country there has been the misguided impression that money was no problem to the government. Against this background, project costs were often inflated. Designs ... were over-costed [sic], equipment and machinery for the projects over-priced. It was this genuine concern that led me to set up a panel which examined the problem and came to a conclusion that contracts in this country were often awarded at exorbitant costs. The recommendations of the committee ... will be used in costing projects in our Fourth National Development Plan (in Falola & Ihonvbere 1985: 107).¹⁵

The situation was so bad that a party chieftain did, at a social party at night, order the manager of a government-owned bank to withdraw N20, 000 which he used in spraying his friends and dancers at the venue; legislators rejected accommodation meant for them and ejected civil servants from a preferred one, got it refurnished at exorbitant cost, and incurred over N3 million (equivalent to \$7 million then) telephone bill (by 1982) “as if they made all the laws they were expected to make by phone”;¹⁶ Tenders Board of the House of Representatives

¹⁴ As in the burning down of the Ministry of External Affairs and the accounts section of the Federal Capital Development Authority, Abuja following allegations of fraud in those places.

¹⁵ This was in the President’s Budget Speech to the National Assembly, January 1981.

¹⁶ The Obasanjo administration prepared for them the ultra-modern Festac 77 (formerly Durbar) Hotel situated along Badagry Expressway, Lagos. They rejected it and opted for the newly built 1004 block of flats at Victoria Island, Lagos which were already occupied by civil servants.

which had a contract award limit of N150,000 awarded contracts in excess of N20 million; overseas trips by legislators cost the nation N2 million in two years; legislators were bribed by government to pass bills (as in for example the Revenue Allocation Bill of 1981) (Agedah 1993: 19-22); legislators and even executives increased their salaries and allowances at will (e.g. within 9 months in 1980, federal legislators obtained as salaries and allowances N44,309,300) (Falola & Ihonvbere 1985: 108-109).

The story from the federal agencies, as revealed by Forrest (1993: 85-86), was the same if not worse: Customs department is generally regarded as a very corrupt institution; N53 million was unaccounted for at Nigerian External Telecommunications; N43 million at the Federal Housing Scheme got missing; Federal Mortgage Bank was rendered impotent as a result of a systematic plundering and looting of its treasury by its board members acting in concert; officials of the National Youth Service Corps (NYSC) siphoned off over N16 million;¹⁷ a Central Bank foreign exchange manager unlawfully transferred \$24.1 million out of Nigeria in 1983; the London Manager of Nigerian National Supply Company stole £1.9 million between April 1979 and December 1980; and renegotiation of the Jaguar jet contract with British Aerospace saved N30 million in kickbacks. State-owned banks were virtually crippled as loans were collected with no security or any repayment schedule. For instance, the Rivers state owned bank had bad and doubtful debts of N172.9 million that had to be written off out of a total of N248.8 million outstanding. Bank of the North, owned by the Northern states, also had bad and doubtful debts worth N131 million (ibid: 83).

¹⁷ In addition to overshooting its limit by a staggering N100 million through the Inter Bank Adjustment Facility (through which they had access to money from CBN irrespective of their balance provided it was within budgetary limits), the NYSC became a place where kickback was a 'rule'. For instance, in giving the NYSC Director-General (an army colonel) an 88-year jail term, the Military Tribunal headed by Brig. Paul Omu said: if the Colonel had diligently managed the funds of the federal government entrusted into his care, he would have done himself credit. Instead, he allowed himself to be carried away ... by joining the get-rich-quick. By October 1983, the dimension of fraud in the NYSC had turned into a landslide...We take note of the fact that the convict had voluntarily surrendered the various sums of money involved ...Even so, the tribunal cannot lose sight of the fact that [he] grossly abused his office and corruptly enriched himself. We are therefore, duty-bound to give him the punishment he deserves" (in Agedah 1993: 54).

Achebe (1984: 39-40) also tells us two mind-boggling stories of corruption during the Second Republic. One was reported by the *National Concord* of 16 May 1983 where the Federal Minister of Communications, Mr. Audu Ogbe, disclosed that in the Department of Posts and Telegraphs of the Ministry, the Federal Government was losing N50 million every month as salaries to non-existent workers. The other story was carried by the *Daily Times* of the same date and it was on fake “Nigerian importers who having applied for and obtained scarce foreign exchange from the Central Bank ostensibly to pay for raw materials overseas, leave the money in their banks abroad and ship to Lagos containers of mud and sand!”

Achebe was therefore right when he said that corruption in Nigeria had passed an alarming rate and entered a fatal stage in reply to a statement credited to President Shagari that there was corruption in Nigeria but it had not yet reached alarming proportions (ibid: 38, 37). It was while the country was teetering into the brink of collapse due to corruption and its leaders playing the ostrich that elections were conducted in 1983 and the same Shagari government was declared re-elected.¹⁸

But three months into Shagari’s second term, the military seized power. Unsurprisingly, corruption and its adverse effects on development was one of the major grounds for the coup. Announcing the coup in a nationwide broadcast on the 31st December 1983, Brigadier Sani Abacha described the Shagari regime as “inept and corrupt”. He stated further that:

Our economy has been hopelessly mismanaged. We have become a debtor and beggar-nation. There is inadequacy of food at reasonable prices for our people who are now fed up with endless announcements of importation of foodstuffs. Health services are in shambles as our hospitals are reduced to mere consulting clinics, without drugs, water and equipment. Our educational system is deteriorating at an alarming rate. Unemployment figures, including the graduates, have reached embarrassing and unacceptable proportions. In some states, workers are being owed salary arrears of eight to 12 months, and in others there are threats of salary cuts, yet

¹⁸ Shagari was sworn in as the President for a second term of 4 years on 1st October 1983. The elections were however alleged to have been rigged by the ruling party, National Party of Nigeria (NPN).

our leaders revel in squandermania, corruption and indiscipline, continue to proliferate public appointments in complete disregard of our stark economic realities (in Falola & Ihonvbere 1985: 229-230).

In his speeches which followed,¹⁹ the Head of State, Major General Muhammadu Buhari, reiterated the above points.²⁰ He stressed that the government had failed to provide even minimum good government and was unable to deal with fraudulent acts, arson at public buildings, corruption, indiscipline, smuggling, etc. He said legislators “were in no position to check the drift of the executive since where they were not active collaborators, they were pre-occupied with other things of no benefit to the people they represented.”²¹ General Buhari made it clear that his was going to be a corrective government promising that “corrupt officials and their agents would be brought to book.”²²

The regime kept to its promise. It set up various Special Military Tribunals at both the federal and state levels to try officials suspected of corrupt practices under the Recovery of Public Property (Special Military Tribunals) Decree.²³ The Tribunals made shocking findings. Public officers across the country were found guilty of one corrupt practice or another. Decisions were mainly jail terms and forfeiture of monies or assets to the Government. The following Table 4.3 shows the details of some of the decisions at State level:

¹⁹ I.e. his maiden broadcast to the nation on January 1, 1984 and his address to a World Press Conference in Lagos on January 5 1984.

²⁰ For instance, in the maiden broadcast, he said “while corruption and indiscipline had been associated with our state of underdevelopment, these twin evils in our politics have attained unprecedented height over the past four years. The corrupt, inept and insensitive leadership in the last four years has been the source of immorality and impropriety in our society, since what happens in any society is largely a reflection of the leadership of that society.” See *West Africa* of 9 January 1984, pp. 56-7 for a reproduction of the maiden address.

²¹ Address to a World Press Conference, Lagos, 5 January 1984.

²² Maiden broadcast of January 1 1984.

²³ No. 3 of 1984. Investigations at state levels came first. That of federal ministers and the Federal Electoral Commission (FEDECO) did not start until 1985. President Shagari was not investigated at all. The toughness of the Buhari regime on corruption was hardly surprising because he was part of the Murtala regime as Governor of North-Eastern State and later as Federal Commissioner for Petroleum and Energy.

Table 4.3: Public Officers Convicted for Corruption

Name of Convict	Nature of offence	Decision of Tribunal
1. Mr. Victor I. Masi	Corrupt Enrichment	21 year jail; forfeit house in Omoku and N1,050,000
2. Simon C. Nwokomah	Corrupt Enrichment	21 year jail; forfeit N655,000
3. Col. Peter K. Obasa	Corrupt Enrichment	22 year jail; forfeit N7,233,637.24 and £47,000
4. Raymond O. Fernandez	Corrupt Enrichment, running private business	21 year jail; forfeit N2,270,501 and shares in Brewery
5. Prof. G.A. Odenigwe	Corrupt Enrichment	10 year jail; forfeit N801,218
6. Oluwole A. Akanla	Corrupt Enrichment	10 year jail; forfeit \$362,600, £85,000
7. Prof. Ambrose Alli (ex-Gov.)	Corrupt Enrichment	22 year jail; refund N983,000
8. Augustine N. Omolaiye	Corrupt Enrichment	5 year jail; refund £100,000
9. Sam Otaniyen Iredia	Corrupt Enrichment	10 year jail; refund £300,000
10. Prince Julius Eweka	Corrupt Enrichment	21 year jail; refund N600,000
11. Alh. Adamu Atta (ex-Gov.)	Corruptly Spent N2m from Kwara State Security vote	21 year jail; pay N2m; each legislator refunds N40,000
12. Alh. S Bakinzuwo (ex-Gov.)	Personal Corrupt Enrichment	22 years jail; pay N100,000 alone; pay N100,000 jointly, forfeit N3,503,973.73
13. Abubakar Rimi (ex-Gov.)	Personal Corrupt Enrichment	22 year jail; refund N593,000
14. Dr. Garba Nadama (ex-Gov)	Personal Corrupt Enrichment	21 year jail; refund N860,000
15. Mr Aper Aku (ex-Gov.)	Engaging in Corrupt Practices	21 year jail; pay N206,479
16. Solomon D. Lar (ex-Gov.)	Personal Corrupt enrichment by spending Plateau's N32,891,000	22 year jail; assets to be investigated
17. Alh. Mohd A. Ibrahim (ex-Gov.)	Personal Corrupt Enrichment and enriching NPN	21 year jail; refund N280,000; NPN refunds N136,000
18. Abdu D/Tofa (ex-actg. Gov)	Personal Corrupt Enrichment	21 year jail; pay N265,000, N424,133
19. Chief Jim I. Nwobodo (ex-Gov.)	Personal Corrupt Enrichment and enriching NPP	22 year jail; refund N5,894,471.06, N2,089,998, N1m and N2,695
20. Dr. A.O. Okafor	Conspiracy, Misappropriating proceeds of sale of 1 m beer cartons for Imo State	22 year jail; forfeit N2,041,976
21. Amos Adenuga	Corrupt Enrichment	21 years; forfeit N2,467,457.06, hotel at Ogudu, houses and land at Idinia
22. Mr Wilberforce Juta	Causing distribution of public funds to Gongola legislators	21 year jail; legislators refund N300,000
23. Dr. O. Fawibe	Corrupt Enrichment	23 year jail; return \$5,623,054
24. Chief Bisi Onabanjo (ex-Gov.)	Corruptly Enriched UNP and company from donations	22 year jail; UPN forfeits N2.8m and N50,170.90
25. Chief Bisi Akande (ex-Gov.)	Corruptly Enriched UNP from Oyo State Contingency vote	20 year jail; UPN pays N598,400
26. Chief Melford Okilo (ex-Governor)	Corrupt Enrichment and operated foreign account	10 year jail
27. Chief Bola Ige (ex-Gov.)	Corruptly Enriched UNP from Oyo State Contingency vote	21 year jail; UPN pays N598,400
28. Alh. Abba M. Rimi	Gave N500,000 out of Kaduna Security Vote to legislators	5 year jail; recover N42,000 from legislators

Source: Federal Government Printer, Lagos.

It may be interesting to note that out of the 28 public officers convicted of corrupt practices in the table above, 14 were elected state Governors.²⁴ Although

²⁴ It was only Alhaji Abdu Dawakin Tofa who, as Deputy Governor, acted as the Governor of Kano State following the Governor's (Abubakar Rimi's) resignation in preparation for a 2nd contest in 1983.

some of the decisions had been varied by the Supreme Military Council (SMC),²⁵ and later by the Babangida administration following the recommendations of a Judicial Tribunal of Inquiry,²⁶ the cases show abuse of power of a large scale. The total amount of money (alone) involved in just these 28 cases is a staggering N42, 499,413; \$5,985,654; and £532,000! It was no wonder that the squandermania and profligacy of the Second Republic not only exhausted the increasing oil money, but also caused the nation's foreign debt to rise from N3 billion in 1979 to N21 billion in 1983. It was no wonder also that the perception of the public towards public officers was negative. One of the convicts, Sam Ikoku, narrated how on arrival at the Kiri-Kiri maximum prison inmates greeted them "with vociferous shouts and hand clapping" out of which could be clearly heard "welcome, oh fellow armed robbers" (Forrest 1993: 95).

In the cleansing exercise, Buhari did not spare his colleagues. He instituted a four man judicial panel to probe the affairs of the Ministry of Defence. Specifically, the panel was to ascertain the role played by any person or persons whether serving in the Army, Navy, Air Force or in the Ministry pertaining to the award of contracts for Defence construction project of N1 million and above between October 1, 1979 and December 31, 1983. Some senior officers in the regime feared indictment from the Defence probe and not long thereafter, a palace coup ousted Buhari and brought in Ibrahim Babangida. It is said that the coup may not be unconnected to the probe. In fact, it has been said that Babangida himself was "by all accounts...about to be indicted by his toppled colleagues of multitudinous acts of corruption and indiscipline (Osoba 1996).

iii. The Babangida Regime (1985-1993)

Babangida instituted a Judicial Tribunal of Inquiry headed by Justice Mohammed Bello to review, on request, the cases of persons convicted under the Recovery of Public Property (Special Military Tribunals) Decree. Out of 66

²⁵ For instance, Abubakar Rimi's and Aper Aku's jail terms were reduced to 10 years respectively and that of Mr. Wilberforce Jura was reduced to 5 years by the SMC.

²⁶ For instance, Babangida's government discharged and acquitted convicts like Bola Ige and Abba Musa Rimi, but banned them from participating in party politics for 10 years. We shall see details in Chapter 6.

cases of conviction reviewed, the Tribunal set aside 15 of which the FMG upheld 12 and gave various jail terms to 3 with the addition of a 10-year ban from holding public office and participating in party politics on all the 15 but two.²⁷ Six (6) cases got their jail terms either confirmed (as made by the Tribunal) or affirmed (as reviewed by the SMC) and the FMG reduced 4 and upheld 2. All other cases got their jail terms reduced by the Tribunal mainly within a range of 3-15 years,²⁸ and the FMG further reduced 21 and affirmed the others except one who got his term increased.²⁹ Consequently, some of the convicts got released immediately.³⁰ All the orders for the forfeiture or refund of monies or assets, except 3 which were set aside, were upheld by the Tribunal and FMG confirmed these verdicts except that it restored 2 of the set aside orders.³¹ In almost all cases, the FMG added a ban from holding public office and participating in party politics either for life or for a 10-year period.³²

In this instance, the Babangida regime showed clemency on the jail terms but insisted public funds or properties illegally acquired were either refunded or forfeited. In another instance however, it went down history lane and did almost the opposite. In March 1993, it promulgated two decrees regarding ill-gotten assets confiscated by the Murtala/Obasanjo regime. Under the Forfeiture of Assets (Release of Certain Forfeited Properties, etc.) Decree,³³ it returned assets to public officers which were forfeited to the government under Legal Notice No. 13 of 1977 and Legal Notice No. 33 of 1978 because according to the Babangida administration, they were improperly acquired. A similar Decree was

²⁷ Adamu Atta got a jail of 5 years, Dr Solomon Ayodele and Alhaji Grema Benisheikh got 2-year jail each. The exceptions in the ban were Mrs. V.A. Mbakwe and Dr Ayodele who got a ban for life.

²⁸ There were two exceptions: Leonard Umeh got a reduction from 21 years to 2 years; Moses Akinpelu from 2 years to 1 year.

²⁹ This convict was Dr. Garba Nadama, the ex-governor of Sokoto State who got jailed originally for 21 years and on another case life sentence. The review Tribunal reduced the sentence to 7 years but FMG increased it to 10 years.

³⁰ For instance Dr Solomon Ayodele, Isa Abubakar, J.A. Anemba and Alhaji Grema Benisheikh who got their jail terms reduced to 2 years were ordered to be released immediately.

³¹ The three forfeiture/refund orders set aside were Alhaji Auwal Ibrahim's refund order of N280,000; Sam Iredia's refund of £300,000; and Adamu Atta's refund of N2m and Kwara legislators' refund of N40,000 each. The FMG restored the last two.

³² The government stated that in coming to its decisions, it was guided by its commitment to respect for the fundamental human rights of all Nigerians, its firm belief in the rule of law, the promotion of a humane and just society and the pursuit of accountability and probity in public life" (FMG 1986).

³³ Decree No. 24 of 1993.

also promulgated for a similar purpose.³⁴ This measure has been described as ‘settlement’ which characterised the Babangida regime (Taiwo in Ayua & Guobadia 2001: 623).

With this ‘settlement’ attitude, it was no surprise that corruption became so pervasive during the Babangida era. It was carried out with such impunity that it was often thought that Babangida wanted to corrupt enough people so that nobody could speak about corruption or public accountability. The strategy was a success to some extent because through various opportunities created (like commissions, directorates, centres, task forces, etc. established with open-ended budgets), all sectors of the Nigerian elite got a fair share of the ‘national cake’ (Osoba 1996). A clear illustration was the Directorate of Food, Roads, and Rural Infrastructure meant to provide feeder roads, electricity, portable water and toilet facilities for rural dwellers. An estimated sum of N1.9 billion was sunk in this Directorate without any positive impact on the lives of the rural dwellers. The same thing goes to People’s Bank, Better Life for Rural Women (run by Babangida’s wife as First Lady),³⁵ National Directorate of Employment, MAMSER, and many other programmes. It has been estimated that Babangida wasted over N100 billion in such phantom projects (Maduagwu 2000).

Unlike previous Heads of State, Babangida is alleged not only to have condoned corruption, but rather to have encouraged it and to have participated in it directly. One notable case involving him directly was the mysterious ‘missing’ of some \$12.4 billion crude oil revenue generated during the Gulf War in the early 1990s. Despite this windfall, Babangida declared deficits of billions of Naira during the period. Although the 1994 Pius Okigbo Panel of Inquiry into the Central Bank’s Accounts did not return a verdict of guilt on the former President, it had not only discovered “a gross abuse of public trust and of payments that were surreptitiously and clandestinely done” (in Maduagwu 2000) but also revealed

³⁴ That was the Forfeiture of Assets (Release of Certain Forfeited Properties etc) Decree No. 50 of 1993

³⁵ This was an office unknown to the Constitution created ostensibly to empower rural women. It ended up being an avenue for siphoning public funds to the benefit of few at the top. Until a court injunction at the instance of a human rights activist, Chief Gani Fawehinmi, the office was funded directly from the Federation Account. After the injunction, it continued thriving on public funds from hidden sources.

that it was his subjugation of the Bank which made it possible for him to take the \$12.4 billion from the CBN account into a so-called Dedication Account which he used without being accountable to anyone (Osoba 1996).³⁶

Babangida's Second-in-Command, the Chief of General Staff (CGS), Vice-Admiral Augustus Aikhomu, had also been accused of being corrupt. For instance, one Alhaji Mohammed Bashir alleged that he had paid the sum of \$500,000 into the account of Aikhomu in Zurich in order to get his (Aikhomu's) cooperation in an oil deal. In its characteristic way, the government dismissed the issue as blackmail and even arrested and detained the complainant.

Corruption at the State level was rampant. Cases which stood out included that of a governor of Cross River State, a Navy officer. The Justice Dorothy Edem Commission of Inquiry established by Lt. Col. Ernest Attah (who succeeded the governor in question) indicted the governor for a dubious valuing of four state-owned oil-palm estates meant for privatisation.³⁷ While they were sold off at N4.8 million, N2.96 million, N5.62 million, and N1.3 million respectively, the Commission reported that they should have been sold at N12.6 million, N6.1 million, N11.38 million, and N4.73 million respectively. Thus the state had lost a total of N20.13 million in this scam. No wonder the Commission noted that the privatisation exercise was shrouded in "utter secrecy and the proceeds salted away in private accounts" (in Agedah 1993: 41). The Commission also found that the Accountant-General could not "properly account for a whopping sum of N7.8 million meant for the state government" (ibid: 42). The same governor was indicted by the Justice Emmanuel Effanga Commission of Inquiry for paying mobilisation fees totalling about N90 million on some 20 contracts for which work was not done. Many contractors were made to refund sums ranging from N500, 000 to N3 million (ibid: 41-42).³⁸ It is interesting to note that his punishment was removal as governor and retirement from service only.

³⁶ In his 1988 budget, Babangida announced the transfer of the CBN to the office of the President and the CBN governor was obliged to report directly to the President and not the Bank's Board of Directors as is customary. He also promulgated CBN Decree 1991 by virtue of which his control of the Bank became complete.

³⁷ The four oil-palm estates were Kwa Falls, Boki, Ibiae, and Nsadop.

³⁸ This second case was carried in the *African Concord* of 20 August 1990.

One other governor who had several allegations of corrupt practices was that of Borno State, Col. Maina, who among other charges was said to have hosted the Prince and Princess of Wales for just 24 hours on 17 March 1990 with N9 million; allotted to himself N300, 000 as out-of-station allowance each time he attended Council of State meetings in Lagos; hosted the President for a six hour convocation visit with N2 million; used chartered flights from Kaduna to Lagos for official meetings; etc. He too was merely removed as governor and retired from service. When pressed by media executives to explain why the governor should not be formally tried and punished as was done to civilian governors, Vice-Admiral Aikhomu stated that the governor did not embezzle money, he only mismanaged it and there was difference between the two words (Agedah 1993: 42).

Whilst lots of monies were being lost due to these and similar corrupt practices, other monies were being siphoned into a chequered transition to civil rule programme. Initially scheduled to be completed within four years, Babangida's transition programme suffered many postponements and readjustments.³⁹ Not only did the government sponsor a constitution-making project, it established and funded two political parties which fielded candidates for elections into various executive and legislative offices. The transition was aborted by the cancellation of the June 1993 Presidential elections before results were fully declared. Babangida constituted an Interim National Government and "stepped aside". General Abacha took over power after 83 days of its existence and launched a fresh transition programme which also was abruptly terminated by his sudden death in June 1998. It has been estimated that these two failed transition programmes cost Nigeria more than N70 billion (Maduagwu 2000).

iv. The Abacha Regime (1993-1998)

In addition to the waste in the transition programme, the 5-year rule of General Abacha was also ridden with corruption in all sectors of the political economy.

³⁹ For these postponements and readjustments, a work on the transition was aptly titled "*Transition Without End: Nigerian Politics and Civil Society Under Babangida*". It was edited by Diamond, L. et al (1997), and published by Lynne Rienner Publishers, Inc., Boulder, London.

One good example was the case of the Ajaokuta Steel Complex debt buyback scam involving two former Ministers (of Finance and Power & Steel respectively), Chief Anthony Ani and Alhaji Bashir Dalhatu. Prior to official revelations, Chief Ani unilaterally and publicly absolved himself of any impropriety claiming to have helped Nigeria save money. But later, government uncovered evidence that he in collaboration with Alhaji Dalhatu had actually stashed away about \$2 billion! The latter too claimed to be innocent vide an affidavit published in *The Guardian* of March 27, 1999 (Owasanoye in Ayua & Guobadia 2001: 589-590).

Recently, Abacha's oil Minister, Dan Etete, was sentenced in absentia by a French court to a 3-year jail and a fine of 300,000 Euros for money laundering. He was convicted for using 15 million Euros in funds obtained fraudulently to buy properties in 1999 and 2000. The properties include a chateau in northwest France, a Paris apartment, and a luxury villa in the chic Paris suburb of Neuilly (*Daily Trust*⁴⁰ 8/11/07).

There was a repeat of abysses into which public funds were sunk in the name of the people of Nigeria during the Abacha regime. One such abyss was his wife's (as First Lady also) Family Support Programme (FSP) and its sister Family Economic Advancement Programme (FEAP). According to the *Tell* magazine of 3 August 1998, FSP gulped over N10 billion from the national resources at a time when the government was retrenching hapless civil servants nation-wide. The Petroleum Trust Fund (PTF) established by Abacha to use excess crude oil money for development had proved to be different because it carried out visible development projects across the country. Yet the organisation did not escape the dubious hands of corrupt people. Dr Haroun Adamu's interim report on the PTF disclosed that about N135 billion had been squandered possibly through over-invoicing, over-supplies, supplying expired materials and blatant thievery (Maduagwu 2000).

⁴⁰ *Daily Trust* is a newspaper published in Nigeria. It can be accessed at <http://www.dailytrust.com/>.

Another stunning revelation of depletion of the nation's resources was the "Abacha Loot" as revealed by the Obasanjo regime. It has been said that the Abacha family had deposited large amount of money in foreign accounts out of what they looted from the Nigerian treasury. The Obasanjo government sought to strike a deal with them on the sharing of the loot. Howsoever that deal ended, it has been confirmed that following an authorisation by the Federal Supreme Court of Switzerland on February 7, 2005, the government of Switzerland repatriated to Nigeria a total amount equivalent to \$505.5 million (equivalent to N65 billion) of funds deposited by the Abacha family in Switzerland. According to a report prepared by the World Bank with cooperation from the Nigerian Federal Ministry of Finance, "The actual repatriation took place in two tranches – in September and November of 2005 (US\$461.3 million) and (mostly⁴¹) in the 1st quarter of 2006 (\$44.1 million)" (World Bank 2006).

At the Sixth National Seminar on Economic Crimes organised by the EFCC in Abuja in November 2007, the Executive Director United Nations Office on Drugs and Crime, Dr Antonio Maria Costa, disclosed that General Abacha alone stole the equivalent of two to three per cent of Nigeria's Gross Domestic Product (GDP) for every year within his 5-year rule as Head of State (*Leadership*⁴² 14/11/07).

This is indeed a puzzling revelation of loot. But there is more to it. It was Abacha's sudden death and the accession to power of Olusegun Obasanjo (a vindictive victim of Abacha's harsh rule⁴³) that made possible the disclosure of this loot. Had he been alive, Nigerians might not have heard of the loot. Surviving Heads of State/Presidents who may have done worse than Abacha have not suffered a similar fate and are still walking free as 'respected statesmen'. One such 'statesman' is the same Obasanjo who exposed Abacha.

⁴¹ The last transfer of \$5.2 million was made in August 2006.

⁴² *Leadership* is a newspaper published in Nigeria. It can be accessed at <http://www.leadershipnigeria.com>.

⁴³ Abacha's government convicted Obasanjo for a hand in a coup plot. His death sentence was converted to life imprisonment after pleas from various quarters. He was in jail when Abacha died in power. The Abdussalami regime released him and he was made to contest for the Presidency in a hurried transition programme. He won the elections and was sworn in on 29 May 1999 as President.

v. Obasanjo Administration (1999-2007)

In his inaugural address on 29 May 1999, President Obasanjo stated that: “Corruption, the greatest single bane of our society today, will be tackled head-on... No society can achieve its full potential if it allows corruption to become the full-blown cancer it has in Nigeria ... There will be no sacred cows...Nobody, no matter who and where, will be allowed to get away with the breach or perpetration of corruption and evil.” To match words with action, the first bill he sent to the legislature was the anti-corruption law establishing the Independent Corrupt Practices Commission (ICPC).⁴⁴ Much later, he established the Economic and Financial Crimes Commission (EFCC).⁴⁵

It was through the EFCC that he exposed corruption at the Petroleum Technology Development Fund (PTDF) involving the Vice-President, Atiku Abubakar.⁴⁶ Based on an EFCC report which indicted the Vice President and some PTDF staff, Obasanjo set up an Administrative Panel of Inquiry under Ignatius Ayua. The Panel’s report which also indicted him was passed unto the Senate. The Senate constituted an adhoc committee headed by Senator Victor Ndoma-Egba to look at the issue. In its report, the committee found that public funds to the tune of \$125 million and \$20 million meant for certain projects at the PTDF had been diverted to deposits in banks, and some of them fraudulently converted to unrecoverable loans to certain companies - NDTV, Mofas Shipping Co. Ltd, and Transvari Services Ltd. The \$20 million was approved for PTDF in October 2003 by the Vice-President without reference to the Federal Executive Council. There was also no input of the President or that of his Special Adviser on Petroleum and Energy, Rilwanu Lukman (Report of the Committee 2007).

The committee found that the Vice President had “abused his office by aiding and abetting the fraudulent conversion of public funds to loans”. Two former

⁴⁴ The bill was not enacted into an Act until 2000. The Act is titled the Independent Corrupt Practices (and Other Related Offences) Commission Act, No. 5 of 2000.

⁴⁵ EFCC was established under the Economic and Financial Crimes Commission Act, 2003.

⁴⁶ At the twilight of their second term, President Obasanjo and Vice-President Atiku Abubakar drifted apart leading to accusations and counter-accusations from both sides. These brought to fore so many issues of national interest some of which we shall discuss in this chapter.

Executive Secretaries of the PTDF were also found to have abused their office. One had already returned to EFCC N200 million and the other N49 million and six vehicles. The president himself, who the vice president accused of using PTDF funds for his third term agenda (the Committee did not make such finding) was also found to have “acted in disregard of the law” for approving the establishment of African Institute of Science and Technology, incorporation of Galaxy Backbone Plc, and purchase of computers for civil servants because these were not within the mandate of PTDF (ibid).

This does not mean that Obasanjo was clean. Early in his office, he was alleged to have bribed Senators in the National Assembly to change Senate President twice. He also allegedly gave a N4 million bribe to the Members of the House of Representatives to influence the removal of the Speaker. The money was publicly displayed in the House and Obasanjo remained defenceless.⁴⁷

Recent media revelations indicate that Obasanjo was more corrupt than he appeared to be. For instance, *The News* magazine of May 28, 2007 reveals how Obasanjo, who hardly had a bank balance of N20, 000 in 1999 when he was drafted into party politics, turned to be one of the richest men in Africa within eight years of his rule. His Ota farm was moribund in 1999 but it turned out to be so productive as to make an average of N30 million a month. Though the president’s spokesman, Uba Sani, had explained that the farm was rehabilitated from a loan of N2 billion, the challenge of the Atiku Campaign Organisation as to the source, conditions, collateral, etc. of the loan; or whether he solely took it from a N50 billion government agricultural fund remain unanswered. Not only that, if by 1999 he had farms only in Ota, Eruwa, and Mambila how come by 2007 he also got developed farms in Ibadan, Iseyin, Lanlate, Igbo Ora and Ibogun each of which boasting many Chinese experts?

What about other lands he acquired across the country like the one along MKO Abiola Stadium Abeokuta where his hilltop mansion is built; the 10,000 hectares

⁴⁷ Evans Enwerem and Dr Chuba Okadigbo were removed as Senate Presidents in succession at the instance of the Presidency as widely believed. The confirmed case of N4 million bribe to the Members of the House was to influence the removal of Ghali Umar Na’Abba as Speaker in Obasanjo’s 1st term.

for his oil palm estate, 5,000 hectares at Kwa Plantations, and the government oil palm nursery he took over all in Cross River State? Could Obasanjo justify resuscitating, at public expense, an abandoned federal government dam to service a land he leased from Jim Shina Farms for N250 million for 50 years near Iseyin, Oyo State; or influencing the construction of a road from his farm in Mfamosong to Ekongyanaku and the Calabar-Oban highway and the construction of a bridge over Ikpam River to link Ekuganaku?

If Second Republic politicians could be jailed for obtaining private donations for their political parties as a form of corruption,⁴⁸ one wonders why the case of Obasanjo should not be worse when as President he obtained from private individuals/companies and public officers large sums of money for his personal N7 billion Library project. The total donation of over N1.6 billion from private hands to the project during its launching on 14 May 2005 in Abeokuta⁴⁹ raises strong suspicion as to either state funds have been diverted in disguise or the donors have been wrongly feeding fat from the state at the expense of Nigerians legitimately yearning for development.⁵⁰ More disturbing is the 'donation', without compunction, of N100 million of public funds by each of the 36 state governments of the federation and \$1 million from the Nigerian Ports Authority.

Obasanjo is also said to have owned shares in Transcorp worth N200 million and he had influenced many concessions the company got in privatisation of public enterprises bids.⁵¹ In October 2005, the company bought 51 per cent stake in Hilton Abuja⁵² for N13 billion. While government sold 51 per cent equity in Nitel (a national telecoms carrier) to International Investments

⁴⁸ See Table 4.3 herein particularly No. 24.

⁴⁹ Big private donations included Chief Mike Adenuga (Globacom Chairman), N250m; Alhaji Aliko Dangote (Dangote Group president), N211.6m; Chief Sunny Odogwu (Chairman Odogwu Group of Companies), N200m; private sector, N622m; Chief Arisekola Alao, N100m; Olorogun Michael Ibru (Chairman Oceanic Bank), N50m; Chief Sam Nwake, N20m; Dapo Abiodun, N10m; Oba Okunade Sijuwade, N10m; Dr Bayo Kuku, N5m; Chief Earnest Shonekan, N1m; Ogun State Obas, N5m; all aids of Obasanjo, N2m; Peoples Democratic Party (PDP), N25m; and Obasanjo Holdings N100m (*The News* May 2007).

⁵⁰ It is not a secret that Bluestar Consortium which bought the Kaduna and Portharcourt Refineries is owned by Alh. Aliko Dangote, one of the donors. The sale has been reversed by the Yar'adua government because the Refineries were grossly undervalued (*The News* May 2007).

⁵¹ Obasanjo claimed he had divested the shares. However, the Chairman of Transcorp's Board of Directors, Dr. Ndi Okereke-Onyiuke told the National Assembly that it is a blind trust which is held for Obasanjo Holdings, the parent company of all Obasanjo's businesses.

⁵² The 5-star hotel consequently got its name changed to Transcorp Hilton.

(London) Ltd (IILL) in 2001 at \$1.1 billion which IILL could not raise, Transcorp bought 75 per cent stake in the same Nitel for \$750 million in July 2006. Transcorp also got concession to build an independent power plant; was granted licence to build a N33.25 billion refinery in Lagos with a capacity to produce 400, 000 barrels of oil per day. It also acquired four oil blocs vide Oil Prospecting Licences (OPLs) 218, 219, 209 and 220 on 21 July 2005.⁵³

The corruption did not stop at the Presidency. It permeated all levels of government. For instance, the governor of Plateau State, Joshua Dariye, was arrested in London in 2004 and found with £80,000 cash and over £2 million in his bank account in London (*The Guardian* 3/9/04).⁵⁴ Before an investigating Administrative Panel in Plateau State, a police officer attached to EFCC, Mr Sunday Musa, disclosed that Dariye used a fictitious company, Ebenezar Retnaan Ventures, “to clear cheques meant for the state into his off-shore accounts” (*Daily Triumph*⁵⁵ 13/11/06). Similarly, the governor of Bayelsa State, D.S.P. Alamiyeseigha, was arrested in London in September 2005 and charged with money laundering. Metropolitan Police said they found £1 million and 70,000 Euros in his possession. He is said to own estate in London worth £10 million. He allegedly disguised as a woman and left London while trial was going on (*The Punch*⁵⁶ 17/9/05; *Thisday*⁵⁷ 16/9/05).⁵⁸

In an interview with the *Daily Trust* of 7 October, 2003, EFCC’s former boss, Nuhu Ribadu, disclosed that they had substantial evidence which showed corruption by public officers among which was evidence that 20 of serving governors owned choice houses in various parts of London alone. It was no wonder then at the end of term of office for Obasanjo and most of the governors on May 29 2007 EFCC arrested and arraigned some of the governors for various

⁵³ *The News* magazine of 1st October 2007 (pages 20-29) also covers the Transcorp issue in addition to other “dubious deals” of the Obasanjo years.

⁵⁴ He was arraigned before a court in London and was granted bail. He jumped the bail and returned to Nigeria. However, he has been arraigned later by EFCC in Nigeria.

⁵⁵ *Daily Triumph* is a newspaper published in Nigeria. It can be accessed at <http://www.triumphnewspapers.com/>.

⁵⁶ *Punch* is a newspaper published in Nigeria. It can be accessed at <http://www.punchng.com/>.

⁵⁷ *Thisday* is a newspaper published in Nigeria. It can be accessed at <http://www.thisdayonline.com/>.

⁵⁸ Later on 26 July 2006, Alamiyeseigha pleaded guilty to six corruption charges before a court in Nigeria and was sentenced to 2 years imprisonment.

corruption charges.⁵⁹ These governors include Rev. Jolly Nyame of Taraba State, arraigned before an FCT Abuja High Court on a 41-count charge of embezzling public funds totalling N1.637 billion; Orji Kalu of Abia State before a Federal High Court Abuja for corrupt charges involving N3 billion;⁶⁰ Saminu Turaki of Jigawa State before Federal High Court Abuja on a 32-count corruption charge to the tune of N36 billion;⁶¹ Joshua Dariye of Plateau State before an FCT High Court; James Ibori of Delta State before the Federal High Court Kaduna;⁶² Lucky Igbenedion of Edo State was recently convicted by a Federal High Court in Enugu; and Alamieyeseigha of Bayelsa State had already been given a 2-year jail following his plea of guilt before a court in Nigeria after his impeachment by the State legislature.

Table payment of June and July 2007 salaries alone in Yobe state saved over N100 million which used to be lost to ghost workers (*Thisday* Editorial 23/8/07).⁶³ A former Inspector General of Police, Tafa Balogun, robbed the nation of money to the tune of over N17 billion. Yet he bagged only a 6-months jail sentence.

In November 2007, a former senior executive of Willbros Group Inc., a Houston-based oil company, (Jason Steph) pleaded guilty to paying \$6 million in bribes in 2003 to a senior member of the executive arm of government, the ruling People's Democratic Party, and officials of the NNPC; and \$1.8 in bribes to Nigerian government officials in 2005. The bribes were in order to secure for the company a \$387 million (about N40 billion) contract to build the Eastern Gas Gathering System pipeline for a joint venture controlled by the NNPC

⁵⁹ By section 308 of the 1999 Constitution, the President and his vice, governors and their deputies enjoy immunity against civil or criminal proceedings (except as nominal parties) while they are in office. Their exits from office saw the end of the immunity which EFCC had been waiting for with prepared dossiers against those alleged to have been corrupt.

⁶⁰ Kalu's charge is numbered FHC/ABJ/CR/56/07, dated 11th June, 2007 and signed by Chile Okoroma of EFCC's Legal and Prosecution Unit.

⁶¹ Turaki's charge is dated 13th July, 2007 and is signed by Isa Bature Gafai of EFCC's Legal and Prosecution Unit.

⁶² James Ibori is said to have purchased the operations and assets of Willbros International in Nigeria for \$155 million (*Governance Watch* November 2007: 1).

⁶³ The Editorial erroneously said N1 billion was saved. It was an error because the paper itself said the new government of Mamman Ali discovered a rise in salaries from N300 million in 1999 to N686 million in June 2007.

(*Leadership* 7/11/07).⁶⁴ Earlier on October 4, 2007, a court in Munich, Germany indicted a top Siemens Manager, Reinhard Siekaczek, of paying more than 10 million Euros between 2001 and 2004 as bribes to former Nigeria's Communications Ministers, a Senator, an immigration officer, and the ruling People's Democratic Party in order to win lucrative telecommunications equipment contracts. The Ministers are said to be Cornelius Adebayo, Haruna Elewi, Tajudeen Olanrewaju and Bello Mohammed; while the Senator was Jibril Aminu (*Daily Trust* 17/11/07; *Governance Watch* Nov. 2007: 1-2).

One level at which corruption is prevalent but largely underreported is the local government system. As we saw in chapter 3, the Constitution has made provision for the allocation of funds to the local governments from the Federation Account. Their duties include providing primary education and primary health care. However, much of the funds they receive generally get dwarfed by corrupt activities. A Human Rights Watch (2007) study carried on some local governments in Rivers State⁶⁵ found that the corruption is commonly carried out through big construction projects, broad and opaque items in budgets such as "security votes", "entertainment and hospitality", "special projects", "miscellaneous expenses", etc. The study found evidence of corruption in several sectors and it concluded that the situation mirrors most of the local governments in the state (ibid: 28-35, 3), and we shall add, in Nigeria.

For instance, the chairman of Opobo/Nkoro Local Government, Christopher Ogolo, is reported to have illegally awarded a N12 million (\$92,000) construction contracts to himself and another lucrative one to his brother

⁶⁴ There are speculations that the former Group Managing Director of NNPC, Funsho Kupolokun, may have benefited to the tune of \$150,000; Mr. Edward Daukoru, former Minister of State for Petroleum, \$30,000; Mr. Philips Chukwu formerly of National Petroleum Investment Management Services (NAPIMS), \$250,000; and one Gibson Okeke \$150,000 (*Governance Watch* November 2007: 1). Although the Minister for Justice, Michael Aondoakaa, promised to launch an investigation into this matter, nothing yet has been heard about it. Cases of this nature are common in the oil-rich Nigeria. For instance, a U.S. oil services company, Halliburton, said that in 2005 "improper payments" to Nigerian officials may have been made in order to secure a multibillion-dollar contract to build a liquefied natural gas plant in the 1990s (*Leadership* 7/11/07).

⁶⁵ Rivers State is the richest state in Nigeria. It is the largest oil-producer among the oil-producing Niger Delta states. It is, *ipso facto*, the recipient of the largest 13% derivative revenue pursuant to section 62 of the Constitution. Its annual budget is larger than that of most West African countries with small population, e.g. it budgeted \$1.3 billion in 2006 (*Human Rights Watch* 2007: 3-4).

between 2005 and early 2006; billed the treasury for twice as much diesel fuel as he actually purchased for the running of electrical generators at an average cost of more than N4 million (\$30,000) per month; built a fish pond (in which no fish was seen) ostensibly to encourage small-scale aquaculture at N50 million (\$384,000); budgeted N7 million (\$53,800) for his travel in 2005 as against N3 million (\$23,000) capital budget for health; allocated for “Miscellaneous Expenses to his office N25.5 million as against the combined overhead and capital budgets for education of N21.9 million; and budgeted N36 million for “Security Vote” to his office which was almost equivalent to the entire health sector budget of N37, 655,293. On these and other corrupt practices, the chairman was removed from office by the state House of Assembly in August 2006 but no prosecution followed (ibid: 35-38).

Similarly, in Obio/Akpor Local Government, N125 million (\$961,000) was budgeted for the “upgrading/expansion and renovation” of health centres in 2005 and 2006 but no such work was carried out or even planned (ibid: 48). In Khana Local Government, the chairman, Kingsley Leh, received the sum of N1, 243,295,330 (\$9.56 million) between 2004 and 2005 but had nothing to show for it. There is evidence that much of this money had been squandered or outright stolen. In 2005 budget, he allocated to himself nearly N49 million (\$376,000) as salary and allowances which was nearly half the total amount allocated for the wages and allowances of 325 health workers;⁶⁶ allocations to his office and the legislative council totalled more than N200 million (\$1.54 million), nearly 20 per cent of the local government’s annual allocation (ibid: 55-56).

vi. Yar’Adua Administration (2007-)

The departure of Obasanjo and the inauguration of the Yar’adua government on May 29 2007 did not seem to herald the departure of corruption. Early incidents indicate that the government would have its own share of corruption scandals. Not long after the new National Assembly had settled down, a mind-boggling

⁶⁶ The total allocation for health workers salaries was N109, 099,468 including N49, 630,451 in allowances which for the most part had not been paid for several years.

corruption scandal rocked the leadership of the House of Representatives. The first woman Speaker of the House, Mrs Patricia Etteh, and her deputy, Babangida Nguroje, were alleged to have had a hand in an inflated contract, awarded without due process, for the renovation of their official residencies to the tune of N628 million! Revealingly, her predecessor, Aminu Masari, disclosed that he left the Speaker's residence in good condition and therefore did not need any renovation. The panel established by the House to investigate the matter, the Idoko Panel, indicted the Speaker and the Deputy and they had to vacate their offices after much pressure (*Leadership* 31/10/07). But they have not yet been tried. A press release signed by the Secretary of the Integrity Group (a group of Members within the House), Blessing Lewis, condemned statements credited to the Special Adviser (Media) to the Speaker, Funke Egbemode, denying that Mrs. Etteh was not indicted by the committee:

The report of the ad-hoc committee has clearly and loudly passed a verdict of guilt on Madam Speaker over the contract scam. The 10 conclusions of the report are each and every one a resounding indictment on Madam Speaker as the political head of the House of Representatives under whose authority and with whose involvement the horrendous wrongdoings as unearthed by the committee were perpetrated (*Thisday* 1/10/07).

The executive arm of government has also got its own share of the corruption scandal. Just recently, it was discovered that about N300 million has been lost to corruption in the Federal Ministry of Health. At a time when the health system is sick and bed-ridden, the money was said to represent 2007 budget surplus. While the President had directed that all unutilised funds be returned to the government treasury, officials at the Ministry decided to share the N300 million among themselves. Some top officials received as much as N40 million. The Chairperson of the Senate health Committee on Health and daughter of former President Obasanjo, Iyabo Obasanjo is said to have pocketed N10 million out of the surplus.

The norm in the ministries has been to appropriate unspent public funds for personal use as 'Christmas bonus'. The Minister of Health, Prof. Adenike Grange and the Minister of State for Health, Mr Gabriel Aduku, have resigned

from their offices. The Permanent Secretary (Prof Simon Ogamdi), the Director of Administration (Dr D. H. Oyedepo), a Chief Accountant (Abdulrahman Ambali), a Principal Administrative Officer (Mr. Donatus Iyang) and eight other officials in the Ministry have been suspended (*Punch* 26/3/08). The Ministers, the Permanent Secretary, the Director of Administration and other officials including Iyabo Obasanjo (who was at large) were later arraigned by the EFCC before a Federal Capital Territory High Court, Abuja on charges relating to this corruption (*Thisday* 9/4/08).

It may be premature to judge the Yar'Adua government because it has been in office for barely two years. Time will tell whether it did business as usual or it attempted to control corruption. But the fact that it is during this new administration that former governors were arraigned on various corruption charges despite being former colleagues to the President;⁶⁷ and the fact that the government did not intervene in the House scandal to save Mrs Etteh despite being of the ruling party (PDP), it could be argued that the government had not started badly. But its passivity on the widespread allegations of corruption against President Obasanjo is sending fears that corruption cannot be tackled in situations of selective justice.

4.4 Impact of Corruption on Development

We have seen in Chapter 1 that one of the consequences of corruption is hampering development. We have even cited examples from some African countries. Here, we shall be focusing on the impact of corruption on development in Nigeria mainly. It has been acknowledged that corruption has negatively impacted on the country's development. For instance, Vision 2010 states that although corruption is a world-wide phenomenon, its level in Nigeria has negatively impacted on the country's development and external image. Corruption appears to have become a way of doing things, though it is resented by a significant number of people who are hopeless in the face of weak and selective application of sanctions (Vision 2010 1997: 9, 58).

⁶⁷ The President is the immediate past Governor of Katsina State in Northern Nigeria where he served two 4-year terms consecutively (1999-2007).

Leakage of public funds as an effect of corruption in Nigeria is conspicuous. It is not known, and it may not be possible to know, exactly how much has so far leaked. As at 1984, “knowledgeable observers...estimated that as much as 60 percent of the wealth of [the] nation [was] regularly consumed by corruption” (Achebe 1984: 40). This percentage is believed to have risen to 70 by 2002. According to the former EFCC Chairman, Nuhu Ribadu, about 70 percent of the nation’s income used to go to waste and corruption until 2004 when it dropped to about 40 per cent due to control on the central government (*The Boston Globe* 2004). The claimed reduction may not however be correct because he assumed that corruption was only prevalent at the state and not the central level during Obasanjo’s term. Events which unfolded after the departure of Obasanjo indicate that corruption existed also at the centre.

If the estimates of the percentage of the resources lost to corruption range between 40 and 70 per cent it would be reasonable to assume that more than half of the country’s resources have gone down the drain. This assumption is supported by the recent disclosure made by the Executive Director United Nations Office on Drugs and Crime, Dr Antonio Maria Costa, that before the return of democratic rule in 1999, past corrupt Nigerian leaders had stolen and stashed away in foreign banks about \$400 billion of the country’s wealth (*Leadership* 14/11/07)! This figure excludes what the leaders stashed within the country and the leakage caused by petty corruption.

It may make economic sense to argue that corruption may not necessarily be anti-developmental if the money is kept in the country since it would trickle down to the people in various ways such as bank loans, job creation through industrialisation, etc. But the fact that this huge sum of stolen public money (i.e. \$400 billion) is stashed away in foreign banks suggests that such argument cannot stand. The figure is not, nor does the source claim that it is, exhaustive. According to recent World Bank estimates, approximately 80 percent of Nigeria’s oil revenues are concentrated in the hands of 1 percent of the population, and some 70 percent of the country’s wealth is held abroad (Khakee 2008). It is safe to conclude therefore that corruption has cost Nigeria about the

equivalent of its total earnings from oil exports between 1970 and 2007 which we put in Chapter 2 as about \$572 billion.

The amount of developmental work some of these monies could do is amazing. On the Posts and Telegraphs Department scam during the Second Republic (already mentioned), for instance, Achebe (1984: 39) estimates that the yearly loss therefrom (N600 million) could build two additional international airports like the Murtala Mohammed Airport Lagos; or buy three refineries; or build a dual express motorway from Lagos to Kaduna;⁶⁸ or pay the salary of 10,000 workers on grade level 01 for forty years!

Similarly, it will be shocking to learn that the total amount of money which 28 public officers of the Second Republic only were made to forfeit by the Buhari Tribunals (N42, 499,413; \$5,985,654; and £532,000) as we saw in Table 4.3 represented more than what the Federal Government projected for secondary education per year;⁶⁹ more than twice the amount it allocated for adult education for five years;⁷⁰ and about 1/6 of what the whole states of the federation projected for the health sector in a year.⁷¹

A clear case of corruption as antithetical to development could be seen in how the repatriated Abacha loot of N65 billion from Switzerland were utilised in five target sectors of the Millennium Development Goals (MDG) by the Obasanjo regime in cooperation with the World Bank. The money was allocated to the power sector (to generate power for economic activities), works (to build priority economic roads), health, basic and secondary education, and water. As a matter of fact, the money, which was about the cost of the 2003 MDG federal budget, was largely responsible for the huge increase in capital expenditure in the 2004 MDG federal budget. In a letter to the Ambassador of Switzerland to Nigeria dated January 9, 2005, the Federal Ministry of Finance explained that

⁶⁸ The distance between these two cities is 635 kilometres.

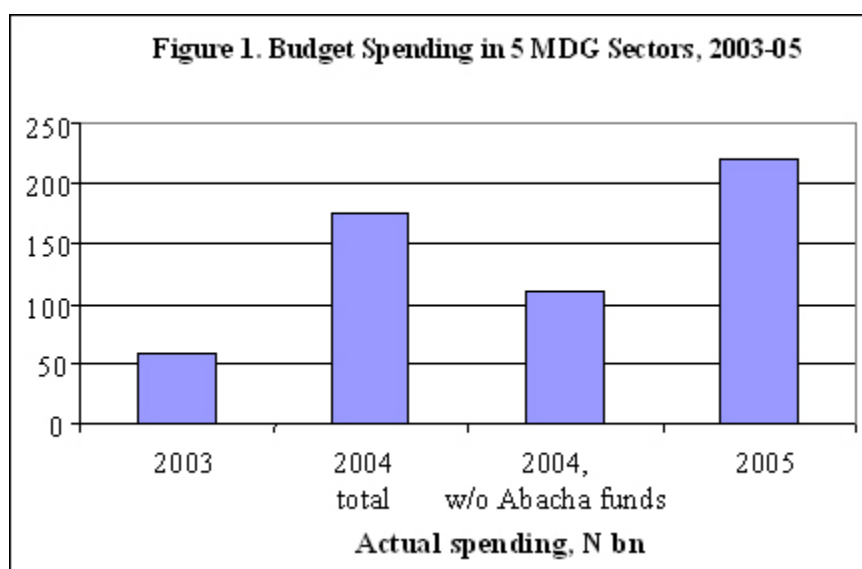
⁶⁹ Under the Fourth National Development Plan (1981-1985), out of its total capital expenditure projection of N2.45b on education, the Federal Government allocated N202.680m for secondary education for the 5 year period (Fourth Plan: 259).

⁷⁰ The Federal allocation to adult education for the whole 5 years was N19m (Fourth Plan: 260).

⁷¹ The whole 19 States projected a total of N1573.576m on the health sector for the 5 year period (Fourth Plan: 280).

the money was programmed into and utilised in the 2004 budget the major objective of which was moving the country towards achieving the MDG. And that this was done partly in anticipation of the repatriated funds and in line with National Economic Empowerment and Development Strategy (NEEDS) programme (World Bank 2006). The government sustained the trend of expansive budget spending in the five sectors in the 2005 budget.

Figure 1 below shows a considerable difference between the 2003 and 2004 budgets and how the trend was maintained in 2005. The first 2004 bar included the repatriated funds while the second 2004 bar shows how the expenditure stood without the funds.



Source: World Bank 2006

And the following Table 4.4 shows how the allocation was made among the five Millennium Development Goals (MDG) sectors:

Table 4.4: Utilisation of Repatriated Abacha Loot

No.	Sector	Allocation, based on preliminary information (NGN bn)	Funds Accounted for via Projects List (NGN bn)
1.	Power o/w: Rural Electrification Power Generation	21.70	21.94 8.10 13.84
2.	Works Priority Economic Roads	18.60	17.06
3.	Health o/w: Primary Health Care Vaccination Programs	10.83	10.84 2.02 8.82
4.	Basic and Secondary Education o/w: Primary Schools Junior Secondary Schools Federal Govt Colleges	7.74	7.79 3.16 3.40 1.23
5.	Water Potable Water & Rural Irrigation	6.20	7.53
	TOTALS	65.07	65.16

Source: World Bank 2006.

An interesting analogy could be drawn on the amount involved in the recent scandal involving the Speaker of the House of Representative and her Deputy. While N628 million contract was awarded for the unnecessary renovation of the official residencies of the duo, a similar amount (N686 million [about Euro 3.9 million]) was being used by the European Union to provide water and sanitation to twelve (12) towns and communities in Enugu and Jigawa States.⁷² The Scheme was to be executed through Water Aid, an international NGO under the theme “Closing the Gap: Improving Water Supply and Sanitation Provision for Small Towns in Nigeria”. It was expected that about 410,000 people would benefit from the scheme out of which 30,000 were considered to be in vulnerable situations (*Thisday* 26/9/07).⁷³ Thus while foreign donors help Nigeria to move closer to achieving the MDG, some of its leaders work to distance it far away from such objective. Looking at cases like this one, one would agree with Osoba (1996) when he stated that:

⁷² Three Local Government Areas would benefit from the scheme in each of the two states. In Jigawa, the Local Governments are Gumel, Suletankarkar and Maigatari. In Enugu, they are Nkanu East, Udenu and Igbo-Etiti.

⁷³ This analogy was contained in a piece titled “Compare N686m with N628m” by Kayode Komolafe on *Thisday*’s Back Page Extra of 26/9/07.

The fraudulent accumulation process has resulted, over time, in the progressive and phenomenal enrichment of Nigerian rulers (both civilian and military), the emptying of the national treasury and the indebtedness of the country almost to the point of bankruptcy: hence the critical dearth of resources for investment on the social, economic and overall cultural development of the masses of our people.

Corruption not only eats up the public funds locally generated like the oil money, it does not also spare funds provided by international development institutions for development projects. For instance, the *Newswatch* magazine revealed that “in about 18 years, the African Development Bank has poured N258 billion loans into Nigeria for various social service projects. Nearly all that money has gone down the drain” (in Gbefwi in Ayua & Guobadia 2001: 640-641).

Where it is prevalent like in Nigeria, corruption lowers work morale among public officials and instead of working hard to build the nation, they indulge in corrupt activities thereby impeding development. Honesty and living within one’s legitimate earnings become lost virtues. One could not agree more with NEEDS when it says that: “Nigeria’s legacy of mismanagement and corrupt governance has encouraged many people to seek ways of sharing the national cake instead of helping bake it” (NEEDS 2003: xiv).

The argument that corruption has the effect of stymieing the development of a nation is also re-echoed by TI as follows:

Corruption aggravates poverty. Surveys of the very poor in developing countries point to corruption as having a significant and detrimental impact on their lives...Corruption not only reduces the net income of the poor but also wrecks programmes related to their basic needs, from sanitation to education to healthcare. It results in the misallocation of resources to the detriment of poverty reduction programmes...The attainment of the Millennium Development Goals is put at risk unless corruption is tackled as an integral part of poverty reduction strategies... The growing global consensus on the importance of corruption as an impediment to development is reflected in the ratification of the UN Convention Against Corruption (UNCAC) (TI 2007).

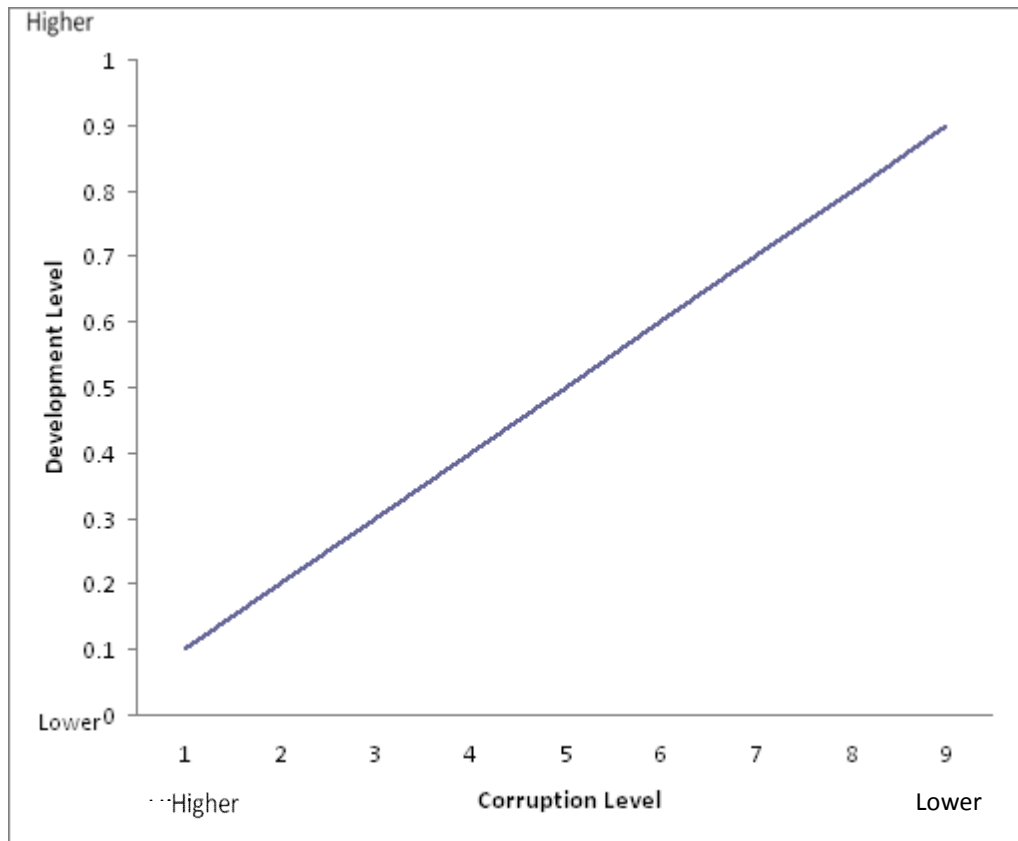
Countries that are highly corrupt are bound to have their level of human development very low. Conversely, countries with low level of corruption

record a high level of human development provided there are available resources. Comparative research has shown that “reducing corruption from Indonesia’s level to South Korea’s in 1997-8 would have produced between a twofold and a four-fold increase in per capita incomes and decrease in infant mortality, as well as improvement in literacy of between 15 and 25 percentage points” (Kaufmann *et al* 2000 in Smith 2007: 180). That there is a strong correlation between human development as measured by UNDP’s Human Development Index (HDI) and levels of corruption is something generally agreed to: “as levels of corruption increase HDI levels decrease more and more precipitously” (Johnston 2002 in Smith 2007: 180).

A look at UNDP’s Human Development Index (HDI) along side TI’s Corruption Perception Index (CPI) would prove the above point. Countries topping the HDI list are the least corrupt under the CPI. As could be seen in Table 4.2, Botswana, Malaysia, Ghana, or even Venezuela and Indonesia have better corruption records than Nigeria and it explains why they have been able to achieve Medium Human Development Index (as we saw in chapter 2) leaving Nigeria at the bottom of the last category, the Low Human Development Index. Borrowing from the law of demand and supply in economics, we could formulate a law of development in the following terms, corruption and development standing in place of price and demand respectively:⁷⁴ the higher the corruption, the lower the development; the lower the corruption, the higher the development. The following chart depicts this law:

⁷⁴ The law of demand in economics states that “the higher the price, the lower the quantity demanded; the lower the price, the higher the quantity demanded”.

Figure 2: Law of Development



4.5 Conclusion

One could write volumes on corruption in Nigeria and its impact on development. The cases presented herein and others which have come to light are just tips of the iceberg. For one case of corruption that leaks out in one government department, there might have been hundreds or more undetected. Each case of corruption means that money which might have been utilised for development has been siphoned off for personal gain.

Like his predecessor, President Umaru Yar'Adua has promised zero-tolerance on corruption. He has recognised that the level of the country's underdevelopment is a measure of its failure to optimise the use of its abundant natural resources. Having recognised this much, he made fight against corruption one of the 7-point agenda of his administration. At the Sixth National Seminar on Economic Crimes organised by the EFCC in Abuja in November

2007, he declared thus: “I vow before you this day that as President of this country, I will lead the fight against corruption. The fight against corruption is my fight” (*Leadership* 14/11/07). It is the position of this study that corruption is merely a symptom of a larger disease. For an effective fight against it, it is necessary that factors contributing to it are identified. Lack of rule of law in practice, we argue, is one such factor. The level of corruption as we have seen in the foregoing discussions is spurred by absence of rule of law in practice. I say “in practice” because I argue that the Nigerian Constitutions have made adequate rule of law provisions. I shall examine these provisions in the next chapter.

CHAPTER 5

RULE OF LAW UNDER THE NIGERIAN CONSTITUTIONS: AN ANALYTICAL OVERVIEW

5.1 Introduction

According to a former Chief Justice of Nigeria, Adetokunbo Ademola, “Rule of Law is not a Western idea, nor is it linked up with any economic or social system. As soon as you accept that man is governed by Law and not by whims of men, it is the Rule of Law. It may be under different forms from country to country, but it is based on principles; it is not an abstract notion” (International Commission of Jurists 1961: 86). In Chapter 1, I argued that though rule of law is an old and universal concept, it is not closed-ended. There are of course principles traditionally constituting it, and they could be found in legislation or constitutions for instance. Other principles could be added to the existing ones in order for it to be consistent with the purpose for which it is invoked.

The purpose of this Chapter therefore is to explore rule of law principles within Nigerian constitutional framework which are consistent with public property preservation and utilisation; and which would have reduced corruption and tempered the want amidst the plenty in the country had they been conformed to. It shall explore ‘the law’ which ought ‘to rule’ but which never ruled in the governance of the country. Though Nigeria has operated several constitutions thereby making changes from one constitution to another inevitable, the bulk of the rule of law provisions has at all times been extant.¹ But with the existence of informal laws (as referred to in the introduction), how justifiable is my choice of formal law as constituted in constitutional law? I shall first give an overview of the Nigerian legal system in order to justify this choice showing mainly the dominance of the latter over the former.

¹ Unless where otherwise indicated, sections of the Constitution cited in parenthesis in the body of this chapter refer to the provisions of the 1999 Constitution. Equivalent provisions, where available, from other constitutions are footnoted.

5.2 An Overview of Nigerian Law

Customary and Islamic legal systems existed in the territories which later formed Nigeria long before colonialism. The British on their advent introduced English law in the Colony of Lagos,² established a Supreme Court and empowered it³ to apply and supervise the application of native law and custom.⁴ However, such native law and custom shall not be “repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature” (s. 19 of Supreme Court Ordinance No. 4 of 1876).⁵ No statutory customary courts were created and existing indigenous courts were unimpaired. Before 1914, there were two Protectorates⁶ in each of which English law and native law and custom applied side by side. In 1914, the Protectorates were merged to create Nigeria. Application of the dual laws was extended to the new Nigeria.

At independence in 1960, Nigeria started off with the Independence Constitution of 1960 which provided for a Federal⁷ Parliament and three Regional Houses of Assembly all of which were bi-cameral legislatures. Federal executive powers were vested in the Queen represented by a Governor-General (s. 78 [i] & [ii]). Regional executive powers lay with the Premiers (S. 80). Each Region and the Capital, Lagos, had its own set of courts. At the Federal level was a Federal Supreme Court from which appeals lay to the Privy Council (s. 104). English law together with validated native law and custom continued to apply.⁸

In 1963, Nigeria became a Republic giving birth to the Republican Constitution of 1963. That meant breaking away from the British royal connection. The powers of the Queen were taken over by a non-executive President and the

² Under Ordinance No. 3 of 1863

³ Under Ordinance No. 11 of 1863

⁴ Native law and custom was the name given to customary and Islamic legal systems.

⁵ In 1945, public policy test was added for the validity of native law and custom through the Evidence Act, S.14 (3).

⁶ The Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria.

⁷ Nigeria's Federation of three Regions and Lagos as Capital was established by the Littleton Constitution of 1954 which followed the 1953 and 1954 London Conferences.

⁸ Enabling statutory provisions were made. These were the Interpretation Act and the various High Court Laws of the Regions. English law consisted of the common law, doctrines of equity and statutes.

Parliamentary system was retained. By section 120 of the Constitution, appeals to the Privy Council were abolished making the Supreme Court the highest court. In the same year, the Mid-Western Region was created.⁹

A military coup in January 1966 changed the legal order. The Constitution was partly suspended and partly modified under the Constitution (Suspension and Modification) Decree No. 1 of 1966. Parliament and Regional Legislatures were abolished. Powers to make law for Nigeria or any part thereof were now conferred on the Federal Military Government (S. 3 of Decree). Regional Premiers were replaced with Military Governors who could make law (in the form of edicts) on matters in the concurrent list of the Constitution. Executive powers were vested on the Head of the Federal Government with provision to delegate functions within a Region on the Governor of the Region (s. 7).

At first, judicial attitude was swinging as to which, between the Constitution and the Decree, was the supreme law.¹⁰ The Supreme Court in *Lakanmi & Ola v. Attorney-General Western State & Ors*¹¹ settled the issue when it held that the coup did not affect the supremacy of the Constitution. But the Government nullified this decision through its Federal Military Government (Supremacy and Enforcement of Powers) Decree¹² which asserted that the coup was a revolution which changed Nigeria's legal order placing the Decree above the Constitution.

On 1st October 1979, the military handed over power to elected civilians and the 1979 Constitution came into force. By section 1(1) thereof, the Constitution was supreme and its provisions had binding force on all authorities and persons throughout the country. If any other law was inconsistent with its provisions, the Constitution shall prevail and that other law shall be void to the extent of the inconsistency (s. 1 [3]). Nigeria was now a Federation of 19 states with a

⁹ It was created by the Mid-Western Region Act of 1963.

¹⁰ E.g. see *Ogunlesi & Ors. V. A.G. of the Federation* (1970) LD/28/69 and *State v. Nwoga & Okoye* (1966) Suit No. E/34C/66 for contradictory decisions (Ojo in Elias, ed., 1972: 18; Ojo 1987: 19).

¹¹ (1971) 1 U.I.L.R. 201

¹² No. 28 of 1970

Federal Capital Territory (S. 2 [1], [2] & 3 [1]).¹³ The application of hybrid laws continued with the States generally retaining the enabling provisions applied by the Regions.¹⁴

The Parliamentary system was replaced with an executive Presidential system (S. 122 [1] & [2]). Law-making powers at federal level were vested in a federal bicameral legislative body, the National Assembly, and at the state level in the House of Assembly (s. 4).¹⁵ Federal executive powers were vested in the President (S. 5 [1] [a]) while executive powers in a State were vested in the Governor of that State (S. 5 [2] [a]). Judicial powers of the Federation were vested in the superior courts of record established by the Constitution (S. S. 6 [1]). Judicial powers of a State were vested in courts established for the State either by the Constitution or under it (S. 6 [2]). The hybridity was given recognition under the Constitution. There were customary and Islamic courts as well as conventional courts each applying the appropriate laws (ss. 217 [2] [b], 240, 242 [1] & [2], 245, 247 [1]).

The military returned to power on 31 December 1983. Provisions of the 1979 Constitution not compatible with military rule were suspended and others modified under the Constitution (Suspension and Modification) Decree No. 1 of 1984. Provisions relating to all elective and appointed offices and political parties were suspended.¹⁶ Legislative competence at Federal level reverted to the Federal Military government (S. 2 [1] of the Decree); and at State level to Military Governors to a limited extent.¹⁷ A Decree or Edict needed not to be in writing (S. 3 [1], [2] & [3]). Save for the provision ousting their competence to entertain any question as to the validity of any Decree or Edict (s. 5), courts of

¹³ Already, the four Regions had been split into 12 States in 1967 and in 1976 7 more States and a Federal Capital Territory in Abuja were created.

¹⁴ For instance, section 34 High Court Law, Laws of Kano State Vol. 2, 1991 replicated a similar section in the High Court Law, Laws of Northern Nigeria 1963.

¹⁵ The National Assembly makes laws exclusively on matters in the Exclusive Legislative List of the Constitution. It could also legislate on matters included in the Concurrent Legislative List. The State Houses of Assembly could legislate for their State or any part thereof on any matter not included in the Exclusive List and on matters included in the Concurrent Legislative List of the Constitution.

¹⁶ See Schedule 1 of the Decree for details.

¹⁷ Military Governors could only legislate by way of Edicts on matters within Concurrent Legislative List with the prior consent of the Federal Military Government.

law were left intact. Customary and Islamic laws continued to apply on civil matters. Executive authority of the country was vested in the Head of the Federal Military Government which he might delegate to a Military Governor when such executive functions fell within his State (s. 6). This regime was unequivocal in asserting the supremacy of the Decree by promulgating the Federal Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984 which provided that the event of 31 December 1983 was a revolution creating a new legal order and giving the regime unlimited legislative powers.

A palace coup took place in August 1985. The Decree continued to prevail and all normal democratic structures remained abolished.¹⁸ Customary and Islamic laws continued to apply like before. The new regime had a transition programme but it failed and a civilian Interim National Government replaced it in August 1993. The military returned to power again in November 1993 and civil rule was restored only in May 1999 under the 1999 Constitution. Nigeria is now a Federal Republic with 36 States, 774 Local Governments and a Federal Capital Territory in Abuja.

The 1999 Constitution is the supreme law of the land (s. 1 [1], [2] & [3]). Legislative power is conferred on the National Assembly at the federal level and on the House of Assembly at state level (s. 4). Matters within the exclusive legislative list of the Constitution like defence, currency and mineral resources are exclusively legislated by the National Assembly. Matters on the concurrent list like education, health and agriculture could be legislated on by both legislatures. Federal executive power is vested in the President and state executive power is vested in the Governor of the state. Both of them could delegate the power to their lieutenants (Vice President or Ministers; Deputy Governor or Commissioners as the case may be). The Constitution established federal courts (ss. 230; 237; 249; 255) and state courts (s. 270) and vested Federal judicial powers in the former and state judicial powers in the latter (s. 6).

¹⁸ The regime promulgated the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 to amend the Constitution (Suspension and Modification) Decree No. 1 of 1984 in order to reflect the changes brought about by the coup.

Customary and Islamic laws are still applicable before various courts (Ss. 262 [1] & [2] [a]-[e]; 277 [1] & [2] [a]-[e]; 267; 282 [1]).

The sources of Nigerian law now are as follows:

- i. English law - the common law, doctrines of equity and statutes;¹⁹
- ii. Nigerian legislation - Acts, Laws and Bye-laws;
- iii. Judicial precedent - Nigerian case law; and
- iv. Customary law (which includes Islamic law).

Customary law continues to apply subject to the validity tests.²⁰ It applies in civil matters and it is uncodified.²¹ Existing laws such as Decrees and Edicts which are not inconsistent with the Constitution are saved and made applicable by the Constitution as if they are Acts or Laws as the case may be (s. 315 [1] [a] [b]). Fundamental issues such as separation of powers among the executive, the legislature and the judiciary; division of power among federal and state governments; citizenship, human rights, etc. are covered by the Constitution while specific matters are accommodated under various laws. Oil and other mineral resources fall within federal legislative competence though the Constitution too has made provision thereon pertaining to ownership.

This study does not see the hybridity of the legal system as a weakness. Nor does it see it as contributing to absence of rule of law in practice. The hybridity does not in any way affect the position of rule of law as proposed herein. This is because formal law has been the dominant law in Nigeria. Customary laws have been subordinate to it. They have been applying at personal levels while the rule of law has been in the domain of public administration. Thus they cannot be

¹⁹ The statutes are limited to those which had general application in England and which were in force as at 1st January 1900. They do not include statutes enacted thereafter and are applicable subject to local law (Obilade 1979: 69-81). Common law and equity do not have time limit but they are only of persuasive influence to Nigerian courts.

²⁰ See for instance s. 34 High Court Law, Laws of Kano State Vol. 2, 1991.

²¹ In 1999, some states in the North expanded the application of Islamic law to cover criminal matters. They codified into Laws the traditional Islamic penal laws pursuant to s. 36 (12) of the Constitution which prohibits trial or punishment under any unwritten law. By the codification, the laws now acquire the new status of Laws of the House of Assembly and are no longer customary.

invoked to explain absence of rule of law in practice. They may graduate into the public realm (as did Islamic criminal law in some Northern states) but cannot dabble into administrative spheres.

But that is not to suggest that the principles of rule of law are unknown to customary laws. Indeed rule of law principles could have universal application. No system of law would for instance object to the principle of the supremacy of law, or condone breach of public trust in the form of corruption. In fact it could be argued that it is the universality of these principles that led to their acceptance as forming part of the Constitution. The Constitution represents a common agreement among the various interests in the country thereby making it a binding and superior document over any other law. It applies throughout the country. The states do not have independent constitutions now.²² Thus rule of law is not only applicable for the whole of Nigeria but it is also deemed acceptable throughout the country. We shall now turn to its principles.

5.3 The Rule of Law Principles

I identify the following 5 principles as constitutive of rule of law within the Nigerian constitutional framework: supremacy of the law, equality before the law, trust over public funds, code of conduct for public officers, and restraint on executive power. The list may not be exhaustive. But it is, arguably, cumulatively sufficient to check corruption and provide a framework for development in Nigeria.

i. Supremacy of the Law

The state of nature, if it ever existed, is characterised by lack of law in a general sense. Law epitomises common agreement to a system of governance. This common agreement is what is otherwise known as the social contract. Constitutions in Nigeria can be said to have institutionalised the social contract concept by providing that “sovereignty belongs to the people of Nigeria from

²² The Regions which were split into States in 1967 had independent constitutions governing regional affairs apart from the central constitution.

whom government through [the] Constitution derives all its powers and authority”; and that “the security and welfare of the people shall be the primary purpose of government” (section 14 [2] [a] & [b] 1999 Constitution).²³ Disobedience to this system of governance is often frowned at by means of sanctions. Law is therefore a state institution. Governments are constituted by it and are expected to govern according to it. This means that law, not any person or authority, is supreme; where otherwise, the essence of the law is defeated and state suffers a great deal. Plato (1970: 174) hinges the success or failure of a state on this point when he says the collapse of the state is imminent where the law is subject to some other authority but full of promise “if law is the master of the government and the government is its slave”.²⁴ The protection of the individual against the arbitrariness of government is also recognition of the supremacy of law. This is captured for instance in Clause 39 of Magna Carta which stipulates that “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land” (quoted in Tamanaha 2004: 26).

The Nigerian legal system upholds the principle of supremacy of the law in various provisions. If the personal interests of the persons in authority were to be supreme, the various provisions on the management of national resources and on discharge of development duty would be rendered useless. Most of these provisions are constitutional. Nigeria inherited a common law tradition from Britain. But unlike Britain, she operates a written Constitution which is supreme over all other laws.²⁵ Any other law which is inconsistent with the Constitution is void to the extent of the inconsistency (s. 1 (1) & (3) 1999 Constitution). Similar provisions were contained in sections 1 of the 1960 and 1963 Constitutions; section 1 (1) & (3) of the 1979 Constitution respectively.

²³ The 1979 Constitution has the same provisions with same section and sub-section numbers. The previous 1960 and 1963 Constitutions did not make similar provisions.

²⁴ Aristotle (1962: 226, Book III xvi) makes a similar statement. See Chapter 1 for a relevant quotation.

²⁵ Britain does not have a written constitution. It is Parliamentary sovereignty that reins; and courts have no powers to review parliamentary action (Dicey 1959: 39 et seq.).

The provisions of 1960 and 1963 Constitutions did not mention the word “supreme”. But the supremacy could be inferred from the Constitutions’ clear authority over other laws (including Regional Constitutions which then existed) which may be inconsistent with them. However, such supremacy was “subject to the provisions of section 4 of [the] Constitution” which meant that the authority of the Constitutions was subject to the over-riding power of Parliament to alter any of their provisions (Elias 1967: 133). The other Constitutions do not contain this ‘subject to’ provision. But its equivalent is contained in sections 9 of the Constitutions respectively which recognise the power of the legislature to alter any of the provisions of the Constitutions. Indeed all the Constitutions clearly state that their provisions shall have binding force on all authorities and persons throughout the country.²⁶ The 1979 and 1999 Constitutions added that the country shall not be governed except in accordance with their provisions (s. 1 (2) of both Constitutions).²⁷ This provision rules out rule by man lest passion pervert the minds of people in authority.

The supremacy provisions have received judicial backing. In *Doherty v. Balewa*,²⁸ the court restated the constitutional provision and based on it, it declared part of the Commission and Tribunals of Enquiry Act No. 26 of 1961 null and void. The Act provided *inter alia* that the Prime Minister could set up a Commission to inquire into any matter affecting the general welfare of the federal territory or any matter within federal competence. And that neither the Commission nor any action of the Prime Minister in relation thereto shall be inquired into by any court of law. At the instance of the Plaintiff whose acts in relation to a licensed bank were subject of inquiry, the court declared part of the Act which purported to limit the jurisdiction of courts in hearing and determining civil rights as contrary to the provisions of the 1960 Constitution and therefore null and void.

²⁶ These are the wordings of the 1979 and 1999 Constitutions. The 1960 and 1963 Constitutions had slightly different wordings. They said “this constitution shall have the force of law throughout Nigeria” (section 1 respectively).

²⁷ This provision is meant to expressly outlaw military interventions.

²⁸ (1963) 1 WLR 949.

The Supreme Court upheld the supremacy of the Constitution even in the face of a military dictatorship in the case of *Lakanmi & Ors v. Attorney-General Western State & Ors*.²⁹ A Tribunal of Inquiry³⁰ investigated the assets of the appellants and prohibited them from further dealing with the assets without the permission of the Military Governor. Pending the determination of the investigation, rents accruing from the assets were to be paid into the state sub-treasury. The appellants' appeals (on the ground, *inter alia*, that the orders contravened their constitutional rights) to the High Court and later to the Court of Appeal failed on grounds of lack of jurisdiction.

It was while the second appeal was pending that the Federal Military Government promulgated a number of Decrees³¹ validating the Tribunal's orders, ousting the jurisdiction of courts, and providing that the constitutional rights provisions were inapplicable on the issues. On further appeal, the Supreme Court held that the rule of law and supremacy of the 1963 Constitution still prevailed notwithstanding the military coup of 1966.³² The Court stated that by the coup, the military never for a moment intended to rule but by the Constitution. Yet as they sought to clean up the polity from corruption, the courts would not look the other way if by any action they contravene the provisions of the Constitution. It saw Decree No. 45 of 1968 in particular as "nothing short of legislative judgement, an exercise of judicial power" and it therefore declared it as *ultra vires* the Constitution.³³

Important though the supremacy provisions are, the constitutions should have done more by declaring the supremacy of law generally so that other forms of law like statutes and case law would be accommodated. Such an approach would have been a holistic one obviating the need for evidence of the supremacy of the other laws over say, the personal view or discretion of public officers.

²⁹ Supra

³⁰ Set up by Edict No.5 of 1967

³¹ Investigation of Assets (Public Officers and other Persons [Amendment]) Decree No. 43 of 1968; Forfeiture of Assets, etc. (Validation) Decree No. 45 of 1968.

³² However, the military legislated to the contrary by promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. See Chapter 6 for details.

³³ The *Lakanmi* case will be discussed in more detail in Chapter 6.

This was the approach of the United States Constitution, Article 6, clause 2 which provides that:

This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or law of any state to the contrary notwithstanding (quoted in Elias 1967: 134).

That is not to suggest however that the supremacy of general law in the Nigerian legal system is in any doubt. There is ample support from case law for the overriding authority of law over persons no matter how highly placed they may be. For instance, in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*,³⁴ the court held that it is a well established principle of law that a Governor of a State can only act in pursuance of the powers given to him by law. Consequently, no member of the executive can interfere with the ownership of property of a citizen except on condition that he can support the legality of his action. Similarly, in *Psychiatric Hospital Management Board v. Ejitaga*,³⁵ the court declared that a minister's policy speech cannot supersede the law.

It is because the exercise of power by all public officers is always subject to law that their actions or inactions are always subject to judicial review. Thus as decided in *Padfield v. Minister of Agriculture, Fisheries and Food*,³⁶ the courts have the authority and, indeed, the duty to correct a misuse of power by a public officer or his department even in instances where the officer is given discretion but he exercises it for reasons which are bad in law. The courts can interfere to make him comply with the law.

ii. Equality before the Law

In the functions of a normative system as provider of justice, law and order in a society, there is implied the need for such system to treat its subjects equally. It would make no sense if laws are supreme but they discriminate between people

³⁴ (1931) A.C. 662; (1931) All ER 44

³⁵ (2000) 6 SC (Part II) 1

³⁶ (1968) A.C. 997

in similar circumstances. Equality before the law is therefore generally regarded as a principle of rule of law. Dicey (1959) places it as the second of the “three distinct though kindred conceptions” generally included under the expression ‘rule of law’ (187-188). It means that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”; and it “excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals” (Dicey 1959: 193, 202-203).

Wade (2004) calls this principle “fairness” and limits it between government and citizen. He concedes that the law cannot be the same for both since government must necessarily have special powers. What the principle “requires is that the government should not enjoy unnecessary privileges or exemption from ordinary law” (ibid: 22).

According to Herbert Chitepo, even in circumstances where there is no constitutional declaration of human rights, or which, having such declarations, have no specific right of equal access to law, or equal protection of the laws, it may be taken to be the lawyer’s attitude that all persons are equal before the law and have equal access to it (International Commission of Jurists 1961: 78). In the case of Nigeria, the constitutions have not omitted this important element of rule of law.

Both 1979 and 1999 Constitutions³⁷ have provided for the principle of equality before the law under their social objectives. They state that the state social order is founded on the ideals of freedom, equality and justice (s. 17 [1]); and in furtherance of this order, “every citizen shall have equality of rights, obligations and opportunities before the law” (s. 17 [2] [a]). They also prohibit “discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties” (s. 15 [2]). All the constitutions have made unequal treatment before the law an act of discrimination freedom from which

³⁷ Under same number of sections.

they clearly made a fundamental human right (s. 42 [1] [a] & [b] 1999 Constitution):³⁸

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
- (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

While the above provisions are laudable, it should be noted that in their prohibition of discrimination under section 15 (2) (which is a non-justiciable provision), the 1979 and 1999 Constitutions include ‘status’ as one of the elements on which discrimination shall not be grounded on. This important element is conspicuously omitted in the subsequent provision (s. 42 [1])³⁹ dealing with freedom from discrimination as an enforceable right. This is a grave omission because unequal treatment before the law is most probably feared and expected between persons of unequal status in society e.g. between

³⁸ These provisions were contained in s. 39 [1] [a] & [b] of the 1979 Constitution; s. 28 [1] [a] & [b] of the 1963 Constitution and s. 27 [1] [a] & [b] of the 1960 Constitution.

³⁹ The equivalents are s. 39 [1] [a] & [b] of the 1979 Constitution; s. 28 [1] [a] & [b] of the 1963 Constitution and s. 27 [1] [a] & [b] of the 1960 Constitution.

ordinary citizens and senior government officials. Does this omission suggest constitutional acquiescence to unequal treatment before the law between such persons? This would hardly be so having regard to the provisions of section 17 [2] [a] which unequivocally state that “every citizen shall have equality of rights, obligations and opportunities before the law”.

The omission seems to be a deliberate one to take care of situations where certain persons are treated differently on account of their status in society. For instance, the Constitutions provide that any law which imposes restrictions with respect to the appointment of any person to any public office or as a member of the armed forces or of the Police or to a corporation established by law remains valid notwithstanding the equality provision contained in s. 42 [1] (s. 42 [3]).⁴⁰

While the Constitutions provide for equality of all citizens before law on one hand, on the other hand they give immunity to certain public officers during their period of office. The President, Vice President, Governor, and Deputy Governor enjoy the privilege of immunity from civil and criminal proceedings (whether to institute or continue); arrest or imprisonment either in pursuance of the process of any court or otherwise. No process of any court shall be applied for or issued requiring or compelling the appearance of any of them in court. Save that they could be subject of civil proceedings in their official capacity or to civil and criminal proceedings as nominal parties (s. 308 [1] [a], [b], [c] & [2]).⁴¹ The immunity provision has been judicially considered and upheld in a number of cases which include *Duke v. Global Excellence Communication Ltd*;⁴² *Alamieyeseigha v. Yeiwa*;⁴³ and *Tinubu v. I.M.B. Securities Plc*.⁴⁴ There are so many cases involving these mentioned executives either in their official capacity or as nominal parties as could be seen in this chapter and the next one.

⁴⁰ These provisions were contained in s. 39 [3] of the 1979 Constitution. Ss. 27 [2] and 28 [2] of the 1960 and 1963 Constitutions had similar provisions but covered more cases which the law may provide for such as prescribing qualification for general public service, according reasonably justifiable privileges to certain persons, etc.

⁴¹ These provisions are contained in s. 267 [1] [a], [b], [c] & [2] of the 1979 Constitution.

⁴² (2007) 5 NWLR, PT 1026, pg. 81 at 106-107, H-A.

⁴³ (2002) 7 NWLR PT 797, pg. 600-601, G-A.

⁴⁴ (2001) 16 NWLR, PT 740, pg. 670 at 693-694.

Similar privileges are accorded by statutes to judges and members of the diplomatic corp.⁴⁵ Members of the armed forces or the police may also be governed by special laws which do not apply to ordinary citizens or be amenable to courts which do not have jurisdiction over others. The existence of this “official law” is accepted as not in any way inconsistent with the principle of equality before the law. Though they incur exclusive legal liabilities by virtue of their position, the officials do not, generally speaking, escape thereby from the duties of an ordinary citizen. It is public policy which dictates that they should have special powers and privileges so that they would be free from fear of possible trial while on duty. However, they are to enjoy these powers and privileges to the extent it is necessary; and the powers and privileges are not meant to exempt them from ordinary law (Dicey 1959: 194; Wade 2004: 22). More over, the immunity is provided notwithstanding anything to the contrary (i.e. equality of all citizens before the law) in the Constitutions (s. 308 [1]).⁴⁶

The executive immunity though apparently consistent with the principle of equality before the law, may leave much to be desired especially that the executive power is open to abuse. Are the protected officers laws unto themselves during their terms of office? What happens if they steal, embezzle, or otherwise deal fraudulently with public property or funds in their control? Could this amount to a wrong for which the law provides no remedy? Consolation would be found if we take sanction for wrongdoing as a mechanism which is not only limited to judicial punishment or liability. The law could, and does in fact, provide other means by which such executive excesses could be checked. In what could be termed as Dicey’s “official law”, misconduct of this or similar nature is accommodated under constitutional checks and balances as in for instance, the power of the legislature to investigate or even remove from office an erring officer (Ss. 88 [1] & [2], 128 [1] & [2]; 143 [1], 188 [1]).⁴⁷

⁴⁵ See for instance Public Officers Protection Act Chapter 379, Laws of the Federation of Nigeria 1990, Vol. XXI.

⁴⁶ S. 267 [1] was the equivalent under the 1979 Constitution.

⁴⁷ 1979 Constitution made similar provisions in Ss. 82 (1) & (2) and 120 (1) & (2); 132 (1) and 170 (1).

While the equality provisions in the Constitutions are reasonably adequate, certain provisions pose a threat to the principle. For instance, the Attorney-General of the Federation or of the state is empowered to institute, take over and continue or discontinue any criminal proceedings against any person before any court (except a court-martial) in respect of any offence created by or under any Act or Law as the case may be (s. 174 [1]; s. 211 [1]).⁴⁸ Although the powers are to be exercised having “regard to the public interest, the interest of justice and the need to prevent abuse of legal process” (s. 174 [3]; s. 211 [3]), it means that among persons who are alleged to have committed offences, he could select those to be prosecuted. Or among those being prosecuted, he could discontinue the proceedings against some of them. This is what is called the power of *Nolle Prosequere* and it received the backing of the Supreme Court in *State vs. Ilori*⁴⁹ where the Court described the Attorney-General as “a master unto himself” in this regard. Absence of this type of discretionary power is often put as one of the principles of rule of law (Raz in Cunningham 1979: 11).

iii. Trusts over Public Funds

Funds are necessary for development. But adequate arrangements are needed for their control and utilisation. In that regard, the Constitutions have established the Consolidated Revenue Fund into which are paid all revenues or other moneys raised or received by the Federation or a State (other than those payable into some public fund established for a specific purpose) (s. 80 [1]; s. 120 [1]).⁵⁰ For the executive to have access to the funds for development purposes, it is required each financial year to prepare and lay before the legislature estimates of revenues and expenditure for the next following financial year. The heads of expenditure contained in the estimates shall be contained in an Appropriation bill providing for the issue from the Consolidated Revenue Fund of the moneys necessary to meet that expenditure and the appropriation of those moneys for the

⁴⁸ 1979 Constitution made similar provisions in Ss. 160 (1) & 191 (1) for federal and state governments respectively.

⁴⁹ (1983) 2 S.C. 155.

⁵⁰ Ss. 74 (1) and 112 (1) contained equivalent provisions under the 1979 Constitution. Sections 123 (1) and 129 (1) of the 1960 and 1963 Constitutions contained same provision for the federal government. Corresponding provisions were contained in Regional Constitutions.

purposes specified therein (s. 81 [1] & [2]; s. 121 [1] & [2]).⁵¹ The legislature may then make an Appropriation Act or Law as the case may be, to authorise the issue of the moneys. This is one of the instances where moneys from the Fund can be withdrawn (s. 80 [2]; 120 [2]).⁵²

If the amount appropriated for any purpose is insufficient; or a need has arisen for expenditure for a purpose for which no amount was appropriated, the executive shall lay a supplementary estimate showing the sums required and the heads of any such expenditures shall be included in a Supplementary Appropriation Bill (s. 81 [4] [a] [b]; 121 [4] [a] & [b]).⁵³

The Constitutions also authorise the withdrawal of moneys from the Fund where the Appropriation Act or Law has not come into operation at the beginning of the financial year, to meet expenditure necessary to carry on government services for a period not exceeding 6 months or until the coming into operation of an Appropriation Act or Law (whichever is earlier). However, the amount to be withdrawn must not be more than the one authorised by the legislature to be withdrawn in the previous year (s. 82; s.122).⁵⁴

Contingency provisions are made at both the federal and state levels by empowering the legislature to establish a Contingencies Fund and to authorise the executive to make advances therefrom in the event of an urgent and unforeseen need for expenditure for which no other provisions exists. However, where any such advance is made, a Supplementary Estimate shall be presented

⁵¹ Ss. 75 (1) & (2) and 113 (1) & (2) 1979 Constitution had similar provisions for the Federal and State governments respectively. Sections 124 (1) & (2); 130 (1) & (2) of the 1960 and 1963 Constitutions respectively had similar provisions for the Federal government. The Regions then had their own Constitutions which made corresponding provisions.

⁵² S.74 (2); 112 (2) 1979 Constitution for federal and state governments respectively. Ss. 123 (2) and 129 (2) of 1960 and 1963 Constitutions respectively had same provisions for the Federal government. Regional Constitutions had corresponding provisions.

⁵³ S. 75 (3) (a) & (b); 113 (3) (a) & (b) 1979 Constitution for Federal and state governments respectively. S. 124 (3) (a) 1960 Constitution; s. 130 (3) (a) 1963 Constitution. Regional Constitutions had corresponding provisions.

⁵⁴ Ss. 76 & 114 of 1979 Constitution for federal and state governments respectively. Ss. 125 and 131 of the 1960 and 1963 Constitutions respectively had same provisions for the Federal government. Regional Constitutions had corresponding provisions. The maximum period in circumstance (iv) for all the three previous Constitutions was 4 months.

and a Supplementary Appropriation Bill introduced as soon as possible to replace the amount so advanced (s. 83 [1] & [2]; 123 [1] & [2]).⁵⁵

The Constitutions have established a special account called “the Federation Account” to be maintained by the federal government and into which all revenues⁵⁶ collected by the government shall be paid (s. 162 [1]).⁵⁷ Any amount standing to the credit of this account is to be distributed among the Federal and State Governments and Local Government Councils on terms and in manner prescribed by the National Assembly (s. 162 [3]).⁵⁸ Any amount to which the states are entitled is distributed among them on terms and in manner prescribed by the National Assembly (s. 162 [4])⁵⁹ and same for the allocation to states for the benefit of their local governments of the amount due to the local governments (s. 162 [5]).⁶⁰ The Constitutions have also established a “State Joint Local Government Account” to be maintained by each state and into which shall be paid all allocations to the Local Governments from the Federation Account and from the government of the state and all the moneys standing to the credit of the (Joint) Account are to be distributed among the local governments of that state on terms and in manner prescribed by the House of Assembly of the state (s. 162 [6] [8]).⁶¹

The Supreme Court in *Attorney-General of the Federation v. Attorney-General of Abia State & Ors*⁶² clearly stated that by virtue of the provisions of s. 162 of the 1999 Constitution,⁶³ the federal government becomes a trustee of the moneys standing to the credit of the Federation Account and the Federal, State and Local Governments are the beneficiaries of the said moneys. If and when

⁵⁵ Ss. 77 (1) & (2); 115 (1) & (2) of the 1979 Constitution provided for the federal and state governments respectively. Ss. 126 (1) & (2) and 132 (1) & (2) of the 1960 and 1963 Constitutions had same provisions for the federal government. Regional Constitutions made corresponding provisions.

⁵⁶ Proceeds from the personal income tax of the personnel of the armed forces, the Police, the ministry of foreign affairs, and residents of the Federal Capital Territory are excluded by the provision.

⁵⁷ S. 149 (1) 1979 Constitution.

⁵⁸ S. 149 (2) 1979 Constitution.

⁵⁹ S. 149 (3) 1979 Constitution.

⁶⁰ S. 149 (4) 1979 Constitution.

⁶¹ S. 149 (5) (7) 1979 Constitution.

⁶² (2002) 6 NWLR, PART 764, PAGE 542

⁶³ The equivalent is s. 149 1979 Constitution.

called upon to do so, the federal government is under a duty as trustee to render account to the beneficiaries. It needs to be added here that revenue generation is a continuous process. So the Federation Account is meant to be a permanent account into which the revenues shall be paid. It follows therefrom that the trust over the moneys in the account is also a permanent one.

The Court was however silent on the respective positions of the three governments with regards to the moneys after the necessary periodic distributions. The only logical conclusion is that since the moneys are public moneys, the governments are trustees over the moneys for the benefit of their respective people and the state as a whole a trustee for the benefit of the citizens. Executive powers are vested in the federal and state executive arms of the government respectively. Federal executive power is vested in the President who may exercise it or delegate it to the Vice-President and federal Ministers or officers in the federal public service; while that of a State is vested in the Governor who may exercise it himself or through the Deputy-Governor and State Commissioners or officers in the State public service. These powers extend to the execution and maintenance of the Constitution (s. 5 [1] [a] & [b]; [2] [a] & [b]).⁶⁴ Though these powers are wide considering the all-encompassing nature of the Constitution, they would certainly include providing adequate standard of living (s. 16 [2] [d]); and harnessing national resources and controlling the national economy for the purpose of development (s. 16 [1] (a) [b]). To this extent, the Constitutions have made development the duty of the executive arm of the state and public funds the subject of trust in its hands.

Sections 84 (1) & (2), 85 and 86 of the 1963 Constitutions had similar provisions for the federal and Regional executive powers. Section 78 (1) & (2) vested the executive authority of the federation in Her Majesty to be exercised on her behalf by the Governor-General either directly or through his subordinates. By s. 79, the authority extended to the execution and maintenance of the Constitution and to all matters within the legislative competence of the

⁶⁴ Same provision under same number of section in the 1979 Constitution.

parliament. The extent of Regional authority was similar at its level save that it was not expressly vested in the premiers (s. 80).

iv. Code of Conduct

In a new bid to check the enormous powers of the public service over public funds, the Constitutions have enjoined the state, as one of its fundamental political objectives, to abolish all corrupt practices and abuse of power (s. 15 [5]).⁶⁵ Neither the 1960 Constitution nor the 1963 Constitution had this provision because the chapter under which it came (Fundamental Objectives and Directive Principles of State Policy) was first introduced in the 1979 Constitution. This new constitutional provision did not stop at enjoining the state to abolish all corrupt practices and abuse of power. The Constitutions also provided a code of conduct which all persons in the public service of the federation or state shall observe and to which they shall all conform (s. 172; s. 209).⁶⁶ The code of conduct is essentially outlawing corruption and abuse of office in the public service of the federation or state. It decrees among others that:

- (a) A public officer shall not put himself in a position where his personal interest will conflict with his official duties and responsibilities (s. 1, fifth Schedule).⁶⁷ For instance, an officer shall not award a contract to a private company for which he serves as director. It may appear that for a full time public officer to be a director of a company is itself prohibited by the Code under section 2 (b) of the Schedule. However, a close reading of the sub-section will reveal that to “engage or participate in the management or running of any private business, profession or trade” excluding farming is what is prohibited. An inactive director of a company seems to fall outside its purview.

⁶⁵ It is the same number of section under the 1979 Constitution.

⁶⁶ The 1979 Constitution has same wordings under sections 158 and 189. The detailed Code of Conduct is provided as the fifth Schedule of both the Constitutions. It was also introduced for the first time under the 1979 Constitution.

⁶⁷ It is a reproduction from the 1979 Constitution.

- (b) the President, vice-President, Governors, Deputy Governors, federal ministers, state commissioners, members of the federal or state legislature, or such other public officers or persons as the federal legislature may by law prescribe are prohibited from maintaining or operating a foreign account (s. 3, fifth Schedule);⁶⁸ nor shall they accept a loan except from government or its agencies or a lending institution recognised by law, nor any benefit of whatever nature from any company, contractor, or businessman directly or indirectly (s. 7 [a] & [b], fifth Schedule).⁶⁹
- (c) All public officers are prohibited from asking for or accepting property or benefits of any kind for themselves or any other person on account of anything done or omitted to be done by them in the discharge of their duties (s. 6 [1], fifth Schedule).⁷⁰ In fact the receipt by any officer of any gifts or benefits from commercial firms, business enterprises or persons who have contracts with the government is presumed to be in contravention of the code unless the contrary is proved (s. 6 [2], fifth Schedule).⁷¹
- (d) The offer of gift or benefit of any kind as an inducement or bribe by any person to a public officer for the granting of any favour in the discharge of the officer's duties has been prohibited (s. 8, fifth Schedule).⁷²
- (e) A public officer shall not do or cause to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to any government policy (s. 9, fifth Schedule).⁷³

⁶⁸ Same with 1979 Constitution.

⁶⁹ Same with 1979 Constitution. Here Permanent Secretaries or head of public corporations, university or other parastatal have been added to the key officers mentioned above in section 3. Except the Permanent Secretary, the other added officers may accept a loan from their respective bodies subject to rule thereunder.

⁷⁰ Same with 1979 Constitution.

⁷¹ Same with 1979 Constitution.

⁷² Same with 1979 Constitution.

⁷³ Same with 1979 Constitution.

To ensure that public officers live within their legitimate earnings, the Code requires every public officer to submit to the Code of Conduct Bureau a written declaration of all his properties, assets, and liabilities and those of his unmarried children under the age of 18 immediately after taking office and thereafter at the end of every 4 years and at the end of his term of office (s. 11 [1] [a] & [b] fifth Schedule).⁷⁴

v. Restraint on Executive Power

As could be seen from the previous discussions, the Constitutions separate power into legislative, executive, and judicial powers and place each unto a separate arm of government. This technique is a reflection of the modern trend which views, quite correctly, the concentration of two or more powers in one body as antithetical to the rule of law. According to Montesquieu, “There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals” (1949: 152, Book XI, s. 6). Not only must power be separated, one power must be a check to another to prevent abuse because “constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go” (ibid: 150, Book XI, s. 4). Lord Acton is quoted to have said “power corrupts and absolute power corrupts absolutely” (quoted in Payne 1975: 179).

Undoubtedly, of the three arms of government under the Nigerian system, the executive is the most powerful. The trust of public resources is put in its hands and the duty of development placed on its shoulders. It would be wrong to assume that there would not be a breach of the trust or failure of development because power corrupts. For the law to rule therefore, it must provide mechanisms by which the executive power is checked.⁷⁵ This is in addition to the code of conduct. Absence of this mechanism is equally antithetical to rule of

⁷⁴ Same with 1979 Constitution save that the age of the public officer’s children here was 21.

⁷⁵ The IMF also has restraint on the executive as one of its elements of development. See Pahuja (2006).

law. Creditably, the Constitutions have not left the executive unchecked. They have made provisions for both the legislature and judiciary to keep the executive on its toes. However, as the court warned in the case of *Senator Okwu v. Senator Wayas*,⁷⁶ the checking powers are not a *carte blanche* for one organ to supervise or control the conduct of affairs of another organ; they are meant to safeguard the provisions of the Constitution.

A. Legislative Check

The legislature is a constitutionally created body and by virtue of being elected representative of the people, it is a legitimate organ. It is an important institution for the rule of law ideal. In addition to its law-making function, it checks the executive in a number of ways. These may either be over control of funds, or when the going goes bad, in the exercise of power of impeachment.

i. Control of Funds

The power of the executive is restrained by the legislature in three main respects here: authorisation of withdrawal of moneys, confirmation of certain appointments and removals, and investigative powers into administrative action.

Authorisation: Constitutional provisions stipulate one important legislative check on the executive at federal and state levels respectively. It is that access to moneys by the latter always requires the former's authorisation by way of an Appropriation Act or Law as the case may be (sections 80 [2] and 120 [2]).⁷⁷ Thus the executive cannot single-handedly prepare a list of expenditure and withdraw moneys for implementation. If the moneys authorised to be withdrawn for any purpose are insufficient; or a need has arisen for expenditure for a purpose for which no moneys were authorised to be withdrawn, the executive is required to lay a supplementary estimate before the legislature showing the sums required and the heads of any such expenditures shall be included in a

⁷⁶ (1981) 2 NCLR 522.

⁷⁷ S.74 (2); 112 (2) 1979 Constitution had similar provisions for federal and state governments. Ss. 123 (2) and 129 (2) of 1960 and 1963 Constitutions respectively had same provisions for the Federal government. Regional Constitutions had corresponding provisions for the Regions.

Supplementary Appropriation Bill to be enacted into Act or Law as the case may be (s. 81 [4] [a] [b]; s. 121 [4] [a] & [b]).⁷⁸

It is also the legislature which establishes a Contingencies Fund and authorises the President or Governor as the case may be to make advances therefrom if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists. Where any such advance is made, the executive shall present a Supplementary Estimate and a Supplementary Appropriation Bill to the legislature as soon as possible to replace the amount so advanced (s. 83 [1] & [2]; s. 123 [1] & [2]).⁷⁹

Confirmation: The constitutions have provided for the auditing of all federal and state public accounts by an Auditor-General. When done, the audit reports shall be submitted to the Senate or House of Assembly (s. 85 [2]; s. 125 [2]).⁸⁰ Though the power to appoint a person to the office of the Auditor-General is vested in the President or Governor as the case may be, such appointment requires the confirmation of the Senate or House of Assembly, and except with the sanction of a Senate or House of Assembly resolution, a person so appointed shall not serve for a period exceeding six months (s. 86 [1], [2] & [3]; s. 126 [1], [2] & [3]).⁸¹ Rejection of the appointment by the legislature renders such appointment ineffectual. And removal of an Auditor-General must be made on the basis of an address supported by two-thirds majority of the Senate or House of Assembly as the case may be (s. 87 [1]; s. 127 [1]).⁸² These provisions are an improvement upon the provisions of 1960 and 1963 Constitutions which did not

⁷⁸ S. 75 (3) (a) & (b); 113 (3) (a) & (b) 1979 Constitution for Federal and state governments respectively. S. 124 (3) (a) 1960 Constitution; s. 130 (3) (a) 1963 Constitution. Regional Constitutions had corresponding provisions.

⁷⁹ Ss. 77 (1) & (2); 115 (1) & (2) of the 1979 Constitution provided for the federal and state governments respectively. Ss. 126 (1) & (2) and 132 (1) & (2) of the 1960 and 1963 Constitutions had same provisions for the federal government. Regional Constitutions made corresponding provisions.

⁸⁰ 1979 Constitution had similar provisions (sections 79 (2) and 117 [2]) for federal and state governments respectively save that: i. by section 79 (3), submission of audit report is made to each House of the National Assembly at federal level; and ii. It uses Director of Audit, and not Auditor-General, designation for the States.

⁸¹ Ss. 80 (1), (2) & (3) and 118 (1), (2) & (3) 1979 Constitution had same provisions for federal and state governments respectively. The power to confirm substantive appointment of Auditor-General is the same as appointment in acting capacity (s. 318 (2) 1999 Constitution; s. 277 (2) 1979 Constitution).

⁸² Ss. 81 (1) and 119 (1) 1979 Constitution had similar provisions for federal and state.

require legislative intervention in either the appointment or removal of an Auditor and which required submission of audit report to parliament only through the Minister in charge of finance.⁸³

The approval of appointments by the legislature is not limited to the office of Auditor-general. Executive power, as noted earlier, is exercised either by the President or the vice-President; Governor or Deputy Governor or through ministers or commissioners. Appointments of a new vice-President or deputy-Governor in the event of a vacancy requires the approval of (both Houses of) the National Assembly or House of Assembly as the case may be (s. 146 [3]; s. 191 [3]).⁸⁴ Appointments of ministers or commissioners require the confirmation of the Senate or House of assembly as the case may be (s. 147 [2]; s. 192 [2]).⁸⁵ Legislative approval of appointments and removals may look unnecessary interference into executive action since the President or Governor is also voted into power. But Nwabueze (1982) justifies it on the ground that the legislature is the 'public eye' and so the exercise of such powers ensures the standards of integrity, competence and national interest required for the efficient management of the nation's affairs.

Investigation: The Constitutions have empowered the federal and state legislatures respectively to direct or cause to be directed investigations into the activities of the executive for the purpose of (a) making laws with respect to any matter within their legislative competence and correcting any defects in existing laws; and (b) exposing corruption, inefficiency or waste in the execution or administration of laws within their legislative competence and in the disbursement or administration of funds appropriated by them (Sections 88 [1] & [2] and 128 [1] & [2]).⁸⁶ The investigation is specifically to be into-

- (a) any matter or thing with respect to which they have power to make laws;
- and

⁸³ See ss. 128 (1), (2), (3) & (4) and 134 (1), (2), (3) & (4) of 1960 and 1963 Constitutions.

⁸⁴ Ss. 134 (3) and 172 (3) 1979 Constitution.

⁸⁵ Ss. 135 (2) and 173 (2) 1979 Constitution.

⁸⁶ Ss. 82 (1) & (2) and 120 (1) & (2) 1979 Constitution .

(b) the conduct of affairs of any person, authority, Ministry or government department charged, or intended to be charged, with the duty of or responsibility for-

- (i) executing or administering laws enacted by them; and
- (ii) disbursing or administering moneys appropriated or to be appropriated by them.

Either of the Houses in the National Assembly (or both Houses jointly) could exercise this power. A legislature could exercise the powers itself or through delegation. The legislature is given certain procedural powers to facilitate this investigation. For instance, it can procure oral, written or circumstantial evidence; summon any person to give evidence or produce any document or thing in his possession; and issue a warrant to compel the attendance of a person who fails, refuses, or neglects to attend after being summoned (s. 89 [1]; s. 129 [1]).⁸⁷ These investigative powers were never conferred on the legislature by either the 1960 or 1963 Constitutions. Such powers are a relevant check on the executive not only for sanctioning the investigation but in creating knowledge on the part of the executive that the investigation could be conducted at any time.

Important though these powers are, the legislatures must exercise them for the purposes specified and not in a manner which derogates from rights guaranteed by the constitutions. In *Tony Momoh v. Senate*⁸⁸ (where an article about Senators lobbying for contracts from the executive was published) and in *Adikwu & Ors. v. National Assembly*⁸⁹ (where the fraudulent claim of salaries and allowances for fictitious staff by legislators was published in a newspaper), the courts refused to allow the legislature to exercise the powers in such a way as to derogate from the right to freedom of speech and expression.

⁸⁷ Ss. 83 (1) and 121 (1) 1979 Constitution.

⁸⁸ (1981) 2 NCLR 105.

⁸⁹ (1982) 3 NCLR 399.

ii. Impeachment

Grounds: The powers of impeachment in Nigeria were provided for the first time in the 1979 Constitution under sections 132 (1) and 170 (1). The current 1999 Constitution maintained those provisions under different sections. The Constitution empowers the National Assembly⁹⁰ to remove from office the President or Vice President if found to be guilty of gross misconduct in the performance of the functions of his office (s. 143 [1]). Similar powers are given to the State House of Assembly as against the Governor or Deputy Governor (s. 188 [1]). The constitution defines ‘gross misconduct’ as a grave violation or breach of the provisions of the Constitution or a misconduct of such nature as amounts, in the opinion of the legislature, to gross misconduct (s. 143 [11]; s. 188 [11]).

The definition is imprecise and it gives room for various interpretations. A violation or breach of the provisions of the Constitution may not be difficult to establish. For instance, it would amount to a breach of the provisions of the constitution for the President to withdraw money from the consolidated revenue fund without authorisation by the National Assembly except in case of emergency.⁹¹ Cases of corruption in the form of siphoning public funds can also be accommodated under this definition.⁹² One thing that is not left in doubt is the exclusion of breach or violation of other laws as a ground for impeachment. The constitution is also silent on the breach or violation which occurred prior to assumption of office.⁹³ However, it is unclear as to what would amount to “a grave” violation or breach. Perhaps it would require a judicial interpretation to know exactly what it means.

⁹⁰ The National Assembly is a bi-cameral legislature consisting of the Senate and House of Representatives.

⁹¹ This would be a clear violation of section 80 (2) in case of the President and section 120 (2) in case of a Governor. Even in emergency cases, authorisation is required as condition subsequent for validity of the withdrawal.

⁹² This act would also be a clear breach of section 15 and the fifth schedule of the constitution.

⁹³ This is unlike the Malawian constitution for instance which covers both serious breaches of the constitution or written laws that either occurred or came to light during the term of office. The inclusion of breach of written laws raises some difficulties e.g. of scope (Hatchard 2000).

The second leg of the definition which leaves the meaning of the phrase “gross misconduct” to the opinion of the legislature does pose a difficulty because the determining test is a subjective one. It suggests that provided in the opinion of the legislature an act amounts to gross misconduct so shall it be. And from judicial attitude to phrases of this nature, it seems likely that courts would interpret it literally. For instance, in *Akintola v. Adegbenro*,⁹⁴ the Privy Council interpreted ‘as it appears to him’ in section 33 (10) of the Constitution of Western Nigeria literally in holding that the Governor was right in removing the Premier of Western Nigeria when it ‘appeared to him’ that he no longer commanded the respect of the majority of the members of the House of Assembly. Such discretion to determine what amounts to gross misconduct could be abused especially in cases where majority of members of the legislature belong to a political party rival to that of the chief executive. We shall see in chapter 6 that this was what happened in the impeachment of the Governor of Kaduna State, Alhaji Balarabe Musa.

It may be a pertinent question to ask what the scope of misconduct is as ground for impeachment. The Constitution unambiguously answers this question when it provides that the alleged misconduct must relate to the performance of official functions (s. 143 [2] [b]). It therefore excludes misconduct arising from private life. For instance, immoral behaviours such as adulterous relationships though may cause public outrage, are not within the ambit of the provision as to warrant exercise of the power of impeachment.

There is no doubt that the provision on the grounds of impeachment leaves room for manoeuvre. For a process as seriousness as impeachment of a chief executive, there is a need for a clearer provision. It would be better if the constitution clearly specifies what impeachable offences are so as to avoid abuse of the powers in ambiguous cases. A general clause such as ‘or any other breach of the provisions of the constitution or other misconduct’ would do no harm if it is preceded by specific provisions for the general clause would then be interpreted *ejusdem generis*. In any event, the provision as it stands is adequate

⁹⁴ (1962) 1 All NLR, 461.

in subjecting immune officers to law and in checking breach of the Constitution such as corruption.

Procedure: The wisdom in separating power among the arms of government seems to have been applied in the procedure for impeachment for it is not entirely the business of the legislature. The input of ‘outsiders’ is required in the process. And this is to avert two important dangers that may arise if everything is left to the legislature: a legislature at loggerheads with a chief executive may use its powers against him/her maliciously on frivolous grounds; and a weak legislature may be pressured by the government not to impeach the chief executive even in the face of genuine grounds. Thus to avoid both situations, an independent body is involved in the investigation of the allegations whilst leaving the final decision on removal to the legislature. This approach is normally adopted where the chief executive is directly elected (Hatchard 2000).

The procedure for impeachment is the same whether it is exercised by the National Assembly at the federal level against the President or Vice President or by a State House of Assembly against a Governor or Deputy Governor. It consists of three stages. At the first stage, the Constitution stipulates that an allegation of gross misconduct against an office holder in the performance of his official functions must be stated in a written notice with detailed particulars; signed by not less than one third of the members of the legislature and presented to the Senate President or Speaker of the State House of Assembly as the case may be. Within 7 days of the receipt of the notice, the Senate President or Speaker shall cause a copy thereof to be served on the holder of the office and on each member of the legislature and shall also cause any reply to the allegation to be served on each member (s. 143 [2] [a] & [b]; s. 188 [2] [a] & [b]).

Whether or not there is reply to the allegation, each chamber of the National Assembly or the House of Assembly shall, within 14 days of the presentation of the notice, resolve by motion without debate, whether or not the allegation shall be investigated (s. 143 [3]; s. 188 [3]). A motion to investigate shall be declared as having been passed if it is supported by the votes of not less than two third of

all the members of each chamber of the National Assembly or of all the members of the House of Assembly (s. 143 [4]; s. 188 [4]).

It is at the second stage that the process goes outside the legislature. Within 7 days of the passing of the motion, the Chief Justice of Nigeria or the Chief Judge of the State as the case may be shall, at the request of the Senate President or Speaker, appoint a panel of 7 persons who in his opinion are of unquestionable integrity, to investigate the allegation. These persons must not be members of any public service, legislative house or political party (s. 143 [5]; s. 188 [5]). In order to ensure a fair hearing, the holder of the office is entitled to defend himself in person or to be represented by a legal practitioner of his own choice during the proceedings (s. 143 [6]; s. 188 [6]). The panel shall have powers and exercise functions as prescribed by the legislature; and shall report its findings to each chamber of the National Assembly or to the House of Assembly within 3 months of its appointment (s. 143 [7]; s. 188 [7]). Where it found that the allegation has not been proved, the issue terminates (s. 143 [8]; s. 188 [8]).

If however the panel reports that the allegation has been proved, the final stage of the procedure starts. Within 14 days of the receipt of the report, each chamber of the National Assembly or the House of Assembly shall consider the report, and if a resolution of each of the chambers or the House of Assembly supported by not less than two third majority of all its members the report is adopted, the holder of the office stands removed as from the date of the adoption (s. 143 [9]; s. 188 [9]). It is not clear however what the word ‘consider’ means here. Does it mean a debate on the report or does it include seeking for a clarification thereon? It may seem plausible to assume that further hearing is excluded since the fact-finding aspect has been delegated to the panel. Thus the legislature is to take a position based on the findings.

It is interesting to note that the jurisdiction of courts has been ousted by the Constitution regarding the proceedings or determination of the panel or the legislature or any matter relating thereto (s. 143 [10]; s. 188 [10]). The approach of the lower courts on this provision seems to be literal. For instance, the

Governor of Kaduna State, Balarabe Musa, filed two actions while under investigation by a panel constituted pursuant to the impeachment provisions. One was for an injunction stopping the impeachment process for being an abuse of the Constitution;⁹⁵ and the other was challenging the qualification of members of the panel.⁹⁶ The Courts in both cases upheld this ouster provision and refused to interfere into the impeachment process.

The same decision was arrived at recently by a High Court in Ibadan when the Governor of Oyo State, Rasheed Ladoja, challenged his impeachment procedure.⁹⁷ It has been argued however that it would amount to a serious affront to the rule of law on which the constitution is based if courts do not assume jurisdiction in appropriate cases such as when the notice of allegations of misconduct is signed by less than the prescribed one-third of the members of the legislature; or where the notice is not served on the chief executive and no opportunity is given to him to defend himself before the investigating committee; or where the acts in question do not amount to gross misconduct in law; etc. (Nwabueze 1985: 339-340). The Court of Appeal seemed to have agreed with this argument when it reversed the Ibadan High Court decision holding that the jurisdiction of courts is ousted only if the procedure outlined in the constitution is complied with.⁹⁸ It clarified that the court has jurisdiction to examine whether the provisions of those sections have been complied with and if it is not so satisfied, it could ensure compliance. Courts' jurisdiction is ousted where there was "compliance with the pre-impeachment process" and then "what happened thereafter [becomes] the internal affairs of the House of Assembly and the court would have no jurisdiction to intervene" (*Vanguard*⁹⁹ 06/11/06).

One wonders whether breach of the 'social contract' by the various governments as could be seen in the terrible level of underdevelopment in the country does not amount to violation of the provisions of the Constitutions. Since

⁹⁵ *Alhaji Balarabe Musa v. Speaker, Kaduna State House of Assembly* (1982) 3 NCLR 450.

⁹⁶ *Alhaji Balarabe Musa v. Auta Hamza* (1982) 3 NCLR 299.

⁹⁷ *Hon. Abraham Adeolu Adeleke (Speaker) & Ors v. Oyo State House of Assembly & Ors* (unreported).

⁹⁸ The appeal was numbered CA/1/2/2006 and presided over by James Ogebe JCA.

⁹⁹ *Vanguard* is a newspaper in Nigeria. It can be accessed at <http://www.vanguardngr.com/>.

development is clearly stated to be the duty of the state by the Constitution, its neglect cannot be anything other than a violation or breach of the Constitutional provisions. If the executive cannot be easily caught in this instance for the availability of evidence of developmental efforts by the governments, same cannot be said about the rate of corruption and abuse of office which has characterised the Nigerian polity particularly from the 1970s onwards.¹⁰⁰

The powers of impeachment have never been exercised against a President or Vice President. There was an attempt in 2002 by the House of Representatives to initiate the process against President Obasanjo for allegations of breach of the Constitution. However, it did not reach any advanced stage. But as indicated earlier, the powers have been invoked at state level. The first instance was in the Second Republic when the Governor of Kaduna State was impeached on allegation of violations of the Constitution which included: removal of the state Director of Audit without the approval of the legislature, appointment of a single person to the offices of Secretary to the government and Head of civil service, the establishment of certain executive boards and the appointment of members thereto without an enabling law passed by the legislature, the expenditure of money without legislative authorisation, and disregard for established procedure for the withdrawal of public money.

The Fourth Republic also witnessed the impeachments of the Governors of Bayelsa, Oyo, Anambra, Ekiti and Plateau States on various grounds bordering on corruption. Except the case of Bayelsa, all the impeachments were nullified by courts for procedural irregularities.¹⁰¹

B. Judicial Check

The judiciary is an indispensable institution for the protection of rule of law. All other principles of rule of law would amount to nothing without the judiciary since law is not self-applying. Hence courts are needed for the interpretation and application of laws made by the legislature. Indeed it is said that the law is what

¹⁰⁰ The issue of corruption has been dealt with in detail in Chapter 4.

¹⁰¹ Details of these cases are provided in Chapter 6.

the courts say it is. According to Dicey (1959: 203), the rights of individuals as defined and enforced by the courts are the source of the English constitution rather than a product thereof. The judiciary is the custodian of the law ensuring that it is the law, and not any person or authority, which rules. This function of the judiciary subjects the executive (and the legislature as well) to its check. Divest a system of this function and there would be injustice and arbitrariness in society. Justice Nnamani captures the role of the courts when he states as follows:

It has been generally acknowledged that the judiciary is the guardian of our Constitution, the protector of our cherished governance under the Rule of Law, the guardian of our fundamental rights, the enforcer of all the laws without which the stability of society can be threatened, the maintainer of public order and public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society (quoted in Mowoe 2003: 148-149).

Similarly, Borkin (in Ohonbamu in Elias 1972: 218) states that:

The attainment of justice is the purpose to which the entire intricate structure of jurisprudence is dedicated. Within this edifice sits a focal figure in whom is crystallized the essence and meaning of law and equity. This is the judge. To the public mind and conscience the judge is the trustee of the assurance of justice... The courtroom is his dominion. He presides, he administers, he decides. He may punish on the spot as contempt any ... aspersions on his person or office. There is no other civil officer clothed with such summary power.

The role of the courts varies from state to state depending on the nature of the constitution applicable. In states where unwritten and flexible constitutions apply like the United Kingdom, courts normally interpret laws made by the legislature without power to invalidate them. The parliament enjoys sovereign omnipotence. In States with written and rigid constitutions on the other hand, courts enjoy enormous powers in determining legal positions in disputes before them. They can invalidate laws made by the legislature and can nullify actions taken by the executive especially when such laws or actions contravene the constitution. The power of judicial review in the United States for instance could

be seen in *William Marbury v. James Madison*¹⁰² where the Supreme Court held that Congress could not expand its (the court's) original jurisdiction as it sought to do under the Judiciary Act 1789 because the Constitution did not permit that. Nigeria too has been operating written and rigid constitutions since its independence in 1960 and the judiciary is empowered to check the excesses of the executive (including the legislature).

Judicial powers in Nigeria are derived from the Constitutions (s. 6 [1] & [2]).¹⁰³ They extend (a) "to all inherent powers and sanctions of a court of law"; and (b) "to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions or proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person" (s. 6 [6] [a] & [b]). Thus it is from these judicial powers that the courts derived their powers of judicial review against the acts of the executive (including the legislature). To guard these powers, the Constitutions prohibited the legislature from enacting any law which ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law (s. 4 [8]).¹⁰⁴ 1960 and 1963 Constitutions did not vest judicial powers in this manner. They merely established the (Federal) Supreme Court and the High Court of the Federal Territory and stated that they shall have all the powers of such courts.¹⁰⁵

Judicial powers mean that the courts may declare an executive act unconstitutional and void on any of the following grounds (Nwabueze 1982: 309):

- a. it was not done in a manner prescribed by law;
- b. it is *ultra vires* the powers of the executive under the federal structure;
- c. it is contrary to the principle of separation of powers;
- d. it infringes a fundamental human right;

¹⁰² 5 U.S. (1 Cranch) 137 (1803).

¹⁰³ 1979 Constitution had similar provisions.

¹⁰⁴ 1979 Constitution had same provisions.

¹⁰⁵ See sections 104 (1) & (3), 115 (1) & (3); and 111 (1) & (3), 122 (1) (3) of the 1960 and 1963 Constitutions respectively.

- e. it ousts or purports to oust the jurisdiction of court; or
- f. it is otherwise inconsistent with, or contrary to the Constitution.

Unlike other arms of government which are proactive, the judiciary though an indispensable organ is always a reactive institution. In other words, no matter the arbitrariness of executive (or legislative) act, the courts can only act if invited to so act through the formal initiation of judicial proceedings by aggrieved parties. But the inevitability of disputes arising from normal state activities always ensured the engagement of the courts in the business of checking the excesses of the executive. Thus in a fairly large number of cases, the courts have wielded their powers of judicial review against executive act. I shall cite few instances here.

Just recently, in the case of *Attorney-General of the Federation v. Attorney-General of Abia State & Ors*¹⁰⁶ the Supreme Court *inter alia* declared certain acts of the federal executive null and void for being contrary to the provisions of s. 162 of the 1999 Constitution. These included the exclusion of natural gas from the natural resources subject of the derivation principle for the purposes of sharing revenue; funding of the judiciary, servicing external debts and funding Joint Venture Contracts and the Nigerian National Petroleum Corporation (NNPC) priority projects all as a first line charge on the Federation Account; and the unilateral allocation to the Federal Capital Territory, Abuja (not being a constitutional allottee) of 1% of the revenue from the Federation Account.

In *Attorney-General of Ogun State & Ors v. Attorney-General of the Federation*,¹⁰⁷ the court held that the President did not have the constitutional authority to regulate or interfere with Governor's exercise of his executive functions. This was apparently due to the division of powers between the tiers of government under the federal arrangement provided by the Constitution. Similarly, in *Shugaba Abdurrahman v. Minister of internal Affairs & Ors*,¹⁰⁸ the court disapproved of the act of the Minister, the President and officers acting on

¹⁰⁶ (2002) 6 NWLR, PART 764, PAGE 542

¹⁰⁷ (1982) 3 NCLR 166.

¹⁰⁸ (1981) 2 NCLR 460

their behalf in deporting the plaintiff and seizing his passport. The plaintiff, the House Leader of Borno State House of Assembly (a state ruled by a party opposed to the national ruling party), was deported on allegations that he was an illegal alien from Chad Republic. The court gave an injunctive order against the deportation holding that by virtue of the Constitution, the plaintiff was a Nigerian citizen, his mother's Nigerian citizenship having been established.

5.4 Conclusion

The Nigerian Constitutions, like other constitutions, were by their nature meant for the present and for the future. To achieve the most desired dynamism, they have made themselves subject to amendments (sections 8 & 9)¹⁰⁹ and courts have a limited leverage to modify them. It is inconceivable that Constitutions would be perfect, but on average, we can find adequate provisions therein to support principles of a rule of law consistent with good management of public resources and state-led development. Thus a theoretical rule of law framework (i.e. the law in books) for development is not lacking in Nigeria. Implementing the provisions would minimise, if not eliminate, corruption. But the implementation is something entirely different. It is within the domain of practice. Nigeria's first and only Prime Minister, Abubakar Tafawa Balewa, referred to the wide gap between theory and practice during the African Conference on the Rule of Law in Lagos in 1961 in the following words: "We, who find ourselves in positions of authority, have responsibility to preserve law and order and at the same time to guard the laws of eternal justice even while we are being guided by them – and how difficult it can be in practice as opposed to theory" (International Commission of Jurists 1961: 88). What does the practice tell us in Nigeria regarding the rule of law? This is the question I propose to address in the next chapter.

¹⁰⁹ Same number of sections under 1979 Constitution.

CHAPTER 6

ABSENCE OF RULE OF LAW IN PRACTICE

6.1 Introduction

This Chapter argues that there has been absence of rule of law in practice in Nigeria. The rule of law provisions examined in the previous chapter, though adequate to ensure good management of public resources and development, have not been fully implemented by governments over the years. This legal problem contributed to the social menace of corruption which in turn affected development adversely. Corruption is not an independent variable but rather a symptom of other underlying problems (UNDP 1997: 37; Hope & Chikulo 2000: 1). There are many factors contributing to it as we saw in Chapter 1. Though corruption in itself is a breach of rule of law in a way,¹ the absence of rule of law in practice, I shall argue, is a factor contributing to it.

This chapter will attempt to show how rule of law became absent in practice and how this absence spurred corruption. It will argue that the suspension of the Constitution, sacking of the legislature and muzzling of the judiciary under military rule resulted in the executive enjoying absolute power free from legislative and judicial check; a situation of monopoly and discretion without accountability. Although the Constitution and the legislature exist and the judiciary ‘independent’ during civilian rule, breach and lack of use of the rule of law provisions left the executive with power as good as absolute. This situation spurs corruption which ultimately becomes a major cause of underdevelopment. I shall examine this situation under two main sections: rule of law under the military and rule of law under civilian rule.

6.2 Rule of Law under the Military

Nigeria has experienced long years of military rule. Out of its 48 years of existence as an independent nation, the country has been ruled by the military

¹ It is a breach of the principle of the Code of Conduct enunciated in the Constitution from 1979.

for a total of about 30 years. Military rule and constitutionalism are mutually exclusive because a successful coup overthrows legitimate government and changes the constitutional legal order which established it.² Nigeria had only two coups which toppled elected governments - one was in 1966 and the other one was in 1983. Each of the two coups was followed by palace coups and subsequent regimes mainly retained the legal order created by the original toppling regime with minor structural modifications. Since our version of the rule of law is derived mainly from the Constitution, it follows that the rule of law will suffer under military regimes. I shall hereunder examine the ways by which the military undermine the rule of law.

i. Subordinating the Constitution

All the Constitutions Nigeria operated stated that their provisions shall be supreme over other laws and any other law inconsistent with them shall be void to the extent of the inconsistency (s. 1 1960, s. 1 1963; s. 1(1) & (3) 1979; s. 1(1) & (3) 1999). In an apparent move to forestall military coups, the 1979 and 1999 Constitutions added that no part of the country shall be governed except in accordance with the Constitution (s. 1 (2) 1979 and 1999 respectively). These provisions, together with the provisions dealing with the amendment of the Constitution³ normally fall within suspended provisions of the Constitution.

A military take over being assumption of power by force as opposed to the conventional democratic way therefore becomes an unconstitutional act. But under the doctrine of necessity, there cannot be a vacuum in a legal order and therefore the success of a military coup begets its legality. It now behoves the new regime to establish a new legal order which suits it. It should be expected therefore that one of the first tasks of a military incursion would be suspending

² But that is not to suggest that the military are not bound by rule of law principles such as accountability and transparency as Obasanjo (in Shyllon & Obasanjo 1980: 23-24) would want us to believe. The military too claim to uphold these principles. For instance, the Babangida administration claimed to be respecting and upholding human rights and the rule of law (see Chapter 4 on its position when it constituted the Justice Bello Commission to review the cases of people convicted under Buhari's Recovery of Public Property Decree). Babangida specifically claimed to respect and uphold accountability and transparency (Agedah 1993: 40).

³ I.e. ss. 8 and 9 1979 and 1999 Constitutions respectively which require stringent procedures through the legislature.

some parts of the Constitution and modifying some other parts. The provision dealing with the supremacy of the Constitution gets modified in order to make the decree superior to the Constitution. Nigeria's first experience of such an aberration was in January 1966 when it recorded its first military coup. The Federal Military Government headed by Major-General Aguiyi-Ironsi promulgated the Constitution (Suspension and Modification) Decree No. 1 of 1966⁴ which provided under section 1(1) that:

This Constitution shall have the force of law throughout Nigeria and if any other law (including the Constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Provided that this Constitution shall not prevail over a decree, and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever.

Similar modifications were made with respect to Regional Constitutions i.e. an edict of a Region shall prevail over a Regional Constitution.

The same position was maintained after Major-General Ironsi was toppled in another coup produced Lt. Col. Yakubu Gowon as Head of State in July 1966. Despite the clear position of the Decree, judicial attitude was not in agreement as to where supremacy lay. For instance, the case of *State v. Nwoga & Okoye*⁵ was decided as if the basic law of the land was still the Constitution but in *Ogunlesi & Ors. V. Attorney-General of the Federation*⁶ the Lagos High court held that Decree could override the Constitution (Ojo in Elias, ed., 1972: 18; Ojo 1987: 19). The Western State Court of Appeal seemed to have appreciated the change in the legal order when in the case of *Lakanmi and Another v. Attorney-General of Western State and Others*⁷ it stated as follows:

Once a Decree is made, as provided in Decree No. 1 of 1966, nothing, not even the provisions of the Constitution can derogate therefrom. Section 1 of the Constitution ... with the 'proviso' clearly establishes the supremacy of a Decree over the Constitution itself

⁴ Dated 17th January 1966.

⁵ (1966) Suit No. E/34C/66

⁶ (1970) LD/28/69 (unreported)

⁷ CAW/35/68 (cited in Ojo 1987: 144).

and one may say that Decrees become the magic wand of the Federal Military Government (quoted in Ojo 1987: 144)

On appeal, the Supreme Court reversed the above decision by courageously holding that neither the first coup of January 1966 nor the second one of July 1966 altered the constitutional legal order. In particular, it declared the Decree which sought to validate the decision of a Tribunal which was subject of appeal⁸ *ultra vires* the Constitution. However, the Government reacted swiftly by promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree⁹ which provided that the coups in 1966 amounted to revolution which changed Nigeria's legal order placing the Decree above the 1963 Constitution. Paragraph 1 of the Preamble to the Decree¹⁰ states that:

... the military revolution which took place on 15 January, 1966, and which was followed by another on 29 July 1966, effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree [No. 1 of] 1966 ... each military revolution involved an abrupt political change which was not within the contemplation of the Constitution of the Federation 1963...

There were two military regimes after Gowon and they both operated under the Constitution (Suspension and Modification) Decree No. 32 of 1975 which was substantially the same with Decree No. 1 of 1966,¹¹ i.e. there was no change in the legal order as sealed by Gowon's Decree No. 28 of 1970.

Civilian rule was restored on 1st October 1979 under the 1979 Constitution.¹² Unfortunately, this constitutional legal order did not last long. The military struck again on 31st December 1983. The new regime, headed by Maj. Gen. Muhammadu Buhari, also promulgated the Constitution (Suspension and Modification) Decree No. 1 of 1984. Under its s. 1 (2), the Decree modified s. 1

⁸ The Decree was Forfeiture of Assets, etc. (Validation) Decree No. 45 of 1968. See the section dealing with muzzling the judiciary, *infra*, for more details of the *Lakanmi* case.

⁹ No. 28 of 1970

¹⁰ S. 1 of the Decree made the Preamble part of the Decree.

¹¹ General Murtala Mohammed took over power from General Gowon in a palace coup in July 1975. In February 1976, General Mohammed was assassinated in a failed coup and his second-in-command, Brigadier Obasanjo took over the reigns of leadership.

¹² Civilian rule was restored with the swearing in of Shehu Shagari on 1st October 1979. He served for 4 years and was re-elected in 1983. He was toppled three months into the second term.

(1) & (3) of the 1979 Constitution in order to make the Decree prevail over the Constitution in the same manner Decree No. 1 of 1966 did to the 1963 Constitution. The states which succeeded the former Regions had no Constitutions so there was no need to replicate this provision at that level.

Perhaps to forestall a judicial decision which might challenge the supremacy of the Decree like it happened in the *Lakanmi* case, the Buhari regime quickly promulgated the Federal Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984 which provided that the event of 31 December 1983 was a revolution creating a new legal order and giving the regime unlimited legislative powers. In clear terms, it means the Decree shall prevail over the Constitution.

The Constitution continued to be subordinated under military rule until May 1999 when civilian rule was restored again.¹³ Before then, there were changes in military regimes with the supremacy of the Decree left intact in all the instances. For instance, General Buhari was overthrown in a palace coup by General Ibrahim Babangida in August 1985. Babangida merely changed administrative structures.¹⁴ The Decree continued to prevail. He promulgated the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 to amend Decree No. 1 of 1984 in order to reflect the changes brought about by the coup.

As part of its transition programme, the Babangida regime came up with a Constitution, the 1989 Constitution, designed to be operated in the Third Republic scheduled to commence in 1993. Presidential election held on 12 June 1993, the last in the series of elections,¹⁵ was cancelled by Babangida and he handed over to an Interim National Government in August 1993.¹⁶ The 1989 Constitution was therefore never applied. The interim government was

¹³ This time, a one-time Military Head of State, General Olusegun Obasanjo (rtd) was sworn in as elected President.

¹⁴ For instance, the name of the highest military body was changed from Supreme Military Council to Armed Forces Ruling Council; Federal Executive Council now changed to National Council of Ministers; the name "Head of the Federal Military Government" changed to "President, Commander-in-Chief of the Armed Forces"; etc.

¹⁵ Elections at local governments, States, and Federal legislature had been concluded at the time.

¹⁶ This government was scheduled to last till 31 March 1994.

established under a Decree though it was headed by an appointed civilian, Chief Earnest Shonekan. It lasted for 82 days only as the military struck again in November 1993. The new Abacha regime dismantled all the political structures set up by Babangida and the country continued to be under military rule until May 1999.¹⁷

ii. Suspending the Legislature

Legislature is a symbol of democracy. Nigeria operates a participatory democracy and therefore the executive and legislative arms of government are a handful of politicians voted into power. While the legislature is a desirable state institution, in times of military rule it is dispensed with. In fact, by the nature of the work of the legislature as a representative institution which checks executive powers, it is inconceivable that it would exist during military rule which, by its nature, monopolises and centralises power. Thus one of the first tasks of a successful military coup is dissolving all democratic institutions such as the legislative bodies and the executive councils. Throughout Nigeria's military experience, save for a short period during Babangida when it had a sort of diarchy, the legislative arm of government was under suspension. After the January 1966 coup, the Head of State, Major-General Aguiyi-Ironsi, stated among other things that:

The Federal Military Government hereby decrees:

- (a) The suspension of the provisions of the Constitution of the federation relating to the office of President, the establishment of parliament, and of the office of Prime Minister;
- (b) The suspension of the provisions of the Constitution of the Regions relating to the establishment of the offices of Regional Governors, Regional Premiers and executive councils, and Regional legislatures (quoted in the *Lakanmi* case in Aihie & Oluyede 1987: 55).¹⁸

¹⁷ Abacha started a new transition to civil rule programme. Presidential elections were to hold in August 1998 with Abacha as the sole candidate for all the 5 registered political parties. He died suddenly in June 1998 and his successor, Gen. Abdussalami Abubakar, initiated a fresh programme leading to the May 1999 hand over.

¹⁸ The broadcast of the Head of State was made on 16th January 1966 and was published as *Government Notice* No. 148 dated 26/01/1966.

The military now assumes a dual role of the executive and the legislature. The implication of this is that the traditional separation of powers is tampered with.

Decree No. 1 of 1966 followed Ironsi's broadcast. It suspended the Federal Parliament together with the four Regional legislatures then existing. The powers to make laws were now conferred on the Federal Military Government and/or Regional Military Governors¹⁹ as the case may be. S. 3 (1) of the Decree provided that "the Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever," while the Military Governor of a Region was empowered to make law on any matter included in the Concurrent Legislative List of the Constitution with the prior consent of the Federal Military Government (s. 3 [2]).

The powers of the Federal Government were unlimited while a Governor had no power to legislate on matters within the Exclusive Legislative List of the Constitution. The power to make laws at the Federal level was exercised by means of Decrees signed by the Head of the Federal Government and, in the case of a Region, by means of Edicts signed by the Regional Governor (s. 4).

By the Constitution (Suspension and Modification) Decree No. 5 of 1966, Nigeria ceased to be a federal country. Each Region became a group of provinces with no direct legislative powers. By this instrument, General Ironsi made Nigeria a unitary state. However, on change of government, Gowon reverted to the federal system vide the Constitution (Suspension and Modification) Decree No. 59 of 1966. The regimes of Murtala and Obasanjo continued with the monopolisation of power both executive and legislative powers having been conferred on the military. The legal framework within which such monopoly was achieved was the Constitution (Suspension and Modification) Decree No. 32 of 1975.

¹⁹ Who now replaced Regional Premiers.

With the return of the military in December 1983, the experience of January 1966 was unfortunately repeated. The National Assembly, a bi-cameral legislature consisting of the Senate and House of Representatives, and the State Houses of Assembly which were all constituted by elected representatives were suspended and political parties dissolved. By Decree No. 1 of 1984, the powers to make laws for the peace, order and good government of Nigeria were conferred on the Federal Military Government (s. 3 [1]) and, in the case of a State, on the Military Governor (s. 3 [2]). The federal government exercised such powers by means of Decrees signed by the Head of State only and at the state level by means of Edicts signed by the military Governor (s. 3 (1) and s. 12 (1) proviso).

The position remained unchanged until May 1999 when civilian rule was restored. All along, the country had been under one military dictatorship or another and naturally they all shared the same feature of concentrating executive and legislative functions in the military.

iii. Muzzling the Judiciary

Of the three arms of government, it is only the judiciary which is ‘saved’ by the military after a coup. It is ‘saved’ perhaps partly because it is a professional body whose job cannot be done by the military and partly because it was never an elected body. Save for the creation of military tribunals, its structure is left intact; and its traditional powers²⁰ unperturbed in a way. Similarly, the role of the courts in entertaining applications for the enforcement of fundamental human rights when the rights of a person have been, are being or are likely to be infringed (s. 42 1979 Constitution; s. 46 1999 Constitution) is normally preserved subject however to the provisions of Decrees.

However, while the military preserve judicial powers on one hand they oust the jurisdiction of courts in certain instances on the other hand. In 1966, the military

²⁰ Otherwise known as judicial powers. It is the constitutional power of courts to determine all matters between persons or between government or authority and any person for the purposes of determining any question of civil rights and obligations (s. 6 of the 1979 and 1999 Constitutions).

ousted the jurisdiction of courts on any question bordering on the validity of any Decree or Edict. Decree No. 1 of 1966 provided that “No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria” (s. 6). The same provisions were replicated under section 5 of Decree No. 1 of 1984. These were specific shields against the use of judicial power to challenge the absolute legislative powers of the military.

Ouster clauses in other specific matters were not uncommon under the military. For instance, the State Security (Detention of Persons) Decree No. 2 of 1984 provided that “No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Decree” (s. 4[1]). In the Recovery of Public Property (Special Military Tribunals) Decree No. 3 of 1984,²¹ it was provided that “the validity of any direction, notice or order given or made or, as the case may be, of any other thing whatsoever done under this Decree shall not be inquired into in any court of law ...” (s. 13[1]). Section 9 of Public Officers (Protection Against False Accusation) Decree No. 4 of 1984 contained same wordings. It is interesting to note that while Babangida repealed Decree No. 4 vide his Decree No. 20 of 1985, he retained Decree No. 2.

Even the traditional powers were sometimes not spared.²² The military went to the extent of validating a decision made by a Tribunal in effect wanting to render an appeal against such a decision nugatory. This led to a legal twist which ultimately determined, in unambiguous terms, the place of the judiciary and rule of law in a military dispensation. That was in the case referred to above, i.e. *Lakanmi & Ors v. Attorney-General Western State & Ors*²³ where a

²¹ This was the Decree under which Second Republic public officers and politicians were tried for various corrupt offences during the Buhari regime as we saw in Chapter 4.

²² There were cases in which action which was ordinarily judicial was taken by means of decrees without resort to the courts at all. For instance, the State Security (Detention of Persons) Decree No. 2 of 1984 authorised the detention and release of persons; legally registered associations were either proscribed or got their elected officials dissolved and replaced with government-appointed administrators. E.g., the Academic Staff Union of Universities (ASUU) was proscribed by Decree No. 24 of 1992; the Executive Councils of the Nigerian Labour Congress (NLC), NUPENG and PENGASSAN were dissolved and substituted with government sole administrator agents vide decrees Nos. 9 and 10 of 1994.

²³ (1971) 1 U.I.L.R. 201. This case is also reported in full in Aihe & Oluyede (1987: 44-64) and we shall rely on this latter report in our discussion of the case.

Tribunal of Inquiry²⁴ investigating the assets of certain public officers ordered that they should not further deal with the assets without the written permission of the Military Governor of Western State and pending the determination of the investigation, rents accruing from the assets were to be paid into the State Sub-Treasury at Ikeja or its Treasury at Ibadan.

An application for an order of *certiorari* before the Western State High Court in Ibadan was dismissed on the ground inter alia, that the order was not *ultra vires* and that by virtue of section 21 of Edict No. 5 of 1967, the validity or otherwise of such order could not be challenged. It was while an appeal against this decision was pending at the Western State Court of Appeal that the military promulgated the Forfeiture of Assets etc. (Validation) Decree No. 45 of 1968, among others, which validated the orders of the Tribunal and ousted the jurisdiction of any court from entertaining any matter relating thereto. State counsel therefore filed a preliminary objection before the Court of Appeal that it had no jurisdiction to entertain the appeal because (1) the proceedings related to a challenge of the validity of an order which had been validated under s. 1 (2) of Decree No. 45 of 1968; and (2) the said proceedings had abated as from 28th August 1968 (i.e. the date of the Decree) by virtue of s. 2 (2) of the said Decree. The Court upheld the objection and dismissed the appeal.

In the appeal to the Supreme Court, the Court mainly examined whether the validity of the Decree as pronounced by the Court of Appeal was correct. It did not hesitate to declare the Decree as “nothing short of legislative judgement, an exercise of judicial power.” The Court declared it *ultra vires* the Constitutional principle of separation of powers and therefore invalid. More importantly, it proceeded to take a stand on the position of the military coup vis-à-vis the constitutional order. It held that the rule of law and supremacy of the 1963 Constitution still prevailed notwithstanding the military coups of 1966. The Court, per Ademola CJN, stated that:

We must once again point out that those who took over the government of this country in 1966 never for a moment intended to

²⁴ Established under Edict No.5 of 1967.

rule but by the Constitution. They did, in fact, recognize the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of the Decree No. 1 of 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military Government should, in its power to enact Decrees, exceed the requirements or demands of the necessity of the case. In the present case we are satisfied that Decree No. 45 of 1968 did go beyond the necessity of the occasion... We have come to the conclusion that this Decree is nothing short of legislative judgement, an exercise of judicial power. It is in our view ultra vires and invalid (p. 63-64).

The Court further stated that:

We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a section of the society which engaged itself in corrupt practices – those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgement and inflicted punishment or in other words eroded to [sic] the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts must intervene (p. 64).

As stated above, the military promulgated Decree No. 28 of 1970 which in its Preamble clearly provided that the effect of the two coups of 1966 was to abrogate the pre-existing constitutional order.²⁵ In specific terms, the Decree annulled the decision of the Supreme Court in the following provision:

Any decision, whether made before or after the commencement of this Decree, by any Court of Law in the exercise or purported exercise of any powers under the Constitution or any enactment of law of the Federation or any State which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of a Decree) or the incompetence of any of the governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making thereof (s. 1 [2]).

²⁵ The government's counter-move was quick and unprecedented. The decision was handed down on 24/4/1970 and the Decree was promulgated on 9/5/1970.

The Federal Government even warned the judiciary that it faced extinction if it did not learn to kowtow. The judiciary, the government said, owed its existence to the military regime which had always had the power to abolish, if it had so wished, the whole constitution and rule the country by Decree. With this stern warning against the judiciary, it could be said that the “door to the maintenance of the rule of law was not only shut and with bars, but the key thrown to the bottom of the sea” (Shyllon in Shyllon & Obasanjo 1980: 5).

From the cases which followed the promulgation of the Decree, the courts seemed to have learnt to kowtow, for they capitulated to the ouster of their jurisdiction. For instance, in *Hope Harriman v. Col. Mobolaji O. Johnson*,²⁶ the Defendant/Applicant prayed the High Court of Lagos to dismiss the claim of the Plaintiff/Respondent on the grounds that based on Decree No. 28 of 1970, the reliefs sought would not avail him (the Plaintiff) and that the court lacked jurisdiction in the matter. The Plaintiff challenged the Public Officers and other Persons (Forfeiture of Assets) Order No. 13 of 1969 and the Public Officers and other Persons (Making of Reparation) Order No. 14 of 1969 which were made under section 8 of Public Officers and other Persons Decree No. 37 of 1968.

By virtue of section 1 of Decree No. 28 of 1970, it appeared the validity of any Decree or Edict shall not be questioned in any court of law. And by section 1 (3) (b) of the Decree, a Decree included instruments made under and by virtue of the Decree. Although the court held that by the wordings of section 1 (2) of the Decree its jurisdiction had not been ousted, it granted the application and dismissed the action on the first leg of the Applicant’s argument i.e. that the reliefs when granted would be null and void by virtue of the same provision of the Decree. A similar decision was reached in an identical case, *Adenrele Adejumo & Others v. His Excellency Col. Mobolaji Johnson*²⁷ and the Supreme Court had subsequently affirmed the decision.²⁸

²⁶ (1970) Suit No. LD/440/69, reported in Aihe & Oluyede (1987: 233-237).

²⁷ (1971) Suit No. M/143/69, reported in Aihe & Oluyede (1987: 237-240). The only difference between this and the other case was that while the main action in the instant case was based on an application for order of *certiorari*, the other case was based on a claim for declaration (ibid: 239).

²⁸ The Supreme Court’s affirmation was reported as *Adejumo & Others v. H. E. Col. Mobolaji Johnson* (1974) 5 S. C. 101. There are also other cases on the issue (Aihe & Oluyede 1987: 240).

On the return of the military in 1983, the government did not wait for a repeat of judicial activism as exhibited in the *Lakanmi* case as stated above. It promulgated Decree No. 13 of 1984 which provided that the event of 31 December 1983 was a military revolution abrogating the constitutional legal order and creating a new legal order giving the military regime unlimited powers. Unlike Decree No. 28 of 1970, this Decree clearly ousted the jurisdiction of courts by providing that no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted after the commencement of this Decree the proceedings shall abate, be discharged and made void. It also provided that “the question whether any provision of Chapter IV of the Constitution [dealing with fundamental human rights] has been, is being or would be contravened by anything done or proposed to be done in pursuance of any Decree or an Edict shall not be inquired into in any court of law and, accordingly, no provision of the Constitution shall apply in respect of any such question” (s. 1 [2] [b]).

It was not unexpected when the judiciary conceded that rule of law must give way to military dictatorship in the face of Decrees such as No. 4 of 1984 and No. 13 of 1984. In the case of *Guardian Newspaper v. A. G. of the Federation*,²⁹ the High Court of Lagos recognised that under the Public Officers (Protection Against False Accusation) Decree No. 4 of 1984 which effectively gagged the press, a publication might be true and at the same time offensive if it brings or is calculated to bring the government or a public officer to ridicule or disrepute. Antithetical to rule of law as it appeared, the court, per Adefarasin C. J., still upheld the Decree as the law of the land:

By the foregoing provision it is unlawful for a person to publish a report or statement which brings or is calculated to bring the Federal Military Government or a State Government or a public officer to ridicule or disrepute even when the publication is true ... I would say that section 1(1) of the Public Officers (Protection Against False Accusation) Decree 1984 makes it unlawful for the plaintiffs to publish any report or statement which is true but which

²⁹ Suit No. M/139/84, cited in Okere in Nwogugu (1988: 69).

brings or is calculated to bring the Federal Military Government or a Public Officer to ridicule or disrepute. The provision may seem harsh but it is nonetheless the law of the land and none can question it (quoted in Okere in Nwogugu 1988: 69).

Although later the Supreme Court was bold enough to hold in *Sani Abacha v. Gani Fawehinmi*³⁰ that a state could not by way of a Decree escape from its obligations under an international treaty, the then Chief Justice of the Federation, Justice Mohammed Bello, strenuously defended the State Security (Detention of Persons) Decree No. 2 of 1984 under which persons could be detained indefinitely without recourse for redress in a court of law (s. 4 [1]). He argued that such Decrees were not peculiar to Nigeria. Another justice of the Supreme Court in the case of *Nwosu v. Environmental Sanitation Authority*³¹ boldly advised victims of human rights violations to seek redress outside the court because under the military, Decrees were inviolable.

iv. Effects on the Rule of Law

As we saw in Chapter 5, the constitutional checks on the executive (which holds the nation's resources) by the legislature and the judiciary are an effective means by which such resources can be utilised for development purposes. With the suspension of the legislature, it means that all the constitutional provisions relating to withdrawal, dealing or distributing public funds as they affect the legislature stand also suspended. For instance, when the executive arm of government decides to withdraw public funds for certain activity from the Consolidated Revenue Fund, there would no longer be any need for submitting an Appropriation Bill containing estimates of the expenditure³² to be incurred before any institution nor does it require authorisation of the issue of the moneys from any such institution.³³

³⁰ (2000) 6 NWLR Part 660, 228.

³¹ (1990) 2 NWLR Part 135, 688.

³² As required by sections 81 (1) & (2) and 121 (1) & (2) 1999 Constitution for Federal and State governments respectively. Ss. 75 (1) & (2) and 113 (1) & (2) 1979 Constitution had similar provisions for the Federal and State governments respectively. Sections 124 (1) & (2); 130 (1) & (2) of the 1960 and 1963 Constitutions respectively had similar provisions for the Federal government. The Regions then had their own Constitutions which made corresponding provisions.

³³ As being one of the instances for withdrawing money from the Fund as laid down in sections 80 (2); 120 (2) 1999 Constitution for federal and state. S.74 (2); 112 (2) 1979 Constitution for

Similarly, manner of distribution of the moneys standing to the credit of the Federation Account among the federal, state and local governments would no longer be prescribed by the National Assembly nor would manner of distribution of the amount due to local governments within a state be prescribed by the House of Assembly (as required by s. 162 (4) & (6) respectively) since these bodies were now suspended. Thus it was left to the discretion of the military to determine how much went where when and how. Of course they gave legal effect to this form of discretion but it was by means of Decrees (e.g. the Allocation of Revenue [Federation Account etc.] [Amendment] Decree No. 106 of 1992) and Edicts.

Again, the military at both federal and state levels did not have to go through the constitutional procedure of legislative authorisation in making advances from any Contingencies Fund in the event of an urgent and unforeseen need for expenditure for which no other provisions existed let alone presenting a Supplementary Estimate or introducing a Supplementary Appropriation Bill to replace the amount so advanced.³⁴

Not only was the military free from seeking legislative authorisation in financial matters, it could also dispense with the constitutional requirement of auditing of public accounts at both federal and state levels. Even when it decided to appoint an Auditor-General for instance, the fact that such appointment was purely at its discretion and would not be subjected to the necessary confirmation of the legislature meant that it could shop for a lackey who would be willing to compromise professional standards and who could serve for an unlimited period of time. And since any audit reports prepared would not be submitted to the legislature as required by the Constitution, the entire issue of expenditure and

federal and state. Sections 123 (2) and 129 (2) of 1960 and 1963 Constitutions respectively had same provisions for the Federal government. Regional Constitutions had corresponding provisions.

³⁴ These requirements are contained in sections 83 (1) & (2); 123 (1) & (2) of the 1999 Constitution providing for the Federal and State governments respectively. Ss. 77 (1) & (2); 115 (1) & (2) of the 1979 Constitution provided for the federal and state governments respectively. Ss. 126 (1) & (2) and 132 (1) & (2) of the 1960 and 1963 Constitutions had same provisions for the federal government with Regional Constitutions making corresponding provisions.

auditing of accounts would become an in-house issue free from an independent check.³⁵

In the event of corruption, inefficiency or waste in government or in the disbursement or administration of funds by the military, the suspension of the legislature meant that there was no body or institution with constitutional powers to do or cause to be done any investigation for the purpose of exposing such corruption, inefficiency or waste. With the constitutional provisions providing for such investigative powers (ss. 88 (1) & (2) and 128 (1) & (2) of the 1999 Constitution for federal and states)³⁶ rendered ineffectual, the military had become masters unto themselves.

If the military was free from an investigative check, what more of impeachment? This democratic process by which the President, Vice President, Governors, or Deputy Governors guilty of gross misconduct in the performance of official duties are removed from office by the legislature (as provided for in ss. 143 (1) and 188 (1) 1999 Constitution)³⁷ is completely unknown to military regimes for the complete absence of the legislative body. No matter the gravity of the official misconduct, Military Governors at state levels were only removable from office by the appointing authority i.e. the highest ruling body at the federal level (e.g. the Supreme Military Council) while Heads of States were removable only through coup de'tat. As we shall see shortly, loyalty to the federal authority was often a shield from disciplinary measures even in the face of grave corrupt practices at state levels. Coups on the other hand even when

³⁵ As we saw in Chapter 5, ss. 85 (2) and 125 (2) 1999 Constitution for Federal and States require such auditing and submission of the report to the legislature. 1979 Constitution had similar provisions (ss. 79 (2) and 117 [2]) for federal and state governments respectively. And the legislative power of confirmation of appointment of Auditor-General (for a maximum term of 6 months unless if they agree otherwise) is provided for under sections 86 (1), (2) & (3) and 126 (1), (2) & (3) 1999 Constitution for Federal and States. Ss. 80 (1), (2) & (3) and 118 (1), (2) & (3) 1979 Constitution had same provisions for federal and state. Early Constitutions did not contain similar provisions. They required submission of audit report to parliament only through the Minister of Finance (see ss. 128 (1), (2), (3) & (4) and 134 (1), (2), (3) & (4) of 1960 & 1963 Constitutions).

³⁶ Equivalent provisions under the 1979 Constitution were ss. 82 (1) & (2) and 120 (1) & (2).

³⁷ The 1979 Constitution contained similar provisions in sections 132 (1) and 170 (1).

they occurred, they were rarely corrective in the end as they merely begot another bad (if not worse) military regime.³⁸

The effect of military rule on the judiciary was felt in a number of ways. For instance, because the Constitution is the yardstick with which the judiciary judges governmental or administrative action, and the Constitution was no longer supreme; its provisions partly suspended and partly modified; it meant that its duty as protector of the Constitution and the ideals contained therein was severely shaken.

The ouster of the jurisdiction of courts and the intimidation of the judiciary made matters worse. Not only do the courts serve as checks on the excesses of the executive as we saw in the examples cited in Chapter 5, they are also the last hope of the common man. When press freedom is trampled upon as was the case under Decree No. 4 of 1984 or through policy statements as we shall see shortly, the situation becomes a case of multiple jeopardy. This is because neither the press nor the judiciary could effectively discharge its ordinary constitutional duties of being the watchdog of the society and protector of constitutional ideals respectively. For instance, the press cannot publish any report or statement which exposes official corruption if such report or statement could bring the government or a public officer to ridicule or disrepute. And in the event of doing so, the court cannot protect it from the wrath of the 'offended' government notwithstanding the fact such exposure is national service. The courts therefore lose the very primary role for which they are created as stated by Justice Augustine Nnamani JSC (as he then was):

... the judiciary is the guardian of our Constitution, the protector of our cherished governance under the Rule of Law, the guardian of our fundamental rights, the enforcer of all the laws without which the stability of society can be threatened, the maintainer of public order and public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society (quoted in Mowoe 2003: 148-149).

³⁸ There are instances of from bad to worse military regimes in Nigeria. The Gowon regime which toppled Ironsi's government in July 1966 was notorious for corrupt practices as we saw in chapter 4. Similarly, when Babangida toppled Buhari in 1985, not only did he stop the anti-corruption crusade which was underway, he is said to have institutionalised corruption.

In the foregoing situations, absolutism and monopoly of power by the military authorities become inevitable consequences. Everything is then left to their discretion. Allocation of resources, carrying out developmental projects and even subjecting persons alleged to have committed offences to the due process of law are decided at the discretion of the military. Thus other principles of the rule of law such as equality before the law and accountability get compromised as we shall see in specific examples shortly. In the end, the rule of law as a whole suffers and in situations of abundance of resources like in Nigeria, corruption gets a conducive atmosphere to flourish. Hassan (2004) makes the same argument when he states that “the opportunity for corruption depends on the size of the rents that are under the control of an official, the amount of discretion that official has in allocating those rents, and the degree of accountability that is required of that official.” He states that the argument is captured by the following equation:

$$C \text{ (corruption)} = M \text{ (monopoly)} + D \text{ (discretion)} - A \text{ (accountability)}$$

The result is depletion of the resources which would have been utilised for development and ultimately, poverty sits side by side with wealth as Nigeria’s paradox of underdevelopment amidst oil clearly shows.

v. Specific Cases

The foregoing discussion presents military rule as a typical case of the equation of monopoly and discretion without accountability. In Chapter 4, I cited cases of corruption during three military regimes and indicated how they adversely affected development. I shall now give specific cases showing how corruption results and flourishes from this equation. These cases depict military rule as governance without rule of law.

One of these cases was that of the Governor of Benue-Plateau during Gowon’s regime. One Mr. Aper Aku accused him of corruption by way of a sworn affidavit. The manner in which the federal government (the only supervisory

authority over the state) handled the matter was telling on the rule of law. After the allegations, the federal government ought to have launched investigations since, being a military regime, legislative investigation or impeachment procedure did not apply. Not only did it fail to do so, the Head of State decided to summarily give ‘a verdict of not guilty’ to the Governor. After a brief consultation with the Governor in Lagos, the Head of State declared: “I am now satisfied, after listening to explanations and having had the time to check all the relevant references provided by the Governor that he has not been guilty of any wrongdoings as alleged by Mr. Aku in his affidavit” (in Agedah 1993: 30).³⁹ Thus “by this step, Gowon not only positively interfered with due process of investigation which might have been conducted by the police, if only for the purpose of ascertaining the authenticity and reliability of these allegations, but deliberately discouraged such investigation” (Onagoruwa 1977 in *ibid*).

As the matter and similar ones were still subject of public comment, General Gowon became adamant promising to deal decisively with those he called indulging in character assassination with the aim of causing confusion in the country; those attempting to give his government a bad name by mischievously impeaching top government functionaries. He took it personal alleging that “it is now evident that some people are aiming at the very man on top of the government by damaging his lieutenants”; stating further that “This country would have no future if we should allow dubious people to continue character assassination of honest people, particularly public servants with a view to tarnishing the good reputation of the country and its government” (*ibid*: 32).

Worst still, Gowon warned the press and the judiciary against allowing themselves to be used as instruments of blackmail against highly-placed public officials. This was followed immediately by similar warnings from his subordinates. For instance, the Governor of North Central State, Brig. Abba Kyari, said affidavit allegations had political undertones and it was up to the judges not to make their courts political fora. The North Western Governor, Usman Faruk, also said that affidavit allegations were the handiwork of political

³⁹ All this was said to have happened within 48 hours of the Governor’s arrival in Lagos.

mercenaries and not any patriot wanting any cleansing of the society. He wished ‘good luck’ to those still wanting to swear to affidavits but assured them that “nemesis will fall on them no doubt” (ibid: 30).

Similarly, in a press conference on 27 August 1974, the then Inspector-General of Police, Kam Selem, warned that the federal government might take drastic and unpleasant measures to curb the excesses of the section of the press it felt had overstepped its bound and deliberately refused to observe the tenets of its profession. Referring to what he called ‘misleading and mischievous publications’, he declared that the government would no longer tolerate press indiscipline and calculated attempts to undermine the government’s authority; and that the government would not allow itself to be blackmailed by the press or stampeded into taking any action in any matter of public interest (Jakande in Oyediran 1979: 117).

The judiciary seemed to have been intimidated by the government because it immediately took a firm stand against the use of affidavit evidence in allegations of corrupt practices. The Advisory Judicial Committee (AJC)⁴⁰ formally declared that affidavits did not confer any privilege or immunity on their deponents and they should no longer be sworn to before public officers, including Commissioners for Oath unless they were required in respect of any court proceedings (Agedah 1993: 30-31). The press on the other hand refused to budge.⁴¹

⁴⁰ The government advisory body on appointment, discipline and dismissal of judges which composed of the Chief Justice of the Federation and the Chief Justices of the 12 States

⁴¹ See for instance the response of the Nigerian Tribune to the Inspector-General’s statement in its editorial of 28 August 1974 where it said among others that there was no mischief or malice in what the press was doing nor was it undermining the authority of the government. On the contrary, it was suggesting how the credibility of the government could be preserved and that it was only a foolish government would angrily dismiss those suggestions and embark on repressive measures against the press (Jakande in Oyediran 1979: 118). Similarly, the New Nigerian of 9th September 1974 in its editorial condemned the “attempt to force the two institutions [the press and judiciary] to deny access to people with genuine complaints against public officials who have abused the public trust to enrich themselves illegally or to break the country’s laws ... The Judiciary has the clear duty, among other things, to try matters brought before it – and to hear affidavits. The press has the duty to inform and to expose public officers who behave with impropriety. Neither institution can know in advance which matter or which affidavit is frivolous... The best way out for all those holding positions of public trust lies in the path of probity. They should not only uphold the laws of the country and live within their legitimate income but should be seen to do so” (in Agedah 1993: 31).

Mr Aper Aku was later arrested and detained under decree No. 24 of 1967. Efforts made by his wife to challenge the detention as being illegal proved abortive.

There were similar instances of absence of rule of law in practice during the Babangida regime. One of them was when Alhaji Mohammed Bashir alleged that he had paid the sum of \$500,000 into the account of the Chief of General Staff (CGS), Vice-Admiral Augustus Aikhomu, in Zurich in order to get his (Aikhomu's) cooperation in an oil deal. The government reacted that it was blackmail against the CGS and the complainant was arrested and detained.

During the same period, some State Governors were alleged to have been engaged in corrupt practices by their commissioners but neither the state nor the federal government caused formal inquiries into the allegations. For instance, Agedah (1993) tells us about a former Governor of Rivers State who was accused by his Health Commissioner, Dr. Deni Fiberesima, of many corrupt activities which included unilaterally buying medical boats for a staggering N10.876 million; keeping large amounts of money in state house account and funding projects directly from it rather than through the normal ministry channels; approving only N4 million for capital projects for the health ministry out of an allocated N36 million; and providing N7 million for the government house clinic alone in the state's 1989 budget. The Governor packaged a defence and not only was he cleared by the federal government, without any formal inquiry into the allegations, but he was eventually promoted to the rank of Air Commodore.

Another case involved the former Governor of Ogun State. His Commissioner for Finance, Dr. Olaseni Akintola Bello, accused him of withdrawing state fixed deposit of over N40 million and lodging it into a low interest-yielding account at Habib Bank Ltd; setting up a rival treasury in the Governor's office under the guise of a special project fund account; paying over 50 to 70 percent value of contracts as mobilisation fees without the work being executed among other accusations. He challenged the Governor to institute public inquiry in to the

matter. Instead, the Governor merely denied the allegations. The federal government did not take up the challenge either. Vice-Admiral Aikhomu disclosed that the General Staff Headquarters had conducted investigations and found the Governor innocent of the allegations. More important was what the federal government would have done had he been found guilty. On a visit to the state headquarters, Abeokuta, to commiserate with the Governor, Aikhomu said: “My friends, I am not a judge. All I am saying is that if there had been anything detrimental to the governance of the state, we would have removed the Governor” (Agedah 1993: 44).

Not only did the government clear suspected military Governors of the allegations, Aikhomu warned newly-sworn in civilian Governors who took over from them in 1992 that the Federal Government would not tolerate criticism of their predecessors (Taiwo in Ayua & Guobadia 2001: 622-623n). Since the civilian Governors were under the federal government at the time, it was inconceivable that the previous military Governors would be investigated.

There may not be a better example of the dangers of monopoly and discretion without accountability than General Babangida’s transfer of the Central Bank to his office as the President.⁴² The Bank had a legally guaranteed independent Board of Directors and power to issue legal tender currency and to monitor and regulate the banking system. With its transfer to the Presidency, the Governor of the Bank was obliged to report directly to the President. He promulgated the CBN Decree 1991 by which his control of the Bank became complete. This made it possible for him to underwrite his regular budget overruns. And he did so not from excess national revenue, but by printing more currency notes thus bringing about devaluation and inflation and thereby lowering the level of income and standard of living of majority of Nigerians (Osoba 1996).⁴³ The effect of the CBN Decree 1991 has aptly been described in the following words:

⁴² General Babangida was the only military Head of State who bore the title of the President and Commander-in-Chief of the Armed Forces. He announced the transfer of the Bank to his office in his 1988 budget speech.

⁴³ There were budget overruns of N8.3 billion in 1988; N14.6 billion in 1989; N18.6 billion in 1990; N24.6 billion in 1991; and N41.5 billion in 1992. It has been estimated that between August 1985 and August 1993 (period of his stay in power) Nigeria’s money supply rose from N11.8 billion to N100.5 billion (Osoba 1996).

In practical terms the 1991 CBN Decree made the President the sole authority for deciding the nation's monetary and banking policy, and for issuing directives for its implementation. The Central Bank of Nigeria (CBN) had become the 'Central Bank of the President' (CBP), a unit or department in the office of the President carrying out the President's binding directives on monetary and banking policy (Enuenwosu 1994 in Osoba 1996).

Lack of budgetary discipline and financial accountability was a feature of the military regimes especially the Gowon, Babangida and Abacha regimes. It has been said for instance that there was no year in Gowon's nine-year rule "when the Ministry of Defence...did not overshoot its approved estimates of expenditure by several million pounds sterling or naira without going through the inconvenient process of passing through the Executive Council and/or Supreme Military Council a supplementary appropriation decree. The Ministry of Defence with the connivance, if not the active encouragement of the Government, also consistently ignored the Auditor-General's queries concerning these vast unauthorised and illegal expenditures every year" (Osoba 1996).

After the first coup in 1966, power did not return to the civilians until 1979. The second intervention in 1983 also lasted long, for power returned to the civilians only in 1999. Military rule which ought to be an exception and only necessary to restore peace and order turned out to be almost the general rule. The negative impact this has had on the rule of law cannot be over-emphasised. It can be said that throughout the period, rule of law has been in suspension. In its place, whims and caprices ruled and corruption flourished.

6.3 Rule of Law under Civilian Rule

It may be argued that one of the impacts of long military rule would be eroding a culture of respect for rule of law and at the same time instilling a culture of corruption. This adverse effect of military rule may not be limited to its period; it may have a spill-over effect. Chapter 4 reveals that the civilians are no less corrupt than the military. Could it be said that the weakened culture of rule of

law during the military has also extended to civilian rule? We shall find out hereunder.

Civilian rule in Nigeria could be classified into three main experimentations: the First Republic, the Second Republic and the current experiment. The current experiment is sub-divided into Obasanjo and Yar'Adua administrations. In all these experiments, the legal order has been the ideal one where the rule of law provisions fully exist. In the first experiment, the 1960 Independence and 1963 Republican Constitutions were operated; in the second, the 1979 Constitution; and since 1999 it has been the 1999 Constitution. The constitutions ensured that rule of law provisions were in place in order to avert large scale corruption which absolute power brings about. Perhaps because large scale corruption was first witnessed during Gowon's regime, the subsequent Mohammed/Obasanjo regime which prepared the 1979 Constitution ensured that more corruption-averting provisions such as the code of conduct⁴⁴ and impeachment powers of the legislature were introduced in the Constitution. It was also the first time executive Presidential system of government was introduced. My examination of how these provisions have fared in practice shall therefore start from the Second Republic. More specifically, I shall examine how the judiciary and legislature performed vis-à-vis the executive. Is it another case of absolute power by the executive despite the constitutional provisions frowning at that?

i. The Judiciary vis-à-vis the Executive

The return to civilian rule in 1979 heralded hope of the return of rule of law which was severely weakened during the military interregnum. Such hope was fortified by President Shagari's early moves. For instance, he sought to actualise the code of conduct provisions by appointing members of the Code of Conduct Bureau and submitting his and his Vice President's Declaration of Assets as was required by the Constitution. At the inauguration of the Bureau on July 30, 1980, Shagari stated that the inauguration "marks a milestone in the constitutional development of [Nigeria]. It holds forth the promise for the attainment of

⁴⁴ In the Fifth Schedule to the Constitution

disciplined and selfless service to the nation on the part of public officers. This is essential to the overall struggle for a better and just society and for the creation of a public service of which we can all be justly proud” (in Agedah 1993: 16).⁴⁵

As days went by, the Shagari government was rocked by various corruption scandals particularly in the executive circles as we saw in Chapter 4. With the rule of law provisions in place, what could be said to be responsible for this state of affairs? Was it that the judiciary failed to perform its duties as envisaged by the Constitution? As I shall shortly attempt to demonstrate, the judiciary exhibited evidence of courage by handing down decisions unfavourable to the government. Yet because such decisions, with the exception of few, did not border much on corruption, public accountability and development, they did not have impact on minimising corruption. The judiciary may be excused for this ‘failure’ because by its nature, it is a reactive and not a proactive institution. Corrective actions have to be initiated by interested parties before the courts could give corrective verdicts.⁴⁶

One of the cases in which the judiciary showed independence was *Attorney-General of Bendel State v. Attorney-General Federation*.⁴⁷ The judiciary stepped on the toes of both the executive and the legislature and exposed them as institutions which undermine the rule of law. In the case, the constitutionality of the Allocation of Revenue (Federation Account etc.) Act of 1981 was challenged by 9 out of 12 States of the federation who apparently were dissatisfied with the allocation formula provided thereunder.⁴⁸ They claimed that the share of revenue allocated to them under the Act was less than what had

⁴⁵ Perhaps the government’s first test was on the alleged misappropriation of N2.8 billion from the government-owned oil company, the Nigerian National Petroleum Corporation (NNPC). Shagari established the Crude Oil Sales Tribunal of Inquiry headed by Justice Ayo Irikefe to inquire into the matter. The Tribunal found that while NNPC accounting system was deplorable, the N2.8 billion represented the value of crude oil which had gone to oil companies under their interpretation (which the Tribunal questioned) of their agreement with NNPC. It therefore held the allegation to be a hoax.

⁴⁶ Unlike countries like Pakistan, the courts in Nigeria have no power to take *suo moto* action. It may be argued that the paucity of public interest litigation (PIL) may have contributed to this ‘failure’. *Locus standi* may in turn be one of the factors explaining the paucity of PIL.

⁴⁷ (1981) 10 SC 1

⁴⁸ As we saw in Chapter 2.7, the Act allocated to the FG 58.5% of the nation’s revenue; States 31.5%; LGs 10%; and 5% as derivation out of States’ share.

been approved by the House of Representatives when the Bill was before it. The share under the Act represented an amended version of the Bill as passed by the Senate only and adopted by the Joint Finance Committee consisting of 12 members from each House (the Senate and House of Representatives) by 13 votes against 11. From the committee level, instead of taking the Bill back to the two Houses in separate or joint sessions, it was sent directly to the President for his assent. He assented to it and it became an Act of the National Assembly.

The Supreme Court⁴⁹ decided that the failure to return the Bill to the two Houses after the proceedings of the committee was a violation of the constitutional procedure for making a law and therefore the Act was null and void. The Court, per Fatayi-Williams CJN, stated that:

I cannot conceive of a situation in any country with a parliamentary democracy where legislative powers generally, and those relating to money bills in particular, could be handed over by the elected representatives of the people to a caucus of twenty-four of such elected members, no matter how eminent they may be.⁵⁰

The manner in which the bill was passed into an Act was not surprising considering the desperation of the executive arm of government towards it. It has been reported that the executive arm had bribed the legislature in order for the bill to sail through the legislative process (Agedah 1993: 19-22). The then Attorney-General of the Federation, Richard Akinjide SAN, argued on behalf of the government in the course of hearing the case that for fear of the violence that might erupt, the Court should not nullify the Act. The Court however refused to budge as the presiding Chief Justice retorted that fear of violence would not make it endorse illegality (Ikein & Anigboh 1998: 162-208).

With the benefit of hindsight, the Obasanjo administration should have been a better experiment. But the level of corruption which characterised the 8-year rule showed clearly that the executive power was as good as absolute. The judiciary was, as usual, apt in exhibiting some measure of activism. In many cases, it decided against the government of the federation. For instance, as

⁴⁹ The Court determined the matter in its original jurisdiction under s. 212, 1979 Constitution.

⁵⁰ See page 33 of the Report.

between government of the federation and the states, the Supreme Court had ruled that the power to create and control local governments lies with the latter, and that the federal government was wrong in withholding allocation of funds from the Federation Account to Local Governments in Lagos State (and other States that created more local governments).⁵¹ More recently, the Court of Appeal held that neither the President nor the political party on whose platform the Vice President, Atiku Abubakar, was elected can remove the Vice President or declare his office vacant on the ground that he changed his political party.⁵² The Supreme Court affirmed the decision.⁵³ It also affirmed the decision of the Court of Appeal nullifying, against the wish of the President, the disqualification of the Vice President from contesting the 2007 Presidential elections.

As argued earlier, decisions of this nature are not uncommon during civilian rule. The question is what has the judiciary done to check the abuse of power by the executive particularly as it relates to public funds? Again as stated earlier, because the courts are a reactive institution, their stand could only be known when relevant matters are initiated. For instance, since corruption is a crime prosecution of suspected public officers can only be initiated by public prosecutors (s. 174 1979 Constitution; s. 211 1999 Constitution). The most a private person could do is to apply before a court for an order of *mandamus* compelling the prosecuting officer concerned to initiate the proceedings.⁵⁴ There is hardly any recorded case of this nature on corruption. The closest to it was when a private lawyer, Gani Fawehinmi, insisted that the Governor of Lagos State, Mr. Bola Tinubu, be investigated for allegedly forging an educational certificate. There is also no culture of public interest litigation in the country.

However, the Supreme Court had spoken on the validity of the Corrupt and Other Related Offences Act⁵⁵ (ICPC Act) together with the power of the ICPC

⁵¹ *Attorney-General of Lagos State v. Attorney-General of the Federation*, (2004) 12 NILR 101, available at <http://www.nigeria-law.org/LawReporting2000-2005.htm>, visited 15/12/08.

⁵² *Abubakar v. Attorney-General of the Federation* (2007) 3 NWLR, Part 1022, Page 601.

⁵³ *Attorney-General of the Federation & Ors v. Alh. Atiku Abubakar & Ors* (2007) 4 NILR 202 available at <http://www.nigeria-law.org/LawReporting2007.htm>, visited 15/12/08.

⁵⁴ As it happened when a lawyer, Chief Gani Fawehinmi, sought to force the Attorney-General of Lagos State to prosecute certain persons for the murder of a journalist, Mr. Dele Giwa.

⁵⁵ No. 5 of 2000.

to investigate and prosecute all persons, public and private, including corporate bodies on issues of corruption. This was in the case of *Attorney-General of Ondo State v. Attorney-General of the Federation & 35 Ors.*⁵⁶ After the passing of the Act, the ICPC attempted to prosecute an official of Ondo State. The Attorney-General of the state sought before the Supreme Court⁵⁷ first, for a declaration that the Act lacked jurisdictional validity for purporting to create a Commission with powers to prosecute persons for offences within states and before state (as opposed to federal) High Courts. And secondly, he sought for a perpetual injunction restraining the ICPC and the Attorney-General of the Federation from applying any of the provisions of the Act in Ondo State. In short the argument was that nowhere under the legislative lists of the Constitution is the National Assembly empowered to create a body with prosecuting powers over the whole country especially that corruption is a residual (unwritten) matter within the exclusive legislative competence of the States.

The federal government as 1st defendant argued on the other hand that by virtue of s. 4 of the 1999 Constitution, the National Assembly is empowered to make laws for the peace, order and good government of the federation or any part thereof. Though corruption is not within the exclusive legislative list, a holistic reading of the Constitution especially item 68 of the exclusive list which empowers the National Assembly to legislate on “any matter incidental or supplementary to any matter mentioned elsewhere in this list” gives the Assembly legislative powers thereon. Further, item 60(a) of the Constitution provides that the National Assembly has the power to establish and regulate authorities for the federation or any part thereof in order to promote and enforce the observance of the fundamental objectives and directive principles of state policy; by s. 15(5) of the Constitution, the state is enjoined to abolish all corrupt practices and abuse of power; and under s. 88(2) (a) (b), the National Assembly is empowered to expose corruption, inefficiency or waste in the administration of laws within its legislative competence. A joint construction of these provisions therefore empowers the National Assembly to enact the ICPC Act.

⁵⁶ (2002) 6 S.C. Part 1

⁵⁷ In its original jurisdiction based on s. 232 of the 1999 Constitution.

The Court agreed with the 1st defendant and it therefore declared the Act as valid. It noted that enforcement of the fundamental objectives and directive principles contained in the Constitution can only be done through legislation. It stressed that a reading and liberal and broad interpretation of the relevant provisions of the Constitution give the National Assembly both incidental and implied powers to enact the Act to enable the state to implement the provision of s. 15 (5) of the Constitution. According to the court, ‘state’ within this section refers to both the federal and state governments and therefore the power to legislate on corruption should be regarded as concurrent. Looking at how pervasive corruption is in Nigeria, one could not agree more with the court when it said that any legislation on corruption must be of concern to every Nigerian. Similarly, the Supreme Court has declared unconstitutional an age-long federal government practice whereby public funds were improperly allocated. It would be recalled that by the Allocation of Revenue (Federation Account etc.) (Amendment) Decree,⁵⁸ which the federal government continued to apply after the transition to civilian rule in 1999, a special allocation of 1% from the amount standing to the credit of the Federation Account was made to the Federal Capital Territory Abuja. In the case of *Attorney-General of the Federation vs. Attorney-General of Abia State and 35 others*,⁵⁹ the Supreme Court decided that providing for Special Funds like the 1% allocation to the FCT in any given revenue sharing formula was unconstitutional. This could be seen as a good decision saving public funds which were expended in a manner not envisaged by the Constitution.

In another instance however, the Supreme Court did not support an initiative to save public funds. This was in the case of *Attorney-General of Abia State & 2 Others v. Attorney-General of the Federation & 33 Others*.⁶⁰ Apparently worried by the manner States have been dealing with funds allocated to Local

⁵⁸ No. 106 of 1992.

⁵⁹ (2002) 6 N. W. L. R., PART 764, PAGE 542. The case mainly determined the seaward boundary of littoral states for the purposes of applying the derivation principle under s. 162 of the 1999 Constitution.

⁶⁰ (2006) 7 NILR 71, at <http://www.nigeria-law.org/LawReporting2006.htm>, visited 15/12/08.

Government Councils from the Federation Account,⁶¹ the National Assembly enacted the Monitoring of Revenue Allocation to Local Governments Act, 2005 with a view to policing the distribution and utilisation of such funds. Section 1 (1) of the Act required each State to establish State Joint Local Government Allocation Committee with a specified membership which cuts across the local, State and federal governments. The Committee was to ensure prompt payment of allocations made to the Councils into the State Joint Local Government Account; ensure that the funds so paid are distributed to the Councils in accordance with the provisions of the Constitution and any law made in that behalf by the House of Assembly; and monitor the payment and distribution of the funds so as to ascertain the actual amount paid to each Local Government (s. 2). The Committee was also required to render monthly returns to the Federation Account Allocation Committee which shall scrutinize the returns and make quarterly returns to each House of the National Assembly (s. 3).

The Act also prevented the States from borrowing money from the funds or revenue allocated to Councils (s. 6 [1]). It also made it unlawful for the States or the Federal Capital Territory, to alter, deduct or re- allocate the funds standing to the credit of the Councils (s. 7). If a State contravenes this provision in addition to a first charge on its next allocation from the Federation Account which shall be credited to the affected Local Government, the persons concerned are liable to punishment.⁶² Section 9 required the Auditor-General of the Federation to report to each House of the National Assembly, following the end of each financial year, stating how the monies allocated to each State for the benefit of the Councils were spent.

The plaintiffs supported by other States challenged the Act particularly the above mentioned provisions as *ultra vires* the powers of the National Assembly. The Supreme Court held, by a majority decision, that it did not see any constitutional provision vesting in the Assembly the legislative power to

⁶¹ In Chapter 2, we discussed the legal provisions on sharing of revenue between the tiers of government. In recent practice, some States do not adhere to these provisions as they do not distribute to Local Governments their due shares.

⁶² This could “a fine twice the amount altered, deducted or re-allocated illegally, or imprisonment for a term of five years, or to both such fine and imprisonment” (section 7 [3]).

establish the State Joint Local Government Account Allocation Committee. It stated that the moment the amount standing to the credit of the Councils is allocated to the States in accordance with section 162 (5) of the Constitution, the business of the State in terms of fiscal policy starts under section 162 (8) of the Constitution. Accordingly, the National Assembly has not the legislative power to ensure that the funds paid into the State Joint Local Government Account are distributed to the Councils. Thus the words "distributed" in section 2 (b) and "monitor" and "distribution" in section 2(c) of the Act offend the provision of section 162 (8) of the Constitution. The rendition of monthly returns to a federal body (required by s. 3 of the Act) in a matter which is within the exclusive domain of the State, vide section 162 (8), is against the federal structure in the Constitution. Though the Court upheld section 6 of the Act, it faulted section 7 and 9 thereof as both a breach of the federal arrangement. The court declared the offending sections (i.e. 1, 2, 3, 7 and 9) null and void being inconsistent with the provisions of sections 4, 7, 162 (5), (6) and (8) of the Constitution.

Referring to *Attorney-General of Ondo State v. Attorney-General of the Federation* cited above, the Court stated that it has never condoned corruption and will never condone it. It quoted the *ipsisima verba* of some Justices in the case to make the point that not only does it not condone corruption but condemns it in and out. But that is not to say that it will be blind to a situation where an Act which is out to check corruption is enacted in contravention of the Constitution. In such a situation, the Court said it will stoutly rise to condemn such an Act even though the Act is designed to promote the highest good and economic well being of the society.

It is submitted here that the Court has failed to consider Nigeria's dire need for public accountability in its decision. Had it done so, it would have interpreted the Constitution and the Act differently. What the Court did was an atomistic interpretation of their provisions in complete disregard for their *Weltanschauung*. A holistic interpretation would have led to a decision which would leave the purpose of the Act intact. The decision is no less a licence for the States to deal with the local government funds as they wish. As we saw in Chapter 4, the level of corruption in the States would certainly not leave these funds safe. The Court

itself has recognised the dangerous effect of its decision, for it warned that persons having access to such funds should not see the judgment as a victory giving them the freedom to steal; that they should think twice and quickly remind themselves that ICPC and EFCC could pounce on them; and that more seriously, God's punishment awaits them. Was the Court not shedding crocodile tears in these warnings?

It was this holistic approach which learned Justices Idris Kutigi and Dahiru Musdapher adopted when they arrived at their respective dissenting judgements upholding the Act as *intra vires* the powers of the National Assembly and not inconsistent with the provisions of the Constitution. According to Musdapher Jsc, "The Supreme Court has the sacred duty to translate into actuality the noble ideas expressed in the basic law, give flesh and blood, in fact life, to the abstract concepts of freedom, liberty, transparency, a society free from corruption, abuse of power and all the noble goals articulated and reiterated in the Constitution." They both looked at the relevant provisions of the Constitution (especially looking at the combined effect of Sections 7 [6] [a] and 162 [5]) and came to the conclusion that the National Assembly has the constitutional power to allocate public revenue to Local Governments in the Federation and the consequential power to *prescribe the terms and manner upon which such allocations may be made*; and that the only way the National Assembly may make such "terms and manner" is to enact an Act as has been done now vide the Act in issue. According to Kutigi Jsc,

The Federal Government by the Act has not prescribed any way and or what manner the Local Governments spend their allocations. Even the reports by the Accountant-General and the Auditor-General referred to in Sections 9 & 10 of the Act respectively, are about *payments* actually made to the Local Governments and actual *expenditures* incurred by them. Thus these are reports of receipts and expenditures actually made and *not* reports about the ways and manners and for what purposes the expenditures were incurred. The simple question therefore is - were the actual allocations received? And were they really spent? Accountability and transparency is what the Act is all about. The allocations, they must have, and spending, they must also do. The allocations must not go into private pockets or private accounts.

One could not agree more. Looking at the matter from the lens Justices Kutigi and Musdapher did would have been better for a system like Nigeria's where corruption is the order of the day.

The decision referred to above permitting the Vice President to contest as a Presidential candidate in the 2007 elections could also be seen in a negative way. As stated in Chapter 4, EFCC, an Administrative Panel and the Senate all indicted him of corruption regarding some PTDF funds and the cause of action (i.e. the disqualification) had to do with that.⁶³ So what the court did amounted to giving a clean bill of health to him despite the indictments and by extension, condoning corruption. Nigeria could have had a President with a corruption dent courtesy of the judiciary.

It is not only the appellate courts which sometimes appear lax on issues of corruption and public accountability. Courts at the lower level too share in the laxity. For instance, under the current Yar'Adua administration, some former Governors who served during Obasanjo's tenure were arraigned before the courts for various corruption charges. These Governors include Rev. Jolly Nyame of Taraba State, before an FCT Abuja High Court on a 41-count charge of embezzling public funds totalling N1.637 billion; Orji Kalu of Abia State before a Federal High Court Abuja for corrupt charges involving N3 billion;⁶⁴ Saminu Turaki of Jigawa State before Federal High Court Abuja on a 32-count corruption charge to the tune of N36 billion;⁶⁵ Joshua Dariye of Plateau State before an FCT High Court; James Ibori of Delta State before the Federal High Court Kaduna;⁶⁶ and Lucky Igbenedion of Edo State before the Federal High Court in Enugu. Alamieyeseigha of Bayelsa State had already been given a 2-year jail following his plea of guilt before a court. All of them were arraigned by the Economic and Financial Crimes Commission (EFCC) after their respective immunities against prosecution under section 308 of the Constitution ceased

⁶³ Details of the indictment of the Vice President are provided in the subsequent section herein.

⁶⁴ Kalu's charge is numbered FHC/ABJ/CR/56/07, dated 11th June, 2007 and signed by Chile Okoroma of EFCC's Legal and Prosecution Unit.

⁶⁵ Turaki's charge is dated 13th July, 2007 and is signed by Isa Bature Gafai of EFCC's Legal and Prosecution Unit.

⁶⁶ James Ibori is said to have purchased the operations and assets of Willbros International in Nigeria for \$155 million (Governance Watch November 2007: 1).

with the end of their respective terms of office in May 2007. All the trials except that of Alamieyeseigha and Igbinedion are still pending and the accused persons are respectively on bail.

However, there are strong indications that the ex-Governors are using their influence to frustrate the trials by all means. Already, the EFCC boss on their neck, Nuhu Ribadu, has been removed from office. His successor, Mr. Lamurde, did not seem to kowtow, and it was reported that James Ibori was working for his removal as well (AmanaOnline 2008). Just recently, he was replaced with AIG Farida Waziri (rtd.) (*Leadership* 6/6/2008). Orji Kalu has also threatened to make Nigeria ungovernable if the trials of the former Governors (including him) continue without the Yar'Adua administration trying the former President Obasanjo and his Ministers (Umar 2008). The trials are in a way a trial of the rule of law. How would the government and the judiciary in particular handle such matters of public interest after they have been exposed? The signs are not positive for now. Not only are the trials stagnant and the accused Governors on open-ended bails, but a number of them “are on the Presidential guest list and act as Presidential envoys!” (*The Guardian* Editorial 8/10/08).

It may look encouraging that after ups and downs Lucky Igbinedion has recently been convicted by the Enugu Federal High Court. But on a closer look, the judiciary can hardly take a credit for it. There were about 191 charges against him and following an amendment, he ended up with only one charge (of neglect to declare his interest in a GTBank account in which he had N3.5 million) for which he was convicted after a plea of guilt and fined N3.5 million (*Thisday* 19/12/08). A fine of N3.5 million against an ex-Governor who is alleged to have hugely enriched himself corruptly can hardly be termed as a satisfactory punishment nor could it deter persons with like minds. This is notwithstanding that he might have negotiated a plea bargain with EFCC leading to the amendment and perhaps his return of some public funds in his possession. It is no wonder that the EFCC rejected the decision and indicated its resolve to appeal against it (ibid).

In particular, the stagnation of the trials of other ex-Governors can be said to be evidence of the weakness of the judicial system in handling important corruption cases such as these. It is a clear evidence of lack of equality before the law (an important element of the rule of law) if even after the loss of immunity former Governors could not be subjected to the wrath of the law despite the gravity of the alleged offences. Not only are the trials stagnant, courts have started issuing injunctions restraining the EFCC from taking further action against some of these ex-Governors despite ample evidence that they have cases to answer. One instance is a Federal High Court order preventing the EFCC from taking any further action against former Rivers State Governor, Peter Odili (*Daily Trust* 19/12/08). The courts seem to be oscillating between activism (as shown in earlier cases) and timidity (as exemplified in later cases). With the later attitude, rule of law is severely threatened for, not only would corruption suspects go scot-free others would be encouraged to be corrupt with impunity.

ii. The Legislature vis-à-vis the Executive

The attitude of the federal legislature in the Second Republic as revealed by *Attorney-General Bendel State v. Attorney-General Federation*⁶⁷ on the Allocation of Revenue (Federation Account etc.) Act of 1981 and many other examples shows that the institution is hardly reliable in the face of abuses of office by the executive. Because of the constitutional immunity against prosecution, it is only through the powers of the legislature to investigate for the purpose of exposing corruption or even to impeach that the executive power would be checked. It failed to do either. Not only did it so fail, it was also complicit in the corruption mess which characterised the Second Republic as Chapter 4 reveals.

The state legislators were not any different. We saw in Chapter 4 the level of executive corruption in the States. Yet there was no single recorded case of investigations launched by a state legislature into the activities of the executive for the purposes of exposing corruption, inefficiency or waste as provided for in

⁶⁷ (1981) 10 SC 1

section 120 (1) & (2) of the 1979 Constitution. Nor were there cases of impeachment of Governors or their deputies by the legislatures on grounds of gross misconduct despite the constitutional powers to do so (s. 170 (1) 1979 Constitution). There was only one case where the power of impeachment was exercised during the Second Republic. That was when the Governor of Kaduna State, Alhaji Balarabe Musa, was impeached in 1980. Though he was not alleged to have personally and corruptly enriched himself, the allegations included expenditure of money without legislative authorisation, and disregard for established procedure for the withdrawal of public money.⁶⁸

This single instance appeared to be a commendable exercise of legislative power. But on a closer look, it could be argued that it was not done to further the rule of law. The Governor was one of only two Governors who won the gubernatorial elections on the platform of a left-wing political party, the People's Redemption Party (PRP) which was in stiff opposition to the right-wing party (National Party of Nigeria, NPN) which captured the federal government and majority of the states.⁶⁹ More importantly, the majority of the members in the legislature belonged to NPN and the success of the Governor in the election petition which challenged his election seemed to have aggravated tension between the two parties.⁷⁰ There are therefore strong allegations that the NPN must have used its majority in impeaching the Governor on allegations which might not be serious as to warrant the exercise of that power. Commenting on this issue, Nwabueze (1982: 144) states that:

The situation that gave rise to the invocation of the impeachment procedure in Kaduna state was hardly one contemplated by that procedure. The impression was strong that it was being invoked for purely partisan reasons to redress the political anomaly created by the marginal and contested victory of a People's Redemption Party (PRP) gubernatorial candidate in what, judging from the results of

⁶⁸ Other Constitutional violations which the Governor was accused of included: removal of the state director of audit without the approval of the legislature, appointment of a single person to the offices of secretary to the government and head of civil service, the establishment of certain executive boards and the appointment of members thereto without an enabling law passed by the legislature.

⁶⁹ The other state where PRP won was Kano, the home state of the Party's alter ego and Presidential flag bearer, Mallam Aminu Kano.

⁷⁰ The legislature was said to have rejected the list of commissioners presented to it for approval by the Governor several times.

the elections to the state assembly, was obviously a stronghold of the National Party of Nigeria (NPN). ... [B]ut the violations alleged by the assembly against the Governor, assuming them to be well-founded, were not of the gravity contemplated by the Constitution as warranting the impeachment of the chief executive of a state government.

It was no wonder that the Governor in two separate cases, *Alhaji Balarabe Musa v. Speaker, Kaduna State House of Assembly*,⁷¹ and *Alhaji Balarabe Musa v. Auta Hamza*,⁷² challenged the impeachment process on the grounds that the impeachment notice served on him did not contain detailed particulars of his alleged acts of misconduct; that some of the signatures on the notice were forged; that the allegations were made *mala fide* and did not constitute gross misconduct; that the investigation of the allegations did not commence within the prescribed time; and that the investigating committee was not competent to investigate the allegations because some of its members were not qualified for appointment by reason of being members of public service or of a political party. Unfortunately, he did not succeed in either case because the courts held that as provided by the 1979 Constitution (s. 170 [10]), they had no jurisdiction to interfere in questions relating to the removal of a Governor or his Deputy.⁷³

The legislature at both federal and state levels did not therefore provide the needed check on executive power despite the clear abuse. That was why after toppling the Shagari government, the Head of State, Major-General Muhammadu Buhari, said that the legislators “were in no position to check the drift of the executive since where they were not active collaborators, they were pre-occupied with other things of no benefit to the people they represented.”⁷⁴

In such situations of both judicial and legislative passivity, rule of law during the Second Republic was only slightly different from rule of law under the

⁷¹ (1982) 3 NCLR 450.

⁷² (1982) 3 NCLR 299.

⁷³ It has been argued however that it would amount to a serious affront to the rule of law on which the constitution is based if courts do not assume jurisdiction in appropriate cases such as when the notice of allegations of misconduct is signed by less than the prescribed one-third of the members of the House of Assembly; or where the notice is not served on the Governor and no opportunity is given to him to defend himself before the investigating committee; or where the acts in question do not amount to gross misconduct in law; etc. (Nwabueze in Okere in Nwogugu 1988: 64-65).

⁷⁴ Address to a World Press Conference, Lagos, 5 January 1984.

military. While the constitutional rule of law provisions were there, in practice, they were not utilised. The consequence was leaving the executive with absolute powers and wide discretion which, as we argued above, lead to corruption and underdevelopment.

During **the Obasanjo years (1999 – 2007)**, the degree of corruption at the Presidency⁷⁵ clearly indicates that the National Assembly did not check the excesses of the federal executive body well. Indeed the House of Representatives under the leadership of the Speaker, Ghali Na’Abba in 2002 sought to impeach the President for alleged constitutional breaches which included failure to implement previous federal budgets. But out of show of absolute power, the President trivialised the matter when he described it as “a joke taken a little bit too far”. In a monthly media chat with the national television, Nigerian Television Authority (NTA), he threatened that there would be war in the country if he was impeached. He made strenuous efforts, including giving a N4 million bribe to the Members, to get the Speaker removed from office but to no avail (Nas 2007). Come 2003 general elections, the government made sure the Speaker and other ‘intransigent’ Members and Senators lost their bids to get re-elected notwithstanding that they belonged to the ruling Peoples Democratic Party (PDP).⁷⁶

It would be recalled that the Vice President and the President drifted apart mainly on the issue of succession.⁷⁷ The revelations which followed the duel between them are another pointer to absence of rule of law in practice. As I pointed out in Chapter 4, there were recriminations between them on the misuse of funds belonging to the Petroleum Technology Development Fund (PTDF).

⁷⁵ See Chapter 4 for details.

⁷⁶ One of them was the late Senator Idris Kuta from Niger State.

⁷⁷ The President wanted a term elongation after their second term which expired May 2007 and the Vice President wanted to succeed him. The situation between them worsened leading the latter to defect to another political party, Action Congress (AC) from the PDP. The President sought to declare his office vacant but at the instance of the Vice President, a court decided that neither the President nor the ruling party could remove him from office on the ground of his defection (*Abubakar v. A.G. Federation* [(2007) 3 NWLR, 601]). Through the Electoral Commission (INEC), the Vice President was disqualified from contesting for the Presidency on the ground that a Presidential Administrative Panel had indicted him for corruption following a report by EFCC on PTDF funds. The Supreme Court nullified the disqualification and he contested but lost to the President’s favoured candidate, the incumbent President Yar’Adua.

The EFCC had issued a report indicting the Vice President for abuse of office in dealing with the funds. The President set up an Administrative Panel of Inquiry headed by Prof. Ignatius Ayua, which also indicted the Vice President. A Senate Committee set up to investigate the matter following the submission of the Panel's report to the Senate also indicted the Vice President for abuse of office "by aiding and abetting the fraudulent conversion of public funds to loans" (Report of Senate Ad-hoc Committee on PTDF 2007).

On the other hand, the Vice President accused the President of using the PTDF funds in funding his third term bid. Though the Committee did not make such finding, it found that the President "acted in disregard of the law" for approving the establishment of African Institute of Science and Technology, incorporation of Galaxy Backborne Plc, and purchase of computers for civil servants because these were not within the mandate of PTDF (ibid). The question is: why did the Senate not proceed to impeach at least the Vice President since they have indicted him of abuse of office? Perhaps an impeachment procedure would have opened a Pandora's Box which might affect the President himself as the Vice President had threatened to spill the beans if the matter were to worsen.

Perhaps the only time the legislature stood against the President was in 2006 when he presented a Constitution Amendment Bill wanting to secure a third term of office among other amendments.⁷⁸ The President lobbied and offered money to the National Assembly through Ministers in order to secure the amendment (*Daily Trust* 19/04/06). The Senate unanimously rejected the amendments and the lower House also followed suit later. While this was a commendable effort, it could have been influenced by public opinion as sensed by the legislature. For instance, the Senate rejection was greeted with a loud ovation and for "over thirty minutes, people took over the entrance to the gallery of the senate cheering the lawmakers as they emerged from the chamber" (*Daily Trust* 17/05/06).⁷⁹ More importantly, the Vice President together with some

⁷⁸ By section 137 of the 1999 Constitution, a person is eligible to be elected into the office of the President or Governor for a maximum of two terms of 4 years each.

⁷⁹ A pro-third term Senator from the North-East was said to have been "waylaid and driven from his home and if not for the emir to whom he ran to," he could have been killed by the people he represented for their resentment of his support for the term elongation (*Vanguard* 02/05/06).

other prominent Nigerians⁸⁰ who also kicked against the idea must have influenced the decision of the legislature. The Vice President hailed the rejection as victory for democracy and rule of law and commended former Heads of State, the media, the civil society and international community for their support in defeating the agenda (*Daily Trust* 17/05/06a).

What could be said of the State legislatures vis-à-vis the executive? We have already seen in Chapter 4 how some state Governors drained the resources of their respective states. This level of corruption, I shall argue, is a reflection of absolute power they wielded notwithstanding the existence of legislative Houses in their respective states. Could it be said that the Houses did not act against the erring Governors through their constitutional powers of investigation and impeachment for instance? On the face of it, the answer is an unequivocal ‘no’ because for the first time in history, Nigeria recorded impeachment of 5 Governors in succession. On a closer look however, one would discover that rather than being evidence of rule of law in action, the gale of impeachments show the opposite.

Almost all the impeachments took place in violation of one constitutional provision or another.⁸¹ Because there was so much politicking, there was no case which scaled the third stage of the procedure in compliance with the Constitution. One major problem which cut across the impeachments was insufficiency of number of members of the legislative house wishing to get the Governor impeached. While it is not difficult to get one-third of the members to sign the written notice of allegations against the Governor at the initial stage, getting two-third thereof to resolve that the matter be investigated at the second part of the initial stage and to adopt the report of the investigating panel (where a verdict of guilt is reached) at the final stage might be difficult.

The impeachment of the Governor of Bayelsa State, Diphriye Alamieyeseigha, was the first to record abuse of the powers of impeachment. The State House of

⁸⁰ Notably Generals Muhammadu Buhari, the Presidential flag bearer of the biggest opposition party, ANPP and Ibrahim Babangida who is also said to be eying the Presidency.

⁸¹ See Chapter 5 for details of the constitutional requirements for impeachment.

Assembly consisted of 24 members. 15 members impeached the Governor (*Thisday* 13/11/06). While 15 members could initiate the proceedings having satisfied the one-third requirement at that stage, they fell short of the required number (i.e. at least two-third) to conduct the proceedings at subsequent stages. This is because two-third of 24 is 16. A similar situation happened in the impeachment of the Governor of Oyo State, Rashid Ladoja. 18 members of the House of Assembly who impeached him on 12th January 2006 satisfied the initial one-third requirement but did not satisfy the two-third requirement of the second part of the initial stage and the final stage because the House constituted of 32 members. To make matters worst, the impeachment took place in a hotel in the capital city, Ibadan. The impeachment of the Governor of Plateau State, Joshua Dariye, also suffered from the same constitutional breach because only 8 out of a 24-member House of Assembly carried out the impeachment. Thus in all the mentioned cases, while s. 188 (2) (a) & (b) of the Constitution had been complied with, s. 188 (4) & (9) had been violated.

The shortage of required number of the legislators happened in some cases where some members claimed to have declared the seats of other members who defected to another political party vacant. In such situations, membership of the House was deemed reduced so that the required one-third or two-third was deemed to be of 'sitting members' only. To be sure, by s. 109 (1) (g) of the Constitution a member of a House of Assembly whose election was sponsored by a political party shall vacate his seat if he decamps to another party except if his former party suffered division or merger with another or other parties. It was based on this provision that the 8 members who impeached the Governor in Plateau state claimed to have declared vacant the seats of 14 members, including the Speaker, who decamped from the ruling PDP to Alliance Congress (AC). The decamping members were said to be loyal to the Governor who apparently shifted support to the Vice President, the founder of AC.

The same could be said of the case in Oyo State. The 18 members there claimed to have suspended 7 members thereby reducing the membership of the House to 25. Assuming such declaration and subsequent action by the remaining members were constitutional, then the impeachment in both cases could be constitutional

as well since the impeaching numbers (i.e. 8 in Plateau and 18 in Oyo) were more than two third of the ‘sitting members (i.e. 10 in Plateau and 25 in Oyo). Commenting on the Plateau case, Lagos lawyer, Gani Fawehinmi SAN, opined that the impeaching members were right in their actions going by the constitutional provision and therefore the impeachment was constitutional (*The Guardian* 14/11/2006). However, as we shall see below, the courts gave a contrary opinion.

It was only in the impeachment of the Governor of Ekiti State, Ayo Fayose, and his deputy, Mrs. Abiodun Olujimi on October 16 2006 that the number requirement of the constitution was satisfied. Here, as high as 24 out of a 26-member House of Assembly carried out the impeachment. However, this case too is not without problems. In a desperate attempt to impeach a Governor, it would not be surprising to see the office of the Chief Judge of the state suffering from abuse of power due to its centrality in the impeachment process. A panel appointed by the Chief Judge, Justice Kayode Bamisile, to investigate the Governor on allegations of corruption cleared him of the allegations. Apparently unsatisfied, the House suspended the Chief Judge and replaced him with Justice Jide Aladejana alleging that he appointed the Governor’s kinsmen into the panel. Justice Aladejana appointed a new panel which “within a matter of minutes ... sat and recommended the impeachment of Fayose and Olujimi while the Speaker, Mr. Friday Aderemi took over as the acting Governor” (*Thisday* 13/11/06). All the three persons (Fayose, Olujimi and Aderemi) claimed to be Governors of the state at the same time.

By the provisions of the Constitution, the House of Assembly clearly did not have the powers to appoint a Chief Judge for the state. That power is vested in the Governor based on the recommendation of the National Judicial Council subject to the confirmation of the House.⁸² The power to remove a Chief Judge too is vested in the Governor based on an address supported by a two-third majority of the House praying for such removal.⁸³ The suspension of the Chief Judge and appointment of another person to the office was therefore ultra vires

⁸² Section 271 (1) of the constitution.

⁸³ Section 292 (1) (a) (ii) of the constitution.

the powers of the House. Assuming without conceding that the acts were constitutional, the impeachment would still remain unconstitutional and an abuse of powers. Finding the Governor innocent of the allegations by the first panel terminated the matter by virtue of s. 188 (8) of the Constitution. So constituting another panel over the same issues amounted to subjecting the Governor to double jeopardy something which the constitution would frown at on a plea of *autrefois acquit*.⁸⁴ Assuming again without conceding that the setting up of the second panel was constitutional, it would be expected that the panel would start fresh and normal investigation (affording the Governor opportunity to defend himself as spelt out by the constitution) and not a hurried one where a verdict of guilt would be passed “within a matter of minutes”.

In Plateau State, it was the Governor who sacked an acting Chief Judge, Justice Dakyen, who acting on the orders of 6 members, constituted a panel to investigate allegations of corruption against the Governor. The Governor claimed to have acted pursuant to s. 271 (4) & (5) of the Constitution. He replaced the sacked Chief Judge with Justice Yau Dakwang who immediately announced the dissolution of the panel. The panel ignored the announcement and continued with its investigations. On 13th November 2006, the 8 members sat around 6.00am, received an interim report from the panel, reaffirmed Justice Dakyen as acting Chief Judge and ordered for the arrest of anybody claiming the office. They then moved to Abuja and announced the impeachment of the Governor (*Thisday* 10/11/06; *Thisday* 13/11/06; *Daily Triumph* 13/11/06; *Daily Triumph* 14/11/06; *Daily Trust* 13/11/06).

It is not only the office of the Chief Judge that suffers abuse, the office of the Speaker of the House of Assembly also suffers similar fate due to its centrality in the impeachment process. The 8 members in Plateau State started with the impeachment of the Speaker, Simon Lalong before 6 of them ordered the acting Chief Judge to constitute the panel. The Speaker and other members obtained an injunction from a Jos High Court, stopping the panel’s investigations pending

⁸⁴ The constitution frowns at double jeopardy in criminal proceedings under s. 36 (9). The same logic could be applied in investigating the Governor not least because the entire impeachment process contemplates fair hearing as obtained in other proceedings.

the determination of their suit challenging the constitutionality of the panel and the powers of the 6 members to commence the impeachment process. The panel obeyed the court order until the newly appointed Chief Judge announced its dissolution. In Oyo State, the desperate 18 members by-passed the Speaker of the House, Mr. Adeolu Adeleke, as the impeachment notice was served on the Governor without his (i.e. the Speaker's) authority while the Constitution provides that such notice, signed by at least one-third of the members, was to be served by him.⁸⁵

The impeachment of the Governor of Anambra State, Peter Obi, also leaves no one in doubt about the abuse of the constitutional powers in Nigeria. The dust in Ekiti State barely settled when on November 2 2006 Peter Obi was impeached by few members of the House of Assembly. The impeachment was said to have taken place at the early hours of 5.00am. And surprisingly, at the time of the said impeachment, the panel constituted by the state Chief Judge, Justice Chuka Okoli, to investigate allegations of corruption against the Governor was yet to submit its report (*Thisday* 13/11/06). No matter the unanimity of the members and however proven the allegations were, the Constitution spells that the report must first be submitted and then adopted by at least two-third of the members. So it is not hard to see that what the House did was quite contrary to the provisions of the Constitution.

With the way the constitutional provisions on impeachment were bastardised by the various Houses of Assembly, it is not surprising that the courts declared all the impeachments, except that of Alamiyeseigha of Bayelsa State, as null, void and unconstitutional. The impeachment in Bayelsa state itself did not go unchallenged. The Governor challenged its constitutionality in the court. However, the merits of the case were not heard as the court declined to hear the matter on the grounds of lack of jurisdiction.⁸⁶ Appealing against this decision as was done in the case of the Governor of Oyo State (which was also turned down by the High Court on grounds of lack of jurisdiction) could have reversed

⁸⁵ Section 188 (2) (a) (b) of the constitution.

⁸⁶ This was in the case of *Alamiyeseigha v. Igoniwari* (Nos. 1 & 2) (2007) 7 NWLR Pt. 1034, Pg. 506 and Pg. 524.

the situation. There would have been an opportunity to look at the merits of the case. Going by the decision in similar cases, the impeachment could have hardly survived. Unfortunately, the Governor did not appeal. It was the appeal in the case of Oyo State which afforded the opportunity to determine the constitutionality or otherwise of the impeachment of the Governor. The Court of Appeal unanimously voided the purported impeachment. It held that the number of lawmakers who purported to impeach the Governor fell short of the number required to undertake such an exercise under the Constitution and “the House of Assembly of a State comprises all the elected members of the House sitting in an official capacity in its designated chambers as the House of Assembly of a State with Speaker or Deputy Speaker presiding” (*Vanguard* 06/11/06).

The 18 members appealed against the decision of the Court of Appeal. The Supreme Court in *Hon. Muyiwa Inakoju & 17 Ors v. Hon. Abraham Adeolu Adeleke & 3 Ors*⁸⁷ dismissed the appeal and affirmed the decision of the Court of Appeal on 7th December 2006 promising to give reasons for its judgement on the 12th of January 2007. Perhaps realising the degree of threat to the rule of law, the Court gave the matter an accelerated hearing⁸⁸ opining that judgement should be given immediately since it had “looked at the brief and the oral submissions of counsel and in view of the fact that time is of essence in [the] case” (*Vanguard* 08/12/06). In the full judgement, the court expressly affirmed the Court of Appeal decision inter alia, declaring as unconstitutional, null and void, and of no effect whatsoever, having regard to the provisions of s.188 (1) and (2) of the 1999 Constitution, the purported Notice of allegation of misconduct made against the Governor as a preparatory step to his removal by the defendants. It also affirmed the order setting aside all the steps taken by the Defendants in relation to the issuance of the Notice, passage of motion to investigate same and the purported directive to the Honourable Chief Judge of the State, the said steps having breached the provisions of s. 188 of the 1999

⁸⁷ (2007) 4 NWLR Part 1025, Page 423. Also reported at (2007) 1 NILR 121, available at <http://www.nigeria-law.org/LawReporting2007.htm>

⁸⁸ Appeals to the Supreme Court normally take years to be disposed of. But political cases are often given priority. The case of Ladoja received a more accelerated hearing considering the violence associated with it.

Constitution. The Supreme Court finally held that Ladoja was the legally, constitutionally and democratically elected Governor of Oyo State.

The impeachment in Plateau State also reached the appellate courts. The Court of Appeal held the impeachment to be unconstitutional.⁸⁹ It did not deny that the 14 members who decamped to AC vacated their seats by virtue of section 109 (1) (g) of the Constitution. But it held that the seats ought to have been filled before commencing the impeachment process. So it was wrong for the Speaker “pro-tempo” to have signed the impeachment notice. The seven-man panel was also unconstitutional; so was its sitting in the early hours of 13 November 2006; and its interim report was insufficient and null and void. The court ordered that the Governor be reinstated cautioning that “removing a Governor is a serious business which should not be reduced to a mere child’s play” (*Daily Triumph* 9/3/07; *Thisday* 9/3/07).

The Supreme Court finally affirmed the Court of Appeal decision in *Hon. Michael Dapianlong & Ors. v. Chief (Dr) Joshua Chibi Dariye & Ors.*⁹⁰ The Court stated among others that:

...the intention of the framers of the Constitution is that the number of the members required to transact the particular business of the legislature is a percentage or proportion of the total number or the totality of the assigned membership of the House under the Constitution. In the instant case it is two-thirds of ALL the members of the Plateau State House of Assembly which is made up of 24 members; that is 16 members... In the instant case, it is not disputed that 8 out of 10 members in a house of 24 membership initiated and carried out the impeachment of the 1st respondent. There is no doubt that there existed in the Plateau State House of Assembly 14 vacant seats as a result of the cross carpeting... It is my view that until the vacancies created by the carpet crossing members are filled by the process of by-election, the Plateau State House of Assembly can only transact such legislative duties that require the participation of less than 2/3 majority of ALL the members of that House, which duties definitely excludes impeachment proceedings.

⁸⁹ In Appeal No. CA/J/302/2006. The judgement was delivered in Jos on 8th March 2007. Even before the impeachment, the Nigerian Bar Association in a letter to the Acting Chief Judge had opined that the process initiated by the 8 members was unconstitutional and urged the Chief Judge to uphold the rule of law (*Thisday* 23/10/06).

⁹⁰ (2007) 8 NWLR Part 1036 Page 239. Also reported at (2007) 4 NILR 273, available at <http://www.nigeria-law.org/LawReporting2007.htm>

It needs to be stated clearly that the courts did not base their decisions on the truth or otherwise of the allegations of corruption raised against the impeached Governors. The decisions were rather based on the procedure laid down by the constitution. So the impeachments were nullified not because the Governors were not corrupt. In fact, as stated in Chapter 4, most of the Governors had one corruption case or another to answer. In addition to the cases of Dariye of Plateau state and Alamieyeseigha of Bayelsa State among the impeached Governors, Ayo Fayose of Ekiti State too had corruption charges against him. For instance there were allegations of money laundering, diversion of N17.8 billion local council funds and N13 billion Ekiti Poultry Integrated Project funds, etc. For being notorious for corruption, his impeachment was welcomed.⁹¹ The anti-corruption body, EFCC, hailed it as good for the country. Its former boss, Nuhu Ribadu, said “We already have a case against him. We will not jump over and start running after him. We will wait and allow justice to take its course. We will do things properly and according to the rule of law. I can assure you that we are extremely happy that for the first time there is no hiding place for corrupt persons” (*Thisday* 17/10/06).

It also needs to be stated that the abuse of the constitutional provisions as could be seen above was not the independent doing of the State legislatures. There is evidence that the federal government stage-managed at least some of the impeachments. This was mostly done through the EFCC which is a federal institution. For instance, it was the EFCC which prepared a report indicting Alamieyeseigha for corruption and jumping bail in London and submitted same to the state House of Assembly. It was on the basis of this report that the House impeached him. It was no wonder that he claimed that he was victimised by the presidency because of his support for the Vice President who, as we indicated above, was not in good terms with the President. Whatever was the case, his plea of guilt over-shadowed his mere allegations.

⁹¹ There were jubilations by youths on the streets of Ado-Ekiti (the state capital) after the impeachment. Elders, some PDP members, former Deputy Governor (who was impeached at the instance of Fayose because he was allegedly against the poultry project) and famous Lagos lawyers, Gani Fawehinmi and Femi Falana all welcomed it.

In the case of Oyo State, it has been reported that the 18 lawmakers were influenced by a federal government-backed 'king-maker' politician in the state, Alhaji Lamidi Adedibu, who felt betrayed by the Governor for not making financial returns to him. He bragged that not even the Supreme Court could return the Governor to power. The man belonged to the ruling PDP and was referred to as the "strongman of Ibadan politics" and the "Garrison Commander". Though he was widely known to be causing violence in the state,⁹² President Obasanjo was quoted as saying that he needed to be managed only! In fact the President once visited him in Ibadan and described him as the "only Father of PDP" (*The Guardian* Editorial 08/12/06; *Thisday* 16/11/07).

It was no wonder then that the federal government halted Governor Ladoja from returning to office after the Court of Appeal decision. Though the Inspector-General of Police, Mr. Sunday Ihendero, restored Ladoja's security, he did not ensure his return to office describing the judgement as a "toothless bulldog that cannot bite" (*Thisday* 15/11/06).⁹³ The government's reason was that the respondents in the case (the 18 legislators) had filed an appeal to the Supreme Court together with an application for injunction to restrain him from returning to office pending the determination of the appeal. In a press conference, the Attorney-General of the Federation, Mr Bayo Ojo, stated that:

Although an appeal simpliciter does not operate as a stay of execution, where a party has exercised his right of appeal and also filed an application for stay of execution or injunction pending the determination of the appeal, the successful party ought to refrain from enforcing the judgement until the pending appeal has been determined. All parties in Oyo State must, therefore, await the determination by the Supreme Court of the appeal filed by the respondents. This is in order to prevent the destruction of the res i.e. subject matter in contention between the parties (*Vanguard* 06/11/06).

⁹² It was reported that the incident led to violence and loss of lives in the state. After the departure of Obasanjo as President, Adedibu was once arraigned before a Chief Magistrate court in Abuja on charges of suspicion that he was likely to incite disturbance of public peace and the conduct of his thugs was likely to cause a breach of public peace in Abuja, Ibadan and other places (*Thisday* 16/11/07).

⁹³ It should be noted that the police is a federal force in Nigeria. States are not allowed to have their own police. See sections 214, 215 and 216 of the Constitution.

The Attorney-General acted as if he was granting the application for injunction. He simply ordered the parties to maintain status quo pending the determination of the appeal and not merely the determination of the application. However, what he did is hardly supportable in law. While parties are expected to maintain status quo when an application for stay of execution or application for injunction is filed pending appeal, such a stay is up to the time the application, and not the main appeal, is determined by the court. An application of this nature when successful has a life span up to the determination of the appeal and that is why it is always made pending appeal. Courts have restated this principle in cases such as *Okafor v. Nnaife*⁹⁴ and *Odugwu v. Odugwu*.⁹⁵ Even when the application filed by the legislators was subsequently struck out by the Court of Appeal,⁹⁶ Ladoja was not restored to office (*Thisday* 15/11/06). It was only after the Supreme Court decision that the federal government directed the police to ensure his return to office.

In Plateau State also, it is hardly deniable that the federal government had a hand in the impeachment. It seems EFCC acted the script of the Presidency in the abuse of rule of law. It was reported that EFCC had previously sought the House of Assembly under the leadership of Simon Lalong to impeach the Governor but it refused to do so. Thus the 8 ‘co-operating’ members were used to impeach him. Hours before the impeachment, it was clear that it was going to happen. Lorry-loads of anti-riot policemen had already been stationed in Jos, the state capital. The 8 impeaching lawmakers had been under heavy security protection, kept away from public view and were led to Jos before the impeachment by the EFCC. The acting Chief Judge appointed by Dariye, Justice Dakwang was arrested to pave way for Justice Dakyen to swear in Mr. Michael Botmang as the new Governor (*The Guardian* Editorial 23/11/06). After ‘considering’ the interim report, the 8 members left the state and announced the impeachment in Abuja, the seat of the Federal government. Arguably, Governor Dariye suffered this fate because he had severed ties with President Obasanjo when he claimed that he used his state’s ecological funds to finance the

⁹⁴ (1987) 4 NWLR Part 64, Page 129

⁹⁵ (1992) 2 NWLR Part 543, Page 539

⁹⁶ It was struck out with the mutual consent of the parties for being an abuse of court process since the appeal was already before the Supreme Court.

President's campaign machinery through their common party, PDP, in the 2003 elections. The reaction of the presidency to the impeachment confirmed that the saga was stage-managed. Mallam Uba Sani, Special Assistant to the President on Public Affairs stated that:

Whatever the decision taken, as long as it is in the interest of the Plateau State people, so be it. The Presidency cannot stop the State Assembly from performing their constitutional mandate... the Presidency has never intervened in the Dariye crisis. Here is a Governor who was accused of abuse of office, corruption and money laundering. Was President Obasanjo there in London when he was arrested over money laundering? Was the President there when he was detained and he subsequently jumped bail or was it the President who asked him to launder money? So if the plateau people feel that their Governor has committed impeachable offences and they remove him, so be it (*Daily Trust* 14/11/06).

Governor Dariye too was not reinstated into office after the Court of Appeal judgement. It was only after the Supreme Court decision that he returned as Governor shortly before the end of his second and final term of office.

Similarly, despite the clear unconstitutionality of Peter Obi's impeachment, the federal government stated that he remained impeached until a competent court of law reversed the impeachment (*Vanguard* 06/11/06). It is not difficult to see why the federal government quickly endorsed the impeachment. The Governor belonged to a minority opposition party, APGA, and he came to power following a court decision nullifying the election of Chris Ngige as Governor of the State on the platform of the PDP. Obi was therefore not in the good books of the federal government and any way of impeaching him would be welcomed.

It was only in the case of Ekiti State that the federal government faulted the impeachment thereby taking a contrary stand from that of the EFCC. It declared the suspension of the Chief Judge, the appointment of an acting one and consequently the impeachment of the Governor as unconstitutional acts. The Attorney-General stated that the procedure for appointing an acting Chief Judge for a state is as spelt out in section 271 of the Constitution and the "the State House of Assembly has no power to suspend the Chief Judge of a State or appoint a Chief Judge." He promised that the federal government will take

appropriate steps to maintain law and order in the State (*Thisday* 17/10/06). Three days later, a state of emergency was declared in the State and Major-General Tunji Olurin was sent as Administrator.

The powers of impeachment are certainly useful in subjecting the public officers concerned to the equality before the law principle of the rule of law. But as clearly indicated, such powers were abused sometimes at the instance of the federal government apparently for political reasons. Indeed the EFCC had the powers to investigate the Governors on issues of corruption.⁹⁷ Because of the immunity they enjoyed under s. 308 of the Constitution, impeachment was the only viable option while they remained in office. Yet the involvement of the EFCC in the impeachments was ultra vires its powers. Assuming it had powers to be so involved, due constitutional process should have been followed. If the federal government was not biased, how come it rejected the abuse of the rule of law in Ekiti State and supported it in Bayelsa, Oyo, Anambra and Plateau States despite decisions of courts holding some of the latter impeachments unconstitutional?

It could be argued that what the cases reveal is that the federal government protected its favoured Governors from the arms of the law and subjected others to abuse of rule of law. The then Chief Justice of the Federation, Modibbo Alfa Belgore, had to complain about how the Presidency picked and chose which rulings of the court were convenient for it to obey (*The Guardian* Editorial 08/12/06). In the case of Oyo State, though the Governor belonged to the PDP, the government sided with Adedibu in disowning him. Governor Dariye of Plateau State too became a disowned insider for his clear support for the Vice President. In Ekiti State, the Governor was a loyal chap to the federal government. Thus the government simply used selective justice in the impeachment cases thereby leading to abuse of the constitutional powers.

Although there is no major face up yet with the executive arm of government, the National Assembly under **the Yar'Adua administration** seems to be more

⁹⁷ See section 6 of the Economic and Financial Crimes Commission Act, 2004.

promising. Recent evidence particularly from the House of Representatives shows that the legislature abhors corruption. It would be recalled that the House investigated allegations of abuse of office against its newly elected Speaker, Mrs. Patricia Etteh, and her Deputy, Babangida Nguroje for awarding contracts for the renovation of their official residences at an inflated rate of N628 million and without following due process. The Idoko Panel constituted by the House to investigate the matter indicted the two leaders. Though the House was divided on their fate following the report, the faction made up of the Integrity Group insisted on their resignation and they had to quit at last (*Leadership* 31/10/07).

The same House of Representatives recently completed investigations into a power sector scam involving about \$16 billion said to have been perpetrated during Obasanjo's time. At the hearing of the investigating Godwin Elumelu Committee, it was disclosed that contracts worth that amount had been awarded to various companies, including fictitious ones, monies advanced without work done. It was alleged that Energo Nigeria Ltd, a fictitious company chaired by former Head of State, General Abdulsalami Abubakar, got an inflated contract of N19.5 billion, received 75% of the sum but did less than 10% of the job.⁹⁸

The report of the House has not yet reached the Presidency. When it finally does, it would remain to be seen how the government will deal with the scam. The scam has further exposed the Obasanjo regime as one where corruption had a field day. It was no wonder that eminent Nigerians and organisations including the Nigerian Labour Congress (NLC) were calling on the government to probe the Obasanjo years or face mass action. The NLC said it is "seriously concerned over the revelations of corruption from the probe of the power sector being undertaken by the House of Representatives. There have been extremely disturbing reports about large-scale corruption also from other sectors. All of these suggest that Nigeria had been massively plundered particularly over the eight years of President Olusegun Obasanjo's administration" (*Thisday* 9/4/08a).

⁹⁸ This allegation has been refuted by the former Head of State's Chief Press Secretary (Haruna 2008).

There is also a probe of the administration of the Federal Capital Territory (FCT) under its former Minister, Mallam Nasir El-Rufa'i. The probe is conducted by the Senate Committee on FCT chaired by Abubakar Sodangi. It is investigating the sale of federal government properties in the FCT during the Obasanjo regime. It was discovered during public hearing that contracts worth N6.4 billion were awarded in the development of satellite towns in the FCT to 10 fictitious companies.⁹⁹ The Corporate Affairs Commission which is responsible for registering companies wrote to the committee that there is no evidence in its system to show the registration of the purported companies. It was said that approval for the award of the contracts to the companies was given by President Obasanjo. But he never appeared before the panel. The former Minister did. Though he had indicated his readiness to "spill all the beans" (*Daily Triumph* 17/04/08; *Leadership* 17/04/08), his testimony hardly spilt any beans. He later turned out to be a suspect in an allegation by the EFCC that he had abused office and misappropriated public funds to the tune of N32 billion, an allegation he denied (*Thisday* 23/12/08).

6.4 Conclusion

A fundamental feature of military rule is monopoly of power and discretion without accountability. With the military command structure, power is concentrated at the centre with regional/state Governors directly answerable to the centre. Assumption of power by force, subordination of the constitution, sacking the legislature and muzzling the judiciary including the press, combined to make the military masters unto themselves. They did what pleased them without being accountable to anybody. They diverted the huge oil resources at their disposal into their personal use.¹⁰⁰ Hence the high levels of corruption witnessed during this period.

⁹⁹ These fictitious companies are Skytech Engineering, Skytech Construction, ICON Resources, Abuja Investment Company, Comic Ltd., Yak International Ltd., Nedeco Works and Projects Ltd., Kard Associates, Landing Nigeria Ltd., and Steam Ventures.

¹⁰⁰ Few exceptions were the corrective regimes of General Murtala Mohammed between 1975 and 1976 and Major-General Muhammadu Buhari between 1984 and 1985. See Chapter 4 for details.

Civilian rule, with all the constitutional legal order, did not differ much from military rule. On the face of it, the executive does not seem to wield absolute powers because the elected legislature and the independent judiciary exist. The judiciary particularly at the appellate level has exhibited some activism. It stood up for the rule of law, but the government was choosy as to which ruling it was to abide by. The legislature on the other hand has been lax so much that in some instances, it became complicit in corruption scandals. The impeachment cases cited in this chapter further confirm how the executive particularly at the federal level wielded so much power as to decide which Governor would be impeached and in what manner. The situation was disturbing during Obasanjo that the Senate and Attorneys-General of the States had to condemn the government's use of the EFCC in the rape of the rule of law (*The Guardian* Editorial 23/11/06).

The relevance of rule of law to the development of a nation cannot be over-emphasised. Absence thereof in practice does incalculable damage to development as the case of Nigeria shows. The high levels of corruption which contributed in no small measure to plunging the country into its state of underdevelopment would have been avoided had rule of law been respected in practice. Neither military regimes nor civilian administrations gave due respect to the rule of law and Nigeria ended up being ruled by a handful of elites exercising absolute power. This situation, I argue, breeds corruption; and corruption in turn impedes development. Thus underdevelopment, corruption and absence of rule of law in practice in Nigeria are inextricably linked.

CONCLUSIONS

The main question which this study set out to address is *why* Nigeria suffers from underdevelopment despite its reasonably sufficient oil wealth. It offers a socio-legal explanation by relating the problem to corruption spurred by absence of rule of law in practice. The thesis postulates first that the problem cannot be attributed to want of commitment to development in state policy. It reveals that development has been a human right in the Constitution since 1979. That was achieved when socio-economic variables as constituents of development (e.g. food, education, health, employment and housing) were accommodated under the Fundamental Objectives and Directive Principles of State Policy. They became human rights albeit non-justiciable; and the gesture is an indication that the state attaches importance to development.

The commitment to development could also be seen in the fact that various administrations since 1962 have come up with series of development policies all of which had as principal objective the improvement of the standard of living for the people of Nigeria. Four National Development Plans and Structural Adjustment Programme (SAP) were drawn up when development in development discourse simply meant economic growth measured by Gross Domestic Product (GDP) and Gross National Product (GNP) per capita. Development in terms of people's standard of living measured by the level of poverty, education, health and life expectancy (i.e. human development) was not a primary area of focus.

On the face of the Plans and SAP, state policy on development followed the same trend. It was only through Vision 2010 that Nigeria expressly shifted towards human development. It may be assumed that serious engagement with human development in state development policy started with Vision 2010. This study shows evidence to the contrary. Although economic growth appears conspicuously in the Plans and SAP, the study shows that their overall objective has been human development. The Plans in particular paid attention to education and health among other sectors allocating huge sums of money to them. The

study also shows that development is so important that in order to facilitate it, the state invokes law as instrument in various ways in its development policies.

The thesis therefore argues that corruption explains Nigeria's situation of underdevelopment amidst oil resources. As rightly pointed out by Dr Eigen, "every day the poor scores in the CPI [Corruption Perception Index] are not being dealt with, means more impoverishment, less education, less health" (in Transparency International [TI] 1997). It is no wonder then that highly corrupt countries like Nigeria, Indonesia, Bangladesh, Pakistan and Cameroon never recorded high Human Development Index (HDI). China too got high level of corruption and despite its strong economy, it has never achieved high HDI. Conversely, countries with low level of corruption like Norway, Sweden, UK, New Zealand, US and some oil-rich Middle Eastern countries achieve high HDI. Botswana and Ghana though not so rich have over the years maintained low level corruption and medium HDI. It is on this basis that the thesis proposes a law of development as follows: the higher the corruption the lower the development, and the lower the corruption the higher the development.

Why is corruption more prevalent in places like Nigeria more than other places? Available development literature covers corruption and underdevelopment, identifying the latter as a consequence of the former. But it ignores the fact that corruption is in itself a consequence of some other factors. Particularly in the World Bank circle, the best that has been done is prescribing ways of combating corruption. This is no more than treating a disease without a proper diagnosis. General corruption literature of course identifies certain causes of corruption such as large government, meagre wages, stiff regulation and inefficient criminal justice system. This thesis proposes an additional contributory factor: absence of rule of law in practice. By explaining corruption from a rule of law perspective, the thesis offers a new way of looking at the concept.

It is hard to find a legal system which condones corruption. Countries generally prohibit it through express legal provisions. In societies where it is endemic like Nigeria, corruption goes beyond a mere crime. It raises questions of rule of law. It epitomises bad governance; and rule of law and bad governance are mutually

exclusive. In essence, the critical success factor in development is good governance which rule of law ensures. It is what distinguishes less corrupt/developed countries from corruption-ridden/underdeveloped countries. Explaining this point in the context of opposing results among countries in the performance of state-managed energy industry, Botchway (2000: 17) states that:

Whereas state ownership and management of the utilities in the UK has been described as leading to satisfactory standards, the ownership and management of the utilities in Kenya by the state has been disastrous. ... [W]hat is the variable that accounts for the differing consequences of state involvement in the energy industry? ... [G]ood governance is at the heart of the explanation for this dichotomy. ... [T]he elements of good governance ... include competitive democracy, rule of law, effective bureaucracy, discretion and decentralisation.

The World Bank has recognised the nexus between rule of law, good governance and development. It introduced rule of law as an element of good governance in 1992 in order to facilitate development in developing countries held back mainly by bad governance. This idea was predicated on earlier Law and Development Movements which sought to develop modern law in the Third World as recipe for its development. As pointed out in Chapter 1, the genesis of the idea is Max Weber's theory explaining the success of Western capitalism in its peculiar rational law. The idea is dubbed 'liberal legalism'. This thesis however reveals that in all its phases, liberal legalism privileges the market. It emphasises capitalist growth; it is meant essentially to facilitate protection of private property (World Bank 1992, 1994; Faundez 1997, 2000; Trubek et al 1994; Tshuma 2000; Trubek & Santos 2006). It therefore cannot explain the paradox of underdevelopment amidst oil wealth in Nigeria because it is an issue within the public sphere.

It is by way of departure from liberal legalism that this thesis proposes an alternative version of rule of law drawn from the Nigerian constitutional framework. It argues that it is an appropriate version which would ensure good management of public property and development, and the absence of which in practice contributed to corruption and underdevelopment in Nigeria. Thus the thesis provides a comprehensive three-in-one Nigerian case study on the nexus

between underdevelopment, corruption and absence of rule of law in practice. To my knowledge, this is the first work of its kind.

It is not impossible to achieve economic growth without rule of law as understood in this study. For instance, it is common knowledge that China does not have a developed legal system. There is lack of judicial independence and the traditional separation of power doctrine is absent. In other words, it lacks rule of law. Yet amazingly, it is one of the fastest growing economies and one of the strongest in the world. This does not in any way mean that China disproves the claim that rule of law is crucial in development (Dam 2006). On the contrary, it proves the claim. The point has been made in Chapter 1 that there is difference between economic growth and human development. The former does not necessarily lead to the latter (Sen 1999). China exemplifies this situation as its consistent human development performance (i.e. medium HDI) (UNDP 1990-2008) does not match its economic growth. Tellingly, its level of corruption has over the years been high (TI 1995-2008). Thus it could be argued that though lack of rule of law did not affect economic growth, it did breed corruption which hampered human development.

A relatively poor country, Botswana, shares the same HDI category with China. In economic growth, Botswana is not unique in that it has not outdone other African countries like Nigeria, Cameroon, Angola and Kenya. Yet Botswana has been able to successfully curb corruption (as its TI CPI consistently indicates) and achieve a satisfactory level of human development. The key distinguishing factor is that while Botswana has been able to achieve sustained public and democratic accountability through democratic institutions and equal application of the law (in other words rule of law), the other countries have failed to do so (Holm in Hope & Chikulo 2000).

The elements constitutive of the rule of law clearly indicate that the concept thrives under democratic dispensations. Where democracy is entrenched like in Western countries, rule of law is equally respected and bad governance which corruption exemplifies hardly finds a fertile ground. Public officers govern according to the rule of law. In the case of abuse, checking institutions like the

judiciary and the legislature call erring officers to order. Where things do not work out according to the expectations of popular will, people have the opportunity of changing government through periodic electoral processes. It is because these mechanisms are lacking in military dictatorships that rule of law and military rule are mutually exclusive leading to high level of corruption. This study reveals it to be the case of military Nigeria.

More revealing from the thesis is that civilian rule does not automatically bring about rule of law, absence of corruption, good governance and development. Through its examination of rule of law under civilian rule in Nigeria, the study shows that rule of law and civilian rule are not necessarily mutually inclusive. Neither the Second Republic civilian rule nor the current civilian rule which began in 1999 (particularly the Obasanjo regime) exhibits any satisfactory adherence to rule of law. That is why they are both corruption-ridden thereby making them complicit in underdeveloping Nigeria. The thesis therefore postulates that what ensures rule of law is not *civilian rule simpliciter*, but rather *a working democracy* where all arms of government perform their functions according to law and where the civil society is active.

All said and done, **how** would Nigeria restore rule of law in practice within its current state of civilian rule? This question is outside the scope of this study. But it is necessary to address it for Nigeria to free itself from the shackles of corruption and underdevelopment. I therefore pose it here as a question for further research. However, by way of recommendation, I shall state that with the necessary democratic structures on ground, Nigeria should strive for credible leadership as a recipe for adherence to rule of law. It would certainly minimise, if not eliminate, corruption and bring about development.

The Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) are insufficient in tackling corruption and abuse of rule of law. Even if they work well, they mainly provide a curative measure that must be supplemented by an inspiring preventive measure. Credible leadership would provide this inspiring preventive measure. Achebe's (1985) statement that the problem with Nigeria was that of leadership is as valid

today as (if not more valid than when) it was made in the Second Republic. A rule-of-law-adhering leadership is good in itself and it serves as exemplary for the lower strata of authority and the followership at large.

The current administration for instance started off well with commitment to respect for the rule of law. Among the many utterances of President Yar'Adua on this point was his statement during the annual conference of the Nigerian Bar Association in Ilorin in August 2007 that:

It is a self-evident fact that the more a society has the respect for the rule of law, the more civilised that society is. The more justice, the rule of law and fairness thrive in a society the more stable, developed and prosperous that society is. As a nation, one of our greatest challenges has been the evolvment of a culture of disrespect for the rule of law, unbridled corruption, endemic crime, violence, infrastructural deficit, and general malaise in the polity, these all constitute a direct manifestation of disrespect for the rule of law (*Thisday* 28/8/07).

The unprecedented resignation and subsequent trial of the two Ministers of Health and some other senior officers in the Ministry and the resignation of the Speaker and the Deputy Speaker of the House of Representatives all for allegations of corruption¹ could be linked to the early stance of the administration on rule of law. The Ministers resigned immediately after a meeting with the President (*Punch* 26/3/08).

However, later events as revealed in Chapter 6 show that the administration has become less serious on rule of law and fight against corruption. The hitherto active EFCC has now been weakened; prosecutions of arraigned officials (particularly some of the ex-Governors) are stuck; and corruption goes unperturbed. This situation reinforces the argument that credible leadership is indispensable in restoring rule of law and Nigerians must strive to have it.

Since leadership is elected in civilian dispensations, the electoral process becomes a necessary tool through which the electorate could ensure credible

¹ The Ministers were Prof Adenike Grange and Mr Gabriel Aduku and the House leaders were Patricia Etteh and Babangida Nguroje. See Chapter 4 for details of these allegations.

leadership. People could vote into power good candidates and vote out of power bad representatives. However, this power of the people is only exercisable if elections are conducted freely and fairly. Nigeria does not have record of free and fair elections as for instance, the general elections of 2003 and 2007 show respectively.²

Lack of free and fair elections could be attributed to fundamental problems with the Nigerian electoral system; and to get credible leadership, the system must be overhauled. The Yar'Adua administration has recognised this need. It inaugurated an Electoral Reform Committee (ERC) led by former Chief Justice, Muhammadu Lawal Uwais, to study and make recommendations for the reform of the electoral process. This was indeed a welcomed development. Not surprisingly, the Committee observed among others that negative political culture, weak constitutional/legal framework and lack of requisite independence and capacity of both federal and state Electoral Commissions are key deficiencies in Nigeria's electoral system (Report of the ERC 2008).

The Committee has made a number of specific and general recommendations in order to overhaul the system. For instance, it has called for the review of the Commissions' composition, administrative autonomy and funding; eliminating or reducing the impact of incumbency and self-succession; civic, moral and political education; easier and quicker way of determination of election petitions; conclusion of election disputes before swearing in of elected officers; etc. (ibid). It is hoped that government would accept and implement the recommendations. This would entail amending relevant provisions of the Constitution.³

² See for instance the Communiqué of the Post-Election Civil Society Summit organised by Alliance for Credible Elections at Denis Hotel, Lagos, held on 25th April 2007 (in file with researcher), which condemned the April 2007 elections as "fraudulent, a charade and indeed non-elections."

³ E.g. s. 153 classifying the Independent National Electoral Commission (INEC) as a federal executive body; s. 154 (1) and s. 198 on the appointments of the Chairmen and members of INEC and State Independent Electoral Commission (SIEC) among other bodies; s. 14 and s. 15 of the Third Schedule Part I and s. 3 and s. 4 of Third Schedule Part II on the composition and powers of INEC and SIEC respectively; s. 135 & s. 180 on President's and Governors' terms of office respectively.

It is timely that the National Assembly is due to start a process of constitutional amendment in 2009. It is only hoped that it would not be blinded by political issues such as term elongation at the expense of the electoral reform and other issues that would minimise corruption, restore rule of law and facilitate development. For instance, besides the ERC recommendations, it would be good if the Assembly could remove the immunity against prosecution accorded the President, Vice President, Governors and Deputy Governors (while protecting them from malicious and frivolous allegations).⁴ This is desirable in the face of the large scale executive corruption taking place⁵ on the one hand and the passivity of legislatures⁶ in such situation on the other hand.

It would also be good for the National Assembly to make at least basic (primary and secondary) education and basic (primary and secondary) health care enforceable human rights. As we saw in Chapter 2, there are adequate resources to provide for even more than that. This would make governments more conscious of their duties and would give people the opportunity to enforce the rights in the event of failure by the governments to discharge the duties.

Besides the electoral reform, governments should find other ways of ensuring maximum utilisation of public funds for development and minimising corruption. For instance, the Petroleum Trust Fund (PTF) idea of the Abacha regime may be revisited so that at least excess oil money could be used in key development areas like education, water supply and health by an established body manned by tested and trusted people of impeccable character. The Constitution should be amended to establish such a body⁷ especially that in most cases prices for oil exceed what the federal government projects as we saw in Chapter 2. The body is not to supplant relevant Ministries. Rather, it would go a long way in supplementing their efforts as the defunct PTF did. It would serve as an 'independent service authority'; and to enhance its efficiency, the body

⁴ The immunity is provided under s. 308 of the 1999 Constitution.

⁵ As revealed by Chapter 4.

⁶ I.e. their unwillingness to exercise their checking powers such as investigation and impeachment as we saw in Chapter 6.

⁷ This would be necessary in order to make allocation of money from the Federation Account to the body constitutional. It may be recalled that President Obasanjo scrapped PTF in his early days in office because it was not constitutionally provided for.

may be subjected to civil society scrutiny as was tried in Chad when the country was looking for ways to spend its oil money well (Collier 2008: 119).

Ways of minimising corruption could include reducing the size of governments. The present situation where a single federal Ministry is having up to 2 or 3 Ministers⁸ or States having too many Commissioners⁹ and President and Governors having several Special Advisors and Special Assistants does not work well for good management of public resources. Even when these appointees do not become corrupt, the running costs of the unnecessary offices would be an avoidable burden on public funds. Such costs could be saved to be used in development projects.

Corruption could also be minimised and development projects could get more finances if governments rethink their approach towards persons who allegedly enriched themselves through corrupt practices. The present approach is entirely within the criminal justice system. Corruption as we indicated earlier is an offence under the Nigerian legal system. So corruption suspects are subjected to criminal trials. Though courts could order for the refund of public funds, this can only happen following a conviction. Criminal proceedings are inherently cumbersome mainly because the standard of proof required to secure a conviction is 'proof beyond reasonable doubt'. This makes corruption difficult to prove not least because the perpetrators, fearing the consequences of their acts, might have tampered with any possible evidence. A civil trial where the standard of proof is 'balance of probabilities' would be a better approach in retrieving substantial part of, if not the entire public funds misappropriated. This would avert double jeopardy against the state when for one technical reason or another, the perpetrators escape punishment under criminal proceedings. This measure may require an enabling legislation; and it is worth enacting having regard to the developmental benefits it could bring.

⁸ For instance, some Ministries like Foreign Affairs, Education and Health have main Ministers and junior Ministers called Ministers for State.

⁹ Some States have Commissioners in Ministries created apparently to accommodate more party loyalists. For instance, in Jigawa State under Saminu Turaki, education was split into three, agriculture into two, each headed by a Commissioner.

In order to promote transparency and accountability particularly in the oil industry, government should strengthen and fully operationalise the Extractive Industries Transparency Initiative introduced by the Obasanjo administration. Suffice it to say, actualising the freedom of information law is one sure way of ensuring transparency and accountability in public administration. Government should not only hasten up the enactment of the Freedom of Information Bill, but should ensure continued publicising (through print and electronic media, particularly the radio) of monthly statutory allocations to the federal, state and local governments from the Federation Account.

Similarly, it would help if asset declaration before taking public office and after leaving it (and other requirements of the code of conduct for public officers) would be observed and made public by all major public office holders. It is also important that the requirement of ‘a clean bill of health’ for people vying for elected offices be taken seriously; be issued by a truly independent electoral body; and be extended in a way to people nominated for political appointments. The practice would help block the entrance of people with corruption-related dents into government lest they divert public funds into private use, and would supplement legislative screening where applicable.

There would still be no room for complacency even when the above measures are taken and the electoral process is reformed. People must find supplementary ways of ensuring the rule of law. Specifically, they must be active participants in the general utilisation of public resources for development. If development is freedom as Sen (1999) argues (and surely it is), then it must be fought for though not necessarily fiercely. People’s passivity leaves governments with discretion to or not to discharge their developmental duties. The probable consequence in a situation of passivity is corruption and underdevelopment. However, when people insist on their developmental rights, such endeavour results in two things: development takes a bottom-up form and check on power as well is supplemented from the bottom.

Lessons could be drawn from Botswana in this respect. There, corruption has been curbed and development improved through institutions at local informal

levels. For instance, *kgotla* has been a traditional institution used by the chiefs to promote their agenda in tribal governance since pre-colonial times. After independence, it became a dialogue forum between local communities and government officials on development issues. In fact, “the need to obtain *kgotla* approval has become a mandatory part of the initiation of projects in the rural areas. The result is that civil servants develop their programmes with the knowledge that they must be prepared to defend their proposals at the community level and not just order their implementation” (Holm in Hope & Chikulo 2000: 292). There are also ‘freedom squares’ where politicians hold rallies in towns and villages and community members can come and question the speakers holding the rallies (ibid: 290).

Non-governmental Organisations (NGOs), labour unions, professional bodies, religious and other pressure groups and individuals have a great role to play in this dual bottom-up approach. For instance, they could mobilise people for action against underdevelopment. The World Social Forum as a counter to the World Economic Forum at the global level is a good example of grassroots mobilisation to challenge or counter unpopular systems. It is what Santos (2002) would call ‘counter-hegemonic mobilisation’. As evidence across the world shows, active citizenship brings about development (Green 2008).

There is evidence of active citizenship in Nigeria as well. For instance, professional bodies had mounted a challenge (though unsuccessful) against SAP in military Nigeria (Jega in Olukoshi 1993); NGOs and the media had ‘forced’ General Ibrahim Babangida to ‘step aside’ after he annulled the June 12 1993 Presidential election. Similarly, the insertion of 13 per cent derivation formula in the Constitution and the recent establishment of Niger Delta Ministry could be said to be the results of active citizenship in the Niger Delta oil communities. These could be replicated at a more general level. Organisations, social networks and individuals could facilitate reform of the electoral system and amendment of relevant provisions of the Constitution in addition to leading a popular challenge against the status quo.

However, in order to have active citizenship, there is need for a nation-wide development education. There must be awareness campaigns in order for people to know of the paradox and the fact that it is largely caused by corruption. More importantly, the campaigns should focus on change of people's attitude. People must not continue to see themselves as helpless victims of underdevelopment. They must believe in their ability to facilitate change. It is only then that they could make effort for a change. Looking at the level of illiteracy in the country, the campaigns must use more than elite-targeted media such as the print media to include radio programmes and lectures in public places such as the market and religious congregations.¹⁰

Nigeria being a predominantly religious country, religious congregations would provide convenient fora for campaigns especially that certain attitudes are rooted in religious principles that are mostly misunderstood. For instance, some Muslims may hold a view that poverty is fate which man cannot change. These fora are often used in promoting issues of public interest such as religious tolerance. They could as well be effectively used in development education particularly in changing some of these attitudes. The campaigns should take a non-confrontational form aiming at improving good governance and development through people's participation. Emphasis should be laid on the fact that development is not a privilege but rather a right and by participating, people would be cooperating with governments in the discharge of a national duty; and that this effort is in no way against religious teachings.

The realization that underdevelopment is neither destiny nor impecuniosity of governments but rather a simple case of abuse of rule of law is an important informational base upon which people could be active citizens. Coupled with a firm belief in their ability, active citizenship would be possible and fruitful. When and where necessary, people would demand for their legitimate developmental rights from the duty-bearers at the various levels of government; and would also resist governments' developmental inaction and illegal diversion of public resources. In other words, people would not permit public officers to

¹⁰ Large congregations are held by Christians every Sunday and by Muslims every Friday.

keep them underdeveloped through corrupt practices. In so doing, rule of law in practice may be restored from below.

Barring any uncertainty, civilian rule in Nigeria appears to have stabilised. It is the first time in Nigerian history that it lasted for 9 consecutive years. It therefore seems less likely that the country would witness military rule again. With the constitutional provisions on the rule of law in place, what is needed is their practical application. Anything short of that is as good as having law which does not rule at all. It means rule according to the whims and caprices of people with power, a situation Aristotle (1962: 226, Book III xvi) describes as “importing a wild beast” which, according to Plato (1970: 174), ultimately leads to the collapse of the state. Underdevelopment in Nigeria, it is submitted, is symptomatic of collapse of the state; corruption and absence of rule of law in practice are socio-legal phenomena which explain it.

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