

## THE MILITARY SYSTEM OF ADMINISTRATION IN NIGERIA

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I. THE ARMY TAKE OVER

Some members of the Nigerian Armed Forces revolted on the 15th of January, 1966, killing the Premiers of the Western and Northern Regions, the Federal Minister of Finance, and some army officers. The Prime Minister of the country, reported at first to be missing, was later announced killed too. His corpse was recovered after a long and patient search, but the exact time of his death still remains a mystery. Indeed, the full story of the revolt is yet to be told.

To the man in the street, the revolt came as a surprise because it was least expected even though disorder and violence had for some time reigned in the Western Region and Tiv Division of the Northern Region. Listeners to the early morning programme of the Nigerian Broadcasting Corporation on the 15th of January were greatly surprised when the line was suddenly disturbed and then cut off. Anxious citizens who rushed out to the streets of the **principal** towns were astonished to find soldiers in control of strategic locations. Although it was clear to many that the state of the country was far from normal, not many had any idea of what was exactly happening. All through the 15th and the 16th of January utter confusion and bewilderment reigned throughout the country, and the people busied themselves speculating on the nature of the trouble that had befallen the country. Official silence was at long last broken on the 16th night when both the Acting President of the country and the Officer Commanding the Nigerian Armed Forces addressed the nation on the wireless network of the Nigerian Broadcasting Corporation. The first to speak was the Acting President who said<sup>1</sup> -

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<sup>1</sup>Government Notice No. 147 of 1966: Nigeria Gazette, Lagos, 26th January, 1966 p. 103.

"I have tonight been advised by the Council of Ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the Armed Forces of the Republic with immediate effect. All Ministers are assured of their personal safety by the new administration." "I will now call upon the General Officer Commanding, Major-General Aguiyi-Ironsi, to make a statement to the nation on the policy of the new administration. It is my fervent hope that the new administration will ensure the peace and stability of the Federal Republic of Nigeria and all citizens will give them their full co-operation."

Replying, Major-General Aguiyi-Ironsi, as the Officer Commanding the Nigerian Armed Forces, announced his acceptance of the invitation and proceeded directly to make public the outline of the first enactment and the policy of his administration.<sup>2</sup> He accepted the invitation in these terms-

"The Government of the Federation of Nigeria having ceased to function, the Nigerian Armed Forces have been invited to form an interim military Government for the purposes of maintaining law and order and of maintaining essential services. This invitation has been accepted, and I, General J.T.U. Aguiyi-Ironsi, the General Officer Commanding the Nigerian Army, have been formally invested with authority as Head of the Federal Military Government, and Supreme Commander of the Nigerian Armed Forces."

Dealing with his external affairs policy, he declared his intention to maintain the existing diplomatic relations and honour all treaty and financial obligations of the country. As to his internal policy, he said on behalf of his Government-

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<sup>2</sup>Government Notice No. 148 of 1966: Nigeria Gazette, Lagos, 26th January, 1966 p. 103.

- "(a) that it is determined to suppress the current disorders in the Western Region and in the Tiv area of the Northern Region;
- (b) that it will declare Martial Law in any of the Federation in which disturbances continue;
- (c) that it is its intention to maintain law and order in the Federation until such time as a new Constitution for the Federation, prepared in accordance with the wishes of the people, is brought into being."

Continuing, the Commanding Officer announced the outline of his first decree which was later published in full as Decree No. 1 of 1966. According to him -

"The Federation 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....

"The Federation Military Government further decrees:-

- (a) that the Chief Justice and all other holders of judicial appointments within the Federation shall continue in their appointments, and that the judiciary generally shall continue to function under their existing statutes;
- (b) that all holders of appointments in the Civil Service of the Federation and of the Regions shall continue to hold their appointments and to carry out their duties in the normal way, and that similarly the Nigeria Police Force and the Nigeria Special Constabulary shall

continue to exercise their functions in the normal way;

- (c) that all Local Government Police Force and Native Authority Police Forces shall be placed under the overall command of the Inspector-General."

On the 17th of January, the Commanding Officer, as the Head of the Federal Military Government, issued a Press Statement<sup>3</sup> to supplement the decree of the previous day. In it he announced that the functions of the Federal Military Government would be exercised by a Supreme Military Council yet to be set up. He also ordered that all federal and regional Permanent Secretaries should retain their positions and continue to exercise their functions under the general direction of the Federal Military Government and Regional Military Governors; that Regional Military Governors should be responsible to the Head of the Federal Military Government for the administration of their respective Regions; and that public corporations and other statutory bodies should continue to function under their appropriate Ministries. In conclusion he said that "all existing laws, regulations, orders and official instructions remain in force, wherever applicable until either modified or abrogated by the Federal Military Government".

Altogether, the Acting President's speech marked the formal termination of the civilian administration of the First Republic and ushered in Military rule which was then introduced to the nation by the speech of the Commanding Officer. The machinery of administration of the military regime was later defined in detail by the Constitution (Suspension and Modification) Decree, 1966 which is more popularly known as Decree No. 1 of 1966. The outline of this Decree given above together with the press statement of the 17th of January clearly shows that the military authorities retained some of the institutions and offices established by the 1963 Constitution. Thus, the Judiciary, the Civil Service and the Police were all retained together with their human functionaries. Indeed, Decree No. 1, as subsequently published in full, even provides that the provisions of the federal and

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<sup>3</sup>Government Notice No. 149 of 1966.

regional Constitutions not suspended by it "shall have effect subject to the modifications specified in... this Decree." Therefore, some portions of the Republican Constitution, such as the provisions relating to the Judiciary, the Civil Service, the Police and Human Rights, are still in force by virtue of the provisions of Decree No. 1.<sup>4</sup> In place of the federal and regional executives and legislatures dethroned, Decree No. 1 and its subsequent amendments created the offices of the Head of the Federal Military Government and Regional Military Governors and set up a Supreme Military Council and the Federal and Regional Executive Councils.

Law making is the function of the Supreme Military Council at the centre and of the Military Governors in the Regions. The Federal Military Government has the power to legislate for the whole country or any part thereof on any matter whatsoever, while the Military Governors can legislate on any matter previously within the legislative competence of the Regions subject to the condition that it cannot legislate on any matter within the concurrent legislative list without the prior consent of the Federal Military Government. In the event of a conflict between a Decree and an Edict on any matter whatsoever, the Decree prevails, though no court of law in Nigeria is competent to question the validity of either.

Although Decree No. 1 established the Federal Executive Council, it vests the executive authority of the Federation in the Head of the Federal Military Government to be exercised by him either directly or through persons or authorities subordinate to him. Likewise, the executive authority of each Region (now State) is vested in the Military Governor of that State and not in local Executive Council. The Military Governors inherited the executive authority of former Regions, while the executive authority of the Federation now extends to the execution and maintenance of the 1963 Constitution as modified from time to time by Decrees and "to all other matters whatsoever throughout Nigeria."

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<sup>4</sup>See ss 1(2), 2(2) of Decree No. 1 of 1966. See also the 1963 Constitution of the Federation, chs. VII, VII and X, as modified by the Decree. See further the corresponding chs. of the regional constitutions of 1963 as similarly modified.

Decree No. 1 allows the judiciary and all judicial officers to continue functioning, but sets up an Advisory Judicial Committee to advise the Supreme Military Council on the appointment of Judges throughout the country. The judiciary is indeed the branch of government least affected by the army take-over of January.

With but slight modifications<sup>5</sup> the machinery of administration set out above functioned smoothly until the 29th of July, 1966 when a much more serious disorder occurred in the country. The Head of the Federal Military Government, Major-General Aguiyi-Ironsi, and a number of other army officers were killed and a new military Government was formed under General (then Lt.-Col.) Yakubu Gowon.

Gowon's ascent to the headship of the Government was far less formal than that of his predecessor, for there was no formal offer or acceptance of the reins of government as in January. On coming to power, however, he like his predecessor, made his maiden speech an occasion for declaring the policy of his administration.<sup>6</sup> The policy he announced in that speech was later repeated in his statement to the press on the 4th of August, 1966 as follows:-<sup>7</sup>

"As I indicated in my maiden broadcast of last Monday, it is my intention to continue the policy laid down in the statement by the former Supreme Commander on 16th January, 1966. We shall also honour all international treaty obligations and commitments and all financial agreements and obligations entered into by the previous Government. We shall maintain good diplomatic relations with all countries. All foreigners in Nigeria are assured of their personal safety and should have no fear of being molested....

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<sup>5</sup>One of the most significant changes was made by Decree No. 34 of 1966. This decree amended the laws so as to give fuller expression to the unitary structure of administration which had been functioning since the military rule began.

<sup>6</sup>For the full text of the speech, see Nigeria 1966 at 32 (Federal Ministry of Information, Lagos).

<sup>7</sup>Id. at 34.

All public officers at the national level and on the various Groups of Provinces will continue in their office carrying out the normal functions of government. Public corporations and other statutory bodies as well as local government council will continue to function under their appropriate Ministries. All existing laws, regulations, orders and official instructions remain in force, unless and until either modified or abrogated by the National Military Government."

Dealing with constitutional questions, he said that no major constitutional or other changes would be effected without the fullest consultation with the people, and to that end he proposed to appoint an Advisory Committee to deal with the main issues of national interest. The idea behind such a committee to be composed of independent and respectable Nigerians was to fill the vacuum created by the ban on political organizations in the country. He put forward a three-stage plan for the return of civilian rule.<sup>8</sup> First, he intended to take immediate steps to modify or nullify any provision of any decree which tended towards over-centralization of powers. Then, the advisory committee would prepare the ground for a Constitutional Review Assembly to be composed of the various shades of opinions in the country, which would recommend the form of constitution best suited for the country. Finally, the recommendations of the Assembly would be subjected to a referendum and, if approved by the people, would become the people's Constitution. Those to be elected under that Constitution would immediately assume political control of the country, and "my Government would fade away after having carried out its task of laying a firm foundation for our national unity."<sup>9</sup>

In carrying out the first part of the plan, Gowon's administration made the Constitution (Suspension and Modification) (No. 9) Decree, 1966 which reversed the centralizing trend of the Ironsi administration and reverted Nigeria to a federation of four

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<sup>8</sup> Id. at 36.

<sup>9</sup> Id. at 36.

regions with effect from the 1st of September, 1966. Section 1 of the Decree repealed Decrees Nos. 14, 34 and 36 of 1966 made by the former administration. Decree No. 14 had given the Federal Attorney-General the power to institute and undertake criminal proceedings in respect of any offence created by any law in force in Nigeria or any part thereof. The repeal of this provision in effect revived the powers of the Attorney-General of each Region to institute and undertake such proceedings under the law of that Region. Decree No. 34 was repealed so as to restore all the overtones of federalism which it had carefully expunged from Decree No. 1. Thus, once again, the Central Government and Executive Council became respectively the Federal (not "National") Military Government and Federal Executive Council; Lagos became Federal, not "Capital", territory; Northern, Eastern, Western and Mid-Western Nigeria again became Regions; and for the words "Republic" and "National" wherever used in reference to Nigeria, the words "Federation" and "Federal" were respectively to be substituted. Of more practical importance, perhaps, is the dissolution of the unified and centralized public service and the revival of separate federal and regional public services under separate Public Service Commissions. The repeal of Decree No. 36 meant that the power to appoint and control Magistrates and Registrars in various parts of the country, which the Decree vested in the Supreme Military Council, once again reverted to the appropriate Public Service Commissions. The Constitution (Suspension and Modification) (No. 9) Decree, 1966 concluded by providing that as from the 1st of September, 1966 Decree No. 1 "as amended by this or any other Decree in force on that day, shall have effect with such modification (whether by way of addition, alteration or omission) as may be necessary to bring it ... into conformity with this Decree."<sup>10</sup>

Therefore, after the July change of government Decree No. 1 together with the parts of the 1963 Constitution it had saved revived; they have remained in force, not by the authority of the first Military Government, but by the authority of the Gowon administration. As indicated above, s. 8 of the Constitution (Suspension and Modification) (No. 9) Decree reserved for the

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<sup>10</sup>s. 8(1).



new administration the right to repeal or amend the Decree No. 1 and all the previous laws (including the 1963 Constitution) it had saved. A glaring example of the exercise of this power is the division of Nigeria into twelve states, which was effected by the States (Creation and Transitional Provisions) Decree, 1967. Section 3 of the 1963 Constitution which defined the territories of the Federation was changed by this Decree to read<sup>11</sup>.

"There shall be twelve states that is to say, North-Western, North-Central, Kano, North-Eastern, Benue-Plateau, Central-West, Lagos, Western, Mid-Western, Central Eastern, South-Eastern and Rivers."

Also, Gowon's Administration has provided a new formula for sharing the distributable funds of the Federation and has, from time to time, modified the composition of both the Supreme Military Council and the Federal Executive Council. It is in fact a supreme authority not limited in any way by any law or authority in this country.

## II

### THE BASIS OF AUTHORITY OF THE MILITARY REGIME

The source of the authority of the present military regime generally comes up for consideration in every attempt to determine whether or not the 1963 Constitution of the Federation survived the January and July changes and still remains the supreme law of the land, by reference to which the validity of other laws is to be tested. Various legal opinions in the country seem to agree that the question hinges on the nature of the changes that took place. If, for instance, the January take-over was constitutional in the sense that it occurred within the framework of the 1963 Constitution, the conclusion would be that since the Constitution was the source of the authority of the first military government it did survive the take-over and limited the powers of that government. If, on the other hand, the take-over

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<sup>11</sup>s. 2(b). Subsequently, the Central-West and Central-Eastern States were respectively renamed Kwara State and East-Central State by the Central-West (change of name etc.) Decree, 1968 and the Central-Eastern State (Change of name) Decree, 1970.

was revolutionary - a coup d'etat - in the sense that the Army dislodged and displaced the republican government in a manner not contemplated or sanctioned by the Constitution, there would be no question but that the Constitution was overthrown and could not have been the source of the authority of the military government. What is said of the January events applies with equal force to those of July. If the change of government was revolutionary both in January and in July, no problem arises for the present military regime would have no direct link with the Constitution; nor would it be bound or limited by it. There would also be a break with the past legal order if the change was revolutionary only in January or in July. The present government would have a direct and unbroken link with the 1963 Constitution only if each change of government was affected under that Constitution. In that event, the Constitution would be the source of authority and powers of the first and present military governments. It is therefore necessary to determine first whether the January and July changes were constitutional or revolutionary.

As noted above, when the Acting President and the Council of Ministers were faced with an inevitable overthrow, they surrendered governmental powers to the Army, believing, as it appears, that their action was constitutionally regular and valid. It is not clear whether or not the Army shared that belief at the time. It seems that their views were mixed. In his maiden speech, the Commanding Officer said that military rule was being established because Balewa's administration had ceased to function and law and order had broken down. The Army must therefore restore law and order, provide essential services and keep the reins of government "until such time as a new Constitution for the Federation, prepared in accordance with the wishes of the people, is brought into being". This seems to indicate that, to the Army, the take-over was necessitated by the preceding overthrow of the 1963 Constitution and the consequent break down of law and order. The Constitution did not therefore survive the change and was not the source of the authority and powers of the first military government. On the other hand, in decreeing the suspension of certain provisions of the 1963 Constitutions, the Commanding Officer seems to have indicated that he believed the take-over to be constitutional and the Constitutions to have survived. He certainly could not have sought to suspend the provisions of a dead and ineffective constitution. Perhaps, the blame for this inconsistency should go to the draftsmen of the maiden speech and Decree No. 1 of 1966, for instead of providing for the revival and modification of certain provisions of the Constitution,

they provided for the suspension and modification of other provisions. If the Constitution was overthrown, it no longer existed and could not therefore be suspended; it could only be revived wholly or in part.

The matter was extensively argued by counsel, and discussed by the Supreme Court in its judgment, in the case of Lakarmi & Kikelomo Ola v. The Attorney General of the West.<sup>12</sup> The issue before the Court was whether the Constitution of 1963 survives and still remains the supreme law of the land, by reference to which the validity of the legislative and executive acts of the military Government is to be tested. The facts of the case were as follows:

The High Court of the Western Region refused to grant an order of certiorari to set aside an order made against the plaintiffs by a tribunal set up by the Military Governor of the Region under Edict No. 5 of 1967. Contending that the Edict was invalid, the plaintiffs appealed against the decision. But while the appeal was pending in the Regional Court of Appeal, the Federal Military Government issued Decrees, repealing the Edict but validating specifically the order made against the appellants. The Decrees in addition barred the courts from inquiring into anything done or order made under the Edict, adding that all actions pending in respect of any order made thereunder should abate forthwith.

In pursuance of the provisions of the Decrees, the Court of Appeal struck out the appeal on the ground that it lacked jurisdiction to consider the matter. The appellants thereupon appealed to the Supreme Court which held that the Federal Military Government is not a revolutionary, but an interim, Military Government brought into power to save the Constitution and safeguard the lives and property of the citizens; that the 1963 Constitution still subsists as the supreme law of the land and the Military Government has no power either to amend or to

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<sup>12</sup> 5 Nigerian Lawyers Quarterly 133.

go against its provisions except to the extent that the necessity of the present situation demands. Accordingly, the Court held that the Decree (No. 45 of 1968) which validated the order made against the appellants and abated actions pending in respect of it constitutes a legislative judgment - an unconstitutional exercise of judicial powers in violation of the separation of powers established by the 1963 Constitution. As a measure "not reasonably necessary to achieve the purposes which the Federal Military Government set out to fulfil," the Decree was ultra vires that Government and therefore void.

The Court in effect accepted the views of counsel for the appellants that the events of January did not constitute a revolution. Quoting from the Shorter Oxford Dictionary, the counsel had argued that a revolution occurs only when "there is an overthrow of an established Government by those who were previously subject to it" or "where there is a forcible substitution of a new ruler or form of government". Neither of these, according to him, occurred in January, 1966. Rather, the Army was enthroned by the wishes of the representatives of the people to uphold the Constitution, and the government they formed is not a revolutionary but a constitutional interim Government. Its powers are strictly limited by the Constitution which it can neither offend nor amend except to the extent demanded by necessity.

On the other hand, the Attorney-General of the West had argued that the January take-over was revolutionary in that the Army obtained power, not under the Constitution, but by sheer force. Therefore, the Constitution like the Abubakar's Government, was overthrown, and the government formed by the Army cannot claim to have any constitutional backing; nor is expected to respect or abide by the provisions of that Constitution. According to him, the Constitution of 1963 is dead, except in so far as it is saved by the new Government in which case the authority behind it is no longer the people but the Military Government which in turn derived its authority from the revolution that gave birth to it. Accordingly, the Military Government is an unlimited government with power to make and unmake any law on any matter whatsoever for the whole country or any part thereof.

Rejecting the argument of the Attorney-General, the Court endorsed the views of counsel for the appellants, including his definition of revolution drawn from the Shorter Oxford Diction-

ary. According to the Chief Justice who read the opinion of the Court, "a revolution occurs only where there is "a disruption of the Constitution and the national legal order by an abrupt political change not contemplated by the Constitution."<sup>13</sup> As is made clear by the Pakistan case of the State v. Dosso,<sup>14</sup> such a revolution occurred in Pakistan in 1958 when the President of the country by a proclamation suddenly annulled the 1956 Constitution and established martial law. Such an abrupt political change did not take place in Nigeria in 1966. Although the President had no express power to transfer the reins of government in certain circumstances, nevertheless, such a power must be read into the Constitution by implication. After all, no Constitution can reasonably be expected to anticipate or provide for all conditions, and in the event of an emergency, the Chief Executive should have the power to effect such a transfer. Necessity, not an express constitutional provision, supports such an action. As declared by him -

"We think it is wrong to expect that Constitutions must make provisions for all the different forms of phenomena which may beset a nation. Further, the executive authority of the Federation is vested in the President by S. 84 of the Constitution and we think in a case of emergency he has power to exercise it in the best interest of the country, acting under the doctrine of necessity. Moreover, it must be remembered that it is not a case of seizing of power by the section of the Armed Forces which started a rebellion. The rebellion had been quelled, the insurgents did not seize power nor was it handed over to them."<sup>15</sup>

Furthermore, he said, the Acting President acted, not in his absolute discretion, but on the advice of the Council of Ministers established by the Constitution to advise him. Although the Council met and tendered the advice in the absence

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<sup>13</sup>(1971) N.C.Q. 133 at 151 N.L.Q.

<sup>14</sup>(1958) 2 P.S.C.R. 180.

<sup>15</sup>(1971) N.L.Q. 133 at 150-151.

of the Prime Minister, the meeting must be presumed to be valid because although the Prime Minister was reported missing at the time, there was no evidence that he was no longer alive. "If he had been killed or he was dead at the time, the situation might have been different."<sup>16</sup> In the circumstances, however, the transfer must be considered valid for the Acting President and the Council of Ministers tacitly agreed with the Army that once law and order was restored the reins of government would be returned to them. The 1963 Constitution, therefore, still remains in force, binding the military Government and limiting its powers, except in so far as it has been suspended or modified on grounds of necessity. Concluding the Chief Justice said-

"We have earlier on pointed out that in our view the Federal Military Government is not a revolutionary government. It made it clear before assuming power that the Constitution of the country still remains in force, excepting certain sections which are suspended. We have tried to show that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of the Constitution and Decrees. The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm. From the facts of the taking over, as we have pointed out, the Federal Military Government is an interim government of necessity concerned in the political cauldron of its inception as a means of dealing effectively with the situation which has arisen, and its main object is to protect lives and property and maintain law and order. <sup>17</sup>

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<sup>16</sup>Id. at 149.

<sup>17</sup>Id. at 152.

The Court's reasoning and conclusion are open to criticism and objection on a number of grounds. First, the Court took a wrong view of the scope of the President's powers under the 1963 Constitution and attributed to him more powers than he really had. Secondly, assuming that the Court's views were right, still the question may be asked whether the powers of the President also extended to the maintenance and execution of regional Constitutions which he also surrendered to the Army. Thirdly, it is somewhat difficult to accept the Court's assumption that the Council of Ministers meeting which advised the President was valid. Fourthly, the Court's conclusion that no revolution or coup d'etat occurred in January is not in line with its definition of "a revolution," having regard to the events that actually took place in the country at the time. Finally, the Court failed to consider the impact of the July events on the Constitution even assuming that it survived the January ordeal.

As to the President's powers, they were either express or implied, and unless the hand-over of the country's administration can be justified under one or other of these two classes of powers, it was unconstitutional and invalid. It is quite clear, as the Supreme Court acknowledged, that no provision of the 1963 Constitution expressly authorized the hand-over. The President had no power whatsoever to change regional governments; he could change a federal government though only in accordance with the results of an election or in the event of the government losing its majority support in the lower House of Parliament. Therefore, the hand-over was not an exercise of any express power. Whether it can be justified as an exercise of an incidental power depends largely on whether there was room in the 1963 Constitution for such a power to be implied. The power could not be implied unless it was so closely and directly connected with some express power that the two must be taken to have been jointly granted by the Constitution.<sup>18</sup> In other words, the power to be implied as incidental must be a necessary preliminary to, or an unavoidable corollary of, an express power. It must be such that the President must exercise it if his exercise of an express power was to be effective or meaningful.<sup>19</sup> What

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<sup>18</sup>As Wynes puts it "The operation and extent of the incidental power in its relation to executive power depend upon the exercise and existence of the main power". Wynes, W.A. Legislative, Executive and Judicial Powers in Australia 351 (4th ed.), 1970.

<sup>19</sup>See generally Wynes, W.A. Id. at 122, 345-51.

express power, it may therefore be asked, could the President not exercise effectively or meaningfully without handing over the administration of the country to the Armed Forces? Certainly, it is difficult to think of such a power which the Chief Executive could not meaningfully exercise without first or simultaneously destroying the 1963 Federal and Regional Constitutions and the governments established under them.

It may, however, be argued, as the Supreme Court did in the Lakammi case, that the hand-over was intended to save the Constitution from forcible overthrow, and as such was incidental to the exercise of the executive powers of the Federation defined in s. 85 of the federal Constitution to "extend to the execution and maintenance of this Constitution". The Court seems to have taken the view that the power to "execute and maintain" the Constitution implied the power to save or uphold it by surrendering it and the governments set up thereunder to the Armed Forces. But it is pertinent to ask whether we save or uphold a constitution by liquidating all the administrative institutions it established. On the other hand, even if we assume that the power to "execute and maintain" a constitution implied the power to liquidate the government and authorities it established, still the argument of the Court would be glaringly defective in that it fails to explain or justify the President's liquidation of regional Constitutions and administrations. The regional Constitutions were enacted, not by the central legislature, but by various regional legislatures. The power to "execute and maintain" them vested in the regional Governors just as the power to "execute and maintain" the federal Constitution vested in the President.<sup>20</sup> Yet, the President in the purported exercise of his power to execute and maintain the federal Constitution surrendered not just the federal Constitution and administration, but the regional Constitutions and administrations as well. The conclusion is certainly inescapable that the President acted ultra vires, unless we assume that the power to execute and maintain the regional Constitutions were incidental to the President's power to execute and maintain the federal Constitution.

However, it is doubtful whether the power to "execute and maintain" a constitution implies the power to abdicate and surrender the constitution and its administrative institutions to

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<sup>20</sup>S. 86 of the Constitution of the Federation, 1963



the armed forces. A provision similar to S. 85 of our Constitution exists in the Australian Constitution,<sup>21</sup> but some Judges of the Australian Supreme Court have held, rightly, it seems, that the phrase "the execution of the Constitution" means "the doing of anything immediately prescribed or authorized by the Constitution", and would not support or justify the doing of an unlawful act.<sup>22</sup> The phrase, "the maintenance of the Constitution" has not been clearly and fully construed. It seems to mean the support or sustenance of the Constitution as, for instance, by upholding its authority and securing compliance with its provisions. It certainly cannot be argued that a constitution is maintained or otherwise supported or upheld by dethroning the government and liquidating other institutions established under it. The court seems to have confused the power to execute and maintain the Constitution with the emergency power which S.70 of the Constitution vested in Parliament. Under that section the Parliament, in an emergency threatening democratic institutions in the country, could do whatever it considered necessary so as to save the Constitutions and the democratic principles they established. But even under that section, it is doubtful if Parliament could have completely and unequivocally handed over or otherwise abdicated to the Army the whole administrative machinery of the country without reserving for itself the power to act under the Constitution. Such a total, unqualified and uncontrollable delegation of powers, "not canalized within banks that keep it from overflowing" has generally been criticized and condemned, especially in the United States.<sup>23</sup>

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<sup>21</sup>S. 61 for a discussion of this section see Wynes, W. A. Id. at 361-385.

<sup>22</sup>Per Knox, C.J. and Gavan Duffy, J. in *The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 C.L.R. 421, 432.

<sup>23</sup>See *Schechter Poultry Corporation v. U.S.* 295 U.S. 495 (1935) in which the United States Supreme Court invalidated an enactment of Congress as "an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard". According to Justice Cardozo, "no such plenitude of power is susceptible of transfer". It is, he said, "unconfined and vagrant" - a "delegation running riot" (at 551-553).

If Parliament could not constitutionally take this fundamental policy action, it is difficult to see how the chief Executive could. To quell the January rebellion, however, the Executive could probably have used the Army in a manner not sanctioned by the Constitution, hoping that Parliament would subsequently regularize his action and absolve him from blame by making retroactive and indemnity laws.

Even if we assume that the President with the advice of the Council of Ministers could effect the transfer, the question still remains whether the meeting of the Council of Ministers was properly convened and validly held on the 16th of January. The validity of the meeting has been questioned on the ground that it was not convened and presided over by the Prime Minister.<sup>24</sup> But this is not a strong objection. Although the Constitution required that the members of the Council should be appointed or removed by the President on the advice of the Prime Minister, the Constitution did not expressly provide for the summoning or conduct of the Council's meetings. As a matter of practice, the Prime Minister normally summoned and presided over such meetings and decided what matters should be included on its agenda. As these were only matters of convention, they were strictly not legally binding. A meeting summoned and presided over by an ordinary Minister or held in the absence of the Prime Minister could not legally be said to be invalid merely because the Prime Minister did not convene it or was absent. No doubt, S. 92 of the Constitution required an Acting Prime Minister to be appointed in the absence of the Prime Minister, but that did not imply that anything done or meetings held by the Council before such an appointment would be unconstitutional. Accordingly, the meeting of January 16 could still be valid, notwithstanding that the Prime Minister was not present and that an Acting Prime Minister had not been appointed.

Perhaps, a more difficult question is whether the Council of Ministers was properly constituted at the time it purported to hold the meeting and to advise the Acting President. Were the Ministers still in office when they met, took the decision or tendered the advice? In other words, was the Prime Minister

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<sup>24</sup> See Ewelukwa, The Constitutional Aspects of the Military Take-over in Nigeria, 2 N.L.J. 1, 4 (1967); Abiola Ojo, The Search for a Grundnorm in Nigeria - The Lakanmi Case (1971) 20 I.C.L.Q. 127.

still alive or had he breathed his last at the time? The precise moment of his death still is, and may ever remain, a mystery. The Supreme Court, as we have seen above, assumed that he was still living when the Council met; so it concluded that the meeting was valid. In the absence of a clear and accurate information to the contrary, that Court was entitled to make the assumption and reach the conclusion.

However, it seems better to assume that the Prime Minister, like the other victims of the rebellion, was killed immediately he was kidnapped or shortly thereafter. There seems to be no reason for the assumption that while the other victims lost their lives in the small hours of the 15th of January, the Prime Minister lived all through the 15th and far into the 16th when the meeting was held or when the advice was given. If he had died at the material time, the conclusion would be that the members of the Council had lost their seats in the Council when they met or when they tendered the advice. By S. 89(2) of the Constitution, a member of the Council "shall vacate his seat in the Council if he ceases to be a Minister of the Government of the Federation", and by S. 87(9), the office of a Minister other than the Prime Minister "shall become vacant if the office of Prime Minister becomes vacant". The crucial question then is: was the seat of the Prime Minister vacant or not at the time the Council met or tendered the advice? Clearly, the seat was vacant if at the time the Prime Minister had died, for by S.87(8)(b) of the Constitution the office of Prime Minister would be vacant if the Prime Minister ceased to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament. Death, undoubtedly, would terminate his membership of the House and so make his office vacant. Therefore, if the meeting was held or the advice **was tendered** after the death of the Prime Minister the advice would be invalid. Those who met or tendered the advice would have ceased to be members of the Council or even Ministers. They would have become ordinary citizens, or at best, members of Parliament without any constitutional authority to advise the President. Where the President was to act only on the advice of the Council of Ministers, any action taken by him on the advice of ordinary citizens, or members of Parliament would be unconstitutional and invalid.

Again, in the opinion of the Court, a disruption of a Constitution and legal order by an abrupt political change not contemplated by the Constitution is a revolution. The events of January, though not contemplated or provided by the Constitution, were not a revolution, for the President must be presumed on grounds of necessity to have the power to deal with such a situ-

ation. The army take-over was therefore not an abrupt change and the Constitution and legal order were not disrupted. The conclusion of the Court is not easy to accept. As we have argued above, the President had neither express nor implied power to hand over the administration of the country to the Army. Threat of a forcible overthrow of a government by the Army or civilians is nothing new to history; it was in fact anticipated by the Constitution when it defined an emergency and made provisions for dealing with it.<sup>25</sup> What was strange or new in the January event was the deliberate handing over of powers to the Army by the Chief Executive, and it seems reasonable to argue that an event sufficiently grave to compel a government to transfer or otherwise abdicate all its powers to another body or authority in a manner not contemplated or sanctioned by the Constitution is nothing short of a revolution. The Court's conclusion is certainly out of all relation to the actual events that took place. That the army threatened the government of the day and challenged the authority of the Constitution, there is no dispute. The Court, however, failed to appreciate the fact that the Acting President and the so-called Council of Ministers had no alternative but to surrender. To save their faces, however, they claimed that they simply handed over the administration of the country voluntarily to the Armed Forces. The surrender was without any precondition, and the Army indicated quite clearly from the start that they understood the Constitution to have gone to rack and ruin and would not bind them or limit their actions. They took what provisions they pleased from the Constitution with or without modifications and incorporated them by reproduction and by reference in Decree No. 1 which they made the basic law of the new administration. They promised to continue ruling until a new Constitution framed in accordance with the wishes of the people is brought into being.<sup>26</sup> These facts pieced together cannot fail to qualify as a revolution. The action of the Acting President could not, and probably was never intended to, save his government and the Constitution but to give them a decent burial.

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<sup>25</sup>S. 70 of the Constitution.

<sup>26</sup>See Major-General Ironsi's maiden speech, Government Notice No. 148 of 1966 - Nigeria Gazette, Lagos vol. 53 p. 103, at 104.

Finally, even if the Court came to the conclusion that the transfer of the country's administration was constitutional and not revolutionary in January, can it say the same of the July events? Clearly, there was no pretence that the country was handed over by the Ironsi administration to that of Gowon. Nobody has ever claimed that the change was made either under the 1963 Constitution or under Decree No. 1. It was a clear example of a forcible overthrow of an administration, and the succeeding government owes its position not to the pre-existing legal order, but to the events that toppled the immediately preceding administration. It therefore marked an end of a legal order and the beginning of a new one. That Gowon's administration is of this mind is quite evident from Major-General Gowon's maiden speech, his statement to the press on 4th August, 1966, his statement of policy of 8th August, 1966, the Constitution (Suspension and Modification) (No. 9) Decree, 1966 and the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970.

The Constitution (Suspension and Modification)(No. 9) Decree, 1966 has been discussed above.<sup>27</sup> As to the Supremacy and Enforcement of Powers Decree, it was specifically aimed at the Supreme Court's decision in the Lakami case. It nullified the decision of the Court, declaring that what happened in Nigeria in January and July constituted military revolutions and that each involved an abrupt political change outside the contemplation of the 1963 Constitution and effectively abrogated the whole pre-existing legal order except such as was saved and preserved by the succeeding administration. This Decree has therefore outlined the official view of the nature and effects of the January and July changes. The July take-over, like the January one, was a revolution from which the present military rule emerged. The present military government is established by Decree No. 1 of 1966 to which it owes its authority and powers. The powers are absolute and unlimited, and enables the Government to make laws for the whole country or any part thereof on any matter whatsoever.<sup>28</sup> It is in exercise of these powers that the Government has adopted and retained certain provisions of the 1963 Constitution to supplement Decree No. 1,

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<sup>27</sup> See pp. 6-8 above.

<sup>28</sup> Decree No. 1 of 1966, S. 3.

enjoined the courts not to question the validity of any Decree or any Edict that does not conflict with a Decree, and made Decrees supreme over any other law, including the 1963 Constitution.

The drafting of the Supremacy and Enforcement of Powers Decree is most unsatisfactory in one important respect. It accepts that there was a military revolution in July, which effectively abrogated the whole pre-existing legal order, yet it still asserts that the present Military Government was established by, and owes its authority to, Decree No. 1 of January, 1966 which was enacted by the preceding Government. The better view seems to be that since the legal order existing before July was abrogated by the events of that month, the present Military Government owes its establishment, not to Decree No. 1, but to the events themselves. Events or the revolution brought it into being, and it then set out to make laws. The most fundamental law of the present regime is the Constitution (Suspension and Modification) (No. 9) Decree, 1966, which adopted and retained Decree No. 1 and some of the amendments thereto as well as parts of the 1963 Constitution. Similarly the first Military Government was not a creation of Decree No. 1; rather it was the author of the Decree and the authority behind it. It is, perhaps, more accurate to say that while the present military rule, like the first one, owes its establishment to the immediately preceding revolution that gave birth to it, the military Government itself together with its authority and powers stemmed from the section of the Armed Forces that set it up. The authority and powers were not defined or limited, and the Government assumed full powers in exercise of which it made what laws it pleased on any matter whatsoever. In particular, it adopted some existing laws, including portions of the pre-existing Constitution and permitted certain offices and their human functionaries to continue functioning.

### III

#### THE NIGERIAN CONSTITUTION TODAY

As we have seen above, a great deal of confusion still exists in Nigeria about the effect of the 1966 crises upon the country and its Constitution. This confusion is evident from the question which one often hears in class-rooms, courts and various circles of informed opinions in the country. Examples of such questions are: "Has Nigeria any Constitution today?" "What now constitutes the country's Constitution?" "Is the

country still a federal or a unitary state?" "To what extent is the military Government bound or limited by whatever Constitution the country has today?" That some of these questions are not easy to answer is quite obvious from the difficulty with which the courts have faced them.<sup>29</sup> At the Conference of the Nigerian Law Teachers held in Zaria in March, 1971 some law teachers even confessed their inability to define clearly what to teach as the present Constitution of the country. Among laymen, the confusion is even worse confounded, and one often hears it argued with vigour that the country has no Constitution and that the military Government or even the rank and file of the Army are at liberty to do what they like in the country. It is therefore intended to examine some of these questions here.

#### Has Nigeria a Constitution Today?

Those who wonder if the country still has a Constitution are those who generally identify a constitution with a written document drafted by the people or their representatives and given special legal sanctity, making it supreme over other laws and various organs of government. To them, no Constitution now exists because the 1963 Constitution was abrogated in January, 1966, and no other one has since been framed or put into force. The Army is free to rule the country the way it sees fit without following any set rules or principles of administration. But this is taking too narrow a view of the term "constitution". A constitution strictly is first and foremost a body of rules which sets out the principal organs of a government and their functions and defines the relationship between any two or more of those organs as well as between any of them and the individual. Such rules may be embodied in one or a number of documents. They may be made by the people themselves or by their representatives; they may even be an imposition by a dictator. In other words, a body of rules can be a constitution notwithstanding that it is not made or sanctioned by the people whose government it defines and regulates. What makes it a living constitution is the contents and their application to an

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<sup>29</sup> Ademolekun v. The Council of the University of Ibadan, (1968) N.M.L.R. 253; Lakami and Kikelomo Ola v. Attorney General of the West, Suit No. 58/69 of 24th April, 1970.

identifiable state. From this point of view, it is clear that Nigeria today has a constitution.

Before the January crisis, the country was ruled under the 1963 Constitutions. When those Constitutions were abrogated in that month, the Ironsi Administration made the Constitution (Suspension and Modification) Decree, 1966 which revived some provisions of those Constitutions and replaced those portions not revived with new provisions. Provisions relating to the regional and federal legislatures and executives were not revived; so, the Decree set up new legislative and executive bodies to make laws and administer them at the centre and in the Regions. Most of the other parts of the Constitutions were revived with or without modification and incorporated either by reproduction or by reference in the Decree. Read in conjunction with the portions of the 1963 Constitutions incorporated therein, the Decree formed the basic constitutional instrument by which the regime ruled the country. It contained a clear and detailed description of the principal organs of the government of Major-General Ironsi, defined the powers of those organs, and regulated the relationship between each organ and the rest and between those organs and the individual. As noted above, this Decree, more popularly known as Decree No. 1 of 1966, was subsequently amended and supplemented by Decrees Nos. 14, 17, 20, 34, 36 and 50 of the same year.<sup>30</sup> By July, 1966 when the Ironsi regime was overthrown the country's Constitution consisted primarily of these seven Decrees. Those portions of the 1963 Constitutions revived and adopted by the regime remained in force, not on their original authority, but as parts of those decrees. With the overthrow of the regime, the authority behind its constitution, laws and administrative institutions quietly disappeared, leaving the succeeding regime completely free to adopt whatever form of constitution and government it pleased.

Though free to rule the country arbitrarily without either a Constitution or laws the new regime, not favouring any hasty

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<sup>30</sup> Decree No. 14 is entitled "The Constitution (Suspension and Modification) (No. 2) Decree 1966" and Decree No. 17 the Constitution (Suspension and Modification) (No. 3) Decree 1966". Following this pattern under this title, Decrees Nos. 20, 34, and 50 are respectively numbered serially, 4, 5, 6 and 7.



or untried innovation, elected to continue the policy and adopt the laws of its predecessor. Major-General Gowon, as the Head of the new Military Government, announced clearly that all existing laws, regulations, orders and official instructions should remain in force until either modified or abrogated by his Government.<sup>31</sup> The laws thus revived and adopted, including the Constitution of the first military regime, can therefore be amended or repealed by the present regime as it sees fit. Indeed, by the Constitution (Suspension and Modification) (No. 9) Decree, 1966<sup>32</sup> Ironsi's Decrees Nos. 14, 34 and 36 of 1966 were repealed and his decrees Nos. 1, 17, 29 and 50 formally adopted. The constitution as thus re-established has continued to be modified and supplemented by other enactments, such as the State (Creation and Transitional Provisions) Decree, 1967, the Constitution (Finance Provisions) Decree, 1967, the Constitution (Suspension and Modification) (Amendment) Decree, 1969 and the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970.

#### What makes up the present Constitution?

Today, the Constitution of the country is contained not in any single document but in a number of documents. It can be gathered from decrees, official statements of the Head of the Federal Military Government and the 1963 Federal and Regional Constitutions. A clear example of the official statement of constitutional importance is Gowon's first statement to the press of the 4th of August, 1966 in which he announced the revival and adoption of all the pre-existing laws and regulations. As to the 1963 Constitutions, one cannot readily say which sections of sub-sections of them were revived unless one first goes through many decrees of constitutional importance such as Decree No. 1 of 1966 in which they are incorporated. Accordingly, the Constitutions and the Decrees must be kept side by side and read together if one is to have a clear idea of the present Constitution of the country. Unfortunately, Decrees of constitutional importance have no special distinguishing mark; their

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<sup>31</sup> See Gowon's maiden speech and his first statement to the press-Nigeria 1966 33, 34 (Published by the Fed. Ministry of Information, Lagos).

<sup>32</sup> Decree No. 59 of 1966

titles do not in every case portray the constitutional nature of their contents. Therefore, they have to be identified, not by their titles, but by the constitutional issues they seek to settle.

On the whole, the key constitutional instrument today is Decree No. 1 of 1966 which defines the nature of our political association and provides the basic structure of our government. It established a machinery of administration at the centre as well as in each State, defined the legislative and executive powers of each and fixed the relationship between the centre and the States. Details of the present central and state legislatures and executives must be learnt from this and subsequent amending Decrees because the previous legislatures and executives, destroyed by the revolutions of January and July, 1966, were not revived. From Decree No. 1 one has to go into the 1963 Constitutions as revived and incorporated in that Decree. These Constitutions are still the sources of our present law relating to Citizenship, the Judiciary, Human Rights guarantees, the Police and the federal and state public funds and public services. The pre-existing constitutional provisions on these matters were adopted with or without modifications, and must be read in conjunction with schedules 1-4 of Decree No. 1 in which they are incorporated either by reproduction or by reference. These two instruments - Decree No.1 and the remains of the 1963 Constitutions - contain the main body of our present Constitution, but they have been amended and supplemented by other Decrees. Of these later Decrees those that are easily identifiable include, first, the Constitution (Suspension and Modification) Decrees designed to amend Decree No. 1 or the revived portions of the 1963 Constitutions or to revive other portions of those Constitutions and adapt them to the present state of affairs. Some of these Decrees were made by the first military Government and others by the present Administration.<sup>33</sup>

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<sup>33</sup>Seven of these Decrees were made by Major-General Ironsi and two by Major-General Gowon in 1966. In 1967 two were made of which one, Decree No. 8 of 1967, was intended to implement the Aburi accord and replace Decree No. 1 of 1966; but it hardly saw the light before it was repealed by Decree No. 13 of that year - the Constitution (Repeal and Restoration) Decree, 1967, One Decree of this class was made in 1968 and another in 1969.

These subsequent Decrees also include those amending particular aspects of the revived Constitutions and named after the aspects of the Constitutions they seek to amend. Examples of such Decrees are the Constitution (Financial Provisions) Decree, 1967, the Constitution (Northern States) (Amendment) Decree, 1969 and the Constitution (Distributable Pools Account) Decree, 1970. They also include Decrees that created new states and made necessary constitutional provisions consequent upon that change, such as the States (Creation and Transitional Provisions) Decree, 1967, the Lagos State (Interim Provisions) Decree, 1968 and the Central Eastern State (Administration) Decree, 1969. It is perhaps worth mentioning that any two or more of these classes of constitutional instruments may be amended in a single Decree. When that happens, the Decree is named the Constitution (Miscellaneous Provisions) Decree.<sup>34</sup> Of the Decrees that are not manifestly constitutional the Interim Administrative Councils Decrees, the Interim Common Services Agency Decrees and the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970 may be mentioned. The last of these, the Supremacy and Enforcement of Powers Decree, declares that the present military Government owes its authority and powers, not to the 1963 Constitution, but to the revolutions of 1966 and Decree No. 1 of that year; and that the Federal Military Government under that Decree is an unlimited Government with absolute and unlimited power to make and unmake any law in the country. As to the Decrees on Administrative Councils and the Common Services Agency, they were designed to deal with some of the problems arising from the creation of new states in 1967; some of them gave to the agencies concerned legislative powers in parts of the country.

The various classes of documents discussed above together make up what one can call the Constitution of Nigeria today. In other words, although the country is under a military rule the Army rules by a Constitution, though the Constitution is flexible and can be revoked or amended by the military Government at will. The Constitution is fundamentally different from the ones of 1963, having lost some of the essential features of

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<sup>34</sup> Examples of such Decrees are the Constitution (Miscellaneous Provisions) Decree, 1967, the Constitution (Miscellaneous Provisions) (No. 2) Decree, 1967 and the Constitution (Miscellaneous Provisions) (Amendment) Decree, 1968.

those Constitutions. For instance, although the Constitution has some federal features it is at the root unitary as we shall show very shortly. Again, the Constitution is not today the supreme law of the land; it is at least not supreme over the present federal legislature. This at once poses the question whether the human rights guarantees revived and incorporated in Decree No. 1 of 1966 still have any practical meaning or value.

Is the Constitution federal or unitary?

As to whether Nigeria is a unitary or a federal state, not much reliance should be placed on the terms used by various Decrees to qualify or describe the country or its government. Decree No. 1 of 1966 revived and incorporated s.2 of the 1963 federal Constitution without modification. That section provided that "Nigeria shall be a federation comprising regions and a federal territory". This provision was repealed by Decree No. 34 of 1966 when Major-General Ironsi sought to make it crystal clear that the country had ceased to be a federation. Decree No. 59 of 1966 made after the fall of the Ironsi Administration repealed Decree No. 34 and provides that "Nigeria shall as from 1st September 1966... again be a federation in accordance with section 2 and 3 of the Constitution of the Federation".<sup>35</sup> Indeed, our present government is named "the Federal Military Government" on whose authority all Decrees are issued. The view that the country is still a federation and that our present Constitution is federal is quite evident from the texts of various Decrees and official pronouncements. It may, however, be asked, how federal is our Constitution and to what extent is Nigeria still a federation?

Nigeria is today divided into twelve states, each with its own machinery of government consisting of a legislative authority, an executive with a separate public service, and a judiciary. There is also a government at the centre with all the branches of modern government. Each government has power to make laws as well as to administer and enforce those laws. These are clearly federal features; but they are not enough to make a state or constitution federal, for according to Professor Wheare whose

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<sup>35</sup>The Constitution (Suspension and Modification) (No. 9) Decree, 1966, s.1.

analysis of federal principles has been widely approved, "what is necessary for the federal principle is not merely that the general government, like the regional governments, should operate directly upon the people, but, further, that each government should be limited to its own sphere and, within that sphere, should be independent of the other".<sup>36</sup> It is therefore pertinent to ask how far each government in Nigeria is today limited to its own sphere of activities and, within that sphere, is independent of the others. It is here that the present system of administration of Nigeria ceases to be federal, for although the regional or state governments have specific areas of action, they are not quite independent of the central government.

Each state is under a Military Governor or a civilian Administrator as its sole legislator and as its Chief Executive. The Military Governor or the Administrator, is however, appointed by, and holds his office at the pleasure of, the Head of the Federal Military Government, i.e., the head of the central government. The Military Governor or the Administrator has legislative and executive powers, but his enactments and executive actions can be overridden by laws made by the Federal Military Government at the centre. Decree No. 1 of 1966 revived the legislative lists of the 1963 federal Constitution and empowered the states to make laws on matters not enumerated in the exclusive or the concurrent legislative list. They can still make laws on matters within the concurrent list though only with the prior consent of the Federal Military Government.<sup>37</sup> The same Decree, however, gives the Federal Military Government absolute powers of legislation. It provides 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."<sup>38</sup> If any law made before the 16th of January 1966 by the legislature of a Region or thereafter by the Military Governor of a State is inconsistent with any law made today by the Federal Military Government, the latter enactment shall prevail and the former shall, to the extent of the inconsistency, be void.<sup>39</sup> Clearly, these

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<sup>36</sup> Wheare, K.C. Federal Government 14 (4th ed., O.U.P., 1963).

<sup>37</sup> The Constitution (Suspension and Modification) Decree, 1966, s.3(2)

<sup>38</sup> Id. at s.3(3).

<sup>39</sup> Id. at s.3(4).

provisions confer unlimited power of legislation on the Federal Military Government. Section 6 of the Decree further underlined the absolute nature of the power of that Government by providing 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".<sup>40</sup> In effect, Decree No. 1 denies to the states any sphere of exclusive legislative action and confers on the Federal Military Government an overriding legislative power in every field throughout the country. It therefore destroyed the basic federal character of the Nigerian Constitution of 1963, and established a unitary system of administration with a considerable devolution of powers. Although the country is divided into states and each state has a separate machinery of administration, the state governments were set up and endowed with powers by the central government; each of them is directly responsible to the Federal Military Government for the proper and effective administration of the state committed to its charge. In the Nigerian context, it can be said that the state governments are to the Federal Military Government what local government bodies in the country are to the state governments. What we have today, therefore, is a unitary constitution with some federal features. It could not have been otherwise under a military rule. Indeed, it was framed after the unitary structure of our military organization. The Army is noted for its hierarchical structure, its chain of command and its unitary system of leadership and control.

Is the present Constitution the Supreme Law of the Land?

Before the Army came to power in 1966, the Republican Constitution of 1963 was the supreme law of the country. All the governments of the country and their organs or agencies owed their existence and powers directly or indirectly to it. Any federal or regional executive or legislative action which conflicted with the Constitution was unconstitutional and invalid. Any other law inconsistent with the Constitution was void to extent of the inconsistency.<sup>41</sup> Above all, the Constitution was

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<sup>40</sup> See s.1(2)(b) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970 which amended s.6 of Decree No.1 1966 so as to enable the courts to review an edict which is alleged to be inconsistent with a Decree.

<sup>41</sup> S. 1 of the Constitution.

rigid and could not be amended by any legislature in the country except in accordance with its stipulated amending procedures. Are these still characteristic of whatever we have today as our Constitution? This is part of the question which the Supreme Court set itself to answer first in Ademolekun v The Council of the University of Ibadan<sup>42</sup> and then in the Lakanmi<sup>43</sup> case. The Court, however, realized that the question of supremacy of the Constitution would not arise until it was established that it had jurisdiction to review and pronounce on the validity of edicts and decrees.

In the Ademolekun case the Court was requiring to decide whether or not an edict of a Military Governor which conflicted with certain provisions of the 1963 Constitution could stand. A preliminary objection was immediately raised on the ground that s.6 of Decree No. 1 of 1966 provides that no question of the validity of any Decree or an Edict should be entertained by any court in the country. The Court held that it had jurisdiction to determine the issues before it, notwithstanding the provisions of s.6 of the Decree. That section, the Court said, "does not preclude the courts from enquiring into any inconsistency that may arise, but merely bars the courts from questioning the validity of the making of a Decree or an Edict on the ground that there is no valid legislative authority to make one." In other words, under that section, the courts must not question the competence of a military Governor to make an Edict, but were free to enquire whether an Edict so made was valid under s.3(4) of that Decree which defined the limits within which Edicts were to be made. Although the decision appears not to be in keeping with the letter and spirit of the section, it must be admitted that the Court had no alternative way of giving life and meaning either to s.3(4) of the Decree which makes an Edict void if inconsistent with a Decree or to the modified and adapted version of s.1 of the 1963 Constitution which make the remains of that Constitution supreme over any other law not being a Decree. Having decided the preliminary question of jurisdiction, the Court then turned to the main issue of the validity of Edicts and Decrees.

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<sup>42</sup>(1968) N.M.L.R. 253

<sup>43</sup>Suit No. SC. 58/69 of 24th April, 1970.

In the Ademolekun case, the Military Governor of the West set up a Court of Appeal for that Region and provided in an Edict that any notice of an appeal from that Region already given to the Supreme Court should be deemed to have been given to the new Court of Appeal. The defendants in this case, who had given notice of an appeal to the Supreme Court six months before the Edict came into force, argued that the Edict was invalid in that it was inconsistent with certain provisions of the 1963 Constitution. They therefore insisted that their appeal should still be heard and determined by the Supreme Court. The Court held that it was still competent to hear and determine the appeal because the Constitution of 1963 was still the supreme law of the land and, to the extent that the Edict conflicted with its provisions, the Edict was void and of no effect. The view of the Court that the 1963 Constitution is still the supreme law of the country is not generally accepted. The better view seems to be that the sections of that Constitution still in force take effect today as part of Decree No. 1 of 1966. Therefore, any Edict which is inconsistent with any of those sections is in effect inconsistent with that Decree and void under s.3(4) of that Decree.

In the Lakanmi case, the Court went a step further and pronounced a Decree invalid on the ground that it was inconsistent with certain provisions of the 1963 Constitution. According to the Court, that Constitution recognized and adopted the doctrine of separation of powers, and none under it, except the courts, can validly exercise judicial powers. Therefore, Decree No. 45 of 1968 which inflicted punishment on certain named individuals was constitutionally ultra vires the Federal Military Government and void because it constituted a legislative judgment or, as it may be classified in the United States, a bill of attainder. In the opinion of the Court, the Federal Military Government, though a child of necessity, was created under the the 1963 Constitution and made subject to it. It cannot today vary or act inconsistently with that Constitution except when necessity demands. In other words, having gone safely through the storms in 1966, the 1963 Constitution is still the supreme law of the land by reference to which the validity of all legislative and executive acts in the country is to be tested. The view of the Court was best stated by the Chief Justice when he said:

"We have tried to show that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the



Constitution. The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm."

Indeed, if the Army derived its authority and powers from the 1963 Constitution, it clearly stands to reason that it should be bound by the provisions of that Constitution. But, as we have argued above, the Army did not come to power under any Constitution; the January revolution that destroyed the 1963 Constitution also ushered in the first military government. Therefore, the 1963 Constitution did not even survive the first revolution, much less support or bind the present government formed after the second revolution. That Constitution used to be, but no longer is, the supreme law of the country. No doubt, some portions of it are still in force; but they are in force today, not on their original authority, but on the authority of the present Federal Military Government which has made them subordinate to its Decrees. Among laws other than Decrees, the remains of that Constitution still reign supreme, and any such law which is inconsistent with them is void to the extent of the inconsistency.<sup>44</sup> It may, however, be argued that the distinction between decrees and the remains of that Constitution is meaningless since those surviving portions of that Constitution now take effect as part of Decrees.

Decrees are the most exalted of all the laws the country has today, and any other law which is inconsistent with any of them is void to the extent of the inconsistency. Though superior to other types of laws, Decrees are not however superior to the Federal Military Government which is the highest legislative authority we have today. The Federal Military Government has the power to legislate for the whole country or any part thereof "with respect to any matter whatsoever."<sup>45</sup> It can therefore make,

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<sup>44</sup> S. 1 of the 1963 Constitution, as modified by Schedule 2 to Decree No. 1 of 1966.

<sup>45</sup> S. 3(1) of Decree No. 1 of 1966

amend or repeal any law by means of a Decree, and is not bound to follow any special procedure in dealing with any. Our courts are not to inquire into the procedure by which a decree is made; once an instrument made by the Federal Military Government is expressed to be a decree and is signed by the Head of the Federal Military Government, the courts will accept it as valid and binding.<sup>46</sup> Thus, although the bulk of our present Constitution is now contained in Decrees, there is no distinction between constitutional decrees and other decrees. They can all be made, amended or repealed by the same procedure. This unlimited power or supremacy of the Federal Military Government over our present constitution is further underlined by s.6 of Decree No. 1 of 1966 which provides that no question of the validity of any Decree shall be entertained by any court of law in the country. The position has recently been further clarified by the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970.

This Decree is merely declaratory in nature and simply asserts that the Federal Military Government is, and has always been, the supreme and unlimited policy and law making authority in the country. It then declares that the Federal Military Government owes its authority and powers, not to the Constitution of 1963, but to the revolutions of 1966 and to Decree No. 1 of that year. It has absolute, unlimited power to legislate for the whole country or any part thereof, and any portion of the 1963 Constitution still in force now takes effect as an enactment of the Federal Military Government. Such portions of that Constitution as have been revived and adopted by the present Government are now inferior or subordinate to Decrees, and, in case of any conflict, must yield to such Decrees. The Decree repeated s.6 of Decree No. 1 of 1966 with a little modification. The courts are still not to inquire into the validity of any decree, but they can now inquire into the validity of an edict under s. 3(4) of Decree No. 1 of 1966, once it is alleged that the edict is inconsistent with any provision of a decree. Finally, the Decree made null and void any judicial decision which had purported or should thereafter purport to invalidate any decree or any edict (other than an edict inconsistent with a decree) on the ground that it is inconsistent with any provision of either the 1963 Constitution or any other law in force in the country. For this purpose a decree or an edict includes "any instrument made by or under such decree or edict".<sup>47</sup>

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<sup>46</sup>See SS. 4, 5, 16 of Decree No. 1 of 1966

<sup>47</sup>s. 1(3)(b) of the Decree.

Though declaratory in nature, the Decree has considerably cleared most of the difficulties and doubts created recently by the Supreme Court's decisions in the Ademolekun and Lakanmi cases. It has placed beyond doubt the fact that the Federal Military Government is an absolute unlimited authority, subordinate to no other body or law, but supreme over all laws and other authorities in the country. It is legislatively omnipotent and occupies in Nigeria the position which Parliament occupies in the United Kingdom. By a simple act of legislation it has given the country a new Constitution and can at any time annul that Constitution, and either establish a new one or rule without a Constitution. No law, however important or fundamental, is beyond the powers of the Federal Military Government to make, amend or repeal.

Among the laws now in force in Nigeria, Decrees of the Federal Military Government are supreme and the most important. As the present Constitution of the country is now contained in Decrees, it forms part of the highest law of the land. It may further be argued that the remains of the 1963 Constitution, in so far as they are incorporated in Decrees, also form part of that 'supreme' law. In this respect, the revived portions of that Constitution, such as the Human Rights provisions, can still override any law other than decrees. They may therefore prevail over any legislative or executive act of a Military Governor; but decrees may in turn override them. The courts cannot inquire into the validity of any decree; but they now have the power to inquire into the validity of an edict if it is alleged that the edict is inconsistent with the provisions of a decree, such as the portions of the former Constitution incorporated therein.

#### IV

#### THE STRUCTURE OF THE PRESENT ADMINISTRATION

We have noted above that though a unitary state, Nigeria is administered as though it were a federation. There is at the centre an unlimited government with the final say in every matter, legislative, executive or judicial. However, centralized administration is sure to be difficult and ineffective in a country as large in size and diversified in tradition and culture as Nigeria. Therefore, the country has been divided into twelve convenient administrative units known as states, each of which now has a locally-based administrative authority with limited legislative, executive and judicial powers. Each state in turn sub-divides into

local government areas known either as provinces or as divisions. Thus, we have a hierarchical structure of authorities with local government bodies as the base and the Supreme Military Council and the Head of the Federal Military Government as the apex. Occupying a position midway between the apex and the base, the state governments are to the Supreme Military Council as the local government bodies are to them. They owe their establishment and powers to the Supreme Military Council as much as the local government bodies owe their creation and powers to them. In our present discussion, however, we shall be concerned not with the local government bodies, but with those administrative institutions established directly by our present Constitution. In other words, we shall be dealing with the Administrative institutions of the central and state governments.

### The Legislatures

Under the 1963 Constitutions we had five legislatures in the country. There was one at the centre and one in each of the four Regions. Each was bicameral and consisted of an upper chamber and a lower one. The Chief Executive (the President at the centre or the Governor in each Region) also formed part of the legislature in each case. These institutions, swept away by the January revolution, were not revived by the Army. They were replaced by the Federal Military Government at the centre and the Military Governor in each Region. But since the creation of more states in the country, we have been having thirteen legislatures in all - one central and twelve state legislatures.

Each state has a one-man legislature - the Military Governor.<sup>48</sup> As the sole legislator, the Military Governor or the Administrator of each State is not bound or even required to take advice or make any consultation before making a law. The responsibility for any law made is his, even if he had consulted his

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<sup>48</sup>The East Central State has no Military Governor. Its Chief Executive and sole legislator is the "Administrator". The Administrator occupies in the East Central State the position occupied by Military Governors in other States, and for all practical purposes any reference to the Military Governors in the country today implies a reference to all regional Chief Executives, including the Administrator.

executive council before drafting it. At the centre, the legislative functions of the Federal Military Government are exercised by the Supreme Military Council which is today the principal instrument of policy in the country. The Council is established by Decree No. 1 of 1966, but its composition has changed again and again until September, 1969 when its present composition was fixed.

The Council now has the Head of the Federal Military Government as its chairman. Other members are the Heads of the Nigerian Army, the Nigerian Navy, and the Nigerian Air Force; the Chiefs of Staff of the Armed Forces and the Nigerian Army; the Military Governors of all the States,<sup>49</sup> the Inspector-General of the Nigeria Police; and such other members as the Head of the Federal Military Government may from time to time appoint. Originally, the Attorney-General of the Federation was a member,<sup>50</sup> but his membership was determined by Decree No. 20 of 1966, which requires him to attend the meetings of the Council in an advisory capacity only. After the creation of more States in 1967, the Military Governors of the former Regions were replaced in the Council by the Military Governors of all the States,<sup>51</sup> the Inspector-General and the Deputy Inspector-General of the Nigeria Police also became members of the Council.<sup>52</sup> Furthermore, consequent upon the creation of more States out of the former Regions, Lt-Col. (Now Major-General) Hassan Usman Katsina lost his seat in the Council as he was no longer a Military Governor; he

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<sup>49</sup>The Administrator of the East Central State was not a member because he was not a Military Governor. He was appointed to the Council in April 1970. See E.C.S. Reference Bulletin, Vol. 7, p. 14, of 26th June 1970 (Ministry of Information, Enugu); See also The 'Enlightener', Enugu, 2nd May, 1970, Vol. 2 No. 5, p. 11. In the rest of this paper, any reference to the Military Governors in relation to any event occurring since April, 1970 includes a reference to the Administrator of the East Central State.

<sup>50</sup>S. 8(2) of Decree No. 1 of 1966.

<sup>51</sup>See p. 38 note 2 supra.

<sup>52</sup>See S. 1(2) of Decree No. 13 of 1967 entitled the Constitution (Repeal and Restoration) Decree, 1967. This Decree repealed Decree No. 8 of 1967 and restored or revived Decree No. 1 of 1966. Decree No. 8 intended to implement Aburi accord, was the first instrument to bring the Inspector-General of Police or, in his absence, his Deputy, into the Council.

was however given a seat in his personal capacity.<sup>53</sup> In 1968 while the Nigerian Civil War dragged on, the Director of Training and Planning was brought into the Council as a member, but his membership was short lived. In September, 1969 when the composition of the Council was further modified, both the Director of Training and Planning and Lt-Col. (now Major-General) Hassan Usman Katsina lost their seats in the Council; but the Head of the Federal Military Government was given the power to appoint to the Council such other members as he from time to time may consider necessary.<sup>54</sup>

The powers of the Council are neither set out nor clearly defined by law. Decree No. 1 of 1966 which constituted the Council contains not even the slightest hint of the functions the Council is expected to exercise. However, it has been officially declared that the Council is to exercise the functions of the Federal Military Government with respect to the administration of the country.<sup>55</sup> Further information about the functions of the Council was given by Major-General Ironsi in his budget speech of the 31st of March, 1966. According to him the Council is responsible for the maintenance of law and order, the defence and security of the state and the appointment and removal of the members of the Judiciary.<sup>56</sup> To these may be added the prerogative of mercy under federal and state laws, which the Coun-

<sup>53</sup> See s. 1(a) of Decree No. 16 of 1967.

<sup>54</sup> See s. 1 of Decree No. 42 of 1969. Although Lt-Col. Hassan Usman Katsina ceased to be a member in his personal capacity, he retained his seat in his capacity as the Chief of Staff of the Nigerian Army. See explanatory note to the Decree.

<sup>55</sup> Major-General Ironsi's first press statement of 17th January, 1966 which has been published as Government Notice No. 149 of 1966; see Nigeria Gazette No. 6 vol. 53, p. 104 (1966).

<sup>56</sup> Nigerian Outlook, April 2, 1966 p. 5 col. 2; see also the Morning Post Lagos, April 2, 1966, p. 18, col. 6.

cil now exercises.<sup>57</sup> The public funds of the central government is now controlled by the Council, and not a penny of the Consolidated Revenue Fund of the Federation can now be spent except by its authority.<sup>58</sup> On the whole, the Council is the highest policy-making body we now have, and its view on any issue overrides that of any other body or authority in the country. Its powers are neither defined nor limited, possibly because they are both limitless and indefinable. All Decrees are made by it, and all issues of importance in the country may come before it regardless of whether or not they are purely legislative. Perhaps, the only check the Council has is the Head of the Federal Military Government who arranges its agenda and presides over its meetings. The Council does not meet unless summoned by the Head of the Federal Military Government, nor does it discuss or continue the discussion of an issue against his wish.

The Council is free to regulate its own procedure, and may act notwithstanding any vacancy in its membership or the absence of any member.<sup>59</sup> So far, the Council has no special rules of procedure, but the members generally express their views freely on any issue. Decisions are made, not by votes, but by the Head of the Federal Military Government declaring what he thinks to be

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<sup>57</sup> See s. 101 of the Constitution of the Federal Republic of Nigeria, 1963 as modified by Sch. 2 of the Constitution (Suspension and Modification) Decree, 1966. See also the corresponding sections of the various Regional Constitutions of that year, as modified by Schs. 3 & 4 of the same Decree. The Council now exercises the power without any advice since the Federal and Regional Advisory Councils on the prerogative of mercy no longer exists.

<sup>58</sup> See Ch. IX of the 1963 Constitution of the Federal Republic of Nigeria and the corresponding chapters of the various regional Constitutions of the same year, as modified schs. 2, 3 and 4 of Decree No. 1 of 1966. Taxation and expenditure of public funds now require the approval of decrees to make them lawful.

<sup>59</sup> Decree No. 1 of 1966, s. 8(4). Quaere, can the Council meet in the absence of the Head of the Federal Military Government who is not just a member, but is the President of the Council? It seems that in the absence of any other person appointed by the Head of the Federal Military Government to act for him in that regard, the Council cannot validly meet.

the stand of the Council. This does not mean that the debates of the Council are generally lifeless and drab; they are often heated and exciting. But the very nature of military rule makes voting and some other basic rules of democracy inapplicable. A measure may be discussed in broad outline or clause by clause; the decisions reached are then turned into decrees by the Head of the Federal Military Government and his law officers. The only firm requirement in the process of making a decree is that it must be signed by the Head of the Federal Military Government who is further enjoined not to delegate this function to any other authority.<sup>60</sup> The same is true of an edict; it must be made and signed by the Military Governor personally and never by an agent or delegate.<sup>61</sup> A decree or an edict is therefore made when it is signed by the appropriate authority and comes into force immediately or on the particular day specified therein.<sup>62</sup>

The Supreme Military Council can legislate for the whole country or any part thereof on any matter whatsoever, while a Military Governor can legislate freely on any matter not included in the exclusive and the concurrent legislative lists of the Republican Constitution. The Military Governor may also legislate on any matter included in the concurrent list provided he first obtains the consent of the Federal Military Government.<sup>63</sup> Immediately a decree comes into force, it prevails over any other law inconsistent with it. It therefore overrides a previous decree, every edict of the Military Governors and every law made by the federal and regional legislatures of the Republican era.<sup>64</sup>

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<sup>60</sup> Id., ss. 4(1) and 9(1).

<sup>61</sup> Id., ss. 4(2) and 9(4).

<sup>62</sup> Id., s. 5. The Decree or the Edict may be made known to the public by a sound or television broadcast, or by publication in writing or in any other manner, provided that once it is published in an official gazette the version of it in the gazette will prevail over any other version.

<sup>63</sup> Id., s. 3. Possibly, the consent is to be given on behalf of the Federal Military Government by the Supreme Military Council.

<sup>64</sup> Id. s. 3(4). See also s. 1 of the 1963 Republican Constitution, as modified by Sch. 2 of Decree No. 1 of 1966.



No court in the country is competent to review or question the validity of a decree,<sup>65</sup> but the courts can review or nullify any edict which is inconsistent with a decree.<sup>66</sup>

### The Executive

The executives of the Republican days were overthrown along with the Republican Constitutions of 1963. Instead of reviving them, the military administrators of the country established one central executive and four regional executives. The number of the regional executives has now risen to twelve following the creation of more states in the country. The central and each state executives are now respectively headed by the Head of the Federal Military Government and the Military Governor of the State. A hasty and superficial study of the present constitution may lead to the conclusion that the army has substantially adopted or retained the republican pattern of division of executive powers between the centre and the regions or states. But, perhaps, nowhere is the unitary character of the present administration more in evidence than in the present definition of the relationship between the central and the regional executives.

Strictly, there is today only one and undivided executive authority which extends to the execution and maintenance of the present constitution and "to all other matters whatsoever throughout Nigeria".<sup>67</sup> The authority therefore combines all that used to be the executive authorities of both the Federation and the Regions, and is vested only in one person, the Head of the Federal Military Government, who is empowered to exercise it either directly or through persons or authorities subordinate to him.<sup>68</sup> The Head of the Federal Military Government can therefore delegate part of his powers; he is particularly required to delegate to

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<sup>65</sup> Id., s. 6. See also the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970, the preamble and s. 1.

<sup>66</sup> Id., s. 6, as modified by s. 1(2) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970.

<sup>67</sup> Decree No. 1 of 1966, s. 7(2).

<sup>68</sup> Id., s. 7(1).

the Military Governors conditionally or unconditionally all the executive functions falling to be performed within the states; and he must be presumed to have delegated to each all the executive functions which immediately before the army take-over were vested in or exercisable by the Military Governor or any officer or authority of a Region under section 86 or 99 of the 1963 Constitution of the Federation.<sup>69</sup> The power thus, or subsequently to be, delegated may at any time be revoked or varied by the Head of the Federal Military Government, but until revoked or varied, it may be exercised by the Military Governor either directly or through persons or authorities subordinate to him.<sup>70</sup> Thus, the Military Governor, like the Head of the Federal Military Government, is not bound to act in person always.

On the whole, the authority of a Military Governor is not parallel but subordinate to that of the Head of the Federal Military Government. It is not an independent but a delegated authority with power to sub-delegate- an offshoot of the federal authority. Although the Head of the Federal Military Government now exercises functions which formerly belonged to the President and Prime Minister while the Military Governor exercises those formerly vested in the regional Premier and Governor, the Head of the Federal Military Government has the power to interfere in the executive affairs of a State.<sup>71</sup> The executive supremacy of the Head of the Federal Military Government is further underlined by the fact that each Military Governor is his appointee and holds office at his pleasure, thereby occupying a subordinate position comparable to that of an agent or field representative. The Head of the Federal Military Government himself owes his position, not to any particular person or authority, but to events. His tenure of office and mode of appointment are nowhere defined by law, but he is the centre of gravity of the whole machinery of the military government.

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<sup>69</sup>Id., s. 7(3-4). See also Decree No. 13 of 1968, i.e. the Lagos State (Interim Provisions) Decree, 1968, s. 2.

<sup>70</sup>Decree No. 1 of 1966, ss. 7(1-2), 9(5).

<sup>71</sup>Id., ss. 9, 12.

As in the past, executive powers are today exercised with the help of the Federal Executive Council at the centre and the appropriate regional executive council in each state. Both the Head of the Federal Military Government and the Military Governors have the power to delegate their executive functions to their executive councils; they can however act in person notwithstanding any such delegation.<sup>72</sup> Furthermore, the central and regional executive powers are each exercised through a public service, controlled and directed by the appropriate chief executive with the help of his executive council, a public service commission and a team of ministers called "commissioners".

(i) The Executive Councils

At the beginning of the military rule only the central executive council, known as the Federal Executive Council, was established; none of the former Regions had an executive council. Today, apart from the central executive council, there is in each state an executive council headed by the appropriate Military Governor. In all, therefore, we have thirteen executive councils— one central and twelve regional.

The Federal Executive Council is now composed of the Head of the Federal Military Government as President; the Heads of the Nigerian Army, the Nigerian Navy and the Nigerian Air Force; the Chiefs of Staff of the Armed Forces and the Nigerian Army; the Inspector-General and the Deputy Inspector-General of the Nigerian Police; the Attorney-General of the Federation; and such other members as the Head of the Federal Military Government may from time to time appoint.<sup>73</sup> The membership of the Council has never been steady; it has changed several times. The Attorney-General, though a member from the start, lost his membership under Decree No. 20 of 1966 but regained it under Decree No. 20 of 1967. Similarly, the membership of the Inspector-General and the Deputy Inspector-General of Police, determined by Decree No. 13 of 1967, was also restored by Decree No. 20 of

<sup>72</sup>Id., s. 8(3), as amended by Decrees Nos. 20 and 50 of 1966 and Nos. 8, 13 and 20 of 1967.

<sup>73</sup>Id., s. 8(3), as amended by Decrees Nos. 20 and 50 of 1966 and Nos. 8, 13 and 20 of 1967.

1967. On the other hand, the Military Governors were first made members by Decree No. 20 of 1966 and the Military Administrator of Lagos by Decree No. 13 of 1967 which introduced the omnibus provision enabling the Head of the Federal Military Government to bring into the Council non-members of the armed forces, such as his commissioners.<sup>74</sup>

Regional Executive Councils were first set up soon after the creation of more States by the Constitution (Miscellaneous Provisions) Decree, 1967. Each council consists of the Military Governor of the State as Chairman; the most senior officer of the Nigerian Army, the Navy and the Air Force in that State; the most senior officer of the Nigerian Police in that State; and such other members as the Military Governor, in his discretion may, from time to time, appoint.<sup>75</sup>

Neither at the centre nor in any of the States is the Executive Council today as important or as powerful as the one set up under the 1963 Constitution. It no longer occupies a key-position in the formulation and execution of policies. The Head of the Federal Military Government and the Military Governors are neither bound nor even required to consult or act on the advice of their executive councils whereas under the 1963 Constitutions the President and the Governors were simply constitutional heads of their executives, required to act in most cases only in accordance with the advice of their executive councils.<sup>76</sup> Nevertheless, the executive council, especially at the centre, is still an important executive organ. The Federal Executive Council now exercises all the powers which vested in the Ministers of the Federal Government under the 1963 Constitution.<sup>77</sup> Also,

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<sup>74</sup> Such appointments are generally made by the Head of the Federal Military Government by means of Government notices published in the Federal Gazette.

<sup>75</sup> See s. 3(1) of the Decree. See also the East Central State (Administrations) (Amendment) Decree, 1970 which established for the East Central State an Executive Council on the model of other regional executive councils, with the Administrator of the State as Chairman.

<sup>76</sup> See Decree No. 1 of 1966, s. 7(1). See also the 1963 Constitution of the Federation, s. 93 (now suspended).

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the council is now vested with all the powers or functions formerly conferred by law other than the Constitution on the Council of Ministers, House of Representatives or Senate.<sup>78</sup> Although it lacks the initiative, drive and constitutional powers of the former Council of Ministers, it still exercises general direction and control over federal departments and sees to it that annual estimates of the revenue and expenditure of the Federation are prepared and laid before the Supreme Military Council.<sup>79</sup> It is given the power to appoint the members of the Police Service Commission.<sup>80</sup> To it the Director of Audit now submits his annual reports on the public accounts of the Federation and of any branch of the Federal Government.<sup>81</sup> The Head of the Federal Military Government can delegate to it any of his powers or function, provided that his power to sign decrees is not delegated.<sup>82</sup> Thus, the Council still bears a great deal of the executive burdens of the Federation; but it is empowered to delegate any aspect of its functions either to any of its members or to any officer of the Federal Public Service.<sup>83</sup>

The position the regional executive councils is far more nebulous than that of the Federal Executive Council. The relationship between the councils and either the Military Governors or government departments is not spelt out and clearly defined by law. Each council is required to exercise only those functions which were before the army take-over vested in the Executive Council, House of Assembly or House of Chiefs of a Region by any law other than the federal or regional Constitution.<sup>84</sup> It

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<sup>78</sup>Id., s. 12(3) and Sch. 2, para. 3, as modified by the Constitution (Miscellaneous Provisions) No. 2 Decree, 1967, s. 2(1)(a).

<sup>79</sup>See the Constitution of the Federal Republic of Nigeria, 1963 ss. 88, 97 and 130, as amended by Decree No. 1 of 1966.

<sup>80</sup>Id., s. 109(2), as modified by Decree No. 1 of 1966.

<sup>81</sup>Id., s. 134, as modified by Decree No. 1 of 1966.

<sup>82</sup>Decree No. 1 of 1966, s. 9(1).

<sup>83</sup>Id., s. 9(3).

<sup>84</sup>Decree No. 1 of 1966, s. 12, as amended by Decree No. 27 of 1967, s. 2(b)(ii). See also Decree No. 44 of 1968, s. 1(b).

has not inherited the constitutional powers of the former regional executive council, for Decree No. 20 of 1967 provides that the creation of the executive councils for the States should not be construed to imply the revival of any other provision of any Constitution of a former Region relating to executive councils.<sup>85</sup> All the executive powers of the former regions, revived by Decree No. 1 of 1966, are now vested in the Military Governors to be exercised by them in their discretion. Thus, the Military Governor of each State is to act wherever under the revived portions of the former federal or regional Constitution the Governor or Premier of a Region was required to act with or without the advice of any person or body.<sup>86</sup> Also, wherever the revived portions of the 1963 federal or regional Constitution refer to the government or a minister of government of a Region it should be construed as a reference to the Military Governor of a State.<sup>87</sup> The Military Governor, not his executive council, is even required to exercise general direction and control over every department of his government, to see that annual budget of his government is prepared, and to receive and consider the reports of the Director of Audit of the State.<sup>88</sup> The fact is that the present regional Executive Council is there only to give advice to the Military Governor whenever he needs and asks for it. But the Military Governor himself is at liberty to delegate to the Council any aspect of his functions, except the function of making and signing and edict.<sup>89</sup>

(ii) The Commissioners

The Commissioners occupy in our present administrative structure the position occupied by Ministers in the republican administrative system. But, like the present executive councils, the Commissioners lack the authority, initiative and drive of their republican counterparts. No doubt, like their republican counterparts, the commissioners are appointed by, and hold office at the pleasure of, the appropriate chief executives - the Head of

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<sup>85</sup> Decree No. 20 of 1967, s. 3(2).

<sup>86</sup> Decree No. 1 of 1966, s. 7(4), Sch. 2 para. 4, Sch. 4 para. 2. See also Decree No. 27 of 1967 s. 2(3-4).

<sup>87</sup> Decree No. 1 of 1966, Sch. 2 paras. 2, 3 and Sch. 4 para. 1.

<sup>88</sup> See the 1963 Constitution of Eastern Nigeria, ss. 44, 57, 61(3), as modified by Decree No. 1 of 1966. See also the corresponding sections of other regional Constitutions.

<sup>89</sup> Decree No. 1 of 1966, s. 9(4).

the Federal Military Government at the centre and the Military Governor or the Administrator in each State. Furthermore, as his republican counterpart, the commissioner at the centre or in a State is not by virtue of his appointment automatically a member of the executive council; the chief executive has a discretion whether or not to appoint him to the council. Nevertheless, the powers and functions of a commissioner differ basically from those of his republican counterpart. The powers and functions of a federal or a regional Minister under the 1963 Federal Constitution now vest in the Federal Executive Council or the State Military Governor as the case may be.<sup>90</sup> It seems too that all the powers and functions of the regional Ministers under the 1963 Regional Constitutions now vest in the Military Governors or the Administrators of the States. But where, by any law other than a Constitution, powers and functions were before the army take-over vested in a federal or regional Minister, those powers and functions are now vested in the appropriate federal or regional Commissioner; where the appropriate Commissioner has not been appointed the powers and functions now vest in the Head of the Federal Military Government at the centre or the Military Governor in each State.<sup>91</sup>

What we have said in the above paragraph is subject to one qualification. The Attorney-General both at the federal and regional levels seems to have stepped into the shoes of his republican predecessor; in every respect, he of all the Commissioners is the true image of his republican counterpart. Indeed, the federal Attorney-General has maintained a direct link with the past. The office was quickly revived by the Army along with other offices in the public service. This was done probably because the Attorney-General was not just the Minister of Justice; he was the chief law officer of the government as well. He was first the Attorney-General and then made the Minister of Justice; so when all ministerial offices were abolished he retained his substantive position as the Attorney-General.<sup>92</sup> Subject to the

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<sup>90</sup> Decree No. 1 of 1966, Sch. 2, para. 3. See also Decree No. 44 of 1968.

<sup>91</sup> Id., s. 12, as amended by Decree No. 27 of 1967, s. 2.

<sup>92</sup> See the 1963 Constitution of the Federation, s. 88(1) and the corresponding sections of the various regional Constitutions of that year.

overall authority of the Federal Executive Council at the centre or the Military Governor in each State, the Attorney-General now exercises general direction and control over the Ministry of Justice.<sup>93</sup> The relationship between other Commissioners and their appropriate chief executives, executive councils or ministries and departments is not precisely defined by law. Clearly, each is first and foremost the agent of the chief executive and responsible to him for the proper and efficient administration of the ministries and departments committed to his charge. Subject to this, he is probably in the same position as the Attorney-General and exercises general direction and control over his ministry and departments, acting under the overall authority and direction of both the executive council and the chief executive.<sup>94</sup> Of course, all exercise of executive powers are ultimately subject to the overriding authority of the Head of the Federal Military Government.

### (iii) The Public Services

Of the various institutions of the republican era, the public services are clearly among the least disturbed by the army take-over. Though we now have thirteen separate public services in place of the former five and though instead of being under a separate and independent executive superior, each is now subject to the ultimate authority of a common superior, yet in functions, structure and personnel each is almost the same as its republican counterpart. We have one central and twelve regional public services, each with its own separate functions, organizational structure, system of control and leadership. Each serves as a link between the policy-makers and the man in the street - a vital role in a system of administration which has no room for political organizations and activities. To the man in the street, the public service brings services and other amenities and benefits supplied by the policy-makers; it also brings to him information on the current and future policies of the government. From him also it secures faithful performance of his civic duties and obtains in-

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<sup>93</sup> Id., s. 88(3) and the corresponding sections of the various regional Constitutions of the same year, as modified by Decree No. 1 of 1966, and Decree No. 27 of 1967, s. 4. See also Decree No. 13 of 1968 s. 7. The position in the Northern States appears different.

<sup>94</sup> See Decree No. 27 of 1967, s. 4.



formation on people's reaction to various policies as well as their current demands and future expectations. Internally, the public service still concerns itself as before the take-over with processing and analyzing various information it gathers from the public as well as with planning and formulating fresh policies it will recommend to the policy-makers.

Both central and regional public services still function on the principles of division of labour. Each is divided and subdivided into ministries, departments, branches or divisions and sections. Each ministry or department usually combines under a common leadership ( a permanent secretary or a head of department) all the related or similar functions which are best considered together and subjected to the same planning and policy. The Permanent Secretary is usually responsible for the supervision of the day to day activities of the Ministry placed under his charge; but he and his ministry are under a political head - a Commissioner - who links them to the policy-makers. Between the Commissioner and the common man there is a hierarchy of grades of officials, forming an unbroken chain of command, direction, supervision and control to ensure that the policy-makers are in constant and unfailing communication with the man in the street. Each public service has a technical as well as an administrative wing. The technical wing supplies services, amenities and other benefits to the common man and also secures his performance of his civic duties. The administrative wing, on the other hand, sees to the internal needs of each department or ministry, such as matters of personnel, finance, research, planning and purchases.

Apart from being under the general control and direction of a Commissioner, each public service is also under the general direction of an executive council as well as under the special control of a Ministry of Establishment and a Public Service Commission. The Ministry of Establishment controls the internal organizational structure of the public service by controlling the grading and seniority of its members. The Public Service Commission, on the other hand, is responsible for the appointment, promotion, dismissal and general disciplinary control of the Members of the public service under its charge, except Ambassadors, Permanent Secretaries, Directors of Audit, Judges and members of the Force.<sup>95</sup>

<sup>95</sup> See ss. 147-150, 112, 123 and 110 of the 1963 Constitution of the Federation, as modified by Decree No. 1 of 1966, and the corresponding sections of the Constitutions of the States, as similarly modified. See also Decree No. 13 of 1968, ss. 4, 5.

An attempt to complete unification of the public services was made by Decree No. 34 of 1966, which sought to fuse various public services under the name of the "National Public Service" with the Federal Public Service Commission (renamed the "National Public Service Commission") in control of the members of the former federal public service and the upper grades of the former regional public services (then renamed the "provincial public services"). The former regional public service commissions, which became the provincial public service commissions, remained in control of only the lower grades of the members of the former regional public services. Decree No. 34 was however repealed shortly after by Decree No. 59 of the same year; separate public services and public service commissions were revived, though still under the ultimate and overall authority of the Head of the Federal Military Government.

Also, between May, 1967 and March, 1968 Interim Administrative Councils were established to take over and control the public services of the former Eastern and Northern Regions.<sup>96</sup> One Council was established for the former Eastern Region and another for the former Northern Region, and the public service of each became the public service of the appropriate interim administrative council. Each council was given the power to make and confirm appointments, promotions and transfers within the service; and to dismiss and exercise disciplinary control over the members of the public service transferred to it; but it could delegate any aspect of its functions to the former public service commission or to any functionary or official of the States carved out of the former Region.<sup>97</sup> On the 31st of March, 1968 the two councils ceased to exist. Decree No. 12 of 1968, however, immediately set up for the States of the former Northern Region a new administrative body known as the Interim Administrative Agency to take charge of specific institutions and services owned and shared by them in common.

The Police is a little detached from the main body of the public service both at the centre and in the States. The internal organization and administration of the Force are under the

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<sup>96</sup> Decree No. 18 of 1967 - the Administrative Councils Decree, 1967.

<sup>97</sup> Decree No. 26 of 1967 - The Interim Administrative Councils (Amendment) Decree, 1967, s. 3.

general supervision of the Nigeria Police Council while appointments, promotions, transfers, dismissals and general disciplinary control of the members of the Force are under the Police Service Commission.<sup>98</sup> As under the republican Constitution of 1963, the Police today has a unitary structure, with the Inspector-General of Police at the head. There is a unit or contingent of the Force in each State, headed by a Commissioner of Police who takes orders and direction both from the Inspector-General and from the Military Governor of the State. The Inspector-General himself acts on the instructions and directions of the Head of the Federal Military Government.<sup>99</sup>

## THE JUDICIARY

### Structure

Like the public service, the judiciary has not changed significantly in the hands of the military regimes. On taking over the administration of the country each regime quickly revived and adopted the pre-existing judicial system, modifying it only when the need for a change was glaring and unavoidable.<sup>100</sup> Just as before the army take-over, so today we have a dual system of courts; some are federal, others regional, but they all function as though they formed a unitary system. The courts are hierarchically arranged, and each - whether federal or regional - occupies an important position within the system.

Before the take-over, our judicial system had a federal peak and a predominantly regional base. The base consisted of inferior courts made up of magistrates courts and native or customary courts. Each Region had both magistrates courts and native or customary courts, but the federal territory of Lagos had only magistrates courts. Immediately above these inferior courts were High Courts

<sup>98</sup> The 1963 Constitution of the Federation, ss. 107-110, as modified by Decree No. 1 of 1966.

<sup>99</sup> *Id.*, s. 106, as modified by Decree No. 1 of 1966.

<sup>100</sup> See Ironsi's maiden speech, Government Notice No. 148 of 1966 and Gowon's first statement to the press dated 4th August, 1966 and published in Nigeria 1966 at p. 34.

one of which was established in each Region by the Constitution of that Region and one in the federal territory of Lagos by the federal Constitution of 1963. Each High Court had branches through which it functioned. In each Region, the High Court branched out first into divisions and then into court rooms, named court 1, court 2, court 3, etc. For this purpose, each Region was divided into judicial divisions, and each division into as many court rooms as there were judges for that division. The federal territory of Lagos constituted a judicial division with a number of courts rooms. In addition to the High Court, the Northern Region had a Sharia Court of Appeal which stood on a level with the High Court. Above the High Court stood the federal Supreme Court which was the ultimate court of appeal for the whole country.

The usual chain of appeal ran from the native or customary court through a magistrate's court and a High Court or direct through the High Court to the Supreme Court. However, in the Western Region where the native or customary courts were graded into A, B, C and D some of which were presided over by legally qualified presidents and provisions were made for the establishment of customary courts of appeal, appeals lay straight to the High Court from a customary court of appeal or from a grade A court or a grade B court with a legally qualified president.<sup>101</sup> In other cases appeals had to go first to a magistrate's court and then to a High Court.<sup>102</sup> In the Northern Region civil appeals from native courts lay to the Sharia Court of Appeal on matters relating to Moslem personal law and to the High Court in other cases.<sup>103</sup> Appeals from various High Courts and, in special cases, from the Sharia Court of Appeal went direct to the federal Supreme Court, there being no intermediate court of appeal.<sup>104</sup> The need for such an intermediate court of appeal had long been felt in the country, and one was established for the Western Region by the 1963 Constitution of that Region though it never came

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<sup>101</sup> See Nwabueze, B.O. Machinery of Justice in Nigeria, ch.6 (Butterworths, 1963).

<sup>102</sup> *Id.*, at 120.

<sup>103</sup> The Sharia Court of Appeal Law, 1960, S. 1.

<sup>104</sup> The Constitution of the Federal Republic of Nigeria, 1963, SS. 117, 119.

into operation before the take-over.<sup>105</sup> Other constitutions, federal as well as regional, authorized similar regional courts of appeal to be established for the Eastern, Northern and Mid-Western Regions by the appropriate regional legislatures, but none had been established before the take-over.<sup>106</sup> Also, the federal legislature had the power to establish courts of law for the Federation in addition to the Supreme Court, but it had not done so before the take-over.<sup>107</sup>

As set out above, the structure of the courts survived the take-over and persists even today, except that following the creation of more states in the country, the High Court and the magistrates courts of the federal territory were transferred to the newly created Lagos State and we now have twelve regional High Courts in place of the former four. In practice, however, the High Courts of the six northern states still function as though they were one. They still function under one Chief Justice, even though the constitution of each state requires that state to have its own separate Chief Justice. The federal judiciary now consists of only the Supreme Court which is still the final court of appeal for the whole country. Also, the Western Court of Appeal has now commenced operation under the Court of Appeal (Commencement of Provisions) Notice, 1967 issued by the Military Governor of the Western State.<sup>108</sup> Since the 1st of April, 1967 appeals from the High Court of the Western Region generally go to this Court of Appeal before going to the Supreme Court. Furthermore, in the East Central State, the customary courts have recently been abolished, leaving the magistrates courts as the only inferior court in the State. Also in the six northern states, with effect from the 1st of April, 1968 native courts were abolished and a new system of local courts estab-

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<sup>105</sup>The Constitution of Western Nigeria of 1963, S. 52.

<sup>106</sup>The Constitution of the Federation, 1963, S. 127; the Constitution of Eastern Nigeria, 1963, S. 54 and the corresponding provisions of the Constitution of the Western and Mid-Western Regions.

<sup>107</sup>The Constitution of the Federation, 1963, S. 126.

<sup>108</sup>See also the Court of Appeal Edict, 1967 issued along with the notice in May, 1967. The Court was, however, deemed to have commenced operation on 1st April, 1967.

lished in their place.<sup>109</sup> The Area Courts Edicts enacted in identical terms by the six states established upper area courts as well as area courts grades I, II and III. The area courts grades I - III have original jurisdiction in criminal and civil matters, but their powers vary. In Criminal cases, for instance, an area court grade I can impose a maximum sentence of five years imprisonment or E500 fine, while a grade III area court can impose nine months imprisonment or E50 fine. Standing midway between the two, a grade II area court can impose three years imprisonment or E300 fine.<sup>110</sup> From the decision of any of the area courts appeal can go to the upper area court having jurisdiction in the area,<sup>111</sup> and any party aggrieved by the decision of an upper area court may lodge an appeal to the Sharia Court of Appeal in cases involving Moslem law and to the High Court in any other case.<sup>112</sup>

### Composition and Appointments

The Supreme Court is composed of the Chief Justice of Nigeria and not less than five other justices; the precise number of Justices is fixed from time to time by Decrees (formerly Acts of Parliament).<sup>113</sup> The quorum of the court is three, though it requires five justices to form a full court. The High Court of each state is composed of the Chief Justice of that state and such number of other judges as the local legislature may from time to time prescribe. In Lagos the number must never fall be-

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<sup>109</sup> See, for instance, the Area Courts Edict, 1967 (Edict No. 2 of 1967) of Kwara State; the Area Court Edict, 1968 (Edict No. 4 of 1968) of Benue Plateau State; the Area Court Edict, 1967 (No. 2 of 1967) of Kano State; the Area Court Edict, 1967 (No. 2 of 1967) of the North Central State.

<sup>110</sup> Area Court Edict, S. 17 and Schedule I.

<sup>111</sup> Id., S. 53.

<sup>112</sup> Id., S. 54.

<sup>113</sup> The Constitution of the Federation, 1963, S. 111(2).

low five.<sup>114</sup> In other southern states the minimum is six;<sup>115</sup> and in the six northern states the minimum is two.<sup>116</sup> Judges of the High Courts usually sit singly. In Lagos each is required to sit with a jury when hearing a murder case, whereas in other southern states they generally sit without either a jury or assessors. In the North, they can sit with assessors or jurors in certain circumstances. In any civil cause or matter a High Court judge may, if he considers it necessary, call in the aid of one or more assessors specially qualified and handle the matter wholly or partially with their assistance.<sup>117</sup> In the Northern States, the Military Governor (previously the Governor in Council of the former Northern Region) may by order specify what class of civil or criminal cause or matters should be heard by the High Court judges with juror.<sup>118</sup> The Sharia Court of Appeal is composed of a Grand Kadi, a Deputy Grand Kadi and three other judges learned in the Sharia, but only three of them can form a quorum to hear an appeal.<sup>119</sup> Magistrates generally sit singly without either a jury or assessor, although a number of them may be stationed within a given judicial division.

As to the method of appointing judges and magistrates, the position is today very close to what it was before the take-over. Before the take over, the judges of the Supreme Court and Lagos High Court were appointed by the President on the recommendation

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<sup>114</sup>Id., s. 122 (2).

<sup>115</sup>See the Constitution of Eastern Nigeria of 1963, s. 50(2) as amended by Decrees. See also the corresponding sections of the Constitutions of Western and Mid-Western Nigeria, as similarly amended.

<sup>116</sup>The Constitution of the former Northern Nigeria, 1963, s. 50 (2), as amended by Decrees.

<sup>117</sup>The High Court Law of the former Northern Nigeria (CAP. 49) s. 87(1).

<sup>118</sup>Id., s. 86(1).

<sup>119</sup>See the Sharia Court of Appeal Law, 1960, s. 4.

of the Prime Minister, except that four of the justices of the Supreme Court had to be appointed by the Chief Executive on the recommendation of the four regional Premiers.<sup>120</sup> In the Regions, High Court judges, including the Grand Kadi and other judges of the Sharia Court of Appeal, were appointed by the Governor of each Region on the recommendation of the appropriate Premier.<sup>121</sup> Today, the justices of the Supreme Court, the Western State Court of Appeal, the State High Courts and the Sharia Court of Appeal, including the Chief Justice of Nigeria and the Chief Justice of the various States, are appointed by the Supreme Military Council after consulting the Advisory Judicial Committee.<sup>122</sup> The committee was established by S. 11(1) of Decree No. 1 of 1966 and is composed of the Chief Justice of Nigeria as Chairman, the Chief Justice of the States: the Grand Kadi of the Sharia Court of Appeal; and the Attorney-General of the Federation. The Solicitor-General of the Federation acts as the Committee's secretary. The function of the Committee is purely advisory, for although its opinion on any intended appointment must be ascertained by the Supreme Military Council, the Council is not bound to act in accordance with the advice; the council is solely responsible for the appointment. Magistrates are appointed by the State Military Governors on the advice of the appropriate Public Service Commission. The take-over had not changed the prescribed qualifications for various forms or grades of judicial appointments, nor has it significantly altered the tenure of office of judges.

Before the take-over, a justice of the Supreme Court or High Court could be removed from his office by the President or Governor as the case might be only on the presentation of address by both Houses of the appropriate legislature supported by two-thirds of the members praying that the Justice be removed for inability to discharge the functions of his office or for misbehav-

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<sup>120</sup>The Constitution of the Federation, 1963, SS. 112, 125.

<sup>121</sup>The Constitution of Eastern Nigeria of 1963, S. 51 and corresponding sections of the other Regional Constitutions.

<sup>122</sup>The Constitution of the Federation, 1963, SS. 112, 123 as modified by Schedule 2 to Decree No. 1 of 1966 and corresponding sections of the Regional Constitutions as similarly modified by Schedule 4 to Decree No. 1. of 1966.



four.<sup>123</sup> Apart from discussing a motion embodying such a prayer, none of the legislatures in the country could constitutionally discuss the conduct or affairs of any judge and the judges were paid personal emoluments from consolidated revenue funds which were not open for discussion by the legislatures. Today, with those Chief Executives and legislatures out of the stage, the judges are now removable by the Supreme Military Council after consulting the Advisory Judicial Committee.<sup>124</sup> Subject to this, a judge still holds office until he attains the age of 65, but the Supreme Military Council can extend the period of office of any judge beyond that limit and did in fact extend that of the former Chief Justice indefinitely.<sup>125</sup> Judges still enjoy special privileges while acting as such; they are still paid out of the consolidated revenues although this no longer had any practical meaning since the Supreme Military Council which is responsible for the appointment and removal of judges also controls the consolidated revenue funds. As an omnipotent or unlimited policy maker, the Council is free at all times to discuss the conduct of a judge either as a separate issue or in relation to annual appropriation measures. As to the magistrates, they are still under the disciplinary control of the appropriate state Public Service Commission, just as before the take-over.

#### Functions

The function of authoritatively interpreting and declaring the law belonged to the courts before the army take-over, and in the exercise of that function the courts, applying the law of the land, resolved disputes between two or more people in the country and reviewed legislative and executive actions, pronouncing upon their constitutional validity. The courts therefore contributed towards the maintenance of law and order in

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<sup>123</sup>The Constitution of the Federation, 1963, SS. 113(2), 124(2) and corresponding sections of the Regional Constitutions.

<sup>124</sup>Id., as modified by Schedules 2 and 4 of Decree No. 1 of 1966.

<sup>125</sup>The Chief Justice of Nigeria (Extension of Period of Office) Decree, 1971.

the country by keeping every organ of government and every individual, including corporate bodies, within their legal bounds. Courts of various grades contributed in varying degree toward the attainment of that objective; each had its powers or legal limits - its jurisdiction - within which to operate independently without fear or favour.

The take-over has slightly modified the position of the courts by curtailing their powers. First, since the Constitution of the country is no longer the supreme law of the land, the courts are no longer empowered to review and pronounce upon the constitutional validity of all forms of laws. At least they are enjoined not to entertain any action questioning the validity of decrees or edicts which are not inconsistent with decrees.<sup>126</sup> Just as they are not to question the validity of decrees and some edicts, so are they barred from reviewing subsidiary laws made under such decrees and edicts.<sup>127</sup> Secondly, it seems that no court in the country today is competent to hear and possibly resolve any dispute between the Federation and any of the component States or between any two of the States. The Supreme Court had original jurisdiction before the take-over to hear and determine such cases; Decree No. 1 of 1966 withdrew that jurisdiction from that Court without vesting it in another court, implying, perhaps, that such a dispute if it ever arises is not justiciable and should not be the concern of any court of law.<sup>128</sup> Thirdly, in the East Central State where the High Court was denied jurisdiction over certain matters arising under customary law<sup>129</sup> the High Court Law (Amendment) Edict, 1971 has recently empowered that Court to handle land causes and matters arising under customary law.<sup>130</sup> Subject to these

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<sup>126</sup> Decree No. 1 of 1966, S. 6 as modified by the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970 S. 1(2).

<sup>127</sup> Id., S. 1(3)(b).

<sup>128</sup> See the Constitution of the Federation, 1963, S. 114(1) which was suspended by Decree No. 1 of 1966, Schedule 1.

<sup>129</sup> The High Court Law of Eastern Nigeria, S. 14.

<sup>130</sup> S. 3 (11).

changes, the functions of the judiciary have not changed as a result of the take-over.

The Supreme Court is still the final court of appeal for the whole country, while the High Court still remains a superior court of record having unlimited civil and criminal jurisdiction and exercising supervision and control over inferior courts functioning within its territorial jurisdiction. In supervising and controlling the inferior courts the High Court still rely on such traditional prerogative tools as certiorari, mandamus prohibition, injunction, declaration and Habeas Corpus. It also hears appeals from inferior courts, just as it did before the take-over. In the North, however, the Sharia court of Appeal and not the High Court is competent to hear and determine appeals based on Moslem personal law from grade "A" and grade "A limited" native courts as well as from provincial courts.<sup>131</sup> The place of the inferior courts in our judicial system has not been much affected by the take-over, except that in the East Central State customary courts have been abolished occasioning the broadening of the jurisdiction of both magistrates courts and the High Court.

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<sup>131</sup>The Sharia Court of Appeal Law, 1960 (CAP. 122 of Laws of Northern Nigeria, 1963) S. 10(1).