THE IMPACT OF MILITARY TAKE-OVER ON NIGERIAN CONSTITUTION 1966 AND BEYOND

BY

SULEIMAN GARBA ILLO

INTRODUCTION

Africans have had many ways of governance before the advent of the Colonial masters, the nature of leadership varies from communities and localities. In fact, the complexity and ethnicity make it always difficult for any country to adopt a particular Administrative method. Therefore, there was never time when a particular system survive fro long.

A question that one may ask is why changes and how do we effect the changes. Changes for what and why, also on examination on the effect of such changes on Nigerian constitutions is our concern here. A number of constitutions emerged in all this country from 1914, 1922, 1946, 1951, 1954, 1960, 1963, 1979 but all these documents failed for one reason or the other. Thus Nigeria is up to this moment in search of democratic and stable Government. However, stability in government, and democracy can only be seen in government when it becomes efficacious. This paper will at the end of the day give a thinking forum as to what is democracy, and indeed draw a conclusion on why Nigerian problem seems to be peculiar. Lastly, a number of suggestions may be offered for the future, as to curtail the frequent military intervention in the country. In fact, looking at issues and events from constructional point of view, one would assert that 1946 constitution (Richard Constitution) usher in era of tribalism, nepotism and ethnicity in the Nigerian politics, because the regionalism as introduced by the said constitution made the political dispensation in this country to cut across tribal boundaries only. This indeed paved way for other maladies that threats the existence of this country as one indivisible and indissoluble nation.

Pressing issues to remember as pre-conditions or our trouble are tribalism, conflicts between various ethnic groups, corruption and inefficient administration were the order of the day. School leavers could not obtain jobs in government services unless they gave financial consideration for same. Rigging of elections, political vendetta, sychopancy and renegades post independence era in Nigeria up to 1966 was plagued crisis following another. On 15th January, 1966, a coup stage and masterminded by five young army majors occurred in Nigeria.

THE LEGAL EFFECT OF THE COUP:

The Constitutionality or otherwise of the military take-over in 1966, has been a matter of controversy among lawyers. This is because the subject for determination evolves around two speeches during the political turmoil, in the first instance, on the 16th day of January 1966, Major Nzeogwu and Central figure in the coup made an announcement that;

> *"In the name of the Supreme Council of the Revolution of the Nigerian Army Forces, I declared martial law over the Northern Provinces of Nigeria. The constitution is suspended and the legal Government and elected Assembly are hereby dissolved. All political, cultural, tribal activities are banned until further notice".*

Meanwhile, the fate and whereabouts of the Federal Prime Minister were unknown as of that moment and shrouded in doubts because of the discrepancies between the various distorted versions of the events of that time. About midnight of 16th January, 1966, the Acting President Dr. Nwafor A.A. Orizu made a broadcast to the bewildered and expectant nation. His address was succinct, lucid and unprecedented in the constitutional history of the country.

> *"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.... It is my fervent hope that the new administration will ensure the peace and stability of the Federal Republic of Nigeria and that all citizens will give them their full co-operation".*[1] *(Nigeria Gazelte: 1966)*

In response to the invitation , the G.O.C gladly agreed to head the new-Military Administration. The General in a unique and cautiously worded broadcast, state;

> *"The government of the Federation of Nigeria having ceased to functions, the Nigerian Armed Forces have been invited to form an interim Military Government for purpose 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 formally been invited with authority as Head of the Federal Military Government, and Supreme Commander of the Nigerian Forces".*[2] *(Nigeria Gazette: 1966)*

The confined effect of these two broadcast was to bring in charge in the political and constitutional history of this country. Looking at the two broadcast, it may be submitted that the take over was a revolution whereas from another perspective, it will be viewed as a mere change in the Government. Undoubtedly, the change of government was unconstitutional because if conditions warrant, the change in the Government is always centred on election not military take over. It is therefore a matter of some legal interests to pose the question what the character of the take over?

Some people view the event of 15th January 1966 as mutiny in the Nigerian Army. The overseas service of Radio Nigeria of 15th January 1966, at 3.pm local time for example, referred to the 15th January 1966 event in these words;

> *"There was a mutiny by a dissident section of the Nigerian Army this morning. The Prime Minister (Sir Abubakar Tafawa Balewa) and the Federal Minister of Finance (Chief Okotie Ebo Festus) were apprehended and taken to an unknown destination".*[3] *(Afr. R. Bulletin 1966)*

1 Government Notice No.147 of 1966: Nigerian Gazette, Lagos 26th Jan., 1966 p. 103.

2 Government Notice No. 148 of 1966: Nigerian Gazette Lagos, 26th Jan, 1966 p. 103.

3 African Research Bulletin, London, 1966, Vol. 3. No. 1 p. 446B.

However, taken for granted, it was never provided for under any provision of the Republican Constitution that the Military to govern the country in the event of an army mutiny. Some scholars view the event as an abdication of powers to sovereignty to the Military. Dr. T.O. Elias said that:

> *"As a prelude to the Nigerian civil war, there occurred a military coup de tat on 13th January, 1966, followed by a second one on 29th July, 1966".*[4] *(N.L.J. 1971)*

The Supreme Court view the event as revolution as expressed in the Judgement of full bench of five judges[5] in celebrated case of Lakami and another V. The Attorney General (West)[6]. Where on 31st August, 1967 the Chairman of the Tribunal of Inquiry Investigating the assets of some public officers of the Western State made orders which. inter alia, restrained the plaintiff/Appellant from disposing of or otherwise dealing with their real properties until the Government of the State otherwise directed; from operating their bank account without the written consent of the Military Governor on and that recent accruing from those properties should be paid into the Government Treasury. (Investigation of Assets) Edict No. 5 of 1967 of Western Nigeria.

The plaintiff/Appellants brought an application at the High court of Western State in Ibadan for an order of certiorari to quash the orders made by the Chairman of the Assets Tribunal on the contention, firstly that Edict No. 5 of 1967 was void since it purported to operate in the same field as the Federal Military Government Decree No. 51 of 1966 which empowered the former National Military Government to investigate the assets of its public officers which had earlier covered the field, and secondly that some provision of the Edict No. 5 of 1966 were inconsistent with Decree 51 of 1966 and thus the orders that were made under Edict No. 5 were ultravires. The trial court rejected the contention of advanced in favour of the plaintiffs/Appellants.

While the plaintiff/Appellants appealed to the Western State court of Appeal. the Federal Military Government passed successive Decrees, namely the investigation of Assets (Public Officers and other personnel) (Amendment) Decree No. 45 28th August, 1968. The respondents filed preliminary objections on 18th October, 1968 contending that the orders which were the subject matter of the proceedings on appeal had been validated by Decree No. 45 of 1966 and since 28th August, 1968 the aforesaid proceedings had abated by reason of the provision of Decree No. 45 of 1968.

The Western State court of Appeal unheld the contentions which in terms were that their jurisdiction had been ousted by Decree No. 45 of 1968 and accordingly struck out the appeal without considering on merit the issue at the High Court.

---

4 The Nigerian crisis in International Law, the Nigerian Law journal. Vol. 5, 1971.

5 Ademola C.J.N. Coker, Lewis, Madrikan and Udoma J.S.C.

6 Suit No. 58/69 of 24th April, 1970, (unreported).

On further appeal to the Supreme Court the issue then arose whether the Decree No. 45 of 1968, was valid or not which in turn led to the question of whether 1963 constitution of Nigeria survived the events of January and July 1966.

and remained Supreme law of the land, by reference to which the validity of the legislative and executive powers of the Federal Military Government was to be gauged.

On behalf of the appellants it was submitted that the Federal Military Government which came into power in January, 1966 was not a revolutionary government but a constitutional interim Government expressing the wishes of representatives of the people and those object was to uphold the constitution excepting, so far as it had to derogate from it under the doctrine of necessity whereby, it was amended that the Federal Military Government assumed the continued existence of the constitution and in its Decree No. 1 of 1966 there was an implied provision for separation of powers between the legislature and executive and the judiciary as it obtained under the 1963 constitution of Nigeria. That, thus, the power of the government under S.3 of Decree No. 1 of 1966 to make the laws by Decree, "*for the peace, order and good government of Nigeria and any matter whatsoever*" was therefore not an unfettered power to amend the constitution by Decree save in so far as properly justified by the doctrine of necessity.

For the respondent it was submitted that the Federal Military Government was a revolutionary Government which seized power on 15th January, 1966. As a result, from its inception the Federal Military Government had an unfitted right to rule by force and by means of Decrees and there was nothing in the constitution that could make a decree void nor could the court have any jurisdiction to Adjudicate on the validity of a decree. Accordingly, it was submitted that Decree No. 45 of 1968 which validate everything done under it could not be challenged.

The Supreme Court Held that the orders of the Chairman of the Assets Tribunal must be quashed since both Edict No. 5 of 1967 and Decree No. 45 of 1968 from which the Tribunal's powers originated were ultravires, null and void. Further, the court held that the Republican Constitution remained the supreme law of the Federation and all laws were subject to it except in so far as by necessity, the constitution ceases to have effect. Finally, the Supreme court upheld the submission of learned counsel for the appellants that the events of 15th January, 1966 were not revolution and consequently that the Federal Military Government was not a revolutionary government but a constitutional interim government. Thus, reading the unanimous judgement of the court, Ademola C.J.N. inter alia declared emphatically:

> *"At this stage it is incumbent on us to clear one point. It must be accepted that the council of Ministers validly met at the time the acting President accepted that they met and they gave him an assessment of the situation. It is no gain say, that what happened in Nigeria in January 1966 is unprecedented in history. Never before as far as we are aware, has a civilian government invited an Army take over or the armed forces to form an interim Government. We disagree with the learned Attorney General that these events in January 1966, are tantamount to a revolution".*

The Supreme Court's rejection that the events of January 1966 were a revolution was influenced by the definition of the word "Revolution" as advanced by the learned counsel for the appellants. He argued, quoting from the shorter Oxford Dictionary, that a revolution occurs 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. Indeed, in the view 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".[7]

With respect to Supreme Court's holding on the dictionary meaning of the revolution, regarding the event in question is untenable. And this can be buttressed by the Pakistan case of the State V. Dosso[8] which was expressly relied by the Supreme Court. In 1758, President Iskandar Mirza of Pakistan, supported by the army declared martial law in that country dissolved the cabinet and the national assembly and appointed General Ayub Khan the Chief Martial law administrator. The actions of the President were done completely outside the provisions of the 1956 constitution of Pakistan and the Supreme court of Pakistan held these events were a revolution being act not within the contemplation of the constitution. Delivering his own judgement, Sir, Muh'd Munir C.J. stated the position clearly:

The occurrence of disruption abruptly changing the political order not within the contemplation of the constitution, any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order. This is to determine revolution from any angle, thus it violence or peaceful it may be inform of a coup de tat.... on same principle the validity of the laws to be made thereafter is judge by reference to the new and not the annulled constitution. Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change. See the cases of Uganda V. Commissioner of Prison, Exp. Matova[9] also Madzimba Mato V Lardner Burke.[10] Also, relevant here is the Ghanian case of Sallah V. The Attorney General.[11]

Considering the cumulative effect of the events in Uganda, Southern Rhodesia and Pakistan a summary may be made that the following major factors characterise a revolution:-

1) A revolution may be tumultuous or peaceful
2) The revolution may be executed from within the government in power itself or entirely from outside.
3) The revolution annuls the existing constitution; and
4) The legitimacy of a revolution depends on its own success or effectiveness.

The event of January 1966, from other quotas may be viewed as a revolution because it was a change outside the constitution. Thus Section 1 (1) of Decree No. 1, 1966 provided that the provisions of the constitution of the Federation mentioned in schedule 1 of the decree were suspended, while section 1(2) provided that provisions of the

---

7 (1971) 5 NlQ 135 at 151.

8 PLS. 1958 Supreme Court (Rak.) 533.

9 (1966) EA. 514

10 (1969) 1 AC. 645

11 S.C. 170 of April, 20th 1970 unreported.

constitution of the Federation which were not suspended by section 1(2) of the Decree should have effect. "The legitimacy of the coup therefore depend on the quality of respect it commands after it has subverted constitution.

The event of January 1966, one can safely assert that it was a revolution outside the contemplation of the constitution. "Kelsen" as he put it, "a national legal order begins to be void as soon as it has become on the whole efficacious, and it ceases to be valid as it loses this efficacy.." The Government brought into permanent power by a revolution or coup de tat is according to inter national law, the legitimate government of the State[12].

The judgement in the Lanami's case should go unnoticed by the Federal Military Government. Therefore, it reacted promptly, and declared that military revolution which took place in Nigeria on 15th January, 1966 (as well as that of 29th July, 1966), effectively very abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the constitution (Suspension and enforcement of power) Decree No. 28 of that year. The Decree even declared its preamble being part of the constitution, and inter alia, declared that "any decision, whether made before or after the commencement of any state powers under the constitution or any enactment or law of the Federation or of any state which, has purported to declare or shall hereafter purport to declare the invalidity of any Decree or any Edict (in so far as the provisions of the Edict are not inconsistent with provisions of a Decree) or the competence of any of the Governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making thereof.

One is therefore, bound to conclude that by the event of January, 1966, a new lawful Government for the country emerged any attribution of its original to the constitution is legally irrelevant; in fact, such an attribution will amount to an absurdity That event was a successful revolution.

DOCTRINE OF STATE NECESSITY AND THE HAND-OVER OF SOVEREIGNTY

The event of January, 1966, and Lakanmi's case indicated that the political situation in the country led to the council of Ministers decisions to declare that they cannot continue in office. Therefore, the take-over whether by Ministers abdication or by force, one can term it to be unconstitutional because it was not an act referable to any of the enumerated or express provisions of the constitution. The question still remain whether the hand-over as per the exigencies of time remain acceptable.

At this juncture, we must resort to application of doctrine of necessity and many legal systems are familiar with it. Necessity may excuse act which is otherwise unlawful. The idea of necessity is generally invoked to cope with the state. When sudden conditions warrants the state should exercise additional powers for the welfare of the state. Writing on the doctrine, Sir William's Scot said:

> *"Necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases is likewise legal".*

---

12 Hans Kelsen, The General theory of law and state (Harvard ed. 1945)

Taking into consideration Sir William's Scot's view of doctrine of necessity, the Supreme Court in Lakanmi's case offered this exposition of the doctrine as follows:-

> *"We think it is wrong to except that constitution must make provision for all emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation. Further the executive authority of the Federation is vested in the President by section 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".*

This doctrine must apply because "a state and the people should not be allowed to perish for the sake of its constitution. The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, regardless of whose fault it is that the crisis has been created or persists.

Furthermore, doctrine of necessity should arise under some circumstances:-

a) That an extraordinary imminent emergency bests the continued existence of the state.
b) That the course taken was the only practicable one in the circumstances.
c) That the course was not out of proportion to the necessity.

The political situation and military activities of January 1966, clearly satisfy condition (a) above. The only doubt as to the application of the doctrine appears to be cast on whether conditions (b) and (c) were satisfied. This is perhaps the more so when one calls that the Republican Constitution expressly entrenched the procedure for dealing with emergencies in Nigeria.

The cumulative effect of this discussion therefore, is that the hand-over of Sovereignty by the President to the Armed Forced under the doctrine of necessity was permissible and supportable. The changing of "grend norm" as per Hanskelsen is that if group for individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave by and large in conformity with the new order, this order is considered as valid order. In State V. Dosso, where Pakistan C.J. Muh'd Munir Observed that, "Thus the essentials condition to determine whether a constitution has been annulled is the efficacy of the change".

Decree No.1, 1966 section 1 and 2 serves as creation of a new constitution, both for the central and regional governments deriving its authority from the Federal Military Government unqualified supremacy "to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever".

In conclusion, one can safely put it that the foregoing events were disturbing to the politicians and lawyers. Even the citizens are not left out. This naive and absurd situation led to the enshrivement of some sections in the 1979 constitution in order to curtail the occurrence such events. When the draft copy of 1979 constitution was submitted to the Government, Obasanjo regime included in the clean copy of the constitution a provision which made coup de'tat illegal in Nigeria. Thus section 1(2) reads:-

> *"The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof except in accordance with the provisions of this constitution".*

Also section 14(1) states that; "The Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice".. Section 14(2) (a) "Soveignty belongs to the people of Nigeria from whom government through this constitution derives all its powers and authority".

CONCLUSION:

Looking at the event in question and trying to reflect on the future, one need to infact refer to 1979 constitution and beyond. From this take-over, the Military rule the country for thirteen (13) years. And democracy has been a new and much envisaged by Nigerians. When the efficacy of the Military rule is getting eroded, they have no alternative than to ursher in a democratically elected government. Thus, under the 1979 Constitution, political parties were formed and registered with National Party of Nigeria (NPN) leading the Federal government. Indeed it was a test of democratical struggle, tussles, and challenges for the government.

Inspite of real and unrealistic oppositions, the National Party of Nigeria (NPN) was able to administer the country for four years and brief attempt for the second time. The regime in question has been reluctant and brought that, the military will never take over again. This can be seen in the commitment of Nigerians and how they cherish democracy. The agreements and other disagreements are all normal in all political set ups elsewhere. And Nigeria's also normal. Constitutionally, the Obasanjo regime after receiving the Draft Constitution of 1979 made a provision to check any coup attempt in the country. "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance of the provision of this constitution". section 1(2).

One would except that any coup attempt in Nigeria would meet with resistance of Nigerians. This is because coup is made illegal in the country, out alas! the country with a large number of illiterates cannot in anyway justify and fight for this noble provision. In 1983, another military coup was staged which brought Major General Muhammad Buhari to power. When Brigadier Sani Abacha as (then he was) made the announcement of toppling Shagari regime, Nigerians in large numbers hail it. And in fact, this is the back ground of its efficacy. At this juncture, Administration based on democracy under constitutional arrangement ceased. Buhari was ousted by General Ibrahim Babangida who made an attempt for democracy and constitution Drafting Committee was formed and constitution Drafted for the country in 1989.

It was only a document which Nigerians were not opportune to see. After laying the foundation from Local Government and state levels, the Federal Government to be headed by Civil President prove abortive. An interim Government was headed by Chief Ernest Shonekan and yet, out stated by General Sani Abacha who promised to ursher in democracy by 1998. A new constitution is already drafted awaiting the time to come as was the case in 1989.

One may enquire into the reason why should the military continue to intervene into Nigerian political arena. The reason is of course obvious, Nigerians by their character and characteristics create a fertile ground for the interventions.

WAY OUT:

1) Nigerians should be educated fully, (functional education) so as to rid out of their minds the act of hailing military regimes, by which move their efficacy will cease.

2) Very honest politicians who served and retired, should be taken care of provided they were not found to be corrupt while in office.

3) All politicians with bad records in the past, should not be allowed to participate in future politics.

Indeed if these few points are put into practice, in future, Nigerian Constitution will survive military take over. And democracy will prevail.

REFERENCE

D.O. Aihe, P.A. Oluyede: Cases and Materials on Constitutional law in Nigeria; published by University Press Ltd. 1979.

Hon. Justice Kayode Eso: Nigerian Grend Norm, Published by Nigerian Law Publishers 1986.

Okay Achike; Ground work of Military Law and Military Rule in Nigeria: Fourth Dimension Publishers 1978;

Hon. Justice Kayode Eso: The Court As guardian of Constitution, Comments on paper of Justice Kayode Eso by Hon. Justice Uche Omo Printed by the Federal Government Printers, Lagos.

The Constitution of Federal Republic of Nigeria 1979: