CONSTITUTIONALISM IN THE NIGERIAN DEMOCRATIC SETTING*

Abstract

Constitutionalism depicts the fact that government must at all times respect the fundamental rights and the liberty of the people as given by God and the constitution. Government itself is a product of the people but not sovereign neither do government derived power through divine inclination. The need to restrain the executive, legislative and judicial arms of government in their day to day activities cannot in any way be over-emphasized in order to prevent government and its functionaries from tyranny, arbitrariness and abuse of power which could lead to a breakdown of law and order. This article is anchored on doctrinal research methodology and concludes that some of the factors militating against constitutionalism in Nigeria and other parts of Africa among other things include: disobedience to court orders and rule of law, impunity, corruption and nepotism, etc. It also recommended that the procedure for the amendment of the constitution should be made less complex; there should be the establishment of constitutional court; law enforcement agents who abuse peoples' rights should be held personally liable; removal of immunity clause from the Nigerian Constitution among others.

Keywords: Nigeria, Constitution, Constitutionalism, Rule of Law, Democracy and Limitation.

1, Introduction

Governments the world over have certain laws put in place to guide the conduct of its functionaries in its day to day activities. Without laws guiding government and its apparatus, government would be oppressive and brutish without restraint and would act *ultra vires* their powers. Laws are however, made by an arm of government called the legislature, saddled with that responsibility.[1] This has culminated in some perplexities as to, how could government have made laws for itself to obey? For example, how can the legislature, an arm of government enact a law that would bind the same legislature or any other arm of government? And how can the laws made by government, for example, the legislature, restrain the government itself? Who will enforce such laws against the government since it is the government apparatus that is saddled with the responsibility of the enforcement of such laws? The supreme law of the land is the constitution.[2] The Constitution is made by the people vide the instrumentality of their representatives, elected by the people themselves in an ideal society. The Constitution therefore, stands supreme over all citizens, institutions and branches of the government, federal as well regional or sub-nationals.[3] No institution of government is authorized to make a law or propagate a policy that is against a constitution.[4] However, the British unwritten constitution is not paramount because the parliament can make any law which could go against the unwritten constitution of Britain.[5] It follows therefore, that the British unwritten constitution is not supreme. Again, in order to guarantee the rule of law, liberty and civil rights of the people, restraint on the part of the government, constitutionalism evolved and stipulates that government should be legally limited in its powers and authority. The implication is that in carrying out their daily duties, government functionaries and officials must ensure that they do so within the ambit of the various laws of the land including the supreme law (constitution). In order to restrain government, certain rules or inhibitions are fundamentally entrenched in the constitution or various laws of the land. Such inhibitions include but not limited to: referendum, two- third majority or four-fifths, interpretation of the laws enacted by the legislature by the courts, tenure of office, recall, impeachment or removal, fundamental rights, etc.[6]

2. The Scope of the Constitution

The notion of constitution is that it has two meanings. In its narrow sense, it denotes a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate.[7] The wider sense of a constitution bothers on the whole system of a government of a country, the collection of rules which establish, regulate and guide or govern the government. Pane was of the view that a constitution is not the act of a government; thus, he stated that 'a constitution is not

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[1] S.4 CFRN 1999 (as Amended).

[2] S.I (1) CFRN 1999 (as Amended).

[3] *Ibid.*

[4] *Ibid.*

[5] *Ellen Estate v Ministry of Health* (1934) 1K.B.

[6] See Chap. IV CFRN 1999 (as Amended).

[7] Desertion Upon Parties (1733) cited in K.C. Wheare, *Modern Constitution*, 27.

the act of a government, but of a people constituting a government and a government without a constitution is power without right… A constitution is a thing antecedent to a government, and a government is only the creature of a constitution'[8] The Black's law Dictionary defines a constitution as 'the fundamental and organic law of the nation or state establishing the concept, character and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise'.[9]

From the foregoing, it follows that the constitution establishes the concepts, structure and organization of government and its limitations. It equally limits the power of the government itself. The constitution is also made by the people through their elected people representatives who also hold such office in trust for the people who elected them. The Supreme Court of Nigeria stated that:

> the functions of the Constitution is to establish a framework and principles, broad and general in terms intended to apply to the varying conditions which the development of our general communities must involve, ours being a plural, dynamic society and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles enshrined in the constitution.[10]

Again, in *ANPP v Benue State Independent Electoral Commission,* [11] the Court of Appeal held thus:

> The Nigerian Constitution is founded on the rule law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power which coke colorfully spoke of as golden and straight metwand of law as opposed to the uncertain and crooked cord of discretion.

No constitution is perfect in the sense that it provides a clear-cut or permanent or everlasting solutions to all societal problems that may rear their ugly heads from time to time; as the society grows or develops so also must its constitution, the grondnorm, whether written or unwritten grows along with that society. This however, depends on whether a country is blessed with articulate, industrious and diligent legislature.[12] A constitution is simultaneously a legal, political, and social instrument. Legally, it enshrines human rights and creates a predictable legal landscape. As a Supreme law, its provisions provide a framework under which all regulations, legislations the rights of citizens which the government or state must ensure its protection. Politically, it establishes, distributes and limits government power and provides mechanisms for deliberating and deciding on public policy. Socially, it may reflect a shared identity or civic vision of the state.[13] The constitution cannot however, provide for all functions, laws and regulations of a state or country. The legislature, from time to time enacts laws to guide human and governmental conducts as the society progresses. In *Independent National Electoral Commission v Musa*,[14] the Supreme Court impliedly interpreted the supremacy provisions espoused under sections 1 and 3 of the 1999 Constitution of Nigeria (as amended) and held that the constitution is supreme and the validity of any provision will be tested by the following interrelated propositions, that is:

a) All powers, legislative, executive, and judicial must ultimately be traced to the constitution;
b) The legislative power of the legislature cannot be exercised inconsistently with the constitution, where it so exercised, it is invalid to the extent of such inconsistency;
c) Where the constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the constitution has enacted must show that it has derived the legislative authority to do so from the constitution;
d) Where the constitution sets the condition for doing a thing no legislation of the National Assembly or of a State House of Assembly can derogate from the provisions of the constitution itself as an attribute of its supremacy expressly so authorizes[15].

In *Bribery Commissioner v Ranasingbe*,[16] the appellant is the Bribery Commissioner of Ceylon on whom lies the duty of bringing prosecutions before the bribery tribunal which was created by the bribery Amendment Act 1958. The respondent was prosecuted for a bribery offence before that tribunal and was convicted. On appeal, the Supreme Court declared the conviction and order made against the appellant null, void and inappropriate on the

[8] H. Barnet, *Constitutional and Administrative Law*, 5th edn. (London: Cavendish Publishing Ltd, 2004), 93.
[9] B. A. Garner, Black's Law Dictionary 7th edn. (USA: West Group Publishing Co, 1999), 306.
[10] *Nafiu Rabiu v The State* (1981) 2NCLR 293.
[11] (2006) 11 NWLR (Pt. 992) 617 S.C
[12] *A.G. Federation v Abubakar* (2007) 10 NWLR (Pt. 1041), I.
[13] International IDEA Constitution Briet, February 2017 accessed 22 June 2022.
[14] (2003) 3 NWLR (Pt. 806), 72.
[15] S.I(1) and (3) CFRN 1999 (as amended).
[16] (1965) A.C 172, See also *Liyangi v R*. (1967) I.A.C

ground that the persons composing the bribery tribunal which tried the appellant were not lawfully appointed to the tribunal. The court took the view that the method of appointing persons to the panel from which the tribunal is drawn, offends against an important safeguard in the constitution of Ceylon. The Constitution has some functions to perform. Such functions include:[17] defining the boundaries of political community; declare and define the nature and authority of the political community; express the identity and values of a national community; define and declare the rights and duties of citizens; establishes and regulate the political institutions of the community; divide or share power between different layers of government; declare the official religious identity of the state and demarcate relationships between sacred and secular authorities; commit states to particular social, economic or developmental goals.

3. Types of Constitution

There are many types of constitution. The type of constitution in a particular country depends on the type or system of government that the country operates. Therefore, what determines a country's constitution is the system of government prevalent in such country. The following types of constitution have been identified: written and unwritten constitution; flexible and rigid constitution; unitary and federal constitution, democratic constitution, presidential constitution and parliamentary constitutions, etc. A written constitution is that constitution that is written and embodied in a single document. Its sources are through customs, conventions, fundamental laws rules and regulations which are codified in a document known as the constitution. Nigeria, USA, India, Canada, Gambia, etc. are some of the countries that have written constitutions. It is usually rigid, thus, its amendment procedure is cumbersome.[18] On the other hand, an unwritten constitution is that constitution that is not written or codified in a single document. It encompasses laws of parliament, conventions, customs, rules and regulations. Britain and New Zealand are examples of countries that operate an unwritten constitution. It is flexible and makes decisions quick. Rigid constitution is not easily amended because the procedures for its amendment are embedded in the constitution and such procedures are somewhat cumbersome.[19] Flexible constitution, unlike the rigid constitution is easily amended because there are no procedures enshrined in the constitution for its amendment. It allows the country take easy and quick actions. Unitary constitution concentrates power on the central government. Only one single government has deciding power and does not share such powers with the component units. Britain, New Zealand, Gambia, Sweden are examples of unitary constitution. A Federal constitution is that which devolves powers to the central Government and the sub-nationals. The tiers of government have their various powers spelt out in the Constitution and each in its own sphere, are co-ordinate and independent.[20] Nigeria and the US operate a federal constitution. Confederal Constitution on the other hand, refers to that type of constitution, whereby almost all the powers and functions are reserved for the sub-nationals and important items such as defense and currency are left for the Centre. Switzerland and Senegal are good examples of confederacy. Democratic constitution bothers on the legal and institutional authority of the majority in order to preserve the rights of individuals and the minorities. It embodies sovereignty, majority rule and minority rights and protection, restraint and limitation of government powers, checks and balances, rule of law, etc. In a presidential constitution, the President leads an executive branch that is separate from the legislative branch in systems that use separation of powers. The President signs legislations by the legislature, controls armed forces, etc. A parliamentary constitution is that type of constitution that gives the power to make and execute laws to parliament. An example is Britain and it is the oldest in the world.

Again, the constitutions must be a product of the people which is always by virtue of the elected representatives in parliament or a constitutional conference to that effect. There is no perfect constitution anywhere but a country's constitution must be accepted by the people and it must meet the yearnings and aspirations of the citizenry. Wheare posited that:

> there are circumstances in which it is morally right to rebel, to refuse to obey the constitution, to respect it. A constitution may be the fundamental of law and order in a community, but mere law and order is not enough. It must be a good law and good order. It is conceivable surely that a minority may be right in saying that it lives under a constitution which established bad government and that if all else is tried and fails, rebellion is right no doubt it is difficult to say just when rebellion is right and how much rebellion is right but that it may be legitimate is surely true.[21]

[17] Nigerian Scholars, <https://nigerianscholars.com> tutorials, accessed 25 August 2022.
[18] See, for example, ss.8 and 9 CFRN 1999 (as Amended).
[19] Ibid.
[20] See, Pt. I, 2nd Sch., Pt. II, 2nd Sch. and Pt. III, 4th Sch to the CFRN 1999 (as Amended).
[21] K.C. Wheare, *Modern Constitution* (1966), 64, quoted in B.O. Nwabueze, *Ideas and Facts in Constitution Making*.

4. Constitutionalism

Constitutionalism is a political philosophy based on the idea that government authority is derived from the people and should be limited by a constitution that clearly expresses what the government can and cannot do.[22] Therefore, constitutionalism emphasizes a constitutional restraint on the government or state or institutions in order to ensure the rule of law and liberty of the citizenry prevails. If government must be legitimate, it has to keep faith with the limitations guaranteed by the constitution and it must abide and conduct itself within the ambit of the law establishing such government, otherwise, it will amount to tyranny or totalitarianism. The idea of constitutionalism is synonymous with the tenets of democracy. It connotes liberty, rule of law equity and egalitarian society devoid of tyranny and totalitarianism. The origin of constitutionalism could be traced to the Magna Carta of 1215, when some nobles compelled King John of England to sign a document called the Magna Carta to set out some limits to restrain the king's power. This limited government's power. John Locke, the English intellectual helped to develop social contract theory which states that government itself is a sort of contract between the people and the state, and if the state abuses its power, the people have right to make the contract null and void.[23]

5. Relationship between Constitution and Constitutionalism

Constitution and Constitutionalism are basically the legal framework of any society our country. Both constitution and constitutionalism seek to achieve the objectives of the foundation of a country. The constitution is the supreme law of the land and it establishes the basic structure of government while constitutionalism tends to limit the powers of government and its functionaries through the instrumentality of the rule of law. This is done to protect the fundamental and basic rights of the people.[24] The constitution or any other laws therefore, makes provisions for such restraints or limitations of the powers of the government. The rationale behind this restriction or limitation is that if government is not restrained from its enormous powers, government would become too powerful and oppressive to the citizenry thereby undermining the rights of the people. And the citizens would no doubt suffer drastically if government becomes too powerful without such limitations or restraints.[25] Non-constitutionalism encompasses a system whereby government uses its arbitrary powers without respecting the citizens' rights. Constitutionalism is therefore, the application of the constitution which stipulates how a state should be governed and the protection of the citizens' fundamental rights.[26] The constitution builds a foundation which constitutionalism pursues vigorously.

6. The Goal and Objectives of Constitutionalism

Constitutionalism tends to achieve some goals and objectives in the society by specifying what government can do or cannot do. Some of these goals or objectives are:[27]to ensure that sovereignty belongs and remains with the people; the Supremacy of the Constitution; the rule of law and protection of citizens' rights; enthronement of democracy; representative and limited government; separation of power; independence of the judiciary; that the Police and other Security agencies are restricted by law and under judicial control, judicial review, etc. These goals are briefly adumbrated below.

7. Sovereignty and Democracy

By Sovereignty, it means supremacy of the people, that sovereignty or power belongs to the people. Constitutionalism pursues these goals by ensuring that the citizens retain the right to vote and be voted for. The rights of the citizenry must be protected and they must have including the rights of referendum and recall as the case may be. Nigeria is a democratic nation and the tenets of democracy and an egalitarian society must be maintained by the government at all times. Democracy is about the will of the people and God, therefore, sovereignty belongs to the citizenry in any nation. In *Speiser v Randell*[28] it was held that democracy means 'a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection

[22] N. Sullivan and J. Perry, 'What is Constitutionalism?'–Definition, History & Concept http://Study.com/academy/lesson/what-is-constitutionalism-definition-history-concept.html accessed 22 June 2022.
[23] *Ibid*
[24] See, Chap. IV CFRN 1999 and Pt. I chap I African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act CAP 10.
[25] T.G. Palmer, 'Limited Government and the Rule of Law'< https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th edition-2017/limited-government-rule-law> accessed 1 September 2022.
[26]Difference Between Constitution and Constitutionalism <http://www.differencebetween.net/miscellaneous/piolitics/difference-between-constitution-and-constitutionalism/> accessed 23 June 2022.
[27]Keypoint, 'Major Objectives of Constitutionalism', <https://keypoints.ng/major-objectives-of-constitutionalism/> accessed 5 September 2022.
[28] (1958) 537, U.S 513.

of the rights of all, even the most despised priorities.' Again, in *Yates v United States*[29] a democratic country was described as 'a free government, one that leaves the way wide open to favour, discuss, advocate, or incite causes and doctrines however, obnoxious and antagonistic such views may be to the rest of us'. The 1999 Constitution of Nigeria provides that 'the Federal Republic of Nigeria shall be based on the principles of democracy and social justice. The said constitution further declared that sovereignty belongs to the people of Nigeria from where government through the constitution derives all its powers and authority.[30] The participation by the people in their government shall be ensured in accordance with the positions of the constitution. It follows therefore, that the Nigerian constitution gives power to the people (the citizenry). This is where the people derived sovereignty. A government that does not recognize the people in the scheme of things will becoming very unpopular and such government is bound to fail.

8. Supremacy of the Constitution

Constitutionalism presupposes that the provisions of the constitution are supreme over any other law and even government and its officials. Thus, the 1999 constitution of Nigeria provides that 'this constitution of supreme and its provisions shall have binding force on all the authorities and persons throughout the Federal Republic of Nigeria.[31] In the United Kingdom, Supremacy of the constitution remains with the legislature because parliament can enact any law that is not omnipotent and absolute. But in *Ellen Estate v Minister of Health*, it was held that British parliament cannot pass any law which would have the effort of binding its successor.[32] Supremacy of the constitution entails the rule of law, good governance and the obedience to the sanity of contract which that does not maintain sanctity of contract between her and her citizenry would prevent foreigners from having good relationships with such country, especially in the area of investment. No foreigners(s) would be interested in investing in such countries where the rule of law and the supremacy of the constitution is eroded and understand. Thus, the Supreme Court held that:

> the organic law or grundnorm of the people. It is the formation of all the laws from which the institutions of state derive their creation and legitimacy. It is the unifying force in the nation and it apportions rights and imposes obligations on the people who are subject to its operations. The constitution of a nation is therefore, a very important composite document and its interpretation is subject to reorganize cannons of interpretation, known to law and designed to enhance and sustain the reverence in which constitution are held the world over.[33]

From the foregoing, there is no gainsaying the fact that the supremacy of the constitution cannot in anyway be over-emphasized. And sovereignty belongs to the people (the citizenry) and nothing more.

9. Rule of Law

One cardinal principle of constitution and constitutionalism is to uphold the rule of law. A.V. Dicey categorized the rule of law into three, viz; that the rule of law means absolute supremacy or predominance of the law opposed to the arbitrary or tyrannical rule orchestrated by some leaders. It pre-supposes that a man can be punished for a breach of law. It follows that no matter your status in life, you are subject to the laws and courts of the land. And the third limb of the rule of law is that the rule of all encompasses the fundamental rights and liberty of the citizenry. The rights of the citizenry emanate from the proclamation of the courts consequent upon the law validly made by the parliament. The court held in *Akulega v Benue State Civil Service Commission and Anor* that:

> the endeavor and ability to honour, apply and defend fundamental rights is a yardstick to measure true democracies and the prevalence of the rule of law. Without the rule of law, any profession of or claim to democracy by any state is only a sham. Where fundamental rights are clearly enacted in the constitution, as in Nigeria, the provisions take precedence over all other statues or legislations on the same matters, including any rules or regulations.[34]

[29] (1958) 354 U.S 298, 344
[30] S.14 CFRN 1999 (as amended).
[31] Ibid, s. 1(1)(3).
[32] (1934) 1K.B
[33] *Shosimbo v State* (1974) 10 S.C.
[34] (2002) 2CHR

Chapter IV of the 1999 of the constitution makes provisions for the fundamental rights of the citizenry. Such rights include: right to life;[35] right to dignity of his person;[36] personal liberty;[37] fair hearing;[38] privacy;[39] freedom of expression;[40] freedom of assembly, freedom of movement; freedom of religion and discrimination; ownership of property; etc. Any person who alleges that any of the above rights as enshrined in the constitution has been is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.[41] It must be noted that such rights are not absolute. The State may intervene in principles because the state might contravene an individual's right in one way or the other such as in times of development or during wars. So, overriding public interest might be a reason to undermine the right of an individual to own a land.[42]

10. Representative and limited Government

Constitutionalism embraces representative limited government where the people choose who leads or represents them. In a limited government, the primary leaders have very little governing powers over decisions and laws that are created without approved from other branches or leaders within the government. A representative government connotes an electoral system where citizens vote in periodic elections to elect their representatives in a free, fair and standard election. To orchestrate limitation, therefore, there must be entrenchment of some constitutional constraints which should restrain those in authority of government in order to cushion the effects of arbitrariness on the part of government officials and this must be embedded in the constitution. Those to be limited should never have the leverage to constitutionally be at liberty to change or expunge those limits at their pleasure.[43] Therefore, the amendment of the constitution must be done with the consultation the people because, at all times, sovereignty must lie in the hands of the people.

11. Separation of Power

It is a cardinal principle and one of the tenets of constitutionalism that power should not be concentrated on one man or an arm of government. The 1999 constitution provided for the legislative, executive and judicial arms of government.[44] If power is concentrated on one arm of government, such arm would become too powerful and arbitrary. In *Lakanmi and Others v A.G (Western State) and Ors*,[45] the court held that:

> We must here revert again to the separation of powers, which the learned Attorney General himself did not dispute is skill the structure of our system of government. In the absence of any thing to the contrary, it has to be admitted that the structure of our constitution is based on the separation of powers – the legislature, the executive and the judiciary. Our constitution clearly follows the model of the American constitution. In the distribution of powers the courts are vested with the exclusive right to determine justifiable controversies between the citizens and state.

From the foregoing, it is clear that the doctrine of separation of powers and judicial remedy are very germane in the discourse of constitutionalism. Our democracy rests on three fundamental pillars: the legislature, executive and the Judicial. All must keep within the bounds of the constitution. The judiciary has the task of seeing to it that the legislative and executive actions do not stray outside those boundaries onto forbidden territory. If that occurs and a citizen within standing complains either against the government or an individual, the court declares the trespass and grants appropriate remedies.[46] John Locke was of the view that legitimate government is based on the idea of separation of powers. Locke accepted strict limitations on the faculties of the mind, and his political philosophy is moderate and sensible, aimed at a balance of powers between the legislative, executive and the judicial arms of government. He believes that the goal of government is to secure and protect the God – given inalienable natural rights of the citizenry.[47]

[35] S.33 CFRN 1999 (as Amended).
[36] *Ibid,* S.34
[37] *Ibid,* S.35
[38] *Ibid,* S.36
[39] *Ibid,* S.37
[40] *Ibid,* S.38
[41] Ibid, s.46.
[42] See, Land Use Act 1978.
[43] <Standard Encyclopedia of philosophy.edu/entries/constitutionalism/> accessed 30 June 2022.
[44] See Ss 4, 5 and 6 CFRN 1999 (as amended).
[45] (1971) 1 UIRL201
[46] *Hinds v Queen* (1976) 1 All E.R.
[47] http://academic.oup.com accessed 30 June 2022.

12. Independence of the Judiciary

Judiciary is regarded as the last hope of an ordinary man. It is the third arm of government. This is because where there is right there is remedy (*ubi jus ibi remedium*). Nigeria's judiciary has been a vibrant one even during the era of the military juntas where draconian laws were promulgated.[48] The court is no respecter of persons, it follows that no matter a person's status in life, he is subject to the law and the courts. The judiciary is saddled with the responsibility of interpreting the laws as made by the legislature and the executive. The judicial power of the federation of Nigeria is vested in the judicial courts to which this section relates, being courts established for the Federation.[49] Judicial umpires saddled with this responsibility are therefore, expected to have a deep relation with the provinces of courts in their sacred duty of being an umpire in the settlement of disputes before them. The independence of the judiciary is very critical and goes to underline their effective contributions in the separation of power doctrine. Whenever there is conflict between the legislative and the executive arms of government, such conflicts are settled by the courts which give interpretations to the problems. Constitutionalism propagates independence of the judiciary where a judge decides a matter free from pressures or inducement and freedom of institution as a whole from government or other concentrations of power. It follows that the judiciary must be independent from the other branches of government or from partisan politics. The following principles among other things guide independence of the judiciary:[50]

i. The independence of the judiciary can be achieved when it is entrenched in the constitution.
ii. It is therefore, mandatory for all government functionaries to respect and observe the independence of the judiciary.
iii. The judiciary must be unbiased umpire and must observe absolute impartiality. Inducements, undue influences improper pressure threats or interference from any quarter must be avoided.
iv. The judiciary must determine whether it has jurisdiction over any matter before it.
v. There shall not be any unwanted or inappropriate interference with the judicial process. Courts decisions shall be without prejudice.
vi. By way of duty established procedures of the legal process everyone shall have right to be tried by ordinary courts or tribunals.
vii. The courts must adhere to the fair hearing principles of *audi alteram partem* (you must hear from two parties to a dispute before giving judgment) and *nemo judex incausa sua* (you cannot be a judge in your cause).
viii. Member states are to provide enabling grounds and adequate resources in order to propagate independence of the judiciary.
ix. Judges shall always conduct themselves in such a manner as to pressure the dignity and sanctity of their offices, they shall have freedom to form judges association, etc.
x. Judges should be persons of unquestionable character and must have adequate and appropriate trainings and qualifications in law.
xi. The law must provide for tenure of office of judges, pensions, conditions of service, retirement, etc.

In Nigeria, there are so many problems militating against the judiciary. Such problems include; corruption, delay of cases in court, inadequate judiciary officers, inadequate infrastructure or facilities, disobedience or flouting of court orders by those in authority, conflict of interest, lack of technological-know-how, intimidation of judges, public distrust, problem of law enforcement agencies, favouritism, partiality and nepotism, etc. These problems hamper the smooth delivery of justice in Nigeria and it is submitted that the independence of the judiciary is eroded in the country. This assertion notwithstanding, one may venture to say that the Nigeria judiciary has over the years lived up to expectations in the country. Every country has its challenges but the Nigeria judiciary needs to do more to uphold the sanctity and dignity of the courts.

13. Limitation of Security Agencies by the Law

One of the goals of constitutionalism is that the police and other security agencies should be limited by law. The 1999 constitution provides that the security and welfare of the people shall be the primary purpose of government and the participation by the people in their government shall be ensured in accordance with the provisions of this constitution.[51] The fundamental rights of the citizenry are enshrined in the constitution.[52] The said constitution equally provided that; there shall be police (force) for Nigeria, which shall be established for the federation or any part thereof. The police Act provides thus:[53]

[48] See *Ojukwu v Military Governor of Lagos State* (1986) I NWLR, 621, where the court ordered the then military Governor of Lagoss State to re-instate Ojukwu to his house in Lagos.
[49] S.6 (1) CFRN 1999 (as amended).
[50] Adopted by the 7th UN Congress on Prevention of Crime and Treatment of Offenders held at Milan, 26|8|85.
[51] S.14 (1) and (2) CFRN 1999 (as Amended).
[52] See chap. IV CFRN 1999 (as Amended).
[53] S.4 Police Act, chap. 359 LFN 2004.

> The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which, they are directly changed, and shall perform such military duties within or without Nigeria as may be required by them by, or under the authority of, this or any other Act.

From the foregoing, it is glaring that the Nigeria Police is a creation of the Constitution and its functions are provided for by the law. The police and other security agencies are not debt collectors[54] and they must act within the ambit of the law establishing them. By providing for the duties and responsibilities of the police and other security agencies, the law restricts the security agents from acting ultra vires their purview and the various ambits of the laws establishing them. This is the goal that constitutionalism tends to achieve by ensuring a constitutional restraint on the police and other security agencies. Although, the police and other security agencies have acted against the law and the courts have on several occasions condemned their arbitrary acts as the watch dogs of rights and the sanctuary of the oppressed and will spare no pains in tracking down the arbitrary use of power.[55] Some inhibitions are from the provisions of the constitution and legal interpretations by the courts. In Nigeria, the President of the federation and the governors has rights to contest elections and to be re-elected for the second term.[56] After the second term, they cease to hold such offices.[57] The State government determines the tenure of the Local Government Area Councils.[58] While in office, the holders, such as the President, Governors or Council chairmen cannot be unjustly or illegally removed.

Again, every acts of the executive arm of government are subject to judicial review – court's interpretation. This is to curtail the excuses of the executive arm of government in the course of implementing or executing laws, policies and programs of the government.[59] A state legislature cannot enact a law that would conflict the provisions of a federal law.[60] And the powers and functions of the President, Governors, Chairmen and the National Assembly are entrenched in the constitution, just as the constitution enjoins the President and the Governors to carry out federal character in all its appointments.

Also, the judicial power is vested in the courts of the land. There is one Supreme Court, Courts of Appeal, High Courts, National Industrial Court and other courts established by various states, such as Magistrate Courts, Area Customary Courts, *Sharia* Courts, Revenue Courts of a state, etc. In determining the rights of the citizens, the courts must ensure fair hearing to the citizens,[61] a person charged with criminal offence shall be presumed innocent until the contrary is proved.[62] A person who claims that he had been tried on a particular offence cannot be tried again on the same offence.[63] A person who has been pardoned cannot be tried on the same offence.[64] Except an offence is defined and the penalty therefore is prescribed in a written law, a person cannot be convicted on such offence.[65] There is also the provision for separation of powers in the constitution[66] and each and every arm of government must perform its duty separately but should act as a check to one another. And any enactments by the National and State Assemblies are subjected to the jurisdiction of the courts and both the National and State legislatures shall not enact a law that would oust the jurisdiction or power of the courts. In legislating on criminal matters, both the National and State legislatures shall not in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.[67]

14. Judicial Review

Constitutionalism accommodates judicial review as another constitutional means of restraining or limiting governmental powers. Judicial review entails the power of the courts when called upon to make a declaration either validating or invalidating the constitutionality or otherwise of a legislative or executive act and even judicial

[54] See in *Re-G.B. Olowu* (1971) 2 All NLR 147, 152; *Ken Mclaren and Ors v Jennings* (2003) 5 FNLR 107 at 114.
[55] See *Enechukwu v Mishark Udeagha and Anor* (1980) I PLR 432.
[56] See Ss 130, 176, 183, 185, 188, 189.
[57] *Ibid* s. 135
[58] See Ss 7 and 8 CFRN.
[59] *Ibid,* S.4(8)
[60] S.4(5) CFRN
[61] *Ibid* Ss. 36(1)
[62] *Ibid* Ss. 36(5)
[63] *Ibid* Ss. 36(9)
[64] *Ibid* Ss. 36(10)
[65] *Ibid* Ss. 36(12)
[66] Ss.4, 5 and 6.
[67] S.4 (9) CFRN 1999

act. It is a constitutional power, thus, in *A.G. Bendel State v A.G. Federation*,[68] the Supreme Court of Nigeria, per Fatai–William (CJN), after reviewing the provisions of sections 54, 55 and 58 of the Constitution of the Federal Republic of Nigeria 1979, held that until the two Houses sitting either separately or jointly as the case may be, passed the Allocation of Revenue (Federation Account etc.) bill into law, it was not a bill passed by the national assembly and the President could not therefore, assent to it as required by the constitution. The court stated thus:

> In my view, a legislature which operates a federal written constitution in which the exercise of legislative power and its limits are clearly set out has no power to ignore the conditions of law making that are imposed by that constitution which itself regulates its power to make law. I am therefore, unable to accept the proposition that such National Assembly, once established, has some inherent power, derived from the mere fact of its establishment, to delegate or transfer to its joint Finance Committee… its exclusive constitutional power to make a valid law.

Chief Justice Marshall of the U.S also held in *Marbury v Madison*[69] while answering the question whether an Act repugnant to the constitution can become the law of the land, stated thus: 'Certainly, all those who have framed written constitutions contemplates them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an Act of the legislature repugnant to the constitution is void.' The legislature has no power to prevent the courts from inquiring into its acts.[70] Judicial review tends to act as checks and balance in the principle of separation of power. The judiciary has power to supervise the activities of the legislative and executive arm of government and even the judicial arm too. The court is saddled with this responsibility by the constitution.[71] Brien[72] stated thus:

> Judicial review is one of the greatest and most controversial contributions of the constitution to the law and politics of government. In the course of constitutional politics, judicial review has come to be the power of the judiciary to consider and over turn any legislative or other official governmental action deemed inconsistent with the constitution, bill of rights or (other law).

In any society, the judiciary is primarily responsible for the determination of the civil rights and obligations of every citizen. The courts have the power to ensure that all laws, actions, decisions and policies of government and its agencies are acceptable in the view of the constitution and all valid laws. Judicial review is part of the inherent supervisory jurisdiction of the courts, particularly the High Court, over the proceedings and decisions of inferior courts and tribunals and also acts of governmental bodies.[73] Thus, in *Amadi v Acho*,[74] the Court of Appeal held as follows:

> Judicial review or call it judicial control, primarily and practically means review and it is founded on a fundamental principle inherent throughout the legal system, that powers can be validly exercised only within their true limits. Indeed, it is a fundamental mechanism for keeping public authorities within their bounds and for upholding the rule of law.

The Supreme Court of Nigeria, per Ogundare JSC restated some principles that guide judicial review as follows.[75]

> In relation to matters within a public body's field of judgment, the court conducts its review from the body's stand point and must not intervene solely on the basis that it would itself have acted differently. The following principles are to be borne in mind by a reviewing court:
>
> (a) Judicial review is not an appeal;
> (b) The court must not substitute its judgment for that of the public body whose decision is being reviewed;
> (c) The correct focus is not upon the decision but the manner in which it was reached;
> (d) What matters is the legality and not correctness of the decision.

[68](1983) 6.S.C 8.
[69](1803) 5.U.S (Granch) 137, L. ed. 60.
[70]S.4 (8) CFRN 1999 (as Amended).
[71]Ibid, s.6 (6) (b).
[72] D. O' Brien, '*Constitutional Law and Politics, Struggles for Power and Governmental Accountability' vol. 1*(USA: Norton and Company 1999), 24.
[73]Ibid, 203.
[74](2006) All FWLR (Pt. 334), 1949, 1960.
[75]*Governor, Oyo State v Folayan* (1995) SCNJ 50, 83.

The court does not as a matter of fact review the procedures, decision or actions of inferior courts or tribunals and government agencies or officials for no just cause. For the court to review such decisions, the followings must be considered: the legislature must have acted in excess of its power;[76] government functionaries must have acted *ultra vires* (beyond) their power;[77] there must be breach of rules of natural justice (fair hearing – *audi alteram partem* and *nemo judex incausa sua*)[78], meaning parties must be heard before judgment is given and one cannot be a judge in his own cause) respectively; where there is non-compliance with any law or the Constitution,[79] etc. However, the Supreme Court of Nigeria refused to grant an application for a judicial review in *Ihedioha* & *Ors v Uzodinma & Ors.*[80] The applicants had approached the apex court, seeking a review of its judgment that removed *Ihedioha*, a former governor of Imo State from office. Six out of the 7 justices of the apex court led by the Chief Justice of Nigeria (CJN), *Tanko* Muhammad, dismissed the application on the ground that the court could not reverse itself. The apex court further held that revisiting its judgment of 14 January 2020, would open the floodgate of similar applications. The court stated that the application was on appeal over its own final judgment. The court added that the finality of the Supreme Court is inherent in the constitution and to ask the Supreme Court to set it aside means an appeal for the apex court to sit on its own decision, which they have no jurisdiction. Nonetheless, a member of the panel, Justice Chima Centus Nweze, in a dissenting judgment, held the 14 January 2020 judgment that sacked Ihedioha as a 'wonder that shall never end', adding that the apex court should exercise its inherent jurisdiction and redeem its image by reviewing the judgment delivered on 14 January 2020. The learned Justice stated that until the judgment is reviewed and set aside, it would continue to haunt the nation's electoral jurisprudence. The learned justice further stated that in the interest of justice, the court had a duty to set aside the judgment that was given in error.[81]

Nonetheless, in *Oriker Jev & Ors v Lyortom & Ors*,[82] the Supreme Court of Nigeria had in an earlier ruling mistakenly ordered that Independent National Electoral Commission (INEC) should conduct rerun election, but upon an application for review, the apex court discovered sequel to wrong interpretation of section 133 (2) in conjunction with section 141 of the Electoral Act 2010 (as amended) and consequently set aside the earlier ruling and ordered INEC to issue the applicant a Certificate of Return. Also, in *Olurunfemi v Asho*,[83] where the Supreme Court on 18 March 1999, set aside its earlier judgment delivered on 8 January 1999 and ordered the appeal to be heard *de novo* by another panel, on the ground that it ought to have considered the respondents' appeal. Again, in *Stanbic IBTC Bank PLC v L.G.C Ltd*,[84] the Supreme Court of Nigeria inter alia held that it can set aside its own judgment under the following conditions:
(i) Where there is a clerical mistake in the judgment or order;
(ii) Where there is an error arising from an incident, slip or omission;
(iii) Where there arises the necessity for carrying out its own meaning and to make its intentions plain;
(iv) When any of the parties obtain judgment by fraud or deceit;
(v) Where such decision is a nullity;
(vi) Where it is obvious that the court was misled into giving the decision under a wrong belief that the parties consented to it;
(vii) When judgment was given without jurisdiction;
(viii) Where the procedure adopted was such as to deprive the decision or judgment of character of a legitimate adjudication;
(x) Where the writ or application was not served on the other party or there is denial of fair hearing;
(xi) Where the decision is contrary to public policy and will perpetuate injustice.

It is glaring from the above cited cases that the Supreme Court of Nigeria with the greatest respect to their Lordships has inherent power or jurisdiction to review its previous judgments or decisions. Their Lordships are humans and could make mistakes or err from to time but when the opportunity comes for them to correct themselves, they should utilize such opportunities in order to restore the dignity and sanctity of the court or judiciary. This work agrees with the dissenting judgment of Justice Nweze which reviewed the apex court's decision as it was basically in tandem with the principles of law and constitutionalism. It must also be noted that

[76]*Doverty v Balewa* (1961) All NLR 604. See also, *A.G. Ogun State v Abemagba* (1985) 1 NWLR (Pt. 3) 395.
[77]*Okonkwo v Public Service Commission of Anambra* (1981) 1 PLR @ 359; *Ugwu v A.G. East Central State* (1975) E.S.E.L.R @ 264
[78]*Aideyan v A.G. Bendel State* (1989) 4 NCLR @ 646.
[79]*Ibid*.
[80]APP. NO.SC.1462/2019 and CR. APP. NO.SC. 1470/2019.
[81]<https://www.thenigerianvoice.com/amp/news/285686/ihedioha-v-uzodinma-supreme-court-dismisses-ihedioha-im/>, accessed 3 April 2021.
[82](2015) NWLR (Pt. 1483), 484.
[83](2000) 2 NWLR (Pt. 643),143.
[84] (2020) 2 NWLR (Pt. 1707) 1.

the same Supreme Court had held that it is better to admit an error than to preserve an error.[85] However, the court must thread with caution in carrying out a review of its previous decision; it must be noted too that there is a difference between a court reviewing its previous judgment and overruling itself.

15. Conclusion and Recommendations

The limitation of government power is a necessity in a democratic setting otherwise there would be tyranny and arbitrariness on the part of the government. There is no gainsaying the fact that government is the power structure of a society.[86] This is the first and most important fact about the political agency, that it has the legal authority to coerce.[87] Again, it is necessary to inquire whether the power wielded by government is self-sprung, or delegated by a more comprehensive authority than political.[88] Does government derive its function or rule by divine right or power; or is the government power loaned to government?[89] This article is of the view that government power is loaned to government to hold in trust for the people. Again, the constitution establishes the social contract between the people and government. Government therefore is subject to the people and the constitution and not the other way round. Thus, in *Elelu-Habeeb & Anor. v A.G. Federation & Ors,*[90] the Supreme Court of Nigeria held that the constitution will not give a right with one hand and remove such right with another hand. The tenet of constitutionalism is to limit the powers of government in accordance with the provisions of the constitution; it is to ensure that government functions within the ambit of the constitution and rule of law. Government itself is a product of the people and ought to be subjected to the rule of law and have absolute respect for the people. The need to restrain government in its day to day activities cannot in any way be over-emphasized in order to prevent tyranny, arbitrariness or abuse of powers conferred on government. The imbroglio bedeviling the smooth practice and propagation of the concept of constitutionalism in Nigeria and other African countries includes among other things, disobedience to court orders, impunity, nepotism, favouritism among the leaders and corruption which has eaten deep in the fabrics of so many Nigerians and Africans. All these have become an albatross to effective implementation and propagation of the tenets of constitutionalism. Again, it must be stated that the 1999 Constitution of Nigeria wielded so much power on the President and Governors of the States of the federation and also immune them from criminal prosecution while in office.[91] Having deliberated on the tenets of constitution and constitutionalism above, this article recommends as follows:

1. That the executive powers of the President of Nigeria and the Governors as enshrined in the constitution should be reduced and subjected to law.
2. The provisions of the constitution relating to the immunity of the President and Vice-President, Governors and their deputies, should be expunged from the Constitution in order to give way for the rule of law to thrive.
3. There should be established Constitutional Courts saddled with the responsibility of entertaining Constitutional matters or causes in each and every States of the federation and the court must take the bull by the horns and ensure that justice is not only done but must be seen to have been done when called upon to so do and be fair and articulate in taking decisions in causes or matters before them no matter whose ox is gored in the society.
4. Also, Government functionaries, including security agents who abuse their power or tramples on the fundamental rights and liberty of the citizenry should be made to be personally liable and pay for such breaches if found liable by the courts.
5. Again, the procedure for the amendment of the constitution should be made less cumbersome in order to embrace change and meet modern day realities and international best practices and standards as the society progresses.
6. The principle of separation of powers should be properly adhered as entrenched in the Constitution in order to guarantee adequate check and balances that an ideal society deserves.

[85]See *Adegoke Motors v Adesanya* (1983) 3NWLR (Pt.109) 250 @ 274.
[86]E.A. Opitz, 'Constitutional Restraints on Power' <https://fee.org/articles/constitutional-restraints-on-power>/ accessed 22 August 2022.
[87] *Ibid.*
[88]*Ibid.*
[89]*Ibid.*
[90](2012) LCN/3983 SC.
[91]S. 308 CFRN (as Amended).