

HUMAN RIGHTS AND DEMOCRACY [IN NIGERIA]: AGENDA FOR A NEW ERA



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"A nation is therefore the expression of a great solidarity, constituted by a feeling for the common sacrifices that have been made and for those one is prepared to make again.... Nations are not something eternal. They have begun, they will end.... At the present time, the existence of nations happens to be good, even necessary."¹

-Chidi Anselm Odinkalu

INTRODUCTION

It is difficult and frustrating to commit to the pursuit of ideas in a political economy in which leadership is usually the prize conferred for freedom from ideas. The founders, trustees and management of AfriHeritage (the African Heritage Foundation) deserve abiding gratitude for their stubborn commitment to this course and, even more, for locating elevating their horizon beyond geographic limitations and explicitly pursuing a Pan-African vision. In the Big Ideas Podium, AfriHeritage provides a continuing convening for dialogues that should connect thought leadership with policy making.

The privilege of the Podium on this occasion is both humbling and challenging – humbling because the previous speakers on the podium have usually paraded a distinction that I am unable to compete with nor match; and challenging because the subject matter on this occasion is one that does not necessarily lend itself to coherent

¹ Ernest Renan, *Qu'est-ce qu'une nation?* (1882), cited in T. Baycroft, *Nationalism in Europe, 1989-1945*, 32 (1998)

policy analysis without descent into controversy. The theme I have been requested to address is **Human Rights and Democracy: An Agenda for a New Era**.

I assume for present purposes that the organisers have framed this theme against the background of the conclusion of Nigeria's 2019 general elections and the impending inauguration of those who have been declared winners for executive offices at federal and state levels into office on 29 May 2019. That, presumably, is the "new era". There are presently pending, about 766 petitions filed against the result announced by the Independent National Electoral Commission (INEC) in those elections.² These include four petitions against the presidential election when in 2015 there was none. This number of election petitions in 2019 compares with 769 filed in 2011. There is one substantial difference though – in 2011, the INEC had less than nine months to deliver an election without the infrastructure for doing so. Yet they were able to cut election petitions by 35% from 86.5% of all results in 2007 to 51.4% in one election cycle.⁴ By contrast, the INEC in 2019 has grown election petitions from about 45% in 2015 to 51.4% in 2019. In my opinion, there is a relationship of inverse proportionality between the quantity of election petitions and the credibility of elections. The more credible elections are, the less the enthusiasm of candidates to contest their outcomes and the less the appetite of the general public for such contests.

Despite legitimate questions about election credibility, we will accord the outcomes announced by INEC in 2019 presumptive legitimacy for present purposes. This is a shaky, yet necessary, foundation for the "new" era. Elections are, of course, a major event on the

² Ade Adesomoju, "Election Petitions Rise to 766 as 77 Tribunal Panels Get Set for Hearing", *The Punch*, 23 April 2019, available at <https://punchng.com/election-petitions-rise-to-766-as-77-tribunal-panels-get-set-for-hearing/> ⁴ National Human Rights Commission, *An Independent Review of Evidence of Gross Violations of the Rights to Participate in Government, To Public Service and to Fair Trial Through the Election Petition Process in Nigeria 2007 and 2011: Final Report*, para 1.18, p. 15 (2015)

calendar of democracy and the exercise of franchise, which is their hallmark, is a signal human right. On the back of this human right as exercised in Nigeria on 23 February and 9 March 2019, the search for an agenda to for this era could be interesting.

It would be useful at the outset to sketch my argument at this session of the Podium. Democracy, is a continuing festival of civic life. In reality, it is not meant to be an event but a process of renewing and improving both the processes of a dynamic society and of outcomes for its people. Those outcomes should include better protections for the human rights of a people. At any point in time, therefore, the sum of a country's processes and outcomes should reflect the health of its civic and institutional wellbeing as well as coexistence. In effect, democracy and human rights are meaningless outside the context of communities and countries (nations). If anything, the state of Nigeria in 2019 advertises the extreme fragility of our communities and country. Underlying structural trends point to exceptional perils to national stability and coexistence. In these circumstances, a new era must acknowledge growing challenges to the sustainability of the notion of Nigeria. Without this acknowledgement, the ideas of democracy and, indeed, of Nigeria could both be in great peril.

2. MEDIATING MULTI-DIMENSIONAL POLARITIES: IN SEARCH OF OUR BIG IDEA

The framing for this session of the Podium arguably departs from many that have preceded it, and forces us to seek resolution of three ideas which appear beguilingly inter-dependent at first sight but are in reality at odds with one another. These are the concepts of democracy, human rights and a country, or, for more specific purposes, the notion of a nation. A conversation about these is defined by a multiplicity of inherent polarities and tensions.

The first is the tension, as will become evident shortly, between democracy and human rights in the mutual contradiction between legitimacy, majoritarianism, normativity and the scale implicit in the geo-spatial assumptions that underpin their implementation. Populist authoritarianism fancies itself as an expression of the will of the majority, shorn of any need to respect human rights generally or protect the minority. Populism of this sort is often a threat to itself.

The second is the tension between the assumptions of internal and civic agency implicit in the practice of democracy and the exercise of human rights on the one hand, and the reality of historical externalities that continue to characterize and define the political economies of African countries on the other.

The third, of necessity, is the tension between the logics of democracy and human rights on the one hand, and the logics of international commerce on the other, which increasingly impinge on and determine both the exercise and outcomes of the former. For example, technology behemoths, like Facebook and Twitter, quite apart from natural resources multi-nationals whose influence was already more well-established, are themselves big subjects of human rights guarantees (such as free expression) as well as determinants of democratic outcomes in many countries, including Nigeria.³

There is a fourth tension between democracy and human rights on the one hand and national and regional stability on the other. This is all the more intense now in the world of asymmetrical forces and populisms. Increasingly, it seems evident that externalities are making choices about primacy between these various variables and, in many cases, they seem to find both the lives of Africans and the legitimacy and authority of our governments and states expendable. At the beginning of May 2019, the Economist

³ See, Rafael Behr, "How Twitter Poisoned Politics", Prospect Magazine, Oct, 2018, p.18

wryly observed that “the threat of jihadism has prompted some Western governments quietly to stop promoting democracy in Africa, just as during the cold war, when they propped up awful regimes if they were anti-communist. A similar approach seems evident now: almost any ruler who is anti-jihadist can seem a suitable ally.”⁴

Underlying all these issues, finally, is the reality that all these require a capable or viable state system that is politically numerate. In many ways, that state system must mediate the reconciliation of all these polarities. Yet, states are unevenly evolved across geographies. Indeed, the Nigerian state itself is unevenly evolved even within Nigeria. This, in itself, is a source and guarantor of inequalities, which in turn breed tensions of their own and undermine the authority of the state to protect everyone within its borders equally. The result as we see now is the proliferation of violence. As Hannah Arendt points out, “no one engaged in thought about history and politics can remain unaware of the enormous role violence has always played in human affairs, and it is at first glance rather surprising that violence has been singled out so seldom for special consideration.”⁵

A capable state as posited here is one that should be able to account for at least three ideas:

- The idea of political numeracy, without which there can be no democracy
- The idea of legitimacy without which nations are mere notions and government struggles to distinguish itself from a band of brigands; and □ The idea of political values, which must constrain the exercise of power.

⁴ “The New War on Jihadism: The West’s New Front against Jihadism is in The Sahel”, *The Economist*, 2 May 2019, available at <https://www.economist.com/middle-east-and-africa/2019/05/04/the-wests-new-front-againstjihadism-is-in-the-sahel>

⁵ Hannah Arendt, *On Violence*, p. 8 (1969)

Additionally, in this digital age, the idea of civic manners which underpins and mediates political competition and coexistence must continue to receive some attention. These ideas require modest elaboration in order to understand their relevance to our current inquiry.

(a) Democracy, Counting and Accounting: The Idea of Political Numeracy

Democracy is the human and institutional mechanics of quantities and itself is an interactive and iterative enterprise – interactive because it is between people and their communities and iterative because its practice should improve with periodic repetition. This is why it is political too. Emeka Odumegwu-Ojukwu would say of democratic politics that it is “the game of the possible played by optimists.... Politics is the science of leverage and leverage depends on numbers. Therefore, one cannot expect much from politics if one does not have the requisite numbers.”⁶

Three processes are essential to the effective functioning of both democratic politics and political economy. These are the processes of:

- (a) legitimating public power (elections);
- (b) quantifying the demographic coverage/composition of the country (census); and
- (c) estimating and distributing the commonwealth (public accounts, including revenues and appropriations).

These three inter-related processes – elections, demography, and public accounts - rely on the basic skills and institutions of honest policy numeracy. In elections, this

⁶ Emeka Odumegwu-Ojukwu, *Because I am Involved*, Ibadan, Spectrum Books, p.185(1989)

involves the counting of and accounting for votes and the conferment of a mandate usually on the persons with the greatest number of counted votes. In a census, we count and account for the people, which in turn helps to determine the bases for allocation of representation, social services, revenue and sundry public goods. In the management of public accounts, we count and account for the size of the commonwealth, so as to know exactly the pool of resources that those who have the legitimate mandate through elections can distribute for the benefit of those that we have counted.

The rationales for these and relationships between them are obvious. Through the votes validly counted, government acquires its legitimacy to rule; through the census, it knows the number of people it needs to cater for and among whom the resources need to be distributed; and in the public accounts, it knows what it needs to manage in the interest of these people. Democratic politics is about acquiring the legitimate exercise of power over the commonwealth/public accounts for the benefit of the people.

The proper conduct of these three signal foundations of democratic governance in a modern political economy requires the articulation of a coherent national interest, norms of political ethics and values, and an infrastructure of capable state institutions to underpin them.

That infrastructure is built on three values, which I will explain briefly. Theoretically at least, the dispersal of power within the institutions and processes of democratic government should constrain possibilities for venality. The accompanying protection of civil liberties and human rights should make for open and transparent government and provide a check on abuse of power. Competitive politics under-pinned by periodic renewal through elections of the mandate to govern should reward politicians with a credible record of protecting the public resources and interest. Together, these three occurrences – dispersal of power, kinetising the institutions of accountable government,

and competitive electoral politics for periodic renewal of government's mandate – are essential elements of democratic government. But if you can acquire power or win without counting, then why bother with any accounting? Paul Collier explains how not counting votes properly can undermine accounting:

If politicians can still face a reasonable chance of winning without bothering to deliver good performance, then....the sort of people who seek to become politicians will change. If being honest and competent does not give you an electoral advantage, then the honest and competent will be discouraged. Crooks will replace the honest as candidates. ...Evidently, one reason elected office is more attractive to criminals than to the honest is that only the criminals will take advantage of the opportunities for corruption. But there is a further reason: elected office provides immunity from prosecution.⁷

The stability of a polity is, therefore, founded on a tripod of three values: legitimacy, accountability, and capacity. To explain briefly, the legitimacy or credibility of the government is essential for its authority, revenue generation and service delivery. Credibility is a function of both the nature of its electoral legitimacy or mandate, and government's fidelity to the norms of political behaviour (counting). This is founded on effective civics. Illegitimate government is not accountable and lacks the authority to deliver anything. In nearly six decades of Independence, Nigeria has yet to hold uncontroversial census. To legitimize the outcome without addressing the underlying malfeasances, we establish census tribunals. In the same period, the country has struggled with public accounts. For its ills of accounting innumeracy, Nigeria has invented everything from coercive instruments to commissions of inquiry whose reports have never been seen.

⁷ Paul Collier, *Wars, Guns and Votes: Democracy in Dangerous Places*, p. 27 (2009)

It is not surprising that the country is now reaping whirlwind. The logic is clear: Political innumeracy has inflicted on Nigeria a succession of mostly regimes with neither legitimacy nor capacity. Lacking the kind of political authority that is the predominant currency of trade in a democracy, nor any incentive to protect people whose votes they did not need to come to power, these regimes have operated like expeditionary missions, relying mostly on cynical indifference where possible and on coercive violence where necessary. A multi-faceted blowback has occurred in the form of a multidimensional assault on the presumptive claim of the Nigerian state to a monopoly of the instrumentality of violence. Structural accelerators including demographics, governance failures, a political economy of rent and now, worsening climate change, among others, have contributed thereafter to give this logic of violence a life of its own, increasingly putting in peril the existence of the very notion of Nigeria.

(b) Democracy: The idea of Legitimacy

Let us turn to democracy. Democracy has both procedural and substantive dimensions. Elections are an essential and even constitutive process of democracy. Elections matter because they are the moment and mechanism through which the people express their preference for whom they wish to be governed by and under what programme. In Article 21(3), the Universal Declaration of Human Rights declares this a right and affirms that “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Article 13 of the African Charter on Human and Peoples’ Rights guarantees the right of the people participate in constituting their government and choosing their leaders.

How they do so is increasingly governed by law, including international law and, in Africa, by the African Charter on Democracy, Elections and Governance (ACDEG). African States parties to this Charter, such as Nigeria, agree to periodically hold “transparent, free and fair elections.”⁸ The ECOWAS Protocol of 2008 also uses the same formula.⁹ The Charter does not say what these standards mean and appears to leave it to experience to work out its meaning. This enterprise is often left to election management bodies (EMBs), such as the INEC and to courts who often settle the outcomes of our elections without regard to any principles except expediency. As I have pointed out elsewhere:

Every election cycle in Nigeria has three seasons. The campaign season belongs to the parties, the politicians and their godfathers. This is followed by the voting season, during which the security agencies and the Independent National Electoral Commission (INEC) hold sway. Thereafter, matters shift to the courts for the dispute resolution season, which belongs to the lawyers (mostly Senior Advocates of Nigeria, SANs) and judges. Democracy may be about choices and decisions by citizens in theory. As practised in Nigeria, however, what is clear from these three seasons is that there is very little room in it for the average citizen. If they is anything, citizens are mostly spectators.¹⁰

⁸ African Charter on Democracy, Elections and Governance, Article 17

⁹ ECOWAS Protocol on Democracy and Good Governance 2001/2008, Art. 1

¹⁰ Chidi Odinkalu, “Nigeria’s Judges: Getting Set to Cast the Final Votes of the 2019 Elections”, Premium Times, 17 August, 2019, available at <https://opinion.premiumtimesng.com/2019/08/17/nigerias-judgesgetting-set-to-cast-the-final-votes-in-the-2019-elections-by-chidi-odinkalu/>

A leading African scholar has been forced to observe that courts and EMBs on the continent generally, and in Nigeria particularly, have habitually failed to realise that the question of who should lead a country “is not one to be decided by a perverse and narrow legalism, by the technicalities of the rules of evidence, practice and procedure and by considerations of expediency. The national interest involved in the question is much too serious and fundamental to be left for determination by such factors.”¹¹

There is an assumption that “transparent, free and fair” are one continuum with peace, coherence and credibility in election management. Yet, clearly, an election may be peaceful without being credible. To excuse elections attended by the peace of the graveyard, some people will argue that you can only get away with rigging where you are strong. But it must baffle all but the stiff-necked partisan why anyone needs to rig where they are supposedly strong. In reality too, transparent doesn’t always equate to free or fair for it is indeed possible to have transparent rigging or electoral manipulation. This is evident in the jurisprudence of election dispute resolution from different parts of Africa.

In *Kizza Besigye v. Electoral Commission & Yoweri Museveni*,¹² for instance, Uganda’s Supreme Court found that there was non-compliance with the provisions of Uganda’s constitution through the disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote; that the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country; that the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas; and that

¹¹ Ben Nwabueze, *Judicialism and Good Governance in Africa*, 176 (2009)

¹² *Kizza Besigye v. Electoral Commission & Yoweri Museveni*, Presidential Election Petition 01 of 2006, Supreme Court of Uganda, [2007] UGSC 24

the counting and tallying of results had been compromised. Yet, the same court upheld the result of Uganda's 2006 Presidential election.

In Nigeria, the Electoral Act of 2006 empowered the election tribunal to nullify an election for, among other things, non-compliance with the Act,¹³ and went on:¹⁴

An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that non-compliance did not affect substantially the result of the elections.

Following the 2007 general elections, the Nigerian Supreme Court was invited to determine what these "principles" were.¹⁵ The majority of the Court in their decision complained that the word "principles" in this provision was "vague, nebulous and large" as well as confusing,¹⁶ and declined to affirm any principles governing elections. In seeking to explain this failure in his lead opinion for the majority, Niki Tobi JSC, himself a former law professor and dean of a leading law faculty in Nigeria, pleaded: "I am confused....I should therefore blame my lack of adequate knowledge."¹⁹ Without moorings in principles, the Court decided that there was no problem with organizing an election with non-serialised ballot papers. In so doing, it missed an opportunity to set a tone that would govern the conduct of all involved in elections and legalized ballot contamination. This was rather surprising because in 1983, the same Court had affirmed that "the essence of democratic elections is that they be free and fair and that in that

¹³ Electoral Act, 2006, Section 145(1)(b)

¹⁴ *Ibid.*, Section 146(1)

¹⁵ *Muhammadu Buhari v. Independent National Electoral Commission & 4 Others*, (2008) 12 S.C. (Pt. 1), 1,

¹⁶ *Ibid.*, p. 78 ¹⁹

Ibid.

atmosphere of freedom, fairness and impartiality, citizens will exercise their freedom of choice of who their representatives shall be by casting their votes in favour of those candidates who, in their deliberate judgment, they consider possess the qualities which mark them out as preferable candidates to those others who are contesting with them.”¹⁷

By contrast, in Kenya’s 2017 presidential elections, the Supreme Court of Kenya determined that non-compliance with the provisions of Kenya’s election laws governing the transmission of results were sufficient grounds to hold that the elections failed to comply with the general principles governing elections.¹⁸ The Kenyan Supreme Court helpfully listed the standards applicable principles governing elections to include:

integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.¹⁹

The assumption at first sight, therefore, is that democracy and human rights are both sides of one coin. Where the former is assumed to provide the foundation, the latter defines the content and substance of the former. This presumed inter-dependence of democracy and human rights is ritualized in legal lore, including provisions of major human rights treaties. In addition, for instance, section 45(1) of Nigeria’s constitution requires that political rights, such as freedoms of expression, information, assembly, and association can only be limited by laws “reasonably justifiable in a democratic society,” a

¹⁷ Ojukwu v. Onwudiwe, 3 Election Petition Reports, 850 at 892 (1983)

¹⁸ Raila Odinga v. IEBC, Presidential Petition No. 1, 2017, Supreme Court of Kenya, 20 Sept 2017, available at <http://kenyalaw.org/caselaw/cases/view/140716/>

¹⁹ Ibid. para 200

formulation that was borrowed from the European Convention on Human Rights. This kind of provision assumes not only that there is some form of consensus on what a democracy is but also that there is normative agreement on what is reasonably justifiable within it. Able theorists, policy makers and judges have wrestled with the difficulty of what a democratic society should look like. Grappling with this formulation, the European Court of Human Rights identified “pluralism, tolerance and broadmindedness” as some hallmarks of a democratic society.²⁰ The predominant view in political theory is that democracy protects the majoritarian imperative in constituting government. This runs up against the legal theory that “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail.”²¹ Human rights are supposed, in some form, to animate the hubris of the majority, ensuring that the minority are protected. While, therefore, democracy can be a legitimating practice, human rights are essentially normative. Before addressing this normativity of human rights, it is necessary to dispose of another element of democracy.

(c) Human Rights: The Idea of Political Values

Human rights in and of themselves suggest the existence of a state in search of values to underpin the exercise of power. Moisés Naím describes power for this purpose as “the ability to direct or prevent the current or future actions of other groups and individuals.”²² Okwudiba Nnoli in turn theorises “political” power as involving “all human

²⁰ Handyside Case, Judgment of 7 Dec, 1976, Ser. A, No. 24, EHRR, 737 at para 49.

²¹ Young, James & Webster v. The United Kingdom, European Court of Human Rights, Judgment of 26 June 1981, para 63.

²² Moisés Naím, *The End of Power: From Boardrooms to Battlefield and Churches to States, Why Being in*

activities that concern the use of state power, consolidation of state and seizure of state power."²³

The exercise of state power is itself connected to questions of values and legitimacy. In this connection Mahmud Tukur argues that legitimacy is indeed one of the constitutive characteristics of a State.²⁴ He defines legitimacy as "a sense of justification for the exercise of power and the acceptance by the people of a specific polity and system of rule. The conception both flows from and reinforces notions of social solidarity and integration."²⁵ Okey Ekeocha for his part explains that:

States, therefore, do not simply pursue power; they pursue a variety of ends that are dictated by the concepts of legitimacy. Such concepts act as powerful constraints on the pursuit of power for its own sake and those states which disregard consideration of legitimacy do so in (sic) their own peril.²⁶

It seems essential, therefore, to begin by acknowledging that human rights are part of a state system and have intrinsic worth in and of themselves as well as consequential dimensions in legitimising the state and constraining exercise of power within it.²⁷ With reference to the former, human rights are based on certain intrinsic attributes of our shared humanity which the law clothes with legal consequences. These different

Charge Isn't What it Used to Be, New York, Basic Books, p. 16 (2013)

²³ Okwudiba Nnoli, *Introduction to Politics*, Lagos, Longman Nigeria Ltd., p. 80 (1986)

²⁴ Mahmud Tukur, *Leadership and Governance in Nigeria: The Relevance of Values*, 49 Abingdon, HudaHuda/Hodder & Stoughton, (1999)

²⁵ *Ibid.*, 50

²⁶ Okey Ekeocha, "The Reality of State Power" in Madubuchi Dukor, ed., *Philosophy and Politics: Discourse on Values, Politics and Power in Africa*, Lagos, Benin, Ibadan, Jos, Oxford, Malthouse Press Ltd., 15 at p. 19, (2003)

²⁷ Amartya Sen A., "Human Rights and Economic Achievements", in Bauer J.R. & Bell D.A eds., *The East Asian Challenge for Human Rights*, Cambridge, Cambridge University Press, pp 88, 99, (1999).

dimensions begin with the nature of the concept of human rights itself. The intrinsic nature of human rights underpins its universal appeal. This is different from the particular cultural context in which these rights are framed or drafted as norms in law. The framing of human rights in particular sources of positive law in different legal systems should not be conflated or confused with the integrity of the concept. Human beings and their communities enjoy human rights. If or when the fulfilment of these rights is threatened, enforcement or implementation machinery whose jurisdiction is geo-politically defined may be needed to secure their enjoyment.²⁸ In international law, the primary obligation to guarantee the conditions for the enjoyment human rights lies with the state but the state is not the only level at which activity may be mobilized for the protection of these rights.

Against this background, it is the case that there is somewhat of an uneasy tension between the 'human' and the 'rights' in the concept of human rights, for while "human" may be a deontological concept, "rights" is a relational one implying both the existence of society and particular assumptions about its normative and institutional ordering.²⁹ This makes the context of state capability relevant to understanding the role of human rights in any place.³⁰ It is possible to understand the state as that institution with the legitimacy

²⁸ Donnelly describes this tendency for the ultimate test of commitment to human rights to be found at the point of their endangerment as "the possession paradox" of rights. See, Donnelly J., *Universal Human Rights in Theory and Practice*, 2nd Ed., 9 (2003)

²⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to A Discourse Theory of Law and Democracy*, 88, (Rehg W., Trans.), Cambridge, Mass, The MIT Press (1996), argues that conceptually, "rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary as elements of the legal order they presuppose collaboration among subjects who recognise one another, in their reciprocally related rights and duties, as free and equal citizens"

³⁰ Abdullahi An-Na'im, "The Cultural Mediation of Human Rights: The Al-Arguam Case in Malaysia", in Bauer

to mediate this tension between the deontological and the relational in the concept of human rights.

I use the state here as a legal concept but that is far from the only sense in which it can be used. A state in this sense could be multi-dimensional. It is at once formal, sociological, and functional. Morton Fried explains that the state "at one extreme of argument.... is identified with one or more highly specific features such as organised police power, defined spatial boundaries, or formal judiciary. At the other end of the definitional spectrum, the state is regarded simply as the institutional aspect of political interaction."³¹ In this latter sense, the word "nation" may be more appropriate. But nationhood describes a state of sociological and political evolution within a territory.

In the formal legal sense, the Montevideo Convention on the Rights and Duties of States defines a state as "a person" in international law that "should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."³² As a sociological construct, Mahmud Tukur describes the State as "a geographically delineated segment of human society united by common obedience to a single sovereign and referring either to the society as a whole or, more specifically, to the sovereign authority which exercises both legal and coercive powers."³³ Functionally, Rotberg argues that:

The state's prime function is to provide that political good of security.... The delivery of a range of other political goods becomes possible when a reasonable measure of security has been sustained. Modern states (as successors to sovereigns) provide predictable, recognizable, systematized methods of

J.R. & Bell D.A eds., *The East Asian Challenge for Human Rights*, 147

³¹ Morton Fried, "State: The Institution", in *15 Int'l Encyclopaedia of the Social Sciences*, 143 (1968)

³² Montevideo Convention on the Rights and Duties of States, Article 1 (1934)

³³ Mahmud Tukur, *supra*, p. 51

adjudicating disputes and regulating both the norms and prevailing mores of a particular society or polity. The essence of that political good usually implies codes and procedures that together comprise an enforceable body of law, security of property and inviolable contracts, an effective judicial system, and a set of norms that legitimate and validate the values embodied in a local version of the rule of law.³⁴

It is impossible to achieve this multi-dimensional state without underpinning values, norms that crystallize them, institutions that implement them and leaders who guarantee the viability of those institutions and norms. This is what institutions of public administration and mechanisms of legality exist to guarantee. Within the framework of the view taken here of the relationship between human rights and the state, it is possible to speak about the values that underpin state building, among which can be counted respect for human rights. The underlying reason behind this position is captured acutely by the father of India's Constitution, B.R. Ambedkar, as follows:

Rights are protected not by law but by the moral and social conscience of society. If social conscience is such that it is prepared to recognise the rights, which law chooses to enact, rights will be safe and secure. But if the fundamental rights are opposed by the community, no law, no parliament, no judiciary, can guarantee them in the real sense of the word.³⁵

³⁴ Robert Rotberg, *supra*, p, 3 (2004)

³⁵ B.R. Ambedkar, Ranade, Gandhi and Jinnah, 34-35, Bombay, Thacker & Co. Ltd, 1943 (Address Delivered on the 101st Birthday Celebration of Mahadev Govind Ranade, 17 January 1943 in the Gokhale Memorial Hall, Poona)

The evolution of political community, its institutions and values is an essential barometer for understanding the fate of rights within it. Thus, while human rights may not be created necessarily by the state, their effective enjoyment and protection requires a capable state and the state of their enjoyment is itself a metric of the evolution of a nation.³⁶ Such a state must have effective bureaucratic and regulatory capacity and, even more importantly, it “must be able to maintain peace based on fair and just laws. It should have political legitimacy so that the difficult choices that must be made.... can enjoy a fairly wide degree of public acceptance.”³⁷ An incapable state, such as that which threatens to befall Nigeria, is, therefore, a danger both to the enjoyment of human rights and, indeed, to the practice of democracy.

(d) Democracy and Digital Frisson: The Idea of Good Civic Manners

As the Sheikh Lemu Report on post-election violence pointed out in 2011, hate and “inflammatory” speech is a major pre-disposing factor in political violence.³⁸ Hate or inflammatory speech is not protected by the guarantee of freedom of expression.³⁹ It is copiously prohibited both under general international law and, more specifically, by Nigeria’s Electoral Act. In reality, there is nothing congenital or genetic about political hate as such. Rather it is a consequence of a political system in which the elite socialize their costs and privatize our common patrimony, creating avoidable scarcity of public goods and growing immiseration. This is achieved at the expense of both responsible leadership

³⁶ See K.Y. Amoako, “The Capable State”, 11:3 *New Economy*, 132 (2004)

³⁷ K.Y. Amoako, “The Critical Role of Capable States in Driving Africa’s Economic Transformation Agenda”, Address to Governance Academy Day, GIZ Sector Network Conference, Maputo, Mozambique, 26 Oct, 2011, p. 3

³⁸ Federal Republic of Nigeria, Main Report of the Federal Government Investigative Panel on 2011 Election Violence and Civil Disturbances, Main Report, Vol. 2, (hereafter referred to as “Sheikh Lemu Report”).

³⁹ Article 20(2), International Covenant on Civil and Political Rights

and capable institutions. What ensues is a popular stampede for the limited crumbs that drop from the table, in pursuit of which narrow identity is freely deployed. As expression is toxified, hate speech becomes a way to get ahead and the online publisher can easily find himself or herself as a tool in the hands of the combatants in a survival war without rules. This is where many of our African countries are presently. As political competition gets steeper and digital media gives a megaphone to every citizen who cannot even conjugate in vernacular the verb "to be", responsible media find themselves caught in an ugly fight to stay alive.

Digital expression and digital anonymity have both enhanced the immediacy of hate speech and the capacity to monitor it. The digital revolution has made a publisher of everyone with a voice, a point of view and portable digital device. This popularization of both content and platform made possible by new media is a mixed blessing. Content is in abundance even if only very little of it contributes to clarity. Precisely because of this, the traffic can itself be a distraction. At the personal level, users of new media now also need to govern our bandwidth and attentions if we intend to get anything meaningful from it.

The ecosystem of digital communication is underpinned by an intimacy and immediacy that lends itself to polarity. Underlying this is the privilege of digital anonymity which is the opposite of what exists in analogue, hard-copy publishing. Digital posts can often have the feel or frisson of a face-to-face confrontation, largely unmediated by editorial judgement. Very often, however, these take place under the privilege of digital anonymity and sometimes take undue advantage of it. As one wellinformed observer points out:

The cloak of anonymity or pseudonymity leads to a well-documented 'online disinhibition effect', a behavioral distortion caused by the absence of social signals that surround analogue communication. This can cause shy people to open up and

make friends. But it can also cause people to abandon empathy, and lose impulse control.⁴⁰

Where circulation used to be the ultimate prize, now it has been replaced by metrics – of clicks and views, of likes, friends and follows. Metrics measure exposure, which in turn drives the world of digital advertisements. In the period between the Nigeria’s general election in 2015 and the next in 2019, the number of internet users in the country were estimated to have grown by 32.04% from 63.2 million to at least 93 million.⁴¹ Some sources put the numbers at well over 100 million.⁴² This is a much bigger market than any analogue publishers ever dreamt of. Every publisher and influencer seeks a piece of this massive market. Existing analogue publishers now straddle the analogue and digital worlds. The competition for clicks and metrics is stiff. In this game of survival of the digital fittest, it pays to get noticed and the easiest way to get noticed is through smut, outland, and lack of manners. This is why and how the digital ecosystem can encourage a world of influence without responsibility.

The problem with this is that there is organic interactivity between online publishing and off-line behavior. Indeed, online publishing increasingly drives online decision making and behavior. A Twitter pile-on can shape political decision making, move stock markets and force issues. Inaccurate information circulated online can define a news cycle and do awful damage before it is unmasked. The end of responsibility in publishing coincides with the “tribalization” of news between the righteous and the despicable, us and them and breeds what a recent British Prime Minister has called “the unreasoning antipathy of the extremes” in which “reasonable voices” are increasingly

⁴⁰ Rafael Behr, “How Twitter Poisoned Politics”, Prospect Magazine, Oct, 2018, p.18 at p. 25

⁴¹ For details, visit, <https://www.statista.com/statistics/183849/internet-users-nigeria/>

⁴² In September 2018, the Nigerian Communications Commission (NCC), puts the number of Internet users in the country at 104.6 million. See “Nigeria’s Internet Users Hit 104.6m in August – NCC”, Premium

“drowned out by the raucous din of the loudest.”⁴⁶ It also makes reporting, publishing and expression hostage to “powerful cognitive errors”,⁴⁷ such as confirmation bias (privileging information that supports what we want to believe), selection bias (privileging information that supports our conclusions) and availability bias (privileging the most recent information). Above all, the digital environment is now also a vector for fact-free information.

This loss of manners and of responsibility could presage a bigger loss of the things that matter to our communities and our shared humanity. In itself, this is becoming a significant crisis for even established democracies. Rafael Behr reminds us that:

A subtle thread connects manners and democracy. To behave well in the town square, not flinging abuse at strangers, for example, is a habit born of mutually

Times, 24 Sept, 2018, available at <https://www.premiumtimesng.com/news/more-news/286201-nigeriasinternet-users-hit-104-6m-in-august-ncc.html> . Adult literacy rate is averaged at about 55%, <https://www.indexmundi.com/facts/indicators/SE.ADT.LITR.ZS/compare?country=ng>

⁴⁶ John Major, “I have made no false promises on Brexit, I’m free to tell you the truth”, The Guardian, 16 Oct. 2018, available at https://www.theguardian.com/commentisfree/2018/oct/16/false-promises-brexitjohn-major?CMP=share_btn_tw

⁴⁷ Rafael Behr, “How Twitter Poisoned Politics”, Prospect Magazine, Oct, 2018, p.18 at p. 22

recognized rights and unwritten norms. Those social codes are as much part of the democratic ecosystem as free elections and independent courts.... Political debate is a form of verbal combat and needs rules of engagement. When a political culture is bleached of civility, when the public realm becomes pathologically ill-mannered, it loses its capacity to mediate between competing interest groups. It becomes

more brittle and less amenable to the ethos of compromise without which a pluralist democracy cannot thrive.⁴³

For a very divided, transitional society like Nigeria, the challenge could be even more substantial. In the 2019 elections, we saw this in how the ruling party used digital disinformation to target a senior national Commissioner of the INEC and human rights activists for violent intimidation, based entirely and exclusively on their places of origin and ethnic affiliation.⁴⁴

3. NIGERIA, A GREAT NOTION?

While statehood is a largely juridical or legal concept, nationhood is a political and sociological one. The Amalgamation in 1914 created the boundaries of the modern Nigerian State or the **notion** of Nigeria. It did not decree a **nation** into existence. The forging of nationhood is a political project of welding diverse peoples within common borders into one shared identity underpinned by common values and institutions. It takes time and needs a leadership to forge it. Colonialism deferred the pursuit of this project beginning, some would argue, with the invention of the great notion called Nigeria. Doubts about the viability of this notion, however, are as old as the Amalgamation itself and have revolved around the huge diversity of its peoples and its oil-based mono-economy.

With reference to Nigeria's diversity, Sir Hugh Clifford, Governor-General of Nigeria from 1920 until 1931, claimed that Nigeria was "[a] collection of independent native states, separated from one another by great distances, by differences of history, and traditions,

⁴³ Ibid., p. 28

⁴⁴ Chidi Odinkalu & Nana Nwachukwu, "How to Stop Digital Terrorism in Elections", The News, 6 April 2019, available at <https://www.thenewsnigeria.com.ng/2019/04/how-to-stop-digital-terrorism-inelections/>

and by ethnological, racial, tribal, political, social and religious barriers.”⁴⁵ In 1939, a still un-disclosed colonial official, writing “with much diffidence, having no first-hand experience of the country” posed precisely the question: “Whither Nigeria?” S/he counseled against attempting to “pour the constitutional future of a vast country into a single mould”, warning that the consequence could be “disastrous”.⁴⁶ Former Prime Minister, Abubakar Tafawa-Balewa, is quoted in 1948 to have said:

[S]ince 1914 the British government has been trying to make Nigeria into one country, but the Nigerian people themselves are historically different in their backgrounds, in their religious beliefs and customs, and do not show themselves any sign of willingness to unite... Nigerian unity is only a British intention for the country.⁴⁷

Delivering the Convocation lecture at the Adekunle Ajasin University in AkungbaAkoko, Ondo State, on 5 November 2014, former Senate President, Iyorchia Ayu, said:

[A]lways at the brink, but never tipping over, we have survived these 100 years post-1914 with reasonable accomplishments and great expectations. However, rather than keep the faith and continue on the positive path of progress, there are still those who would rather we fulfill the doubts cast over us on the day of our birth.⁵³

⁴⁵ Cited in Iyorchia Ayu, “The Breakup of Nigeria: Myths, Realities and Implications”, Convocation Lecture, Adekunle Ajasin University, Akungba-Akoko, 5 Nov. 2014, p. 1

⁴⁶ Cited in Michael Peel, *A Swamp Full of Dollars: Pipelines and Paramilitaries at Nigeria’s Oil Frontier*, p. 42, Chicago, IL, Lawrence Hill Books (2010).

⁴⁷ Iyorchia Ayu, *supra*,. P. 1 (italics original)

⁵³ *Ibid.*, p.2 ⁵⁴ *Ibid.*

In July 1958, Deputy Governor-General of Nigeria, Sir Ralph Grey, reported a visit from former Prime Minister, Abubakar Tafawa Balewa, who was unsure whether Nigeria was indeed ready for independence and was worried that the country would “have trouble” thereafter.⁵⁴ In the same year, another colonial officer, M.G. Smith, in a line that could easily have been hewn for 56 years later, feared that Federal Ministers were “unworthy of high office”, lacked “strength and prestige”, and were “always looking back over their shoulders” to shore up their positions in their places of origin.⁴⁸

Two years later, Nigeria became Independent, inheriting colonial institutions that had not been tested by a free people. The Police Force bequeathed to the country in 1960, for instance, was an expeditionary institution already burdened at Independence with a century of the wrong kind of traditions and history. Far from being alleviated, this pathology has deepened since Independence. The judiciary, for all the admirable men (they were all men then) that administered it, was institutionally younger than the Police at Independence, but essentially also not much different in its essential philosophies. In his book, *Nigeria Beyond Divorce: Amalgamation in Perspective*, Pioneer Director of Nigeria’s National War (now Defence) College and former Adjutant-General of the Nigerian Army, General Sam Momah observes:

Definitely, the amalgamation (the marriage) made Nigeria very large in size but we failed as a people to capitalize on that hugeness in a continent where most countries are relatively smaller. And so, in reality, the potentials for Nigeria being great are manifest but we must stop deceiving ourselves because we are still very far from being great. Indeed, Nigeria should first be a nation before aspiring to be great....So far, we have collectively failed in making a start towards nationhood.

⁴⁸ Ibid., 42-42

Today, Nigerians are more divided than they were in 1960, 53 years ago, and every year it tends to get worse..... Nigeria is therefore degenerating into a country in which the poor cannot sleep because of hunger, and the rich cannot sleep because the poor is awake. Most Nigerians are therefore sleepless, edgy, and stressed up. In the ensuing tension, Nigeria becomes a mixed bag of complex personalities that are at best ambivalent in principle and paradoxical in action.⁴⁹

In this little snippet, General Momah synthesizes our chapeau polarities into their consequences for state fragmentation and stability. The narrative of how the great notion of Nigeria found itself at such a point can be traced to several factors. I will focus here on a few highlights in no particular order:

(a) Mis-Managing Diversity & Institutionalising Discrimination

With reference to the former, sadly, a legal and political system evolved that appears to have made a vice (instead of a virtue) out of the country's diversities, replacing the constitutional prohibition of discrimination with a practical license to discriminate. This creates a pathology that I choose to call the Bantustanization of Nigeria. Post-colonial Nigeria appears to have evolved into an advertisement of Tagore's country "broken up into fragments by narrow domestic walls"⁵⁷ in which most peoples have retreated behind identity frontiers, reducing the country increasingly to a collection of Bantustans in which narrow identity is the only effective currency.

Many people trace the crisis of the Bantustanization of Nigeria to the proviso to Section 147(3) of the 1999 Constitution, which obliges the President in appointing Ministers to designate "at least one Minister from each State, who shall be an indigene of

⁴⁹ Sam Momah, *Nigeria Beyond Divorce: Amalgamation in Action*, xxiii-xxvii (2013),

such State.” The concept of “indigene” is not itself defined in the Constitution. The Constitution does not define the word “indigene” but contains a definition for “belong to or its grammatical expression”, which, “when used with reference to a person in a State, refers to a person, either of whose parents or any of whose grand-parents was a member of a community indigenous to that State.”⁵⁸ Yet, the same Constitution guarantees that “every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof”,⁵⁹ and prohibits discrimination in the following terms:⁶⁰

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

Having thus set up a conflict between the citizen and the indigene, Nigeria’s Constitution, however, offers no sensible framework for resolving this tension and sets

⁵⁷ Rabindranath Tagore, “Mind Without Fear” in *Gitanjali: Selected Poems* (1913)

⁵⁸ 1999 Constitution, s. 318; 1979 Constitution, s. 277

⁵⁹ 1999 Constitution, s. 41(1)

⁶⁰ *Ibid.*, s. 42(1)

the country on course to be frustrated in the search for nationhood. In the absence of clear constitutional guidance, several interpretations have naturally mushroomed serving narrow interests. In 1993, Olusegun Obasanjo, then retired as Nigeria's military ruler, warned that:

The concept of "settler" or "non-native" syndrome has of recent hardened into a theory of ethnic exclusiveness and has been moulded and propagated to foist a pejorative meaning to advance economic and political control among competing elite groups for interests during democratic regimes.⁵⁰

In its 2005 report, the Plateau Peace Conference defined indigenes as "[p]eople who are the first to have settled permanently in a particular area and who are considered traditional natives...Such people have rights to their lands, traditions and culture."⁵¹ Such an attempt at definition polarizes the relationships between indigene and settler, underpinning them in inequality and insecurity and, simultaneously, diminishes the idea of common citizenship. It is also uniquely founded on a sedentary world view which denies does not acknowledge the non-sedentary claims of pastoralist communities or livelihoods. Such definitions thus create political landmines and elevate competing livelihoods into politically explosive difference. Additionally, it makes the "indigene" a bounded or territorialized identity marked by supposedly defining characteristics that are however, not necessarily objectively verifiable or indeed beneficial to a developing country. Implicitly, the indigene loses their status as such if s/he steps out the recognized territorial

⁵⁰ Olusegun Obasanjo, Opening Address Seminar on "The Settler Question in Nigeria: The Case of Jos Plateau", organized by the Conflict Prevention and Management Centre, Africa Leadership Forum (ALF), Jos from 15 to 17 December, 1993.

⁵¹ Government of Plateau State, Plateau Resolves: Conclusions of the Plateau State Peace Conference, p. 30 (2004)

markers of this identity grouping into a zone of less or no protection. Above all, it elevates indigeneship in a way that subverts the constitution and economic mobility implicit in existence in federal union.

Indigeneship is posited as an exclusive, once-and-for-all-time occurrence that can only be asserted by one group or set of groups and their descendants. It is also bequeathed on a group, not individuals. Thus a person not recognized as from an indigene group cannot be an indigene irrespective of how long they or their ancestors or descendants have lived in the location and even if their proof of contact or settlement in the land pre-dates that of members of a group recognized as indigenous. One clear consequence of this is that both naturalized Nigerians and their descendants would be ineligible to access federal appointments as they can never qualify to claim indigeneship of any place. Another consequence is that this creates a barrier to social integration, fossilizes political competition and creates a Chinese Wall between our politics and our economics. While the mobility fosters economic wellbeing, such mobility in the Nigerian context alienates the citizen from the exercise of full rights of participation.

From this has arisen several unfortunate and tragic fallacies. For instance, in its 2009 report, the Bola Ajibola Commission of Inquiry asserts that:

One is a Nigerian in the first place because he or she belongs to a community indigenous to Nigeria. See Section 147 of the Constitution of the Federal Republic of Nigeria 1999. It is the application of indigeneship that makes us know who is a Nigerian and who is not.⁵²⁵³

⁵² Bola Ajibola Commission Report, *supra*, p. 54

⁵³ constitution, ss. 25-26

This conclusion is patently mistaken on many grounds. Although membership of a community indigenous to Nigeria is one of the grounds for citizenship, it is not the only ground. Others include descent from a citizen of Nigeria or naturalization.⁶⁴ Contrary to the claim by the Commission, s.147 of Nigeria's Constitution does not provide bases for any such claim, limited as it is to the question of sourcing nominees for ministerial appointments. In the argument over supremacy of indigeneship and citizenship, Nigeria's Court of Appeal has in fact held that Sections 25(1)(a)-(b) are a "binding guide" in the determination of who is an indigene of Nigeria,⁵⁴ suggesting somewhat (but without resolving the problem) that citizenship has primacy over indigeneship.

To protect the invidious divisions that have been so established, the "indigene" like the colonial era "native" is supposed to be clothed with "personal" law that is immutable. It was the case that howsoever the native travelled, s/he was always subject to personal law of the tribe or locality from whence they came. The tyranny of personal law was the ultimate proof of the normative sub-ordination and segregation of the native from 'civilisation". S/he could never shake off customary law. Independence was supposed to have dispensed with this economic immobility of the native/indigene. Thus, on the silver jubilee of Nigeria's independence in 1985, the Supreme Court decided in the case of *Olowu vs. Olowu* that personal law was indeed changeable, expendable and potable and that a person could through the exercise of individual agency in migration re-locate their personal law and indigeneship.⁵⁵ Nearly three decades later, however, the implications of this jurisprudence continue to be resisted by a combination of bad law, desperate politics and incapable institutions.

⁵⁴ *Anzaku v. Governor of Nassarawa State*, (2005) 5 NWLR (Part 919) 449

⁵⁵ [1985] 12 S.C. 84

Among these bad laws is the Federal Character Commission Act that empowers the Federal Character Commission to, among other things:

work out an equitable formula, subject to the approval of the President, for the distribution of all cadres of posts in the civil and the public services of the Federation and of the States, the armed forces, the Nigeria Police Force and other security agencies, bodies corporate owned by the Federal or a State Government and Extra-Ministerial Departments and parastatals of the Federation and States.⁵⁶

In addition, under S. 17(2)(k), the Commission is empowered to define who the indigene of a state is for the purpose of benefitting from federal goodies under S. 4(1). The underlying legal justification for this is entirely well-intentioned provision of section 14(3) of the 1999 Constitution:

The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.

The suggestion is that this provision makes it a pre-condition for realizing the Federal character that it mandates that all the component identities of Nigeria to be atomized. It is ironic that a provision whose motivation, it appears, was to promote

⁵⁶ Federal Character Commission Act, s. 4(1)

national unity, can now be cited as the rationale for atomizing the country into narrow, mutual antagonisms all formulated for the purpose of accessing public goods that should ordinarily be available to all Nigerians. However, many more would argue that the real problem is an original sin traceable to the Amalgamation and to the failure of a leadership to grow an economy in which all parts of Nigeria can have a stake.

(b) A Country that Cannot Count

27 years ago, Chinua Achebe declared that the “the trouble with Nigeria is simply and squarely a failure of leadership”, and argued that “Nigerians are corrupt because the system under which they live today makes corruption easy and profitable.”⁵⁷ As a supplement to this, I propose shortly to suggest that corruption in Nigeria thrives because, as a system, we have failed to develop the skills or values for counting in a political economy. As I will shortly show, all of our crises with governance come down to this: as a people, we cannot count or account honestly and there are no consequences for dishonest counting and accounting.

A brief detour through post-colonial Nigeria should reveal quite easily that this inability to count is the most constant feature of five decades of independence. As an independent country, we have never been able to organize credible polls or census nor developed a credible public accounts management system. The first crises of postcolonial Nigeria arose with the 1963 national census, the federal elections of 1964, and the elections in the old Western region in 1965. Successively compromised by dishonest counting, these three events ultimately preceded the descent into military rule, mass atrocity and war between 1966 and 1970. As Robert Collins observed in his book Nigeria

⁵⁷ Chinua Achebe, *The Trouble with Nigeria*, 1 (1983)

in Conflict, "this atmosphere was....the main reason for the two coups and the civil war. Dishonesty both in thought and deed were the prime bases of the Nigerian troubles."⁵⁸

The end of the war was quickly followed by post-Yom Kippur War Oil Boom. Immediately before the Oil Boom, there was a national census in 1973 which proved to be "farfical. The results were never published."⁵⁹ Then Nigerian Head of State, Yakubu Gowon, publicly declared that far from a pre-occupation with knowing how much we were worth or how many people we had to manage the money for, Nigeria's national priority was how to spend money (whose quantity, by the way, we didn't care to know). Intoxicated with liquidity hubris, the government of General Gowon initiated an ambitious public infrastructure project that required massive importation of cement whose quantity we did not care to know. Led by rulers who were un-schooled in the complicated mechanics of international commercial credits, the country received an inundation of useless sand imports that it had not ordered and did not need. This import of sand was so vast, it overwhelmed the capacity of the ports in Nigeria, necessitating massive commitments in demurrage, lost maritime contracts and revenues, and the leasing of port space in neighboring countries. We lost a lot of money (no one has ever computed how much) and those that ran our country appeared to lose whatever marbles they had.

In one of history's more expensive piques of martial fit, Nigeria's then military government repudiated its payment obligations under the original commercial arrangements. Sued before courts in several European countries (including England, Germany, Switzerland and Austria), Nigeria unsuccessfully pleaded sovereign immunity in support of its attempt to repudiate the contracts. It failed. Armed with judgment debts that became due for payment together with accrued interest payments various

⁵⁸ Robert Collins, *Nigeria in Conflict*, p. 187 (1970)

⁵⁹ Karl Maier, *This House Has Fallen: Nigeria in Crisis*, p. 54 (2000)

international creditors easily enforced their judgment debts against Nigeria's assets overseas. Shortly after the turn of 1980, the country became unable strictly speaking to finance its commitments. We were bankrupt because substance dependency (the politics of crude) had caught up with Nigeria:

The optimism expressed by foreign bankers and businessmen about Nigeria in 1980 and 1981 had given way to 'unrelenting gloom'. Oil revenues had fallen 42 per cent in two years as the price of crude collapsed from \$40.97 a barrel in December 1980 to \$28.25 in March 1982. In a sure sign of a country in crisis, the government turned its hostility on immigrants, which it expelled en masse. The large Ghanaian community was hit particular hard.⁶⁰

As the English Court of Appeal put it with characteristic understatement in 1977, this kind of mess could only have been caused by "some mis-management somewhere."⁶¹ Rather than find out and fix the source of this obvious mis-management, Nigeria's leaders sought new frontiers for money without adjusting the way government business was conducted. While the full import of this debacle was unfolding, the military turned over power to a civilian regime following elections in which the counting was characteristically "tainted by the sort of vote-rigging and intimidation that have marred all post-independence Nigerian Polls."⁷³

Faced with national bankruptcy, the civilian government of President Shagari declared "Austerity" in 1981. To ameliorate the resulting difficulties for working Nigerians, his federal government established a taskforce to import and distribute rice at subsidized prices to Nigerians. The quantities were undetermined. Cement Armada was now replaced

⁶⁰ Michael Peel, *supra*, p. 58

⁶¹ *Trendtex Trading Corporation v. Central Bank of Nigeria*, (1977) 2 Weekly Law Reports, 356, at p. 363 ⁷³ Karl Maier, *supra*, p. 15

by Rice Armada and a few more millionaires were made at the expense of the public interest. Under the combined assault of these various difficulties, the Nigerian economy reportedly shrank at an annual average of two percentage points or a cumulative eight percentage points in the four-year period from 1979 to 1983.⁶²

Immiseration became democratized, the middle class never quite recovered, and having turned out the foreigners, it was not long before we would turn on ourselves. The consequences for our politics were predictable. The elections of 1983 were even more flawed than those of 1979. In a familiar reprise of our incapacity to count, the then ruling party, the National Party of Nigeria (NPN), manufactured what it called a landslide “characterized by rigging, violence, bribery, and wildly inflated voter turnouts.”⁶³ Promising to put the country (and then President, Shehu Shagari) out of our collective miseries of leadership and institutional ineptitude, the military overthrew and replaced the civilian regime on 31 December 1983. So pervasive was the practice of manufacturing figures in elections that in its 1986 report, the Bolarinwa Babalakin Judicial Commission of Inquiry into the Federal Electoral Commission (FEDECO) concluded that “indeed, it can be claimed with a large measure of truth, that rigging of elections has become part of our political culture.”⁶⁴

By the onset of the third decade of Nigeria’s independence, the consequences of this history had also percolated into the failure of public confidence in judicial decision making in the first evidence of what would become a gangrene of allegations of judicial corruption. In 1986, the report of the Bolarinwa Babalakin Commission of Inquiry into the

⁶² Ibid. pp 15-16

⁶³ Ibid., p. 58

⁶⁴ Federal Republic of Nigeria, Report of the Judicial Commission of Inquiry into the Affairs of the Federal Electoral Commission (FEDECO) 1979-1983, Main Report, Nov. 1986 [“Babalakin Commission Report”], para 10.10.

then Federal Electoral Commission (FEDECO), found, in relation to judicial decision making in the 1983 elections as follows:

As the verdicts began to be pronounced, the general public often expressed shock and dismay. Some commentators in the nation's newspapers took the view that the verdicts in a number of instances constituted a rape of democracy perpetrated through the law courts. Allegations of corruption in high places were freely made.⁶⁵

After the inconclusive interregnum of the succeeding regime of Muhammadu Buhari, it was the lot of the Babangida regime, which took over power in August 1985, to initiate dialogue with the Bretton Woods institutions to assist Nigeria with a facility of \$2billion to alleviate our lingering balance of payments crisis. In return, they required economic liberalization. The fallacy was to assume that economic liberalization could happen without political, institutional and ethical renewal of government and how it was constituted and run. To prolong himself in power, General Babangida contrived to corrupt politics. In 1991, he made another unsuccessful attempt to conduct a national census. Meanwhile, the General was unable to count or account for the enhanced earnings – windfall – that accrued to Nigeria from the spike in international oil prices that followed the first Gulf War between 1992-1993. A subsequent investigation led by late economist, Dr. Pius Okigbo⁶⁶, allegedly estimated that about \$12Billion of these earnings were not accounted for, but the report remains officially not published.

In June 1993, when it seemed Nigeria had for once broken the curse of a people that could not count with an election that was widely viewed as credible, Ibrahim Babangida inexplicably nullified the outcome. In the ensuing crisis, he was forced to

⁶⁵ Ibid.

⁶⁶ Karl Meier, *supra*, p. 68

“step aside”. In doing so, he left the country in the hands of the hapless Ernest Shonekan, a lawyer and former CEO of United African Company (UAC) Nigeria PLC, then the biggest conglomerate in Nigeria. In this, the country had come full circle from its first contact with British colonial expedition a little over a century earlier when, in 1879, George Tubman Goldie’s United African Company (UAC) received a Royal Charter to administer the Protectorate of Southern Nigeria.

It was under these circumstances the General Sani Abacha, Nigeria’s military ruler from November 1993 to June 1998 contrived to appropriate to himself an estimated 35% of the country’s GDP. No one has ever quite managed to put a firm figure on how much he actually stole. However, martyred former Attorney-General of the Federation and Minister of Justice, Bola Ige, reported as among the sums stolen by General Abacha, “\$2.3 billion from the treasury, awarded contracts worth \$1 billion to front companies and taken \$1 billion in bribes from foreign contractors.”⁶⁷

Meanwhile, since these events, elections in Nigeria have progressively and successively descended – in 1999, 2003 and most recently in 2007 and 2019 - into spectacularly farcical non-events, each succeeding one more jaw-dropping than its predecessor in which counting votes has become too inconvenient to bother with. Meanwhile, we still do not have credible census figures; and our collective illiteracy about how much we produce or earn appears to have worsened instead of getting better.

⁶⁷ Bola Ige, “Abacha and the bankers, cracking the conspiracy”, *Forum on Crime and Society*, vol. 2, No. 1 (December 2002), (United Nations publication, Sales No. E.03.IV.2), pp. 111-117, cited in, United Nations, “Preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets to the countries of origin”, Report of the Secretary-General, A/61/177, para 15 (2006)

(c) The Destruction of Accountability Institutions

The post-colonial travails of the two institutions of accountability, the judiciary and the police, underpin the reversals that the country has suffered along the path to evolving appropriate values for state building. The defining landmarks in the early unraveling of the post-colonial legal and political systems were three events that happened in quick succession from 1961 to 1963 in the civilian interregnum that preceded military rule.

First, shortly after Independence, the Nigerian legal system faced its first major test in the treason trial of J.S. Tarka in 1961. Tarka, firebrand leader of the Opposition United Middle Belt Congress (UMBC), was charged with the serious crime of levying war against Her Majesty, the Queen of Nigeria - treason. This was two years before Nigeria would become a Republic in 1963. The trial somehow conveniently coincided with the elections into the dissolved Northern Nigeria House of Assembly, controlled by the then ruling Northern Peoples' Congress (NPC). The effort to crush the UMBC failed in the short term as forces loyal to Tarka prevailed in his beloved Tiv-land during the elections and he was acquitted in the trial. However, the ruling party had learnt not to be outmaneuvered.

Under cover of the treason trial, meanwhile, the NPC-controlled Federal Government deployed an expeditionary military operation in the Middle Belt, first led by Major Anuforo and later by Major Hassan Katsina, which committed serious atrocities against a people whose only crime appeared to be that they chose – as they were perfectly entitled to do in a democracy – to support a party different from the ruling party at the Centre. This model of expeditionary deployment of the armed forces continues to live with and haunt us. Since the operation in Tivland, north central Nigeria, we have had similar expeditionary operations in the emergency and violence in South West Nigeria (1963-65); the civil war with South-East Nigeria (1967-70); the JTF in the

Niger Delta (since 1994); the STF in the Plateau (since 2002); and now, the JTF/Seventh Division in North-Eastern Nigeria (since 2011). The playbook seems to replay itself every time with worse consequences.

Thus, next, in 1962, Chief Obafemi Awolowo, leader of the Opposition in the Federal Parliament would subsequently be tried and convicted of treasonable felony in proceedings in which the then Federal Minister for Internal Affairs, Usman Sarki, denied his counsel of choice, Mr. Gratien QC, entry clearance into Nigeria.⁶⁸ This was to precede a takeover of Chief Awolowo's Western region under cover of a State of Emergency and his removal as official Leader of the Opposition in the Federal Parliament by the same government.

Thirdly, in 1963, dis-regarding a pending Privy Council appeal (which it subsequently lost) in a dispute over who was the lawful Prime Minister of the Western Region, the government restored Chief Awolowo's ambitious former deputy, Samuel Akintola, as the Prime Minister of the Western Region. Following the Privy Council decision in this case,⁶⁹ the then Federal Government established the Supreme Court, abolished appeals to the Privy Council and proclaimed Nigeria a Republic. The civilians had laid the foundations of what would define post-colonial political economy and governance – that the decisions of courts which prove not to be malleable could be dispensed with at the whim of the rulers of the day.

The military would take this lesson to heart when they took over the reins of power following the coups of 1966. When the then Supreme Court ruled in 1969 that the events

⁶⁸ See, Chief Obafemi Awolowo vs. Usman Sarki, Minister of Internal Affairs & Anor. (1966) 1 All NLR 178

⁶⁹ Adegbenro vs. Akintola, (1963) A.C. 164

of January 1966 were not revolutionary in a constitutional sense,⁷⁰ obliging the then military regime, therefore, to subject itself the niceties of the written 1963 Constitution, the soldiers simply promulgated the Federal Military Government (Supremacy and Enforcement of Powers) Decree of 1970, eviscerating the decision and lobotomizing the courts. One common character in these episodes – from the Tarka treason trial to Decree No. 1 of 1970 – was Taslim Elias, a legal academic who was the Attorney-General of the Federation and arguably the most influential lawyer in the evolution of post-Independence Nigeria. Despite episodic stirrings to judicial imagination since then, our judicial institutions have never quite recovered from this and the consequences of these grave errors by men who were inevitably limited by their youth continue to haunt our country and its succeeding generations. In 2019, a ruling party decided to get rid of the Chief Justice by an ex-parte order given by a Code of Conduct Tribunal under the control of the Executive arm of government. To use a Nigerian metaphor, the judiciary has been truly castrated. With that also goes its capacity to offer deliberative stability when the political system is in trouble.

The tendency of the post-colonial regimes to respect only legal advice that they liked and obey judicial decisions that favoured them would quickly catch up first with the country in an absence of credible institutions to prevent arbitrariness and check mendacity in public life. Now, even the National Judicial Council (NJC), seems to have acquired the bug to pick and choose what court decisions it can abide or not abide by.

With respect to the Police, the President is the operational head of the Nigeria Police Force (NPF) under both the Constitution and the Police Act. The effect of this on the Force has been entirely deleterious. In early 2008, the M.D. Yusuf Presidential

⁷⁰ Lakanmi's case (1970) LPELR-SC.58/69

Committee on Police Reform, which included three former Inspectors-General of Police, reported as follows:

Successive military regimes erroneously regarded the Nigeria Police as a rival power base (to the armed forces) and as such did everything, they could to undermine its capabilities and effectiveness, so as to sustain their political hegemony. As a result, standards of training, discipline, kitting, etc. fell drastically as a result of deliberate under-funding and neglect. Worse still, through several interventions and subterfuge, the military deliberately created rival law and order institutions, and usurped police duties by setting up anti-crime taskforces and other outfits and effecting so many changes in the institutional organization, appointment and deployment of the Nigeria Police, which further eroded public confidence in the Force. This trend went on throughout military rule, from 1966 to 1979, and from 1983 to 1999. The advent of democratic administration from 1999 did not change matters, because the former President came with the same military mindset. As such, the position of the Nigeria Police even deteriorated.

The cumulative impact of all these has been a Nigeria Police Force that has been weakened, deficient, incapacitated, lacking in confidence and orientation.⁸³

Another Presidential Commission on Police Reform, headed by former Deputy Inspector-General, Muhammadu Danmadami, in 2006 identified several constraints that compromise the work of ensuring accountability by the NPF as follows:

Basic operational logistics like statement papers, case file jackets, office lockers for storage of case files are no longer provided. Some of these items are procured by detectives with the assistance of complainants. Detectives take case files home, resulting at times in the loss or even destruction of such files and swapping of

important statements in the file with statements that cannot sustain conviction in court.⁸⁴

In December 2008, the Presidential Committee on Electoral Reform chaired by a former Chief Justice of Nigeria, Mohammed Lawal Uwais, complained about the “functional ineffectiveness of the police during elections” and certified a litany of complaints of criminal conduct by the police during elections including “unprofessional conduct like brutality, intimidation, facilitating the snatching and destruction of ballot boxes, under-age voting, mass thumb-printing of ballot papers, forgery of results in exchange for bribes, etc.”⁸⁵ Lacking the institutional confidence to interpret laws clearly or the capability to enforce them, firmly, the state now confronts an existential crisis of legitimacy of which the foremost symptom is the democratization of violence, the opposite of a state based on humane values.

(d) Legitimising Illegitimacy

⁸³ Yusuf Committee Report, pages 177-178

⁸⁴ Federal Republic of Nigeria, Main Report of the Presidential Committee on Police Reform, Vol. II, (2006), p. 30.

⁸⁵ Federal Republic of Nigeria, Report of the Electoral Reform Committee, Main Report, Vol., 1, 196 (December 2008), para. 5.6.6.4 (hereafter referred to as “Uwais Committee Report”). See also, International Crisis Group, “Nigeria: Failed Elections, Failing State?” Africa Report No. 126 of May 30, 2007; Lydia Polgreen, “Election in Nigeria Sullied by Chaos,” New York Times, April 22, 2007, available at:

www.nytimes.com/2007/04/22/world/africa/22nigeria.html?ex=1334894400&en=c2f32b6b44e6e904&ei=5088&partner=rssnyt&emc=rss

The multiple crises of constitutional instability, mis-governance and political exclusion that have plagued the country crystallize the reality that in Nigeria, governance does not have to be grounded in popular legitimacy. Colonial rule lasted sixty years during which Nigerians were subjects of a foreign sovereign, incapable of being citizens of their own country and not exactly regarded as full or equal members of the human race.⁸⁶ Since political independence in 1960, the story has hardly been different. In 54 years as an independent country, Nigeria has had twelve presidents and heads of government, eight of whom ruled in 29 years of military rule. The country has experienced eight military rulers, seven military-inspired changes of government, five of which have been successful military coups, six Constitutions (including one that was never used),⁷¹ four Constitution drafting processes, four programmes of transition from military to civilian government,⁷² at least three unsuccessful coup attempts,⁷³ three civilian regimes, two Constituent Assemblies, two transition programmes from military to elective government and one civil

⁷¹ The 1989 Constitution drafted under the auspices of the Babangida regime was abrogated before it was formally promulgated following the annulment of the presidential elections of June 1993. See, *AttorneyGeneral of Anambra State & Others v. Attorney-General of the Federation & Others*, [1993] Nigerian weekly Law Reports (Part 302) 692.

⁷² With the notable exception of the regime of Major-General Muhammadu Buhari (December 1983-August 1985), every military regime in Nigeria has evinced an intention to design and implement a programme of transition to elected civilian government. See, Awa U. Kalu, "The Democratization of Nigeria: More Bullet(s) or Ballot?" in *1:1 Lawyers Biannual*, 40 (1994)

⁷³ It is widely believed that the claim (in early 1995) by the regime of the late General Sani Abacha to have foiled a coup attempt against it by a group allegedly comprised of middle ranking Army officers without command positions, retired Generals, civilian pro-democracy activists and journalists was not credible. *Africa Confidential*, for instance, reported that '[t]here is new concern that human rights activists....and independent journalists.... will be roped into a secret treason trial held under military rules. Such reports confirm that the tribunal is purging dissidents rather than trying plotters.' See 'Nigeria: Widening the Net' in *Africa Confidential*, Vol. 36:14, p. 8 (1995)

war.⁷⁴ Nigeria returned to civilian government at the end of 15 unbroken years of military rule under a Constitution that entered into force on 29 May 1999.⁷⁵

⁸⁶ See, *Re Southern Rhodesia*, (1919) A.C. 211 at 233, where the Judicial Committee of the Privy Council observed about African communities that they were "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society... Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

Over this prolonged period of colonial domination and post-colonial exclusion, institutional habits crystallized that define much of the way the country works, even today. Issue-driven politics was dead or nearly dead by the time the then National Party of Nigeria (NPN) orchestrated its infamous "landslide" in 1983. Thereafter, the public space encouraged irresponsible government and an irrelevant citizenry, neither equipped to develop a culture of expectations nor capacitated to make demands in fulfillment of such expectations. By the time the country returned to civil rule in 1999, it was as if the people no longer mattered. In 2019, the INEC invented another mechanism for clothing illegitimate government with legitimacy – it is called "inconclusive" elections. Osun and Kano governorship elections are classics in this genre.

The jurisprudence from Nigerian courts makes this state of affairs wholesome. The courts have been at best cavalier and self-serving in their attitude to issues of electoral legitimacy, regarding them as no better than customary neighbourhood disputes to be decided by black-letter lawyering and settled by the rules of evidence, pleadings, practice

⁷⁴ The Nigerian civil war began in 1967 and formally ended on 15 January 1970

⁷⁵ Chapter II of the 1999 Constitution of the Federal Republic of Nigeria provides for economic, social and cultural rights while the chapter IV provides essentially for civil and political rights. The distinction may well be a hangover from the 1979 Constitution which was enacted at the height of the Cold War. It is

and procedure. The Electoral Act creates electoral crimes such as electoral corruption, provides for elections to be invalidated for corrupt practices, and authorizes the courts to set aside electoral outcomes that have been procured through processes that are not in substantial compliance with the principles of elections.⁹²

Nigeria's Courts and legal processes have, however, subverted these provisions in three ways. First, contrary to the clear provisions of the Evidence Act, they claim that any allegation of corruption in an election petition must be proved to the standard of criminal law, i.e., beyond reasonable doubt. Second, even where they have set aside elections on grounds of corrupt practices, Nigerian courts do not order any criminal investigations or prosecutions for the crimes established. It is as if our judges believe election rigging is an act of nature without human agency.⁹³ Thirdly, they have created

arguable that the present constitution does not comply with the United Nations Resolution 48/134 of December 1993, to the extent that all human rights are equal, universal, indivisible, interrelated, interdependent and inalienable.⁹² Electoral Act 2006, ss. 145-146

⁹³ See National Human Rights Commission, *An Independent Review of Evidence of Gross Violations of the*

Rights to Participate in Government, To Public Service, and to Fair Trial Through the Election Petitions Process in Nigeria 2007 & 2011: Initial Report, February 2014 at, p. 11, para 1.13 available at <http://endelectoralimpunity.org/reports.html>

insurmountable burdens of proof that cannot be discharged by even the supernatural.⁷⁶

⁷⁶ See generally, Onyechi Ikpeazu, SAN, "Constitutional Limitation on Determination of Election Matters: Confronting the Petitioners' Nightmare", Legal Year Commencement Lecture, National Association of Catholic Lawyers, Abuja, 25 November, 2014.

In *Muhammadu Buhari v. Independent National Electoral Commission (INEC) & 4 Others*,⁷⁷ the Supreme Court took this tolerance of electoral corruption to a level of absurdity. In this case where even the INEC admitted that ballot papers were not serially numbered and the Court of Appeal found as a fact that this was indeed the case, a four-judge majority of a seven-person Supreme Court panel spectacularly concluded that:

Non-serialization, if it had benefits and advantages, was not exclusive to the respondents. I do not see any proof by the appellant that the respondents had benefits or advantages over and above the appellant on the alleged non-serialization of the ballot papers. I do not see that the non-serialization favoured the respondents and disfavoured the appellant."⁷⁸

This is not the place to speculate as to the origins of this provocatively cynical non-sequitur or the motives behind it. If ballot papers are not serialized, the only result, one would think, must be that there are no elections to begin with because it is impossible to control in such circumstances for contamination of the ballots. Thus the question of whether or not any party has benefitted from failure of serialization does not arise in the first place, for no one should be speaking about that. To accord judicial stamp of approval to alleged elections with no serially numbered ballot papers is therefore to fundamentally mis-understand the nature of elections or willfully dis-regard or destroy the people's will in constituting their government. Either way, this dooms advocacy for credible elections

⁷⁷ *Muhammadu Buhari v. Independent National Electoral Commission & 4 Others*, (2008) 12 S.C. (Pt. 1), 1.

The Seven-person panel of the Supreme Court in this case comprised, Kutigi CJN, Katsina-Alu, Niki Tobi, Musdapher, Oguntade, Mukhtar and Onnoghen JJSC. Niki Tobi JSC read the opinion of the four-judge majority, which included Kutigi CJN, Katsina-Alu and Musdapher JJSC. Oguntade, Mukhtar and Onnoghen JJSC dissented.

⁷⁸ *Ibid.*, p.165

in Nigeria and renders the idea of popular legitimacy as the basis of government moot by diktat of the highest court in the land.

This line of jurisprudence is the legal basis for corruption and the accompanying impunity in Nigeria. It has corrupted politics, politicised corruption, denuded the state of credibility and legitimacy, and rendered most of Nigeria's institutions of governance, including the police, the electoral umpire (INEC) and even the judiciary partisan at best in the experience of the participants as well as the perception of the average Nigerian. This has crystallised a system of perverse incentives that is conducive to government without legitimacy, reducing the electoral process to a rat-race for the Certificate of Return. The Nigerian Bar Association graphically captures this denouement in its submission to the Uwais Electoral Reform Panel as follows:

This has created a political culture in which the acquisition, control, and retention of power and the levers of government have become ends in themselves rather than means to an end of ensuring enhanced development and welfare for the population of the country. In turn, this situation has destroyed the implicit bargain at the root of electoral democracy – the right of the people to reward performing politicians with a renewal of their electoral mandates and to punish the non-performing ones by declining to renew their mandates. Finding themselves exercising power in spite of the citizens, rather than because of them, those in power increasingly feel no obligation to deliver (good) government or enhance the capability of the government to do so. This outcome, this memorandum will demonstrate, has largely been fostered by a system of incentives founded on or created by the laws - including judicial decisions and doctrine – and institutions of Nigeria. The destruction of the electoral system has been achieved through a system by which the law has over time elevated the Certificate of Return

irrespective of how it is acquired into a prize with overwhelming significance in Nigeria's electoral system. The Certificate of Return is the document issued to the declared winner as evidence of their eligibility to the office contested in the election. The process of issuing this certificate is administrative and has increasingly become divorced from the processes and legitimate outcomes of elections. In the absence of any requirement for the electoral umpire to prove substantial compliance with the electoral laws before issuing the Certificate of Return, the process of procuring this Certificate, has increasingly been commercialized.⁷⁹

Another perspective on this is offered by Dr. Kayode Fayemi in his description of Nigerian politics as the idol worship of "five gods and the god-father." Dr. Fayemi's words bear repeating here:

I think there are five 'mini-gods' that one must pay significant attention to in any attempt to understand the nature of electoral politics in Nigeria. These are the mini-gods all serious politicians must find a way to appease in order to even get a foot in the door. First is the 'INEC (the election umpire) 'mini god' which often acts like a Siamese twin of the ruling party – PDP. The second 'mini-god' is the security agencies – particularly Nigerian Police Force and the State Security Service and occasionally the Military, the third 'mini-god' relates to the bunch of thugs and bandits ever so handy in the rigging of elections and the fourth 'minigod' is that of the 'Judiciary' often needed to help wade off any legal challenge to incumbents' stolen mandate. Central to all four is the 'Money God' and finally the notorious and ubiquitous 'Godfather complex' of the Garrison-Commander's notoriety. I must say that these gods are neither exhaustive nor mutually exclusive. They are useful as analytical categories in explaining why elections go the way they do in

⁷⁹ Nigerian Bar Association, "Memorandum to the Electoral Reform Committee", January 2008, p. 5

Nigeria with unpopular candidates 'emerging' as 'winners' in questionable elections.⁸⁰

Dr. Fayemi uttered these words just shortly in 2009, a mere four months after a little-known leader of an upstart Islamic Movement was killed by agents of the Nigerian state. The movement that he started, today known as Boko Haram, has exposed the underbelly of the Nigerian State. Today, patterns of chronic violence afflict much of the country which cannot seem to find any solutions to this problem. These are only symptoms of the problem that must define Nigeria's agenda into this new era – violence and state fragmentation.

4. ADDRESSING NIGERIA'S MULTIPLE CRISES OF STATEHOOD AND FRAGMENTATION

These trajectories have led Nigeria to multi-dimensional crises with existential consequences. Six dimensions of these crises can be pointed to here. First is a crisis of nationhood, which, as the narrative above shows, has largely been created by bad leadership, poor memories, bad laws and desperate habits. The result is that today, there is no Nigerian identity. The ruling President is seen as "Hausa-Fulani" President; the one before him was an "Ijaw President". After them, others seek to produce an "Igbo President". All of these, of course, seek to rule over a disembodied territory called Nigeria. The incumbent has done nothing to assuage these divisions. If anything, he has actively fed them, ensuring that communities in Nigeria can only be organized in polarities:

⁸⁰ Kayode Fayemi, "An Insider's View of Electoral Politics and the Struggle for Electoral Reform in Nigeria", Paper presented at the Panel on "Ten Years of Civilian Rule in Nigeria", at the African Studies Association's 52nd Annual Conference in New Orleans, USA, November 20, 2009.

indigenes or settlers; pastoralist herders or sedentary farmers; Christians or Muslims; Northerners or Southerners; Militants or Bombers; Ruling Party or Opposition; men or women; rich or poor; haves or have-nots. Those who pine for popular uprisings such as we have seen recently in Algeria and Sudan miss the point that those uprisings are evidence of a shared identity and common mission that, at this moment, is impossible in Nigeria. Without that shared mission and identity, the protection of human rights in a democracy is impossible. There are no Nigerians anxious to own a Nigeria.

Second, we have a crisis of legitimacy underpinned by out-dated and unsuitable laws, of irrelevant sources of law and mal-adapted institutions. In one sentence, most of our laws lack legitimacy, have very little connection to the Nigerian reality and have been largely un-reconstructed from the racisms and narrownesses of the colonialists or the narrow arbitrariness of the military. As a result, our laws in Nigeria - and structure of opportunities (or lack of them, including educational systems) - have undermined equal citizenship and sustained a status-based country in exceptionalism is the norm and the efficacy of norms and institutions is based on who you are or who you know. The only exception is that where the exceptionalisms of the colonial era were race-based; those of post-colonial Nigeria are based on status and narrow identity.

Thirdly and unsurprisingly, our legal, administrative and political institutions are dysfunctional, incapable and unfit for purpose. As a result, they lack public support and respect. The case of *Society BIC S.A. v. Charmin Ind. Ltd*, illustrates why and how. In this case, Rhodes-Vivour JSC had this to say:

This is an interlocutory appeal from the decision of Hunponu-Wusu J of a Lagos High Court where his lordship ruled that the state High Court has jurisdiction to hear the plaintiff/respondents claims. This suit was filed in 1995. Nineteen years ago. It took nineteen years to resolve the simple issue of jurisdiction!! The case

would now be sent back to the high court for hearing of the main suit. That would possibly be settled after fifteen years or more. This is unfortunate and a sad state of affairs for the rule of law. Cases must be heard with dispatch and resolved quickly.⁸¹

The combination of a dysfunctional remedial process and a dysfunctional political process has produced a system dis-serves our citizens and now endangers our collective co-existence. Making this point with reference to the conduct of elections and electiondispute resolution in Nigeria in a report issued in February 2014, the National Human Rights Commission of Nigeria complained that “the Nigerian judiciary has created the impression that there is one law for poor people and another for the big men and women who put themselves forward for elections... The courts not only facilitate the violation of citizens’ rights to effective participation in their government, they also aid the culture of impunity that has become the hallmark of elections in Nigeria.”⁸²⁸³ Continuing further, the Commission points out about the judiciary and election petitions, that:

petitions have been fought to the level of the Supreme Court, at huge cost in time, public money, and the credibility of the judiciary.... This system of procuring the appearance of electoral legitimacy through the judiciary has corrupted both elections and the legal process. It has also undermined the right to effective participation in government and the capability of courts to guarantee fair trial. By

⁸¹ (2014) 4NWLR (Part1398) 497, At 541-54,

⁸² National Human Rights Commission, An Independent Review of Evidence of the Rights to Participate in

Government, to Public Service, and to Fair Trial through the Election Petition Process in Nigeria 2007-

⁸³ : Initial Report, Para 1.13, pp. 11-12 (2014)

2007, the courts had evolved a jurisprudence that clearly condoned and even permitted electoral criminality.⁸⁴

Fourthly, we have become unable to guarantee safety and security as a country as violence gallops and the capacity of the state to prevent or punish it vanishes. Even worse, political leaders evince no need to show empathy. The result is the crisis of the coming anarchy. I had cause six years ago to say about the system of crime and punishment in Nigeria (or lack of it) that:

Nigeria is in the throes of a severe safety and security crisis with profound human consequences. A major cause of this crisis is the incapacity of the institutions of the criminal justice system – the police, the prosecutorial system, and the courts – at all levels to identify, isolate, and establish the culpability of perpetrators of crimes.⁸⁵

Evidence of this systemic incapability abounds in the statistics, empirical, policy as well as anecdotal. Nigeria has an inordinately low prison population (30 per 100,000 of the general population compared to 756 per 100,000 in the United States; 335 per 100,000 persons in South Africa and 153 per 100,000 persons in the United Kingdom).⁸⁶

Over 77% of the prison population awaits trial in Nigeria, worsted only by four other African countries.⁸⁷ By contrast, Namibia has a pre-trial population of 7.9%; Egypt, 9.9%, Botswana, 17%; and Ghana 28%.⁸⁸ Because of the crisis of an ineffective criminal justice

⁸⁴ Ibid., para 1.18-1.19, p. 13

⁸⁵ Chidi Anselm Odinkalu, "Plea Bargaining and the Administration of Justice in Nigeria", Keynote Address to National Association of Judiciary Correspondents, (NAJUC), Abuja, 5 march 2012, p. 4

⁸⁶ Ibid. p.10

⁸⁷ Liberia, 97.3%; Mali, 88.7%; Benin, 79.6%; and Niger, 76%. Figures available from the International Centre for Prison Studies, ICPS, King's College, University of London, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=africa&category=wb_pretrial

⁸⁸ Ibid.

system of which indeterminate pre-trial detention is evidence, police officers sometimes set themselves up as vigilantes, abusing suspects and summarily executing them, rather than ensuring that every suspect is treated properly in accordance with the law and evidence. As pointed out in one of the most authoritative investigations of Police abuses in Nigeria published three years ago, "counting the number of people killed by the police in Nigeria is a hopeless task: there are simply too many, scattered over too large a geographic area, for outside monitors to measure accurately."⁸⁹ Even these arbitrarily low figures still produced an officially admitted "daily killing rate of 7.85 persons and a yearly rate of 2,865 police killings."⁹⁰ These increasingly pale in significance to the volume of mass killings. The Police reports that in the first three months of 2019, 1071 persons were killed in the country and another 685 kidnapped.⁹¹ In Zamfara State alone, the Senator representing Zamfara Central in the Nigerian Senate, Kabiru Marafa, claims over 11,000 were killed by bandits in the state since 2010,⁹² a yearly average of well over 1,000 killings. On many fronts, Nigeria is at war.⁹³

All these culminate in perhaps the biggest crisis of all: the crisis of a new entitlement to impunity. Many people will say Nigeria's biggest problem is corruption. Indeed, in a lecture in Lagos in November 2009, Ghana's immediate past President, John Kuffuor, claimed that "corruption is basically enshrined in our culture".⁹⁴ In these few words, President Kuffuor turned Cassius on his head, arguing, in effect, that the problem is in our

⁸⁹ Network on Police Reform in Nigeria (NOPRIN), and Open Society Justice Initiative, *Criminal Force: Torture, Abuse and Extra-Judicial Killings by the Nigeria Police Force*, p. 61 (2010)

⁹⁰ *Ibid.*, p. 62

⁹¹ "1,071 Killed, 685 Kidnapped in First Quarter of 2019 – IG", *The Punch*, 1 May 2019, available at <https://punchng.com/1071-killed-685-kidnapped-in-first-quarter-of-2019-ig/>

⁹² "How Bandits Killed 11,000 Men, Orphaned 44 in Zamfara – Marafa", *RealNews Magazine*, 6 May 2019, available at <https://realnewsmagazine.net/crime/how-bandits-killed-11000-men-orphaned-44000-in-zamfaramarafa/>

⁹³ See, Heidelberg Institute, *Global Conflict Barometer 2017*, p. 14

⁹⁴ John Kuffuor, "Growing Economies in West Africa: Ghana-Nigeria Relations", 40th Anniversary Lecture to Nigeria-Britain Association, Nigerian Institute of International Affairs, Lagos, 9 November 2009.

stars and ancestors and not in ourselves.⁹⁵ In doing so, he implausibly caricatures culture, incredibly generalizes about corruption as a social pathology; racialises it as a governance problem in a manner that would have caused severe hackles if it had been done by a Caucasian; and ultimately trivializes a rather serious issue. Dr. Sam Amadi asserts that "corruption is mainly the reason why about \$400 Billion realized from the sale of oil in Nigeria since 1958 has resulted in a few hundred millionaires and millions of starving and sick citizens."⁹⁶ I cannot quarrel with the figures but I disagree with the analysis. The reason for the situation Dr. Amadi describes is not corruption but impunity and a failure of state and institution building. The problem is not that people steal our resources; it is that we allow them to get away with it and, even worse, reward them with management of public trust as well as control of the public till, resources and institutions or applaud their claim that it is the turn of their people to get away with it.

5. CONCLUSION: BETWEEN CONVENIENCE AND PROMISE

The reality is that Nigeria does not have a lot of time in which to correct this. The structural outlook is not good. Population growth is at nearly three per-cent and average economic growth for the past half decade at less than half of this; investments in alternative sources of energy, including renewables, the hydrocarbons and natural resources that have been the bedrock of our revenues are dropping off precipitously; the replacements for these lost sources of revenues should come from innovation and entrepreneurship but the country is under-investing in education and skills. For over half a decade, the country has run recurrent deficits and sovereign debt outlook relative to

⁹⁵ Julius Caesar, I, ii, 140-141

⁹⁶ Sam Amadi, "Corruption and the Law: A Case of Unequal Justice?", 2nd Bamidele Aturu & Co., Law & Social Development Lecture, Monday, 26 October 2009.

revenues is looking unsustainable. The upshot of all these trends is that Nigeria is approaching a perfect storm of crises between supply of state capability and demand for public goods. If this new era does not find urgency in mediating this crisis, it may not have a successor. That, on its own should supply enough clarity to define its own agendas.

There are two notional paths to building such an agenda. One would be authoritarian. The current dispensation in Nigeria appears to have opted for that, with President Buhari's doctrine enunciated in August 2017 of placing his parochial sense of "national security" above the rule of law.⁹⁷ The logic of such a course will extend to suborning institutions and emasculating free expression even further. Two recent illustrations of this respectively are the removal and replacement of the Chief Justice of Nigeria through an ex parte order made by an institution controlled by the Executive and the conviction of Ibrahim Wala on charges arising from a public protest. In the latter case, the judge justified his conviction and sentence on the accused by declaring in his judgment: "We have come to accept the change mantra of this government (of President Buhari). Indeed, change is the only thing that is constant. He who rejects change is the architect of decay."⁹⁸

The other path is egalitarianism, that involves investment in institutions, political numeracy, public goods, pluralism, diversity, and political rights. In many ways, this is the harder option but it is also about the only one that potentially guarantees a sustainable country, without which democracy and human rights cannot exist. The former is convenient and alluring; the latter is inconvenient but promising. The real question is

⁹⁷ Ikechukwu Nnochiri, "Rule of Law Must be Subject to National Interest, Buhari Insists", *The Vanguard*, 27 August 2017, available at <https://www.vanguardngr.com/2018/08/rule-of-law-must-be-subject-to-nationalinterest-buhari-insists/>

⁹⁸ *Inspector-General of Police v. Ibrahim Garba Wala*, Suit No, CR/96/18, unreported judgment of Halilu J, High Court of the Federal Capital Territory, 15 April 2019, p. 64

whether the government and the people will be willing to choose the promising over the inconvenient.

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