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The Republican Constitution of 1963, the Supreme Court and Federalism in Nigeria

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“Individual judgment and feeling cannot be wholly shut out of the judicial process. But if they dominate, the judicial process becomes a dangerous sham.”

Baron Parke in Egerton v. Brownlow, 4 H.L. C.I (1853).

This paper specifically examines the constitutional changes of 1963 as the most important factor responsible for the redefinition and reconceptualization of the interrelationship of the Executive and the Judiciary during the era of representative government and parliamentary democracy in Nigeria. A careful review of the Nigerian political environment, especially the zero-sum game of the First Republic, will confirm that the Republican Constitution of 1963 was introduced, among other things, to allay the fears of insecurity by the Prime Minister, bolster the powers of the Executive, regulate Cabinet/Legislature relations, and enhance the leverage of the Executive over the Judiciary through subtle intimidation. The Prime Minister believed that Nigeria should review her relationship with Britain to reflect her sovereignty and independence.¹

This belief could not, however be divorced from the decision of the Privy Council in Adegbenro v. Akintola² and, of course, the highly controversial build-up to the case.³ It seemed that the Prime Minister felt insecure in office due to the provisions of the 1960 Constitution that gave the Governor-General wide discretionary powers to remove the Prime Minister, as was the case in the Western Region between the Governor and the Premier.⁴ The Government Sessional Paper of 1963, which enunciated government proposals on the constitutional amendment, contained a sentence that reflected the apprehension of the Prime Minister:

The Prime Minister himself will not be removable from office by the President unless he no longer commands the support of most of the members of the House of Representatives as a result of a vote of no confidence in the Government, secured on the floor of the House of Representatives.⁵

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1 Nig. House of Representatives, Legislative Council Debates (1963).

2 Adegbenro v. Akintola, 3 W.L.R. 12. (1963).

3 B. J. DUDLEY, INSTABILITY AND POLITICAL ORDERS POLITICS AND CRISIS IN NIGERIA 1-86 (Ibadan Univ. Press 1973) (detailing the political undertones in Adegbenro, *supra* note 2).

4 Nig. Western Region Const. (1960) § 33 (10)(a).

5 Nig. Govt. Sessional Paper No. 3 (1963) (containing proposals for the new constitution adopted by

The recent experience of the Prime Minister of the courts in the Doherty case⁶ and his personal distaste for adversarial arguments based on precedents and procedure aroused in him a need to revise the way justice was administered.⁷ He believed in and felt safe with a practice that would allow for the decisions of a wise man of honor rather than a learned man who had impeccable credentials among his professional colleagues.⁸ This formed the touchstone of the abolition of the Judicial Service Commission as a body responsible for the appointment and removal of judicial officers.⁹ Beyond the argument that the proposed changes were on the grounds of "bringing the Nigerian practice in line with what obtains in the United Kingdom," it could be seen that the appointment of the Chief Justice by the President on the advice of the Prime Minister was meant to be a clear warning to the Judiciary to always defer to the Executive. Adetokunbo Ademola was right when he said that the abolition of the Judicial Service Commission was enough to encourage judges to dance to the tune of any government.¹⁰

Pursuant to the same objective of enhancing the leverage of the Executive over the other arms of government, the abolition of all appeals to the Privy Council and the elevation of the Supreme Court to the Final Court of Appeal on all Nigerian cases¹¹ within a context of constitutional inferiority smacked of Executive tyranny.¹² Section 120 of the Constitution provided that "no appeal shall lie to any other body or person from any determination of the Supreme Court." "The Supreme Court was also allowed to retain its original jurisdiction in any dispute between the Federation and a region and between regions."¹³

Kasunmu seems to miss the point when he supports the abolition of the Judicial Service Commission by arguing that the attainment of judicial independence should, in the final analysis, depend on the quality, courage, and integrity of the individual judges, regardless of who

the all party at the Constitutional Conference held in Lagos, July 1963; *see infra* note 17).

6 *Doherty v. Balewa*, 1 All N.L.R. 604 (1961).

7 Trevor Clark, A RIGHT HONOURABLE GENTLEMAN: THE LIFE AND TIMES OF ALHAJI SIR ABUBAKAR TAFAWA BALEWA 595 (Hudahuda Publishing Co. 1991).

8 *Id.*

9 Nig. Const. (1963) § 112 (1) (relating to judges of the Supreme Court of Nigeria); See also Abiola Ojo, the panel on Nigeria since independence project Proceeding of the National Conference on Nigeria since Independence 348-349 (J. A. Atanda and A. Y. Aliyu eds. 1985).

10 DAILY TIMES (Nigeria), Jan. 17, 1972 cited in A.B Kasunmu, The Supreme Court of Nigeria 1956-1970 10 (1977).

11 Nig. Const. (1963) § 120.

12 The 1963 Constitution did not provide for judicial review of executive actions because judicial power was not expressly granted to the courts. This was corrected, albeit inadequately, by the 1979 constitution.

13 Nig. Const. (1963) § 120.

appoints them.¹⁴ The fact is, however, that the abolition of the Judicial Service Commission would preclude the appointment of judges who could be of high intellectual quality, courage and integrity. These qualities according to Adetokunbo Ademola could be better discovered and appreciated in any judge by the Judicial Service Commission.¹⁵ Nwabueze was equally right when he described the Commission as an “insurance against the injection of political and tribal considerations into judicial appointments” in a pluralized society.¹⁶ The analogy drawn by the Executive with the English practice to justify the abolition of the Judicial Service Commission was incorrect given that the decisive voice in all English judicial appointments was that of the Lord Chancellor’s Department, which according to English traditions was far removed from partisan politics.¹⁷ This argument proceeds on the premise that the constitutional changes with respect to judicial administration within the context of enhanced executive powers of a more confident Prime Minister affected the institutional safeguards of judicial independence during the 1963-1966 period.

The abolition of the Judicial Service Commission according to Adetokunbo Ademola was ill advised and in the words of W.O Briggs, “the twin brother of preventive detention Act.”¹⁸ Adetokunbo Ademola believed that although the machinery of justice worked with many wheels, the judge was the central figure in the scheme of things and it was around him that the whole machinery of justice revolved.¹⁹ The judge occupied a unique position as the arbiter of rights and duties not only between, citizen and citizen but also between the state and, the citizen and in a federal constitution, between the constituent regions.²⁰ The Chief Justice further contended that however good and however democratic the constitution might appear to be, it had, in the last resort, to depend and be greatly influenced by the quality of its judges, who would interpret the Constitution.²¹ “The more detached or impersonal the judge, the more likely will the intention of the framers of the constitution

14 Kasunmu, *supra* note 10.

15 In person interview with Hon. Justice Adenekan Ademola (Feb. 14, 1995).

16 B.O. Nwabueze, *CONSTITUTIONAL LAW OF THE NIGERIAN REPUBLIC* 290 (Butterworths, 1964).

17 A.E.W. Park, *The Constitutional Changes of 1st October 1963*, Nig. L. J. 97 (1964).

18 W.O Briggs was an Action Group Politician representing Degema at the House of Representatives. See Nig. House of Representatives Parliamentary Debates Vol. 13 2953 (1963); See also Clark, *supra* note 7 at 601.

19 Adetokunbo Ademola, *Personnel problems in the Administration of Justice in Nigeria*, 5 L. and Contemp. Probs. 27, 576-577 (1962).

20 *Id.*

21 *Id.* at 577.

be realized.”²² It was therefore submitted by the Chief Justice that the recruitment of judges should be left in the hands of a nonpartisan and professional body that would be able to assess and appreciate the basic qualities of a good judge.²³

Adetokunbo Ademola gave the following as the basic qualities of a good judge:

- a) Sound knowledge of the law. The judge must possess a sound logical mind, which would help the assimilation and application of knowledge of the law;
- b) A good judge should be objective in assessing facts. A judge should never allow his own personal feelings or his own preconceived notions to displace facts which had been proved before him;
- c) Sound common sense. A judge must also be good on facts and his assessment of facts that is, evaluation of the evidence before him and deductions from facts. Common sense is considered an indispensable factor in the attributes of a good judge;
- d) A judge should be humane. This attribute played an important role in the relation between the Judiciary and the public. The humane element in the administration of justice had always strengthened the position of the Judiciary; and
- e) Freedom from fear, prejudice or corruption.²⁴

The Chief Justice submitted that modern constitutions provided for the appointment, renewal of appointment, dismissal, general welfare, and promotion of judges.²⁵ In order to ascertain all these attributes, the Judicial Service Commission was the best suited. The abolition of the Commission was therefore seen as an attempt to expose the independence of the Judiciary to gross abuse by the political class. As noted by Clark, the Chief Justice could not be convinced of the reasons why the politicians abolished the Judicial Service Commission and he continued to plead with the Prime Minister and Premiers to reconsider the decision and reconstitute the Judicial Service Commission.²⁶ He believed that the Nigerian politicians generally never sympathized with any system that excluded their right to determine important state appointments. “We cannot, therefore, but feel that in the years ahead the appointment of judges by politicians may lead to what we call a packed

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 578.

²⁵ *Id.*

²⁶ Clark, *supra* note 7, at 600.

bench.”²⁷ Timing and the political turbulence of the period 1963-1966 did not, however, allow for the fulfillment of this prophecy.

By September 1964, it was obvious that the executive was not prepared to reconsider its stand on the abolition of the Judicial Service Commission in spite of the general and overwhelming conclusion that it was both deplorable and premature, considering the character and features of the Nigerian Federal System. The Supreme Court and its Chief Justice had to readjust to the new reality and this regulated or moderated its relationship with the Executive. It is, however, feared that considering the depth of the interpersonal relationship between the Prime Minister and the Chief Justice,²⁸ the public condemnation of the abolition of the Judicial Service Commission by Adetokunbo Ademola was only a professional duty. It would seem that the Prime Minister would never contemplate any judicial appointment without an input of his friend, the Chief Justice. In view of his recent experience with the courts, the Prime Minister would seemingly prefer to deal with the Chief Justice in his private capacity with regard to judicial appointments. The Judicial Service Commission seemed too formal, independent, and difficult to manipulate in carrying out the dictates and preferences of the Prime Minister.

One recurrent, and perhaps serious, defect of both the 1960 and 1963 constitutions was the attempt to practice a Westminster cabinet system in a supposedly federal framework plagued by ethnic, religious, educational, and economic disparities.²⁹ Intra-class conflicts assumed dangerous dimensions when such conflicts were presented and fought deceitfully as inter regional hostilities and rivalries. The actual manifestations of these rivalries undermined the objective base of the artificial federal system because the apparatus of the Nigerian state became structurally suspect. The political class, as composed in the major parties and in shifting combinations and alliances, could not resolve and arbitrate the differences among them; and this led to an escalation of political disturbances in many parts of the country.³⁰ These were clear indications of the existence of a deep resentment against government.³¹

A major cause of concern for some politicians of the first republic, especially the opposition, was the existence of an arrangement that gave a particular section of the country the opportunity to dominate

²⁷ *Id.* at 643.

²⁸ Clark, *supra* note 7 (detailing the relationship between the Prime Minister and the Chief Justice).

²⁹ Akin Alao, *The Military and National Integration in Nigeria 1966-1979*, Chapt 2. (1987) (unpublished M.A. Thesis, Obafemi Awolowo University, on file with author).

³⁰ B.J. Dudley, *INSTABILITY AND POLITICAL ORDERS: POLITICS AND CRISIS IN NIGERIA 78* (Ibadan Univ. Press 1973).

³¹ *Id.*

Nigerian politics and central government.³² The Northern Region was much bigger in total land area and in population strength than all other regions, including the federal territory of Lagos, put together. In the allocation of seats in the House of Representatives, the Northern Region was allocated 174 seats out of the 312 seats. The Eastern Region had 73, while the Western Region and Lagos had 62 and 3 respectively.³³ This inequality of a federal system that was created through the peculiar process of devolution negated one of the conditions necessary for the practice of a truly federal government.³⁴ In the words of John Stuart Mill: "There should not be any one state so much powerful than the rest as to be capable of vying in strength with many of them combined. If there be such a one, and only one, it will insist on being master of the ... deliberations; if there be two, they will be irresistible when they agree and whenever they differ, every thing will be decided by a struggle for ascendancy between the rivals."³⁵

The fact that the ruling elite in the North was consciously using the North's political weight to decide major issues and to promote private political as well as economic interests at the expense of their disparate Southern counterparts led to mistrust and suspicion.³⁶ The Prime Minister was more determined in using the Central might at his disposal to redefine and rearrange the basis of the federal system; an attempt that was seen as a clever design to entrench the domination of the Northern oligarchy over the federation. It would appear that it was the extent to which the judiciary, headed by Adetokunbo Ademola, became involved in this design that provoked Ezejiiofor's conclusion that the crisis which ultimately led to the collapse of the First Republic was the failure of the courts to "interpret the Constitution fearlessly, impartially and liberally."³⁷ The Supreme Court and its leadership became involved in the national question; an involvement which affected public perception of its role as the final arbiter in constitutional matters. As the Chief Justice of Nigeria, a statesman and confidant of the Prime

³² *Id.*

³³ Oyeleye Oyediran, *NIGERIAN GOVERNMENT AND POLITICS UNDER MILITARY RULE 1966-1979* (Macmillan 1979).

³⁴ For an articulate theoretical positions on the evolution, nature and character of the federal system in Nigeria. See L. Adele Jinadu, *Federalism, the Consociational State and Ethnic Conflict in Nigeria*, 15 *Publius J. of Federalism* 2 (1985); see also *FEDERALISM IN A CHANGING WORLD* (R.A. Olaniyan ed., Lagos: Office of the Minister of Special Duties 1988).

³⁵ John Stuart Mill, *REPRESENTATIVE GOVERNMENT* 367-368 (Everyman Doubleday, 1948).

³⁶ For an analytical examination, see Oyeleye Oyediran, *NIGERIAN GOVERNMENT AND POLITICS UNDER MILITARY RULE 1966-1979* (1979).

³⁷ Kasunmu, *supra* note 10, at 67 (citing Dr. G. Ezejiiofor, *A JUDICIAL INTERPRETATION OF CONSTITUTION: THE NIGERIAN EXPERIENCE DURING THE FIRST REPUBLIC* 67 (A.B. Kasunmu ed. 1977)).

Minister, Adetokunbo Ademola could not but participate in the effort to arrest the drift of the state, as it were, to anarchy.³⁸

The 1962 census controversy erupted³⁹ in the course of the felony treason trial of Obafemi Awolowo and others that most people in the Western Region felt was a political vendetta in an attempt to liquidate the Action Group. The initial and unconfirmed figures had shown that the South was more populous than the North; a claim the N.P.C rejected immediately. The Prime Minister cancelled the 1962 exercise because virtually everyone became a "willing liar of the first magnitude." A new board, headed by Sir Kofo Abayomi was set up to produce a more credible figure. The 1963 head count preserved the numerical supremacy of the North over the southern regions. The Southern politicians, however, had a "free for all" contesting the figures and after serious negotiations, the Economic Council adopted the figures in May 1964.⁴⁰

The appeal of Obafemi Awolowo and 17 others came before the Supreme Court with Adetokunbo Ademola presiding and empanelled with Lionel Brett, J.I.C. Taylor, Vahe Bairamian and Louis Mbanefo.⁴¹ The accused persons were charged with three counts of the following offences: felony treason contrary to section 41(b) of the Criminal Code, conspiracy to commit a felony contrary to section 516 of the Criminal Code and conspiracy to effect an unlawful purpose contrary to section 518(6) of the Criminal Code.⁴² There is evidence to believe that Adetokunbo Ademola had a prior knowledge of the case against Obafemi Awolowo and his associates since he had the benefit of a privileged discussion concerning the same with the Prime Minister.⁴³ According to Trevor Clark, the Prime Minister had shown some of the impounded firearms to Adetokunbo Ademola to convince him that the leadership of the Action Group had indeed master minded a plan to overthrow the central government through non-constitutional means.⁴⁴

When the appeal in the case eventually came up before the Supreme Court, it was wholly dismissed with respect to Michael Omisade, Gabby Sasore, Samuel Akanbi Onitiri, Sebastian James Umoren, Sunday Ebietoma, Lateef Jakande, Uzodinna Iroegbu

38 In person interview with the Hon. Justice E.O. Fakayode Ibadan (Mar. 11, 1996).

39 L.K. Jakande, *The Trial of Obafemi Awolowo* (Seeker Warburg 1966); *Politics in Africa - 7 Cases* (R.L. Carter ed., Brace and World Inc. 1966).

40 The figures were North: 29,177,986, East: 12, 388, 646, West: 10278,50, Mid West: 2533,337, and Lagos: 675,352.

41 *The Queen v. Omisade & 17 Others*, N.M.L.R. 67 (1964).

42 *Id.*

43 Clark, *supra* note 7, at 555.

44 *Id.*

Nwaobiala, Samuel Adesanya Otubanjo and Chief Obafemi Awolowo.⁴⁵ The performance of Adetokunbo Ademola in the felony treason trial on appeal at the Supreme Court was not a surprise to Obafemi Awolowo, who believed that the Chief Justice was decidedly against him and his party, the Action Group.⁴⁶ Awolowo believed that the Chief Justice as far back as October 31 1962 had confided in Adewale Thompson that Awolowo would be arrested on November 2, 1962 and charged with treasonable felony, convicted and sentenced.⁴⁷ This confirms Trevor Clark's claim that the Chief Justice had discussed the matter with the Prime Minister and that the latter had a strong case against the leadership of the Action Group.⁴⁸ It further confirms our submission that Adetokunbo Ademola seemed to have been convinced by the evidence of the Prime Minister, and that he was prepared to allow the Supreme Court to protect the person and office of the Prime Minister.

Michael Omisade believed that the felony treason charges, trial and the dismissal of the appeal wholly by the Supreme Court, were a part of a grand design to eliminate any opposition to government in the Federal Parliament.⁴⁹ The Action Group provided a robust opposition to the government side in the legislature. Obafemi Awolowo also referred to an instance when Adetokunbo Ademola compared him to a man in a village who thought it was his duty to oppose everything done in the village.⁵⁰ Awolowo seemed to believe that the Chief Justice and the Prime Minister were too simple minded to know that in a dynamic society and in politics, there was always something for thinking people to oppose. He accordingly said:

However, the business of the opposition in a democracy was something totally beyond the ken and comprehension of our Chief Justice. Otherwise, he would not have spoken the way he did. It were better if in future he kept his wits within the confines of the Bench so as to avoid behaving like a fish out of water.⁵¹

From the above, it could be inferred that the Executive and the Judiciary believed that the opposition was detrimental to the unity and stability of the Nigerian State and to orderly conduct of government business. The Prime Minister was a firm believer of peaceful negotiation. According to his friend Adetokunbo

45 *Omisade & 17 Others*, N.M.L.R. (1964) at 99.

46 Obafemi Awolowo. *ADVENTURE IN POWER: MY MARCH THROUGH PRISON* 203-236 (Macmillian Nig. Pub. Ltd., 1985).

47 *Id* at 204.

48 Clark, *supra* note 7, at 555.

49 In person interview with Chief M.A. Omisade Lagos (Aug. 4. 1994).

50 Awolowo, *supra* note 46, at 211.

51 *Id*.

Ademola: "Sir Abubakar was a peace loving man and he accepted the Prime Ministership of Nigeria with a view of establishing peace, unity and love among the several tribes and peoples of Nigeria."⁵²

The Federal Election of 1964, which was characterized by the alliance of strange bedfellows, mutual distrust and boycotts, created "a lot of tension and upheaval." The President, Dr. Nnamdi Azikiwe, was obviously disturbed about the state of the nation in 1964 when he confided to an interviewer on his 60th birthday that, "what is happening in Nigeria today does not inspire me to be optimistic that we shall survive as a nation."⁵³ The Northern Peoples' Congress and the Nigerian National Democratic Party formed the Nigerian National Alliance. The National Council of Nigerian Citizens and the Action Group became the United Peoples Grand Alliance. UPGA lost faith in the ability of the electoral body to organize a free and fair election devoid of persecution and intimidation of political opponents, especially in the Northern Region.⁵⁴ It therefore decided to boycott the elections. The NNA was sure of electoral victory and therefore went ahead and held the elections as scheduled. The boycott was effective and absolute in the Eastern Region and some parts of the Western Region. The Mid Western Region belatedly participated when the Premier Sir Dennis Osadebay realized that the boycott would improve the chances of the NNA candidates at the polls.⁵⁵ The haphazard conduct and participation in the elections raised the question of credibility, especially when the Chairman of the Electoral Body had cause to resign his appointment.⁵⁶

On December 30, 1964, elections were held in the Northern Region, in many parts of the West and in some parts of the Mid West. They were completely boycotted in the East.⁵⁷ The results that were eventually released showed that the N.N.A. had won 190 seats and the U.P.G.A only 40 seats.⁵⁸ Many people called for the cancellation of the elections and urged President Nnamdi Azikiwe to assume executive powers, nominate a caretaker government under a Prime Minister of his choice and later hold a new and more credible election.⁵⁹ Tafawa Balewa

⁵² Clark, *supra* note 7, at VIII.

⁵³ *Id.*

⁵⁴ For details, see Olav Stokke, *INTEGRATION AND DISINTEGRATION: THE CASE OF THE NIGERIAN FEDERATION UP TO JUNE 1967* 24 (Scandinavian Inst. of Afr. Studies 1970).

⁵⁵ J.D. Ojo, *CONSTITUTIONAL BREAKDOWN IN NIGERIAN*, LECTURE DELIVERED AT THE UNIVERSITY OF SOUTH AFRICAN (Sept. 1995).

⁵⁶ Sir Kofo Abayomi resigned as both the Chief Electoral Commission and Chairman of the Federal Electoral Commission on April 1964.

⁵⁷ Stokke, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ Clark, *supra* note 7, at 698.

on the other hand, strongly believed that the results of the elections were truly reflective of the political preference of the majority of Nigerians. On January 1, 1965, the President informed the Prime Minister that the elections were "unsatisfactory in view of the violations of freedom of recent weeks."⁶⁰ The President believed that the results of the elections could not be relied upon in calling up a new Parliament and that he had no intention of appointing Tafawa Balewa or any person to form a government.⁶¹ Azikiwe further said he would prefer to resign as President of the Federal Republic of Nigeria rather than to accept the results of the elections.⁶² The Prime Minister responded that he was still the Prime Minister until a new one was appointed within the provisions of the Constitution.⁶³ He believed that the clear majority votes of the NNA votes gave the President no alternative other than to reappoint him. He concluded that, if the President was not prepared to carry out the duty of his office, he should resign.⁶⁴

It was in the thick of this national crisis that Adetokunbo Ademola became involved in finding a workable solution to the impasse. The Prime Minister confided in Adetokunbo Ademola his intention to appoint Sir Kofo Abayomi to succeed Azikiwe as President.⁶⁵ Adetokunbo Ademola, however, disabused his mind and assured him that Nnamdi Azikiwe would not resign.⁶⁶ The President had wanted to call in the Armed Forces and the Police to strengthen his bargaining position *vis a vis* the Prime Minister's.⁶⁷

At a joint meeting with Major-General Welby-Everard, Commodore J.R.A. Wey and Mr. Orok Edet, the Inspector General of Police, the President sought to secure the allegiance and loyalty of the Forces.⁶⁸ It was, however, at this stage that he called for legal advice as to which office the Forces should pledge their loyalty. It would seem that the constitutional interpretation that was provided by Mr. Justice Lionel Brett of the Supreme Court was with the fore knowledge and concurrence of Adetokunbo Ademola.⁶⁹ It was submitted that the Constitution gave the Federal Parliament sole powers to legislate for the Forces. The Army and Navy Acts laid down general control to be

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 699.

⁶⁸ *Id.* at 700.

⁶⁹ *Id.*

wielded by the Army Council and the Navy Board. They were both responsible to the Minister of Defense. The operational control of the Forces was said to be by the commanders who were under the policy direction of the cabinet. With respect to the maintenance of public safety and order, the direction was to come from the Prime Minister.⁷⁰

This legal position emphasized the figurehead position of the President who had no operational control or command over the Forces. The position of the law on the matter was conveyed to the President on Sunday 3 January 1965 by Adetokunbo Ademola and Louis Mbanefo and with a six-point proposal on how best to resolve the crisis. The six points as proposed were:

- (i) reaffirmation of the federal unity of Nigeria, with equal opportunities and no oppression;
- (ii) strict observance of the constitution till it is properly amended;
- (iii) a broad based national government formed on the declared election results to avoid chaos;
- (iv) detailed legality of the election to be determined by the courts and the constituency results upheld, except where the small turn-out had made an obvious mockery and common sense required a re-run;
- (v) a one-year eleven man commission to be set up within six months, to review the constitution and electoral machinery with a view to a constituent assembly (the President to nominate a member and the Prime Minister and Premiers two each); and
- (vi) the Western government to be dissolved to allow a free expression of regional electoral will.⁷¹

In spite of the uncompromising position of the activists who surrounded him, President Nnamdi Azikiwe, on Monday 4 January, called on Tafawa Balewa to form a government on the basis of the 1964 electoral results.⁷² In his acceptance speech, the Prime Minister said *inter alia*: "The President and I have once again showed [sic] that the things that bind us together are much stronger than those that sometimes divide us... it is my intention to try and form a broadly based (SIC) government that will cater for all our peoples."⁷³

Between 1963 and 1966, the fragility of the Nigerian federation was quite apparent.⁷⁴ The Chief Justice became involved in the resolution

⁷⁰ *Id.*

⁷¹ *Id.* at 701.

⁷² *Id.* at 703.

⁷³ *Id.*

⁷⁴ Oyeleye Oyediran believed that all that happened between 1962 and 1966 were signposts to

of the national crisis. His performance as head of the Judiciary could therefore be understood in view of his avowal to use the agency of the courts, especially the Supreme Court to ensure the survival of the Federation. The political situation and circumstances of the period called for enlightened self-restraint and not judicial activism. As noted by Cardozo, the Chief Justice could not help but be influenced by prevailing values⁷⁵ and in the words of Wright, "value choice is the most important function of the Supreme Court, because of constitutional causes."⁷⁶ This would be better determined when judges prefer a process of selecting values to one of constructing and articulating principles.⁷⁷ Adetokunbo Ademola believed that the problem of the country was how to meld together the diverse ethnic groups and bring about a balance between national unity and regional autonomy.⁷⁸ The Constitution, which Ademola described as a piece of African art in its detailed simplicity,⁷⁹ would in his opinion only succeed if the politicians approached it with care and tolerance and the judges with prudence and restraint. The Bench in Nigeria must always be aware of the "peculiar Nigerian circumstance and situations while considering constitutional issues and allowance must be made for spatial and historical differences," which according to Adetokunbo Ademola while commenting on the Nigerian situation during the First Republic noted that:

Much had been said about the liberal method of interpretation, but one must remember that conditions are different from country to country and whilst therefore judicial interpretations in Nigeria may not necessarily follow those of other countries, it was to be hoped that courts would evolve their own distinct jurisprudence.⁸⁰

The case Attorney-General Western Nigeria v. African Press Ltd. and Ayo Ojewunmi, provided an opportunity for the Supreme Court, presided over by Chief Justice Adetokunbo Ademola, to make more definitive pronouncements on sedition. The facts of the case were as follows: the Director of Public Prosecutions Western Region initiated criminal proceedings against African Press Ltd. and Ayo Ojewunmi in the name of the Attorney General for the Western Region. The following

disaster.

75 Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* (Yale Univ. Press 1925) 1921.

76 Robert H. Borke, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 5 (1971).

77 *Id.*

78 Constitutional Problems of Federation in Nigeria, Record of Proceedings of a Seminar Held at Kings College, Lagos 8-15 August 1960 134 (Lionel Brett ed.).

79 *Id.* at V.

80 *Id.*

charges were preferred against them:⁸¹

- (i) Publishing seditious publication contrary to section 47(1)(c) of the Criminal Code, Cap 28, Laws of the Western Region of Nigeria, 1959.
- (ii) Publication of false news with intent to cause fear and alarm or to disturb public peace contrary to section 54(1) of the Criminal Code, Cap 28, Laws of the Western Region of Nigeria, 1959.
- (iii) Publication of defamatory matters contrary to section 316 of the Criminal Code, Cap 28, Laws of Western Region of Nigeria, 1959.⁸²

Relying on the Republican Constitution of 1963, which placed the Director of Public Prosecutions under the Attorney General, the respondents at the lower court submitted that the Crown could not prove that the Attorney-General's written consent, a prerequisite, had been obtained before the prosecution was initiated.⁸³ The lower court acquitted the respondents, despite reference to Western Nigeria Legal Notice 293 of 1963 giving a general consent of the Attorney-General to the Director of Public Prosecutions, the Deputy Director of Public Prosecutions, and all grades of State Counsel in the Department of Public Prosecutions.

When the case came before the Supreme Court, Chief Justice Adetokunbo Ademola was concerned with the policy implications of the case, and perhaps more importantly by the political climate of the Western Region in particular and the country in general. Relying on the 1962 Second Amendment to the Constitution as contained in section 47 (1), (2), (3), and (6) of the Constitution of Western Nigeria,⁸⁴ the Chief Justice held that the Respondents' argument that the power to institute proceedings differed from the duty of giving consent and that the latter could only be personal and could not be delegated was a misunderstanding of the constitution.⁸⁵ Accordingly the Chief Justice said: "The Attorney-General may exercise the power to institute criminal proceedings which the constitution of the Region gives him in any case in which he considers it desirable to do so, and in exercising it he is not subject to the control of any other person or authority."⁸⁶

With reference to the clause disallowing the intervention of any court of law in the proper exercise of the powers of the Attorney General to delegate his or her powers, Adetokunbo Ademola acquiesced that:

81 *Attorney General Western Nigeria v. African Press Limited and Ayo Ojewunmi* 4 N.M.L.R. 158 (April 1965)

82 *Id.*

83 *Id.*

84 Nig. Const. Western Region, §47 (1), (2), (3) and (6).

85 *Id.*

86 *Id.*

"The question whether in instituting these proceedings, the Director of Public Prosecutions was acting in accordance with any instructions he may have received from the Attorney General has no bearing on the question of whether the proceedings were validly instituted and is not one into which the court can inquire."⁸⁷

It was therefore declared that:

Generally, there is no need for a Judge to know what instructions the Attorney General has given to the Director of Public Prosecutions in regard to the conduct of a case and the courts must normally take it for granted that if the Director of Public Prosecutions begins a prosecution under section 47 of the Criminal Code, he has done so in accordance with instructions given him by the Attorney General....⁸⁸

Commenting on the case under review, Ijalaye contends that the Supreme Court sat on the fence when it had the opportunity to review the rules of evidence relating to the exclusion of evidence on grounds of state privilege.⁸⁹ It would seem, however, that the Chief Justice was, above all, concerned about the stability of the country at the material time. Sedition was an obstacle to healing the wounds of the country. Indeed, the African Press Ltd. case was the only criminal case that called for a decision of the Court on privilege claims of the state under section 219 of the Evidence Act.⁹⁰

The restrictive interpretation of the Constitution by the Supreme Court and the fear that it had compromised its separateness and independence as an arm of government affected the confidence of the people in the court as protector of individual liberty, rights, and privileges.⁹¹ As noted by S. S. Ogan, the number of constitutional cases that came up for determination by the Supreme Court reduced in number progressively from 1963 to 1965. He believes that the reduction in number was a clear indication that the public had lost confidence in the ability of the courts to settle constitutional disputes impartially.⁹²

It could however be argued that the reduction in the number of constitutional cases was the result of a combination of factors. In the first instance, by 1963 the federal government had succeeded in assuming a

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ D.A. Ijalaye, *THE IMPACT OF THE SUPREME COURT DECISIONS IN THE ADMINISTRATION OF CRIMINAL JUSTICE* 183 (A.B. Kasunmu ed. 1977).

⁹⁰ *Id.*

⁹¹ S.S. Ogan, *History of the Supreme Court of Nigeria* 268 (1989) (unpublished Ph.D. dissertation on file with the University of Ibadan).

⁹² *Id.*

position of leverage over the regions and had penetrated the Western Region, the hot bed of opposition to its rule.⁹³ The leader of the opposition and his lieutenants in the regional and Federal Houses of Assembly had been silenced.

The Supreme Court under Ademola became characterized as over-protective of the interest of the Federal government. His extra judicial activities during this period confirmed that he was very close to the Prime Minister and would not mind using his position as Chief Justice of Nigeria to protect the interest of the government led by his friend and soul mate. The personnel of the Court became involved in hotly partisan matters such as giving political advice to political actors.⁹⁴ The political climate was not conducive to constitutional litigations, as the business of government was conducted on the basis of political bargaining, compromise, mutual and ethnic mistrust and suspicion.⁹⁵ The preferred position of the Prime Minister was to give as little recourse to the courts as possible, and this appeared to have been appreciated by Adetokunbo Ademola.⁹⁶

The Western Regional election of October 11, 1965 was a landmark in the history of federalism and political party activities in Nigeria.⁹⁷ The various political parties were all interested in the outcome of the elections as the political stakes were high. The political calculations were that, if the NNDP won, the AG would probably collapse and the NCNC would then be isolated in a federation completely dominated by the Northern Region and its leadership. If the AG defeated the NNDP, all three Southern Regions (East, Midwest, and West) would then be under parties opposed to the NPC. By acting together, they might be able to cause sufficient political upheavals to force the federal government⁹⁸ to conduct a new round of general elections which they might possibly win.

Adetokunbo Ademola's support for the NNDP through the Egbe Ornn Olofin was well known.⁹⁹ The election was characterized by electoral fraud of frightening proportions in order to secure victory for the NNDP.¹⁰⁰ Some electoral officers disappeared or refused to accept nomination papers of opposition candidates, thereby declaring NNDP candidates unopposed. Ballot papers were widely found on unauthorized

93 Douglas A. Anglin, *Brinkmanship in Nigeria: The Federal Election of 1964-1965*, XX Int'l. J. 173 (1965).

94 Clark, *supra* note 7, at 700-702.

95 *Id.* at 674-712.

96 Sam Ekpelle, NIGERIA SPEAKS 54-55 (Lagos: Federal Government Printer 1966).

97 Anglin, *supra* note 93.

98 Clark, *supra* note 7, at 674-712.

99 Awolowo, *supra* note 46, at 219.

100 NIGERIAN GOVERNMENT AND POLITICS (Jolin P. Mackintosh ed., Allen & Unwin 1966).

persons on election day, and some returning officers refused to declare the result of the polls after their count so false returns could be made from the regional capital.¹⁰¹ The Chairman of the Electoral Commission resigned in protest and declared that he had no confidence in the conduct of the elections.¹⁰²

The Federal Government for inordinate political reasons became most insensitive to the situation in the Western Region. In spite of public outcry, the NNDP went on the air, through the federal government owned radio network, to declare its victory in 73 out of the 94 seats.¹⁰³ These returns were transmitted to the Governor of the West, Sir Odeleye Fadahunsi, who immediately called on S.L. Alcintola to form a new government in the Western Region.¹⁰⁴ The rump of the Action Group, led by Alhaji Dauda Adegbenro, were arrested and charged for illegal assumption of office.¹⁰⁵ The supporters of the AG felt that the injustice was so unbearable, that it led to a complete break down of law and order in the region.¹⁰⁶ Moreover, farmers saw the cut in guaranteed price of Cocoa from £120 to £65 as an attempt by the Premier S.L. Akintola and the Northern dominated Federal Government to repress them politically and economically.¹⁰⁷

The Federal Government watched the mounting tension but remained generally indecisive. Some observers however believe that the Federal Government was waiting for the crisis to escalate to a point that would justify the use of the armed forces as an army of occupation in the Western Region.¹⁰⁸ The coup of January 15, 1966, led by Major K.C. Nzeogwu pre-empted the Federal Government's plan to use the army in the West.¹⁰⁹

In fact, it is believed that January 15, 1966, became the D. Day because Major K.C. Nzeogwu and his collaborators were aware of the intention of the central government to use the army to settle a sectional and political cause in the Western Region.¹¹⁰

From an analytical class perspective, the January 15, 1966 coup

¹⁰¹ *Id.*

¹⁰² Clark, *supra* note 7, at 656.

¹⁰³ Toyin Falola et al., *THE MILITARY FACTOR IN NIGERIA 1966-1985* 67 (The Edwin Mellen Press 1994).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Adewale Ademoyega, *WHY WE STRUCK* 67 (Evans Brothers Nig. Publishers Ltd. 1981).

¹⁰⁷ Olutayo Adesina, *An Historical Evaluation of Western Nigerian Government Agricultural Policy 1951-1966* (1989) (Unpublished M.A. Thesis on file with Obafemi Awolowo University).

¹⁰⁸ Ademoya, *supra* note 106.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

that ended the life of the First Republic was a result of zero-sum-game politics, compounded by a winner-take-all strategy.¹¹¹ The Nigerian political class competed amongst themselves for access to the corridors of power and by extension the acquisition of substantial wealth.¹¹² The federal state structure was not founded on any enduring principle; the institutions of state including the judiciary were not prepared or equipped to resolve deeply rooted structural conflicts and contradictions.¹¹³

Adetokunbo Ademola thought that the judiciary's role was independent to the extent that it could not be said that the Supreme Court was under the control of the executive. It is obvious, however, that the Chief Justice failed or pretended not to see the thinly disguised maneuvers of the Prime Minister to build up the powers of the central government at the expense of the regions, and to ensure the protection of the political interest of the NPC by all the institutions of state including the Judiciary.

111 Falola, *supra* note 103.

112 Toyin Falola and Julius Ihonvbere, *THE RISE AND FALL OF NIGERIA'S SECOND REPUBLIC 1979-1984* 254 (Zed Books Ltd. 1987).

113 *Id.*