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Comparative Constitutionalism: A Critical Appraisal of the Constitutions of the United States of America and Nigeria.

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Abstract

The human race since it found itself in existence has experimented with many forms of political organizations in the bid to govern itself. Therefore, many forms of government abound, from the ancient through the middle ages to contemporary times. Humankind had fiddled with aristocracy, gerontocracy, autocracy, dictatorship, and of course, democracy.
In this article, the writer shall discuss the concept of constitutionalism on comparative basis between the U.S.A. and Nigeria. In this comparison, salient features inherent in both Constitutions will be critically examined. The comparison made here is to check into the proximity, in term of the differences and similarities of the constitutions to each other, given the fact that both constitutions are Federal Constitutions.

1. Introduction

Constitutionalism has been variously defined. However, there appears to be one thread running through the length of the definitions. And that is the description wherein the concept of constitutionalism, is the system of government based on a constitution. Constitutionalism means that the power of leaders and government bodies is limited, and that these limits can be enforced through established procedures. As a body of political or legal doctrine, it refers to government that is, devoted both of the good of the entire community and to the preservation of the rights of individual person.[1]

Nigeria, just like the United States of America, has always been a federal state, then before independence. The Nigerian federalism chiefly is predicated by the heterogeneous nature of the country's diverse culture and languages. However, the vex question, since the adoption of federalism is how far has the country fared emergent the adoption of a federal structure?

Perhaps, this, more than anything, brought about the switch over from the Westminster type of government, in 1979, to the American presidential system of government. Since the American federal constitution has been regarded as the model for federal constitution, it becomes imperative that the Nigerian Constitution, of 1999, be juxtaposed with it.

2.0 Synopsis of the Constitutions

2.1 The United State of America

The Constitution of the United States, perhaps, is the most outstanding from the eighteenth century upward. This sobriquet came about given the features of the said Constitution, and these features are regarded by pundits – political scientists, lawyers etc. as the

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[1] Greg Russell, "constitutionalism: America & Beyond" gotten from the internet, 04/0/2013, 12.53pm.

features of an ideal constitution. A typical constitution is written, short, general, and entrenched.[2]

> "A typical Constitution is written, short, general and entrenched. The oldest and.... most successful Constitution in the world, that of the United States, illustrates all these points."

The Constitution was written at a Constitutional Convention in 1787 and ratified by all the existing states except Rhode Island. It is the law of the land since 1789.[3] The US Constitution and all subsequent amendments ran to only around 8,000 words – it is the shortest in the world, India being the longest. It contains no rules about what must be done, except procedural rules governing the election of Presidents and Congress and the nomination of Supreme Court Justices and other senior officials.[4] It contains many rules about what Congress, the executive, and (since the Civil War) the States may not do. And it contains the rules for its own amendment:[5]

The Constitution of the US embodies the concepts on which the US system of government is based[6]. It established a Federal Republic, balancing the power of the states and that of the federal government. In the federal government power is divided among three independent branches: legislative, executive and judicial.

The constitutional document comprises a short preamble followed by seven articles which include: the organization, powers and procedures of the legislative branch (Congress); the powers of the President and executive; the powers of the judiciary, including the Supreme Court; the rights of the states; and procedures for amending the Constitution. The articles are followed by twenty-seven amendments, the first ten of which are known as the Bill of Rights (although later amendments also deal with civil rights issues).

It should be remarked that prior to the present Constitution, the United States had a constitution, Article of Confederation, from 1781 to 1788. This document was prepared by the Continental Congress, it established a single-house Congress, with one vote for each state and with no executive, courts, or independent revenue. Its weaknesses led to it replacement by the present US Constitution in 1788.[7]

2.2 The Nigerian Constitution

The issue of constitutionalism and constitutional development seem to have had a chequered history in Nigeria, arguably, though. In a discourse of this nature, it may be

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[2] *Oxford Concise Dictionary of Politics*, 3rd edition, U.S.A. (New York), Oxford University Press, 2009), p.116.

[3] *Chamber Dictionary of World History*, 2000 edition, (New York, Chambers Harrap Publishers Ltd, 2000), p. 856.

[4] Article II, section I; article I, section 2,3,4,5; article III of the U.S. Constitution.

[5] Articles V, U.S. Constitution. proposals must emanate from either two-thirds of each house of Congress, or a convention called at the request of two-thirds of the state legislatures, and to succeed they must be ratified by three-quarters of the states.

[6] These concepts shall be discussed shortly.

[7] *Chambers Dictionary of World History, ibidem*, p.55.

convenient to take off from the time in history when the country was weaned off her colonial master, Britain. Prior to independence, Nigeria had a couple of constitutions –

> "In its chequered political history, Nigeria has experimented with eleven Constitutions. Pre-independent Nigeria experimented with five Constitutions, while it has so far tried out five since attaining independence from Britain in 1960. Each successive Constitution was designed to take care of the inadequacy of the previous one."[8]

Colonially, constitutional development in Nigeria commenced with the Sir Fredrick Lugard's Amalgamation Report of 1914:

The first pre-independence Constitution named after the Governor-General, Lord Lugard was written and published in 1914. The Constitution established a legislative Council known as the Nigerian Council comprising thirty members who included seventeen officials and thirteen non-officials."[9]

In 1922, a new Constitution known as Clifford Constitution was introduced. The new Constitution was an improvement on the 1914 Constitution. This Constitution replaced both the Legislative Council of 1862 which was subsequently enlarged in 1914, and the Nigerian Council of 1914. Under the Constitution, a Legislative Council was for the first time established for the whole of Nigeria, which was styled as, 'The Legislative Council of Nigeria'. In spite of the embracive colouration of the Council, its jurisdiction was confined to the Southern Provinces, including the colony of Lagos, whose Legislative Council was subsequently abolished. The Legislative Council did not legislate for the Northern Province but its sanctions, signified by a resolution, was necessary for all its expenditure out of the revenues of Nigerian in respect of those provinces.[10]

Then came the Richards Constitution of 1946 which was framed by Governor Bourdillon. The main feature of the Constitution which incidentally was the last of Governor's Constitution is that it ended the unofficial majority in the legislature; ensuring unofficial numbers of the legislature council out-numbered the official numbers.

Next was the Macpherson's Constitution of 1951. The Constitution established a central legislature for the country and also a bi-cameral regional legislative comprising of House of Chiefs and House of Assembly. The Macpherson Constitution could be rightly termed as Nigeria's first indigenous Constitution, evolving a strong national government because a select committee consulted widely across the country to be able to draw up the Constitution.

By 1954, a new constitution known as Lyttleton Constitution came into force thus ending the operation of 1951 Constitution, barely three years old.

The collapse of the 1951 Constitution was occasioned by a motion moved by the Action Group members of the House of Representative, Chief Anthony Enahoro, calling for attainment of self-governance in 1956. The consequences of this motion opposed by the northern members of the legislature marked the beginning of political hostilities and even open violence between the ethnic nationalities.

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[8] OkeyNwachukwu, "Nigeria's Constitutional Development" gotten from the internet 11/9/2013.

[9] *Ibidem.*

[10] G. O. Olusanya, *Constitutional development in Nigeria, 1861-1960.*

A Constitutional Conference was called in 1954 which established the principle of federalism, to ensure that the ethnic diversity was fully captured, giving each component of Nigeria authority over its own affairs.

The constitutional evolution of Nigeria which started in concrete terms with the Clifford's Constitution of 1922, climaxed with the enactment of the 1960 Independence Constitution. The Constitution, as expected was fashioned after the British Westminster model. Amongst its provisions was the presence of the office of governor-general who was the non-political Head of State, while the Prime Minster was the Head of Government. Even when Nigeria became a republic in 1963, the Republican Constitution did not change this position but merely removed the Constitutional umbilical cord binding Nigeria to Britain.[11]Nigeria did not stand for long after independence as the nation collapsed:

> "Within six years of independence, the Constitution had failed, basically due to the cracks that had started appearing within its first two years.[12]

Why did the young Republic collapse like a pack of cards?

> "One of the factors that led to the collapse of the first republic was the nature of political authority within the State. The President, who was Constitutionally the chief executive usually, exercised his powers on the advice of the Prime Minister and his cabinet members. The Westminster model could not fit into African society where "the leader wants to assert his authorities without restraint. Expectedly, there were clashed between the President and the Prime Minister, the climax of which was the federal elections crisis of 064"[13]

In 1966, the military struck, and subsequently the Nigerian-Biafran war (1967-1970) followed. The second republic commenced almost a decade after the war with the 1979 Constitution. This Constitution marked a watershed in the chronicle of the nation's constitutional development.

Given the apparent contradictions in the parliamentary system of governance as demonstrated above, the drafters of the 1979 Constitution dropped the dual system of leadership for the executive presidential system.

> "The adoption by Nigeria of a presidential system of government, on the model of the American, is an important milestone in the Constitutional history of the country. It was an act of great courage. It involved abandoning the heritage of the

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[11] Aghalino, S.O., 'Dynamics of Constitutional Development in Nigeria, 1914-1999,' Indian Journal of Politics (XL N0. 2) April – Sept.,2006)p.7.

[12] *Ibidem*, p. 7.

[13] *Ibidem.*

> Westminster system. By it, the country took as it were, a leap from the known to the unknown."[14]

A learned author captured succinctly the features of the 1979 Constitution, which railroad presidentialism into the polity of the country:

> "... to provide insight into the general principles of the presidential system of government. The supremacy of the law of the Constitution, the division of powers between two autonomous tiers of government, the executive presidency, separation of powers, participating democracy, the Constitutional guarantee of rights, judicial enforcement of Constitutional limitations, and the responsibility of government for the wellbeing of the people...[15]

Even though the Constitution was patterned after the American Constitution, yet it was Nigerianically domesticated:

> "These general principles of presidentialism originating in the Constitution of the United States of America have been adopted with substantial modifications designed to suit the circumstances of Nigeria. The central principle of presidentialism is that of an executive of one man in whom the entire executive authority is vested. Under the Nigerian Constitution 1979, that principle is substantially modified by Constitutional limitations imposed on the president's executive power in favour of other functionaries of government. Not only is the president's executive power limited by the powers vested in other independent executive bodies, but the exercise of such powers as are left with him is restrained by the Constitution in a variety of ways."[16]

2.3 The Nigerian 1999 Constitution

This Constitution, which is the extant Constitution, was signed into law on May 5th 1999; to a large extent it took after the 1979 Constitution, with some significant amendments. This Constitution was hurriedly put together. Again it was exclusive and devoid of consultation and popular participation of course, it was midwifed by the federal military government. This Constitution has been greatly criticized.[17]

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[14] Nwabueze, B.O., The Presidential Constitution of Nigeria, (London, C. Hurst & Co,. 1982), p.v.

[15] Nwabueze, B. O., *ibidem*.

[16] *Ibidem*.

[17] This criticism will be undertaken anon.

3.0 Constitutional Features/Principles

3.1 Source of Sovereignty

A Constitution as the highest law in a country should be traceable to a source - where does it derive its sovereignty? On this, the American Constitution has its preamble, "We the People ... do ordain and established this Constitution." These words give expression to the doctrine of popular sovereignty, or rule by the people. The Constitution's framers created a governing document, which they submitted for popular ratification, based on the conception that ultimate political authority resides not in government or in any single government official, but rather, in the people.[18] "We the People" own our government, but under our representative democracy, we delegate the day-today governing powers to a body of elected representatives. However, this delegation of power in no way impairs or diminished the people's rights and responsibilities as the supreme sovereign. The government's legitimacy remains dependent on the governed, who retain the inalienable right peacefully to alter their government or amend their Constitution.[19]

The Preamble also states categorically why the Constitution was brought about:

> "... in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity..."[20]

Many cases abound in American polity that demonstrate beyond doubt that sovereignty – power belongs to the people. A case in point here is that of *Clinton v. Jones 418 U.S. 683 (1997).* In 1997, the Supreme Court accepted Paula Jones sexual harassment case to resolve the issue of whether President Clinton could be sued while in office. The court ruled that a sitting president could face civil proceedings, as long as the proceedings did not interfere with his ability to perform the job. The lawsuit was eventually settled out of court.[21] Similarly, in *United States v. Richard Nixon 418 U.S. 684 (1974),* still on executive privilege, in 1974, the Supreme Court of the United States had to determine whether the immunity applied in the circumstances of the case. The case involved the refusal of President Nixon to turn over to Watergate Special Prosecutor Leon Jawarski several hours of Oval office tapes believed to concern the Watergate break-in and subsequent cover-up. Although the Court unanimously concluded that the Constitution does indeed contain an executive privilege, the court said the privilege was "presumptive" and not absolute. Balancing the interests in the Nixon case, the Court found the privilege not to extend to the requested Watergate tapes.[22]Interestingly, the Nigerian Constitutions (1979 and 1999) have the similitude of the American preamble:

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[18] Greg Russell, *op.cit.*, p.3.
[19] *Ibidem.*
[20] The Constitution of the United States,Preamble.
[21] Nick Ragone, "Checks on The Supreme Court", p.2, gotten from the internet 09/9/2013.
[22] "Separation of Power", material obtained from the internet, 09/9/2013.

> "We the People of the Federal Republic of Nigeria having firmly and solemnly resolved"[23]

But to what extent is the Nigerian Constitution really people-driven? How did the Constitutions evolved? The pre-independence Constitutions, on the whole, had a little, negligible, if any, contributions from the people. Little wonder, then, there were always clamour for Constitutional review at the wake of a new Constitution.

> "It is difficult to accept the 1979 Constitution as a document which emanated from the people. This is particularly so because the Constitution was not adopted by the people through a referendum, although there was a constituent Assembly established through military decree in 1977 with 230 members. It is relevant to add that this number, 20 were appointed by the government. Other members were elected not directly by the people rather they were elected by local councils acting as electoral college. *Clearly, a Constituent Assembly elected this was cannot claim to have the mandate of the people to adopt a Constitution on their behalf.*"[24]

The fate of the current constitution, the 1999 Constitution, is not different from the 1979 Constitution as adjudged above. The Constitutional Conference, which produced the 1999 Constitution, was inaugurated in 1994 in the wake of the turmoil that greeted the annulment of the June 12, 1993 Presidential election. Some members of the conference were "elected" one-third of the members of the conference. Those appointed were pliant individuals who openly canvassed the position of the regime on the floor of the conference. Immediately after the conference submitted its reports, the Abacha regime appointed another Constitution Review committee (CRC) consisting of about 40 person to "rework" the report and evidently make it in tune with the self-succession agenda of his regime. When the CRC finished its task in 1997, its report was further subjected to scrutiny by a group of close advisers to General Abacha. The point to note is that the recourse to the drafting of the Constitution by the Abacha regime, apart from securing his self-succession agenda, was merely diversionary in order, for the regime to consolidate its hold on the nation. In any case, Abacha did not live long enough to actualize his self – succession agenda as he died mysteriously in 1998. General Abdulsalam, Abacha's successor, reviewed Abacha's 1999 draft Constitution with a view to its possible adoption.[25] Against the people's desire, the Abubakar Abdulsalam administration raised a Committee to organize a debate on the draft. The committee was named the Constitution Debate Co-ordinating Committee. The Committee later submitted its report to the government in the end of December, 1998. Eventually, there was a preference for the 1979 Constitution. Some amendments and reviews were recommended. The 1999 Draft Constitution was signed into law on May 5th, 1999. On the whole, the Constitution has been greatly criticized:

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[23] The Nigerian 1979 and 1999 Constitutions,Preamble.

[24] Aghalino, S.O., *Ibidem,* p.9. Italics the writer's for emphasis.

[25] The Guardian, Lagos, May, 1999.

> "It is obvious that the 1999 Constitution being practiced today was hurriedly put together. Besides, it was exclusive and devoid of consultation and popular participation... The regime was in a hurry to conduct elections and relinquish power to a democratically elected civilian administration became popular opinion was against continuous stay of the military in politics. Since the 1999 Constitution came into force on May 29, 1999, it has been variously dismissed as a "False" document and a mere Tokunbo (fairly used). The preamble, which states among other things "we the people of the Federal Republic of Nigeria do hereby make, enact and give to ourselves the following Constitution", amounts to a false claim. It would appear that this criticism is predicated on the fact that the people of Nigeria were barely consulted before the 1999 Constitution.[26]

The 1999 Constitution, against the backdrop of agitation, was successfully amended by the National and State legislature in 2010.

4. Separation of Powers

One of the general principles of the presidential system of government is the separation of powers.[27] And it is a feature of both the American and Nigerian Constitutions of 1979 and 1999.

The need for separation of powers – governmental powers, has always been harped upon down the ages and civilizations. Power has always been said to corrupt and absolute powers corrupts absolutely. Montesquieu developed this (Separation of Power) into a full-blown theory of the separation of the legislative, executive, and judicial powers. From here it passed to the US Constitution.[28] It has been contended that the Constitution, the US (and by extension Nigeria, since both, on the principle, are similarly patterned) contains no provision explicitly declaring that the powers of the three branches of the federal government shall be separated.

In the US Constitution, the first article says "All legislative powers... shall be vested in a Congress". The second article vests "the executive power... in a president. "The third article places the "judicial power of the United States in one Supreme Court" and such inferior Courts as the Congress... may establish. Why structure the Constitution on the basis of separation of power:

> "Separation of powers serves several goals. Separation prevents concentration of power (seen as the root of tyranny) and provides each branch with weapons to fight off encroachment by the other two branches. As James Madison argued in the Federalist Paper (No 51), "Ambition must be made to counteract ambition." Clearly, our system of separated powers is not designed to maximize efficiency; it is designed to maximize freedom."[29]

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[26] Aghalino, C.O., *ibidem*, p. 12.
[27] Nwabueze, B.O., *The Presidential Constitution of Nigeria*, (London, C. Hurst & Co., 1982), p.v.
[28] *Oxford Concise Dictionary of Politics*, 3rd edition, (New York, Oxford University Press, 2000), p.481.
[29] *Ibidem.*

Considering the breadth of executive power, under the American Constitution, in *Youngstown Sheet 7 Tube Co. v. Sawyer343 U.S. 579 (1952),* a case which arose when President Harry Truman, responding to labour unrest at the nation's steel mills during the Korean War, seized control of the mills. Although, a six-member majority of the Court concluded that Truman's action exceeded his authority under the Constitution, seven justices indicated that the power of the president is not limited to those powers expressly granted in article II. Had the Congress not impliedly or expressly disapproved of Truman's seizure of the mills, the action would have been upheld. Again, the constitutionality of executive order was considered in *Dames and More v. Regan(1981).* In this case, President Jimmy Carter issued executive order directing claims by Americans against Iran to a specially-created tribunal. The court, using a pragmatic rather than liberalist approach, found the executive orders to be a constitutional exercise of the President's article II powers. The court noted that similar restrictions on claims against foreign governments had been concise at various time at various times by prior presidents and the Congress had never in those incidents, or the present one, indicated its object to the practice.

4.1 Congressional encroachments.

In *INS v. Chadha462 U.S. 919 (1983),* the Court considered the constitutionality of "the legislative veto," a commonly-used practice authorized in 196 different statutes at the time. Legislative veto provisions authorized Congress to nullify by resolution a disapproved of action by an agency of the executive branch. Chadha contended that Congressional action over-turning an INS decision suspending his deportation constituted legislative action that failed to comply with the requirements for legislation spelled out in article I, section 7 of the Constitution. The Court agreed. Still, on the Congress, in *Bowsherv.Synar478 U.S. 714 (1986),* the court invalidated a provision of the Balance Budget Act that aurthorised Charles Bowsher, as Comptroller General of the U.S., to order the impoundment of funds appropriated for domestic or military use which he determined the federal budget was in a deficit situation. The court concluded that allowing the exercise of the executive power by the Comptroller General an officer – in the Court's view – in the legislative branch, would be "in essence to permit a legislative veto."

The case of *Morrison v. Olson 487 U.S. 654 (1988)* considered the constitutionality of the "independence Counsel" (or "special prosecutor") provisions in the Ethics in Government Act. The court had considerable difficult in identifying in which of the three branches of government the independent counsel belonged. Justice Rehnquist's opinion for the court in Morrison took a pragmatic view of government, upholding the independent counsel provisions. Rehnquist noted that the creation of the independent counsel position did not represent an attempt by any branch to increase its own power at the expense o another branch, and that the executive branch maintained "meaningful" controls over the counsels exercise of his or her authority. In an angry dissent, Justice Scalia called the Court's opinion "a revolution in Constitutional law" and said "without separation of powers, the Bill of Rights is worthless. Justice Scalia dissented again in *Mistrettav.U.S*488 U.S. 361 *(1989),* a decision upholding legislation which delegated to the seven – member United States sentencing Commission (a commission which included three federal judges) the power to promulgate sentencing guidelines.

Executive privilege and immunities are attached to the offices and persons of presidents under presidential system of government. Executive privilege, the right of the President to

withhold certain information sought by another branch of government, was first claimed by President Jefferson in response to subpoena from John Marshall in the famous treason trial of Aaron Burr. The Supreme Court's first major pronouncement on the issue, however, did not come until 1974 in *United State v. Richard Nixon(1974).* The case involved the refusal of President Nixon to turn over to Watergate Special Prosecutor Leon Jaworski several hours of oval office tapes believed to concern the Watergate break-in and subsequent cover-up. Although the Court unanimously concluded that the Constitution does indeed contain an executive privilege, the court said the privilege was "presumptive" and not absolute. Balancing the interests in the Nixon case, the Court found the privilege not to extend to the requested Watergate tapes.

In a related development, in *Clinton v. Jones 520 U.S. 681(1997),* the court rejected President Clinton's argument that the constitution immunizes him from suits for money damages for acts committed before assuming the presidency. The case arose when Paula Jones filed a suit alleging sexual harassment by Clinton served as Governor of Arkansa. Congress, under the American Constitution, in the spirit of separation of powers, has immunity. The framers sought in various ways to guarantee the independence of each of the three branches. The President was protected against criminal prosecutions while in office, answerable only in impeachment trial with a super-majority required to convict. Members of the federal judiciary were given lifetime tenure, with a guarantee that their compensation would not be reduced. To ensure free dissension of controversial issues in Congress, the framers immunized members of Congress from liability for statement made in House or Senate debate. In 1979, in *Hutchison v.Proxmire 443 U.S. 111 (1979),* the Court considered whether the immunity for Senate and House Debate extended beyond the floor to cover press releases and statements made to the media. The court concluded that the speech and debate clause protected only official Congressional business, not statements for public consumption.

4.2 Nigeria

The 1999 Constitution in sections four, five, six provided for legislative, executive and judicial powers respectively. The judicial powers of the government are vested in the judicial.[30] These include the power to adjudicate between individuals and between persons and the government.[31] It also extends to interpretation of the Constitution.[32] In all, the decision of the court, especially the Supreme Court, is final and binding on all authorities and persons in the federation except in electoral matters where the decisions of the Court of Appeal are final and binding on all.[33] The judicial power of the courts, here the Supreme Court was brought to bear on the action of the executive president Olusegun Obasanjo in the case of *Attorney-General of Lagos State v. Attorney-General of the Federation.*[34] Here, it was alleged that the President withheld the statutory allocation that was due to Lagos State from the Federation Account on the grounds that the state created local government councils without compliance with the relevant provisions of the Constitution.

The State, among other relieves, sought a declaration that the President lacked power to withhold the money due to the State from the Federation Account. The Supreme Court, in

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[30] *Nigerian Constitution*, 1999, s.6(2).
[31] *Ibidem*,s.6(6).
[32] *Ibidem*, s. 231(1).
[33] *Ibidem*, ss.239, 287.
[34] NSCQR, 2004, vol. 20.

exercise of its power of constitutional/judicial review, declared the president act as unconstitutional, null and void.[35] Unfortunately, the President did not, in spite of the Court's ruling, release the fund. This was akin to the attitude of President Andrew Jackson of the United State, towards a ruling of the Supreme Court he disagreed with. He remarked, "[Chief Justice] John Marshall has made his decision, now let him enforce it."[36]

The safeguard provided by the tripodal stand of separation of powers was bought to the fore in the case of *Inakojuv.Adeleke*.[37] The 1999 Constitution[38] empower the Legislatures to impeach the Chief Executives (the President and the State Governors) on the ground of gross misconduct.[39] This power of removal is vested in the legislature by the people to ensure that Chief Executives are conscious of their democratic responsibilities to the electorate and to ensure that the officeholder does not engage in any act unbecoming of the status of the office. Rather than exercise the power of removal for the end of democracy, the legislature saw the power as an instrument of political vendetta such that the infant democracy was almost truncated. In the *Inakoju* case, there was political bickering and animosity between the Governor and his one-time godfather, AlhajiLamidiAdedibu. The sour relationship engendered political and unconstitutional crises between the Governor and the State House of Assembly and the House was polarized against itself. Consequently, a section of the legislature aligned with the Governor and the other section supported the Deputy-Governor. Eventually, the pro-Deputy-Governor group sat at a hotel in the capital city of that state, Ibadan on the 13th December, 2005 and purportedly issued a notice of allegation of gross misconduct against the Governor. The Governor was eventually removed from office, though unconstitutionally. The removal was consequently challenged before the State High Court, which declined jurisdiction; the matter went before the Court of Appeal. The Court of Appeal gave judgement against the manner in which the purported impeachment of the Governor was carried out. Dissatisfied with the judgement of the Court of Appeal, the splinter legislature brought an appeal before the Supreme Court. The Court was to determine the constitutionality of the procedure adopted by the splinter legislature. The Supreme Court, per justiceNiki Tobi, JSC, declared the removal unconstitutional.

The decision of the Supreme Court in that case has thus saved the infant democracy in the country from being truncated. This essentially points to the fact that separation in Nigeria with the power of judicial review is to achieve the ends of constitutionalism that is an anchor for democracy.[40]

It must however be noted that any model of separation of powers has its unique peculiarities. For example, as a matter of constitutional policy demand, Nigerian President is empowered to modify[41] an existing law, while in the United States of America, the Vice-

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[35] *Ibdiem*, p.147-148.

[36] Nick Ragone, "checks on the Supreme Court, gotten from the internet, 9/9/2013.

[37] 29 NSCQR (pt. II).

[38] *Nigerian Constitution*, sections 143, 188.

[39] For a critical insight into this case (and similar ones on removal of state chief executive in Nigeria, see Iloh, F. O., 'Removal Proceedings: Whether Courts Should Blow Muted Trumpet?' *Confluence Journal of Private and Property Law*, Vol. I, Part 2, 2010, pp. 7-24.

[40] Shehu, A. T. &Akanbi, M. M., 'Modelling Separation For Constitutionalism: The Nigerian Approach,' *Journal of Law, Policy and Globalisation*, Vol. 3, 2012, p. 28.

[41] *Nigerian Constitution*, 1999, s.315.

President though elected as a member of the executive, he is at the same time the President of the Senate, though without voting right, unless there is a tie.[42]

5. Federalism

The U.S.A. Constitution contains the principle of federalism.

Federalism is an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalized (i.e. territorially localized) government in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.[43]

Therefore, under the U.S. Constitution, confederation was to give way to federation – a system in which power would be shared between one national and several state governments. The national government was supreme in certain areas, but the states were not to become more administrative units of the central government. The states' rights were protected in a number of ways. First, the tenth Amendment to the Constitution made clear that a number of spheres of activity were to be reserved for the states. State governments, for instance, are largely responsible for managing their own budgets and making and enforcing laws in many areas that impact residents of the state. Secondly, States were also protected by their representation inside U.S. Senate – two Senator to a state, irrespective of the size of the state. Third, the electoral college, the body that normally elects the U.S. president, was to be an aggregation of electors selected by the states, with each state awarded a minimum of three delegates.

It should be remarked that the relationships created by the arrangement are between government, not between people in different geographical locations. And so, from a legal standpoint, the federal state with its territory and people is one and indivisible. The Supreme Courts of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by stateliness for the purposes of state government and local administration.[44] A state government cannot sue the federal government to enforce against it the rights of the inhabitants of the state.

The U.S. Constitution does provide some very specific powers to both the states and the federal government. These powers are traditionally divided into three categories.

Reserved powers are those that have been reserved specifically for the states or are of a traditionally state scope. These consist mostly of police powers, such as provision of health regulations, licensing, and education.

Granted powers, also known as express, enumerated, implied, delegated, and inherent powers, are those specifically listed in article I, section 8, such as the power to coin money to raise an army and navy, to provide for patent and copyright protection, to establish a post office, and to make treaties and war with other nations. An express, delegated, or enumerated power is one specifically listed; an implied or inherent power is one that exists to carry out an express or

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[42] US Constitution, article I, section 3.

[43] *The Presidential Constitution of Nigeria, op.cit.*, p. 37; *Federalism in Nigeria under the Presidential Constitution, ibid.*, p. 1.

[44] *White v. Hart,* 1333 Wall. 646 at 650 (1872).

enumerated an army; this implies the ability to specify regulations concerning who can join the army.

Concurrent powers are those held to some extent by both the federal and state governments. Both, for example, have taxation power, the ability to construct and maintain roads, and other spending for general welfare.

Many things are denied of both or either levels of government. States, for example, have no authority to coin money or wage war. Neither may pass a bill of attainder or an *ex post facto* law. Much of the Bill of Rights applies restrictions to both states and federal government, while all of the Bill of Rights applies restrictions to the federal government. The bill of Rights originally had not effect of restriction on the states, but judicial interpretation of the fourteenth Amendment's due process clause has incorporated much of the upholding of civil rights to the states.[45]

5.1 Federalism in Nigerian Constitution

The 1979 and 1999 Constitutions of Nigeria contain the principle of federalism.

> "Nigeria shall be a Federation consisting of States and a Federal Capital Territory."[46]

The constituent states that make up the federation is listed in section 3(1). Indeed Nigeria is a federation of 36 States and a Federal Capital Territory, Abuja.[47] As is the case with the American federalism, notwithstanding the multiplicity of states, Nigeria is

> "... one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria."[48]

The federal arrangement under the Nigerian Constitution assigned to the national government power over specified matters, leaving to the state government the residue of matters not so specified. The specification of matters within the competence of the national government is done partly by specific provision in the body of the Constitution and partly by enumeration under two lists scheduled to the Constitution (Second Schedule) – one exclusive to the national government and the other concurrent to it and the state governments, called exclusive and concurrent legislative lists respectively.[49]

The exclusive lists has sixty-six specified matters, but the matters provided for in the body of the Constitution are incorporated by reference in the list as the sixty-seven item; the last item on the list, sixty-eight, relates to matters incidental or supplementary to any matter mentioned elsewhere in the list. The scope of incidental and supplementary matters is defined in part III of the lists. The incorporation as an item in the list of exclusive federal matters provided for in the body of the Constitution is intended to get round the decision of the judicial committee

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[45] http://www.usconstitution.net/consttop_fedr.html, assessed 9/9/2013.
[46] *Nigerian Constitution*, 1999, s.2(1).
[47] *Nigerian Constitution*, 1999, s.2(2).
[48] *Nigerian Constitution*, 1999, s.2(1).
[49] Nwabueze, B. O., *The Presidential Constitution of Nigeria*, (London, C. Hurst & Co., 1982), p.53.

of the privy council that the extended scope given to incidental or supplementary matters in part III applies only to matters mentioned in the list, but not to those in the body of the Constitution.[50]

The concurrent list, which has thirteen matters, is somewhat innovative in its approach, since, apart from enumerating the thirteen matters, it also defines the respective extent of federal and state power in respect of those matters, with the aim of reducing possible conflict, especially through the application of the doctrine of covering the field.[51] The result is that a concurrent matter no longer necessarily implies that both the federal and state governments are competent to act over its entire field. In respect of some matters in the list, their competence is respectively restricted to some aspect only of a so-called concurrent matter, making such aspects exclusive to the one or the other.[52] With respect to scientific and technological research, for example, the function of the federal government is merely to regulate and co-ordinate, it does not include power to establish or run research institute.[53] On the other hand, the federal government has competence over the whole field of university, technological and professional education, including the establishment of institutions for the purpose, while the state governments may only establish institutions for university, professional or technological education.[54] Electric power is dealt with in the same, with the general power being lodged in the federal government, while a state government is restricted to the generation, transmission and distribution of electricity to areas within the state not covered by a national grid system.[55]

Some matters in the list, e.g. trigonometrical cadastral and topographical survey, and archives remain strictly concurrent in the sense, as the word is ordinarily understood that both the federal and state government can act over their entire fields. To the extent that a matter is truly concurrent, the federal government in the event of inconsistency between a federal and state law.[56]

As noted earlier, any matter not included in the exclusive or concurrent list or which is not mentioned in the body of the Constitution, belongs exclusively to the state governments. (S.4[7]). Such matters are called residual matters. It needs hardly be said that the extent and importance of residual matters depend largely on the coverage of the enumerated matters. The enumerated matters may be so extensive in their coverage they may be so important as to determine the balance of power in the federation.[57] In the Nigerian Constitution (1979,1999), the residual matters are by no means insignificant, while their exact content is difficult to indentify, they certainly include religion, primary and secondary education (excluding educational standards which are matters exclusively for the federal government), local government (with certain exceptions), land tenure, agriculture, housing, chieftaincy and indigenous customs, and social relations generally including contracts, forts and general civil relations among the inhabitants of a state.[58] There is no doubt that these are the matters that affect the ordinary man in his daily life. He is thus apt to think of government in terms mainly of the state government. Yet it does not follow that the lodging of residual powers in the state government necessarily

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[50] *Ibidem.*
[51] *Ibidem.*
[52] *Ibidem.*
[53] *Ibidem.*
[54] *Ibidem.*, p.54.
[55] *Ibidem.*, p.54.
[56] *Ibidem.*, p.54.
[57] *Ibidem.*, p.54.
[58] *Ibidem.*, p.54.

makes them stronger than federal government.[59] One has to study the nature and scope of the matter assigned to the latter in order to be able to form an intelligent opinion as to where the balance of power lies in the federation. It is necessary to state that the scheme of division just described applies to both legislative and executive powers. Although the enumeration of matters is specifically for purposes of the exercise of legislative power, the division of executive power follows upon the same principle.[60]

On the whole, federal arrangement suits Nigeria. Nigeria is a pluralistic country along ethnic diversity and federalism thrives in a country composed of geographically segregated groups divided by wide, fundamentally differences of race, religion, language, culture or economics. Its purpose is to enable each group, free from interference or control by the others, to govern itself in matters of local concern, leaving matters of common interest to be managed centrally, and those which are of both local and national concern to be administered concurrently.[61]

6.0 The Executive Presidency

This is a feature, perhaps the most prominent, that stood out in the system of government, as laid down in the U.S. Constitution, when juxtaposed with the Westminster model, or, parliamentary system, as commonly referred to.

With regard to the American State, the presidency connotes headship. By virtue of his headship of the state and of being its representative in the totality of its relations, the president is endowed with all the symbolism and dignity of the state.[62] The status of the executive president is in sharp contrast to a monarch.

Against the status of the British monarch, the American President, as the chief executive of State, is not the state, and does not personify the state, except, perhaps, only in a symbolic sense. Allegiance is not owed to the president, but rather, to the American people, the fountain of sovereignty.

6.1 What is the extent of Executive Power?

Two very different views of executive power have been articulated by past presidents. One view, "strong president" view, favoured by Theodore Roosevelt (1901-1909) essentially held that presidents may do anything not specifically prohibited by the Constitution. The other, "weak president" view, favoured by presidents such William Howard Taft (1909 – 1913), held that presidents may only exercise powers specifically granted by the Constitution or delegated to the president by Congress under one of its enumerated powers.

Two cases, among others, dealt with the breadth of executive power. *Youngstown Sheet & Tube Co. v. Sawyer (1952)* arose when President Harry Truman (1945-1953), responding to labour unrest at the nation's steel mills during the Korean War, seized control of the mills. Although a six-member majority of the Court concluded that Truman's action exceeded his authority under the Constitution, seven justices indicated that the power of the President is not limited to those power expressly granted in Article II. Had the Congress not impliedly or expressly disapproved of Truman's seizure of the mills, the action would have been upheld.

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[59] *Ibidem.*, p.54.
[60] *Ibidem.*, p.54.
[61] *Ibidem.*, pp. 46-47.
[62] *The Presidential Constitution of Nigeria, ibidem*, p.76.

Dames and More v. Regan (1981) considered the Constitutionality of executive orders issued by President Jimmy Carter (1977-1981). thirty-ninth President of the U.S., directing claims by Americans against Iran to a specially-created tribunal. The Court, using a pragmatic rather than literalist approach, found the executive orders to be a Constitutional exercise of the President's Article II powers. The Court noted that similar restrictions on claims against foreign governments had been made at various times by prior presidents and the Congress had never in those incidents, or the present one, indicated its objection to the practice.

6.2 The Executive Presidency under the Nigerian Constitution.

The Constitution created the office of the executive presidency.

> "There shall be for the Federation a President. The President shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation.[63]

The excerpt above crowns the president with three titles – Head of State, Chief Executive and, significantly, Commander-in-Chief of the Armed Forces, - this consortium of power in one man. Like his American counterpart, the president symbolizes and, really is headship.

The Constitution acknowledges the president's representative status by vesting him and the government of the Federation all property, rights, privilege, liability or obligation of the federation and making it exercisable or enforceable by or against them.[64]

Given the republican nature of the Nigerian state, unlike the British sovereign, but like the American President, the Nigerian President is not the State – though he symbolizes it in a sense.

> "... the president of the federal republic of Nigeria is not the state, and does not personify it except perhaps in a symbolic sense only. The government is not his, neither is he the government. Allegiance is owed, not to him, but to the sovereign people who make up the federal republic of Nigeria. A public functionary swears, not that he will well and truly serve the president, but that he will discharge my duties to the best of my ability, faithfully and in accordance with the Constitution of the Federal Republic of Nigeria and the law, and always in the interest of the sovereignty, integrity, solidarity, wellbeing and prosperity of the Federal Republic of Nigeria."[65]

Unlike the American Constitution, the Nigerian Constitution grants an incumbent president, vice-president, governor and deputy-governor immunity from court action, civil and

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[63] *Nigerian Constitution*, 1999, Section 130, (1) (2).
[64] *Ibidem*, S.317; discussed in *The Presidential Constitution of Nigeria, ibidem*, p.76.
[65] *The Presidential Constitution of Nigeria, op.cit.*, p.78.

criminal, arrest or imprisonment in pursuance of a court process, and from any court process requiring or compelling their appearance.[66]

The government of the federation is organized around the president. With certain exceptions and restrictions, the entire executive power of the federation and, what is more significant, makes it exercisable by him in his discretion as a personal ruler, uninhibited by the artificial separation between nominal and real authority, whereby powers legally vested in one person can only Constitutionally be exercised by others. Unlike his predecessor under the Constitution of the first republic, the president under the 1999 Constitutionis no figurehead who takes no executive decisions or action except through or as advised by others, and who therefore bears no personal responsibility whatever for government.[67]

7. The Judicial Arm of Government

The U.S. The Judiciary Act of 1789 implemented the entire judicial branch, including the Supreme Court. It was also the first Act by Congress to be partially invalidated by the Supreme Court. The Constitution averred:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."[68]

The Supreme Court of the United States is the only court specifically established by the Constitution of the United States, implemented in 1789; under the Judiciary Act of 1789, the Court was to be composed of six members – though the number of justices has been nine for almost all of its history, this number is set by Congress, not the Constitution. The Court convened for the first time on February 2, 1790.

In the U.S. it is declared that the Constitution and the laws of the United States shall be the supreme law of the land, and that the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[69] This is taken as implied authority, indeed direction for the state courts to apply the Constitution and laws of the United States.[70] The whole of the United States is covered by a network of federal courts established by Congress, the country being divided for this purpose into districts. A district court is created for each district, and invested with original jurisdiction in all civil cases arising under the Constitution and the laws of the United States where the value involved exceeds a prescribed amount or where, whatever the amount involved, the case relates to admiralty, bankruptcy, patents, copyrights, trademarks, revenue of the United States or to the United States as a party.[71]

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[66] The Nigerian Constitution, 1999, S.308.

[67] *The Presidential Constitution of Nigeria, op.cit.*, p.84.

[68] Article III, S.I., *U.S. Constitution.*

[69] Article IV, S.2.

[70] *The Presidential Constitution of Nigeria, ibidem*, p. 295.

[71] *Ibidem*, p.236.

The jurisdiction of the district courts is therefore for the most part concurrent with that of the state courts, except in the special cases mentioned above (i.e. admiralty, bankruptcy, etc) and except for cases within.[72] Unlike in Nigeria, the Supreme Court has no appellate jurisdiction whatever over their decisions on matters arising under state laws.

The Supreme Court of the United States of America has over the years played a vital role in the deepening of democracy, nay the rule of law in the country. The Supreme Court spent its first session organizing itself and determining its own powers and duties. The Court heard and decided their first actual case in 1792.

Lacking any specific direction from the Constitution, the new U.S. Judiciary spent its first decade as the weakest of the three branches of government. Early federal courts failed to issue strong opinions or even take on controversial cases. The Supreme Court was not even sure it had the power to consider the Constitutionality of laws passed by Congress. This situation changed drastically in 1801 when President John Adams appointed John Marshall of Virginia to be the fourth Chief Justice. Confident that nobody would tell him not to, Marshall took clear and firm steps to define the role and powers of both the Supreme Court and the judiciary system.[73]

The Supreme Court, under Marshall (1801-1835), defined itself with the historic 1803 decision in the case of *Marbury v. Madison (1803)*. In this singular landmark case, the Supreme Court established its power to interprete the U.S Constitution and to determine the Constitutionality of laws passed by Congress and the State legislature, legally cementing the power of judicial review.[74] The Marshall Court also made several important decisions relating to federalism. Marshall took a broad view of the powers of the federal government – in particular, the inter-state commerce clause and the Necessary and Proper Clause. For instance, in *McCulloch v. Maryland (1819)*, the Court ruled that the inter-state commerce clause and other clauses permitted Congress to create a national bank, even though the power to create a bank is not explicitly mentioned in the Constitution.[75] Similarly, in *Gibbons v. Ogden (1824)*, the court found that the inter-state commerce clause permitted Congress to regulate inter-state navigation.

The Marshal Court made several decisions restraining the actions of state governments. Marshall served as Chief Justice for a record period of thirty-four years, along several Associate Justices who served for over twenty years.[76]

The incumbent Chief Justice, John G. Roberts was confirmed by the United States Senate on September 29,2005[77] On November 20, 2007, the Court agreed to hear a case, *District of Columbia v.Heller*, that was regarded as the first important and historically significant Constitutional decision on the second Amendment to the Constitution's Bill of rights since 1875. On March 18, 2008 the Supreme Court heard arguments concerning the Constitutionality of a District of Columbia ban on handguns. On June 26, 2008 the Supreme Court ruled that "The Second Amendment protects an individual rights to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defence within the home.[78]

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[72] *Ibidem.*
[73] "Brief History of the US Supreme Court," material gotten from the internet, 9/9/2013.
[74] "History of the Supreme Court of the United States" Wikipedia, assessed, 9/9/2013.
[75] *Ibidem.*
[76] *Ibidem.*
[77] *Ibidem.*
[78] *Ibidem.*

Before settling at nine in 1869, the number of Supreme Court Justices changed six times. In its entire history, the Supreme Court has had only sixteen Chief Justices, and over one hundred Associate Justice.[79]

Supreme Court Justices are nominated by the President of the United States. The nomination must be approved by a majority vote of the Senate. The Justices served until they either retire, die or are impeached.[80]

7.1 Nigeria

There is division of judicial power between the federal and State government. This division is not apparently clear in the 1999 Constitution, given the fact that the Constitution merely gave a definition of the nature of judicial power.[81]

> "The Judicial powers vested in accordance with the foregoing provisions of this section shall extend ... to all inherent powers and sections of a court of law; ... to all matters between persons, or to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."[82]

The extent of this division, however, can be gleaned, arguably, from the definition placed upon federal causes and 'federal offences' in relation to the jurisdiction conferred on state courts to administer federal laws. 'Federal causes' means civil or criminal cause relating to any matter with respect to which the National Assembly has power to make laws', while 'federal offences means an offence contrary to the provisions of an act of the National Assembly or any law having effect as it so enacted. In addition to these, federal judicial power will include matter arising under the Constitution.

The Federal judicial power is vest in courts referred to in section 6(5) of the Constitution, 'being courts established for the federation. These courts are – the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the National Industrial Court;[83] the High Court of the Federal Capital Territory, Abuja, a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory Abuja; a Customary Court of Appeal of a State. Beside the above named courts, the National or any House of Assembly is empowered to establish courts with jurisdiction subordinate to that of a High Court.[84]

The Constitution established for each state a high court and, for a State that requires them, a Sharia court of appeal and/or a customary court of appeal, and/or a customary court of appeal, and then authorizes the legislature of the State to establish other courts with jurisdiction subordinate to the High Court.

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[79] *Ibidem.*

[80] *Ibidem.*

[81] This view is also held by a distinguished learned mind, Ben Nwabueze, *The Presidential Constitution of Nigeria, ibidem*, p. 24.

[82] *The Constitution of Nigeria*, 1999, S.6(6)(a) and (b).

[83] The National Industrial Court came into existence vide Constitution of The Federal Republic of Nigeria (Third Alteration) Act, 2010. It commenced 4th of March, 2011.

[84] *Nigerian Constitution*, 1999, S.6(4)(a).

State Courts exercising jurisdiction under state law in civil or criminal matters, both at first instance and an appeal, are authorized by the Constitution to exercise a like jurisdiction to hear and determine 'federal causes' and 'federal offences'[85]

Appeals from the Court of Appeal go to the Supreme Court, the Supreme Court being the Court of finality on the judicial ladder.[86] The Court of Appeal and the Supreme Court have original and appellate jurisdictions. The Supreme Court, to the exclusion of any other court, has original jurisdiction in any dispute between the federal and a state or between states.

7.1.2 The Nigerian Supreme Court

Upon attaining the status of a republic, Nigeria abolished appeals to Privy Council in England, hitherto the highest court for the country. As the highest Court in the land, the Court had played a prominent role in the history of Nigerian legal system. Even in the dark days of inglorious military rule, it rose to the occasion. In Lakanmi Attorney – General (West), where the Supreme Court, during a military regime, courageously, held that the forfeiture of an individual's assets, at any rate in circumstances suggesting that it was being exacted because of the individual's involvement in corruption, which may or may not amount to a criminal offence, is a legislative exercise of judicial power and a usurpation. A learned author, commenting on the impact of this judgement, retorted

> "What follows upon this courageous decision – its prompt reversal by the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 – forms an important chapter in Nigerian legal history.[87]

In *Governor of Lagos State v.Ojukwu*,[88] a case that came up at the height of military dictatorship, bordering on the unlawful occupation of the property of Ojukwu, the Supreme Court, in a no-nonsense-manner depreciated the action of a lawless executive arm of a federal military government, the importance of the observation of the rule of law. Here, Uwais, JSC had this to say:

> "If government treats court order with levity and contempt, the confidence of the citizen in the court will be seriously eroded and the effect of that will be the beginning of anarchy in replacement of the rule of law"[89]

Obaseki, JSC, who also sat on the appeal, posited:

> "The Nigerian Constitution is founded on the meaning of law and the primary meaning of which is that it means also that government should be conducted within the framework of recognised rules and principles which restrict discretionary

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[85] *Nigerian Constitution*, 1999, S.286(1).
[86] *Ibidem*, S.235.
[87] *The Presidential Constitution of Nigeria, ibidem*, pp. 259-260.
[88] (1986)1 N.W.L.R. (pt.18).
[89] *Ibidem*, p.639.

> power which Coke colourfully spoke of as golden and straight word of law as opposed to the uncertain and crooked cord of discretion.[90]

The Court in *Bello v.Attorney-General of Oyo State*, where the Constitutionally guaranteed right to life, was flagrantly abused, while the convict's appeal was pending at the Court of Appeal, lamented:

> "This is the first case in this country of which I am aware in which legitimate government of this country – past or present, colonial or indigenous – hastily and illegal sniffed off the life of an appellant whose appeal had vested and was with no order of Court upon the appeal and with reckless disregard for the life and liberty of the subject and principle of the rule of law. The brutal incident has bespattered the face of the Oyo State Government with the pan brush of shame."[91]

Since Nigeria tottered into democratic rule in 1999, in the fourth republic, the Supreme Court has helped immensely to stabilize the polity by making and delivering apt judgements. Cases like *Inakojuv. Adeleke*, [92]*Amaechiv. I.N.E.C.* – where the Supreme Court, rightly, annulled the election of governor of Rivers State, on the basis of wrongful substitution of the candidate by political party; readily come to mind.

Appointment. The appointment of a person to the office of Chief Justice of Nigeria is Constitutionally instituted in the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate[93]. Other justices of the Supreme Court are appointment by the President on the recommendation of the National Council subject to the confirmation of the Senate. A person shall not be qualified to hold office as the Chief Justice of Nigeria or a Justice of the Supreme Court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for period of not less than fifteen years.

8.0 Judicial Review

The concept or theory of separation of powers necessarily makes the idea of judicial review inevitable. The essence of separation of power is to prevent the concentration of all power in one hand and so prevent totalitarianism in dictatorship, again, to harness the benefit of separation of power, one again or branch of government must check the actions of the others. Judiciary review is the safety value that brings about the essence of separation of powers.

Simply put judiciary review is the process whereof the court uses its judicial power, as enshrined in the Constitution, to evaluate the actions of either the executive in legislative arm of government, with the aim of determining its Constitutionality.

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[90] *Ibidem.*

[91] *Bello v. A.G., Oyo* (1986)12 SC.I., per Aniagolu, J.S.C.

[92] op.cit.

[93] *Nigerian Constitution*, 1999 (as amended) S. 231 (1)(2).

8.1 In the American Constitution judicial review abounds. In the course of this article so far, we have had course to discuss many instances wherein judicial review came up in the American polity. It is needless to repeat it here.

8.2 Like in the U.S., judicial review of legislative and executive action is obtainable under the 1999 Nigerian Constitution, as was the case under the defunct 1979 Constitution. In A.G. *Lagos State v. A.G Federation*[94], it was alleged that President Obasanjo of Nigeria withheld the Statutory allocation that was due to Lagos State from the Federation Account on the grounds that the State created local government council without compliance with the relevant provision of the Constitution. The State argued that the President's action violated the Constitution. The Supreme Court, in exercise of its power of judicial review, declared the presidential act as unconstitutional null and void.

There is also judicial review of legislative action in the case of *Inakojuv.Adeleke*[95] where the legislative of Oyo State perpetually removed the Governor of State, Senator Ladoja on premise other than Constitutional. This perpetual removal was challenged all the way to the Supreme Court. It was a clear case of judicial review. The Supreme Court declared the removal unconstitutional.

9. Fundamental Rights

It can be argued that the presence fundamental right is the most important feature in the U.S Constitution. The preamble to the Constitution looked to a new American political order based on the following principles: to form a more perfect union, to provide for the common defense, to establish justice, and secure the blessings of liberty for present and future generations. Even earlier, the Declaration of Independence had spoken of "inalienable rights" that were inherent in all people by virtue of their being human and that no government could take away. When first drafted and submitted to the states for ratification, the Constitution did not include any reference to individual rights. One explanation for this anomaly is that the framers assumed that the power of the newly created national government were so carefully limited that individual rights really required no additional protections. In addition, other federalists made the case that enumerating additional rights carried an additional liability – that is, those rights deemed essential yet left unspecified would become vulnerable to government encroachment.[96]

Although the Anti-federalist were defeated in the battle over drafting the 1787 Constitution, they were able to force concessions from their opponents. Fearful of the power of the new national government, they demanded that a series of specific protections of individual rights be written into the Constitution. They also obtained promises from federalists leaders in some state conventions to support the passage of appropriate amendments to the Constitution. Unless assured that a bill of rights would be passed, a number of States threatened to withhold ratification of the Constitution. The first federalist kept their promises. In 1789, the first Congress of the Unites States adopted the first ten amendments to the Constitution. By 1791, the Bill of Rights, consisting these first en amendments, had been ratified by the required number of States. Moreover, the Ninth Amendment – expressly protecting fundamental rights not specifically described in the Constitution – laid to rest federalists fear that singling out any right for protection would jeopardize the protection of all other rights not similarly identified.

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[94]NSCQR, 2004 (pt. 20).
[95]*Op.cit.*
[96]Greg Russell, "Constitutionalism: American and Beyond", *op. cit.*

The bill of rights limits the ability of government to trespass upon certain individual liberties, including freedom of speech, press, assembly, and religion. It also prohibits Congress from passing laws respecting the establishment of any official religion, that is, favouring one religion over another. Nearly two-thirds of the Bill of Rights is geared to safeguarding the rights of persons suspected or accused of crime. These rights encompass due process of law, fair trials, freedom from self-incrimination and from cruel and unusual punishment, and being held twice in jeopardy for the same crime. When first adopted, the Bill of rights applied only to the actions of the national government.[97]

Restraining state infringement upon civil liberties was the subject of the 13th (1865), 14th (1868), and 15th (1870) amendments, the so-called Reconstruction Amendments passed after the Civil War and intended to dismantle the institution of slavery. Over the past hundred years, any of the liberties provided for in the first en amendments have been incorporated in the fourteenth amendment's guarantee that no State shall deprive its citizens of either due process or equal protection of the law. Especially after the 1920s, the Constitution first ten amendments played an increasingly active and significant role in resolving difficult questions of public policy – from the Constitutionality of school prayer and mandatory drug testing laws to birth control and capital punishment.

The Warren Court (1953-1969), arguably one of the most significant in the history of the U.S. Supreme Court, made several controversial decisions relating to the Bill of Rights. The court declared that officially sanctioned prayer in public schools was unconstitutional under the First Amendment in the case of *Engel v. Vitale(1962).* Similarly, in *Abington School District v.Schempp(1963),* it struck down mandatory bible reading in public schools. The court also expanded and incorporated the rights of criminal defendants, on the basis of the Fourth, Fifth, and Sixth Amendments. In *Mappv. Ohio* (1961), the Court incorporated the Fourth Amendment and ruled that illegally seized evidence could not be used in a trial. *Gideon v. Wainwright*(1963) established that States were required to provide attorneys to indigent defendants. *Miranda v.Arizona* (1966) held that the police must inform suspect of their rights (including the right to remain silent and the right to an attorney) before being interrogated. The decision is the source of the famous Miranda warning. Another significant and controversial decision made by the Warren Court was *Griswold v.Connecticutt* (1965), which established that the Constitution protected the right to privacy.

9.1 Fundament Rights In Nigeria

Right from the Republican Constitution of 1963 to the present 1999 Constitution, there has always been a corpus of fundamental rights in Nigeria. However, unlike the position in the U.S., various military regimes had stunted the growth of human rights jurisprudence in Nigeria.

Fundamental rights are enumerated under chapter four of the 1999 Constitution. They include right to life[98], right to dignity of human person[99], right to personal liberty[100], right to fair hearing[101], right to private and family life[102], right to Freedom of thought, conscience and

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[97] *Ibidem.*
[98] Nigerian Constitution, 1999, s. 33(1).
[99] *Ibidem,* s.34(1).
[100] *Ibidem,* s. 35(1).
[101] *Ibidem,* s. 36(1).
[102] *Ibidem,* s. 37(1).

religion[103], right to peaceful assembly and association[104], right to freedom of movement[105], right of freedom from discrimination[106], right to acquire and own immovable property anywhere in Nigeria[107], compulsory acquisition of property[108]. In the celebrated case of *Governor of Lagos State v.Ojukwu*[109], the Supreme Court upbraid the Lagos State military government for invading the property right of the appellant. In *AlhajaAbibatuMogajiv. Board of Customs*[110], the court held that the use of horsewhips and guns on market men and women by a combined team of customs men, police and soldiers amounted to inhuman and degrading treatment and this is a violation of the Constitution provision against it.

10. Conclusion and Recommendations

This paper is a comparison of the Constitution of the United State of America and Nigeria. In doing this concept – executive presidency, separation of power, fundamental rights etc., have been examined and commented upon. This inter-jurisdictional comparison shows the similarities between the two jurisdictions; however, significant differences abound. The paper however makes the following recommendation.

First, the executive arm of government must possess the political spirit of obeying and abiding by the decisions of the courts. No Constitution is without fault; however, the success in otherwise of a Constitution is directly proportional to its operation. A situation where the President, as in the seizure of Lagos State's statutory allocation, is a display of executive recklessness and arrogance, which is an ill-wind that portends no good for the polity. The problem may not be with our Constitution, but in the operator of the Constitution.

Second, the Nigerian Constitution should be amended as often as the situation warrants. The American Constitution, though older than Nigerian Constitution, has had twenty-seven amendments. The Nigerian Constitution is not proactive, infact, the whole corpus of the law does not respond spontaneously to changing phenomena. A good example is the Evidence Act, a law which was enacted in June 11945, and only got amended in 2011 – an amendment long overdue.

Third, Constitutionalism operates well where there is independence of the judiciary. The Nigerian judiciary should in fact really be independent.

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[103] *Ibidem*, s.38(1).
[104] *Ibidem*, s.39(1).
[105] *Ibidem*, s. 40(1).
[106] *Ibidem*, s. 41(1).
[107] *Ibdiem*, s, 42(1).
[108] *Ibidem*, s. 44(1).
[109] (1986)1 NWLR (pt. 18).
[110] 1 NLR (pt. 43).