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ABSTRACT

Recently, political theorists have intensified their call for the entrenchment of deliberative democracy as the style of governance. Its proponents have argued that deliberative democracy's emphasis on citizen-led process of decision making, rather than its outcome, makes it the ideal form of democracy. While no country has successfully entrenched this form of democracy, Canada, the United States and Australia have applied its principles to address some issues of governance successfully. Its appeal has drawn the attention of communist nations like China and supranational organizations like the European Union. Relying on the public reasoning principle, power checking principle, and entrenchment principle, the author inquired into the parameters within which deliberative democracy as an ideology could thrive within the framework of the existing 1999 Constitution. After that, the author reflected on those principles, conclusively identified hindrances to its application, and recommended some practical solutions.

1.0. INTRODUCTION

After hostilities of the Nigerian civil war ceased in 1970, politicians, civil rights groups, and representatives of ethnic minorities in Nigeria came together to deliberate on the steps to tow to avoid a recurrence.[1] Some have argued, and this author agrees, that the war was an aftermath of fear of dominance of the ethnic minorities by the

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[1] For a detailed analysis of the events that led to the Nigerian civil war and its aftermath, see E.E. Osaghae et al. (eds), *The Nigerian Civil War and its Aftermath* (John Archers Publishers for Programme on Ethnic and Federal Studies: Ibadan, 2002).

larger ethnic groups in Nigeria.[2] The ethnic minorities in Nigeria were particularly apprehensive that they would have no input in the political, economic, social, cultural, educational and legal decisions.[3] This apprehension resulted in agitation for the adoption of a new constitutional order and governance model.

By 1979, Nigeria adopted the federal-presidential system of government modelled after that of the United States and enacted the 1979 Constitution - which *inter alia* ought to make the government more responsive and responsible to the clamouring of Nigerians. That constitutional governance model remains in force. However, its existence had done little to address the fears of those ethnic minorities or rectify the dissonance between the Nigerian government and the Nigerian people. This dissonance, expressed as dearth of deliberation among the levels and arms of the Nigerian government, as well as between the Nigerian government and the Nigerian people, requires urgent redress.

Deliberation within this context refers to the engagement and exchange of ideas between the respective arms and levels of government, as well as between the government in its entirety and the citizens, minimal as it might be, in the decision-making process. Nigeria's constitutional democracy is a continued struggle between procedural and constitutional democratic theories. The former underscores popular sovereignty and majority rule, and merely permits individual rights necessary to ensure the impartiality and integrity of the democratic process. In contrast, the latter gives pre-eminence to institutions, practices, and rights that protect the minority against majoritarian excess, by imposing restrictions on

[2] O. Awofeso, "Secessionist Movements and the National Question in Nigeria: A Revisit to the Quest for Political Restructuring" (2017) 2(7) *Journal of Social Science and Humanities Research,* available at https://www.ijrdo.org/index.php/sshr/article/view/773 (accessed 5 September 2019).

[3] M.R. Rindap and I. Mari, "Ethnic Minorities and the Nigerian State" (2014) 3(3) *International Journal for Arts and Humanities*, p. 89; A.A. Ahmad, "The Position of Minority Identity in Nigeria and Its Effect on Governmental Policies" (2015) 5(4) *International Journal of Research in Social Sciences,* p. 89.

popular decision-making.[4] It is within this struggle that the author identified three distinct deliberation principles. The principles are – public reasoning principle, power checking principle and entrenchment principle.

In this article, the author analysed these principles to reveal the extent of their optimization. After that, the author identified factors that constrain their optimization. These constraints are a result of Nigerian's deep distrust for and in their government, corruption, abuse of power, illiteracy, ethnic and religious intolerance, terrorism, nepotism, poverty and the abuse of fundamental rights and civil liberties. Finally, the author recommends solutions that have the potential to ease those constraints.

1.1. Deliberation Principles in the 1999 Constitution of Nigeria

A detailed analysis of the 1999 Constitution would reveal several deliberation principles. This revelation is not unusual. The 1999 Constitution is the expression of Nigeria's source of power, and this includes its scope and limits.[5] The Constitution further prescribes the duties of the Nigerian government[6] and identifies the rights of Nigerians.[7] Furthermore, both the Nigerian government and Nigerians are obligated to comply with and uphold the Constitution's provisions. This symbiotic relationship between the government and the citizens is imperative in a constitutional democracy and it is within the scope of this relationship that the author identified the following deliberation principles.

[4] J.J. Worley, "Deliberative Constitutionalism" (2009) 2(5) *Brigham Young University Law Review*, pp. 431 – 432.

[5] Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), Cap. C23, Laws of the Federation of Nigeria, 2004, s. 1(1).

[6] *Ibid*, at Ch. 5, 6, and 7.

[7] *Ibid*, at Ch. 4.

1.1.1. Public Reasoning Principle

The origin of the public reasoning principle is traceable to Immanuel Kant. The renowned philosopher had mainly argued that self-legislation is imperative to stifle the emergence of an autocratic government.[8] Kant generally reasoned that self-legislation is the only avenue through which the people can simultaneously be free and governed. According to him, "only the united will of the people" can make legitimate laws.[9] While self-legislation does not mean that the people themselves must make all laws, it envisages that the government has a duty to justify laws made and ensure their implementation in a manner that is acceptable to the citizens. In instances of disagreements, the government must clarify said laws to enhance the norms generally accepted by the citizens. In doing this, it reassures the citizens that the exercise of governmental power is strictly to their benefit.

Predicated on the preceding, the 1999 Constitution provides that "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its power and authority."[10] By acknowledging that power belongs to the people, the Constitution mandates the government to ensure that the exercise of said power primarily focuses on catering to the welfare and security of the people.[11] However, if sovereignty truly belongs to the people, why is governmental power in Nigeria commonly exercised in a manner that is most adverse to the rights of and unaccommodating of the will of Nigerians?

Popular sovereignty does not connote that power resides with the people; rather, it implies that political office holders attain office through the choice of the people.[12] By this, the people had delegated governance to said elected officials, because the people as a group

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[8] I. Kant and M.J. Gregor, "*Practical Philosophy*", 9th print ed., (Cambridge University Press: Cambridge, 1996), p. 457.
[9] *Ibid*.
[10] CFRN (1999) (as amended), s. 14(2)(a).
[11] *Ibid*, at s. 14(2)(b).
[12] P.H. Russel, *Constitutional Odyssey: Can Canadians Become a Sovereign People*? 3rd ed. (University of Toronto Press: Toronto, 2004), p. 7.

neither have the necessary intellect nor will power to govern.[13] This averment reminisces of Plato's condescension when he broadly argued that wisdom and virtue – qualities that are required for a political community to thrive – are unevenly distributed in the community.[14]

However, the citizens could reclaim their status as the source of the power of the State during elections. The citizens could exceed the act of merely voting against elected officials who had inadequately justified policies formulated and implemented in the previous election cycle. In addition to voting at elections, the citizens could identify, compile, and explain their perceived failings of said policies, both in its formulation and implementation. The process of identifying, gathering and interpreting said "failed" formulated and implemented policies would require detailed deliberations amongst the citizens. These deliberations could create an avenue to unravel the specifics of and propose necessary improvements to those "failed" policies. In turn, these improvements could then be presented as a white paper to a new government, voted into power by the people, based on a mutual promise to adopt and implement the improvements proposed in that white paper. This way, sovereignty could be returned to the people.

The public reasoning principle also ensures that the State pursues the common good of all. The drafters of the 1979 and extant 1999 Constitution of the Federal Republic of Nigeria were confident that the common good of Nigerians could be adequately addressed if the Nigerian government religiously pursues the objectives contained in Chapter II of the Constitution. Those objectives, known as the Fundamental Objectives and Directive Principles of State Policy (the policy), contain the aspirations of the government and the

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[13] J.D. Maistre and R.A. Lebrun, *Against Rousseau, On the State of Nature and On the Sovereignty of the People* (McGill-Queen's University Press: Quebec, 1996), p. 45.

[14] S. Chambers, "The Philosophic Origins of Deliberative Ideals" in Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (eds.), *The Oxford Handbook of Deliberative Democracy* (|Oxford University Press: Oxford, 2018), p. 54.

expectations of the citizens.[15] This policy embodies the collective will of Nigerians. Thus, the extents to which these objectives have been pursued and attained are additional avenues for deliberations. This measurement could be by criticism and comment on government policies or civil arguments amongst the citizens and the government on the extent to which the government had achieved the objectives contained in the policy.

Furthermore, the Constitution guarantees the freedom of all Nigerians to participate in the governance of Nigeria.[16] To ensure that the minorities remain heard, the Constitution created the Federal Character Principle, which principle mandates that as much as practicable, appointments into public offices in Nigeria should reflect the ethnic diversity of the Nigerian State.[17] Some have argued, with some measure of validity, that this principle entrenches mediocrity in public service in the name of national unity and integration.[18] By

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[15] E. Alemika, "Fundamental Objectives and Directive Principles of State Policy within the Framework of Liberal Economy", in *Nigeria: Issues in the 1999 Constitution* (NIALS: Lagos, 2000), p. 235.

[16] CFRN (1999) (as amended), s. 14(2)(c).

[17] *Ibid,* at s. 14(3) and 14(4); S. 318 of the Constitution defines the federal character principle thus: "*Federal Character Principle refers to the distinctive desire of the people of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14(3) and (4) of this constitution*".

[18] This argument has generated a body of literature of its own. See E.E. Osaghae, "Federal Society and Federal Character: The Politics of Plural Accommodation in Nigerian Politics since Independence" in U. Eleazu (ed.), *Nigeria: The First 25 Years* (Infodata Limited: Lagos, 1985); A.A. Ayoade, "The Federal Character Principle and the Search for National Integration" in K. Amuwo, A. Agbaje, R. Suberu, and G. Herault (eds.), *Federalism and Political Restructuring in Nigeria* (Spectrum Books Limited: Ibadan, 1998); D. Abubakar, "The Federal Character Principle, Consociationalism and Democratic Stability in Nigeria" in K. Amuwo, A. Agbaje, R. Suberu, and G. Herault (eds.), *Federalism and Political Restructuring in Nigeria* (Spectrum Books Limited: Ibadan, 1998); T.P. Aondoakaa, and G. Orluchukwu, "Federal Character Principles in Nigerian Constitution and Its Applicabilities: Issues and Challenges" (2015) 20(12) *IOSR Journal of Humanities and Social Sciences,* p. 51; T. Onimisi et al., "Federal Character Principles: A Conceptual Analysis" (2018) 6(2) *International Journal of Social Science and Humanities Research*, p. 172. However, the analysis of the appropriateness or otherwise of the federal character principle is outside the scope of this research. Nevertheless, this author notes that arguments against the federal character principle is mostly a veiled attempt to subjugate the ethnic minorities and

ensuring the representation of all ethnicities in Nigeria, the respective ethnic groups could identify issues affecting and pertinent to them by both their representatives in the National Assembly, as well by those appointed into public offices by the executive arm of government in compliance with the federal character principle. This federal character principle also ensures the representation of those that would have been unrepresented in the administration of Nigeria.

It is undisputed that the public reasoning principle is comprehensive. Despite its potential, this deliberation principle remains under-utilized. If appropriately harnessed, this principle could accommodate conversations on issues like provisions of public infrastructure, quality education, acculturation, religious liberties, freedom of association and speech, as well as security and welfare of Nigerians and Nigeria.

Optimizing this principle nevertheless remains a tall order, hindered by a myriad of factors. The concept of divide and rule[19] adopted by the colonial masters remains rife and continues to be employed by the political elite[20] to their benefit and the detriment of Nigeria and Nigerians. The consequence of this divide and rule approach is the mounting dissonance between the government and the governed. However, the constitutional guarantee that power is derived from and exercised in trust for the people, if adequately harnessed could pressurize the government to justify its exercise of governmental power to the governed, and this could re-animate the public reasoning principle as contained in the 1999 Constitution.

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dissuade real conversations and deliberations on issues relevant to them within the framework of the Nigerian State.

[19] For a comprehensive understanding of this policy, and how it negatively impacted governance in former British Colonies, including Nigeria, see A.J. Christopher, "Divide and Rule: The Impress of British Separation Policies" (1988) 20(3) *Area*, p. 233; F.S. Bethke, "The Consequences of Divide-and-Rule Politics in Africa South of the Sahara" (2012) 18(3) *Peace Economics, Peace Science and Public Policy*, pp. 1 – 13.

[20] H. Canci and O.A. Odukoya, "Ethnic and Religious Crises in Nigeria: A Specific Analysis upon Identities (1999 - 2013)" available at https://www.accord.org.za/ajcr-issues/ethnic-religious-crises-nigeria/ (accessed 15 December 2019); T. Edoh, "The Upsurge of Ethno-Religious Sentiments and the Future of Democracy in Nigeria." (2001) 1(2) *Nigerian Journal of Political and Administrative Studies*, p. 79.

1.1.2. Limitation Principle[21]

This principle emphasizes the importance of limiting the powers of government to ensure that deliberation thrives. It does this by stipulating the scope of governmental powers and ensuring that said powers are subject to regular checks to eschew its abuse. The limitation principle operates vertically (amongst the levels of government in federalist states) and horizontally (amongst the arms of government). According to Ojo:

> A complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another.[22]

Since the overlap of the exercise of governmental power is intricately necessary for the efficiency of government, restraint must be exercised to ensure that said overlap does not silently brew over-harmonisation, which in turn, could reduce or perhaps eliminate checks on the exercise of power between the levels and arms of government.

The horizontal check of powers is usually exercised in moderation because the constitutional duties of the respective arms differ. As such, these arms of government employ distinct tools to perform their constitutional responsibilities. While the legislature generally employs a combination of normative, empirical and pragmatic reasoning when enacting legal norms, the executive is constrained to practical discourse. At the same time, the judiciary merely applies said enacted and other existing norms to ensure the coherence of the legal system.[23]

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[21] CFRN (1999) (as amended), Ch. 2, s. 13.

[22] A. Ojo, "Separation of Powers in a Presidential System of Government" (1981) *University of Lagos Public Law Journal*, p. 105.

[23] J. Habermas and W. Rehg, "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy" in T. McCarthy (ed.), *Studies in contemporary German social thought* (MIT Press: Massachusetts, 2001), p. 192.

Of the three arms, only the legislature, otherwise known as the deliberative body, has the leisure to deliberate on issues. Despite this unique feature, the legislature is constitutionally restricted in its duties to check the excesses of the executive alone, and the exercise of such power is mostly within the parameters of legislative procedures and norms. Concerning the judiciary, the power-checking duties of the legislature become constrained. Once the legislature confirms the nomination of members of the judiciary, it mostly becomes *functus officio* on the regulation of and inquiry into the acts of the judiciary.

On their part, the judiciary neither has the luxury of deliberating with the public nor other arms of government, except when it delivers judgment on issues and disputes that have come to the court. Furthermore, the judiciary does not have the liberty to comment on or provide advice to the other arms or levels of government in Nigeria.[24] Instead, the judiciary sits above the fray, like a demi-god waiting to pronounce judgment on all before it.

Since deliberative democracy requires a "reasoning[-]giving process which is open and accessible to all citizens, binding in the short term, but dynamic and open to change as a result of future dialogue,"[25] that reasoning-giving process is best provided by the executive, who must remain pragmatic in its deliberation with the other arms and the citizens. Its constitutional role of implementing policies that affect the daily lives of its citizens and the general well-being of the country limits the timeframe it has to deliberate on issues and simultaneously underscores the importance of such deliberations. Depending on the prevailing circumstances, such deliberations could be exhaustive or limited, but they ought to be dynamic so that they could cater to the

[24] *Ikuforiji* v *Federal Republic of Nigeria* (2018) LPELR-43884 (SC). In this case, the Supreme Court reiterated the long-established principle of law in Nigeria that Nigerian courts do not engage in or adjudicate on academic issues. In contrast, the Supreme Court of some countries like Canada have the inherent powers to advise the government on issues that have not amounted to a dispute. See Section 53(1) and (2) of the Supreme Court of Canada Act. R.S.C., 1985, c. S-26.

[25] D. Gittings, "Separation of Powers and Deliberative Democracy" in R. Levy, H. Kong, G. Orr and J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, 1st ed. (Cambridge University Press: Cambridge, 2018) p. 117.

changing necessities of governance. The preceding, if properly optimized, could be an adequate check on the exercise of the power of the executive, because it demands that the executive continually and simultaneously justify its acts to both the other arms of government and the citizens.

The vertical separation of power operates similarly. While the horizontal separation of power eschews the emergency of autocracy, the vertical separation of power ensures that the voice of all, especially the minorities, is not drowned. It does this by certifying that certain legislative items are within the exclusive purview of the federating states.[26] This way, Sager's "moral progress" germinates, permitting the respective federating units to invent ideas, propagate them and ensure its consolidation without unravelling the social fabric of the country.[27]

The limitation principle is essential for deliberative democracy to thrive within the framework of the Nigerian Constitution. Its applicability, however, had not been without constraint. Although the 1999 Constitution describes the powers of government, it leaves the

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[26] See the Second Schedule to the Constitution of the Federal Republic of Nigeria (1999) (As Amended). The Schedule has two parts. The first part, titled "Exclusive Legislative List" contains items that are within the exclusive legislative competence of the federal government. The other list, titled "Concurrent Legislative List" contains additional items that are with the concurrent legislative competence of both the federal government and that of the federating units. If both the federal government and any of the federating units legislate on an item on the Concurrent Legislative List, any conflict that might arise from the respective legislations must be resolved in favour of the legislation passed by the federal government. This principle is known as covering the Field. See Nigerian case of *Saraki* v *Federal Republic of Nigeria* (2016) LPELR-40013 (SC) for an analysis of the Nigerian Supreme Court's analysis of the meaning of covering the field.

[27] L.G. Sager, "Cool Federalism and the Life-Cycle of Moral Progress" (2005) 46(4) *Williams and Mary Law Review*, p. 1385. Sager in this article had argued that the respective legislative competence of the different levels of government reflects the moral compass of the society that allows such society to evolve within the confines of certain legal principles guarded by the federal government. This way, the federating units could act as a testing ground for the pursuit of specific policies, whose policies might affect the social fabric of the society if they were pursued in the first instance by the federal government. By acting as a testing ground, the extent of the success and the rationale for the failings of said policies could be identified. This identification would serve as a rich source of information from which the federal government could draw on if it ever desires to implement similar policies at the federal level.

task for checking the excesses of government with the government.[28] These power checking gaps are an unsettling problem[29].

Similarly, the executive's total control of all instruments of State sanction is unsuitable for a developing, federal and quasi-democratic country like Nigeria where the government, especially the executive arm, views the law, including the Constitution, as literature it can cherry-pick from and completely disregard with little consequence. This exclusive control of State power is premised on the executive's total control of all instruments of State sanction and has negatively impacted and continues to impact democratic governance in Nigeria.[30] This limitation extends to all constitutional democracies, with weak institutions and "strongmen" occupying the position of power.[31]

The fact that the citizens have limited constitutional and statutory avenues to challenge the excesses of government save for the institution of an action in court, further compounded the potential of deliberation within Nigeria's constitutional order. Even when litigants institute actions in court, such litigants must scale the hurdle of *locus standi* and accurately show that they are not meddlesome interlopers.

Furthermore, the Nigerian government hardly considers the clamouring of Nigerians when it formulates and implements policies.

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[28] CFRN (1999) (as amended), Chapters 4, 5, and 6.

[29] Furthermore, there is a pre-eminence of party loyalty in Nigeria, which means that if most members of the legislature are from the same party as the head of the executive arm, then there is little prospect for the effective exercise of oversight functions. Gradually, party loyalty is upending time-honoured constitutional principles with impunity in countries that practice the presidential system of government.

[30] W. Idada and S.O. Uhunmwuangho, "Problems of Democratic Governance in Nigeria: The Way Forward" (2012) 3(1) *Journal of Sociology and Social Anthropology,* p. 49.

[31] Countries like Syria, Egypt, Zimbabwe, Venezuela, Russia, China, Iraq, Iran, Afghanistan, Pakistan, and North Korea have strong men at the helm of affairs. The weak institutions in their respective countries are incapable of checking the impulses of these strongmen. Thus, they become the uncommanded commander whose wishes and wills become policies and are therefore mostly enacted as law. The pre-eminence of strongmen and weak institutions has been identified as one of the primary reasons why nations fail. See D. Acemoglu, J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, 1st ed. (Crown Publishers: New York, 2012).

Additionally, the power of recall[32] is restricted to the legislature and does little to neither check the excesses of the executive nor challenge the conduct of the judiciary. Records also exist, showing that the legislature's check on the powers of the executive is akin to power struggles between the respective arms rather than an actualization of what the Constitution mandates.[33]

The quasi-independence of the Nigerian judiciary makes a mockery of its attempts to check the excesses of the other arms, especially that of the executive.[34]Although the Nigerian judiciary may deliver judgment on issues presented to it, the enforcement of said judgment, especially if said decision is against the executive or any of the agencies of the executive, depends mostly on the willingness and co-operation of the executive.

All, however, is not lost. By having the scope and limit of the powers of government delineated, it becomes easier to identify excesses in the exercise of governmental power. This identification process permits the citizens to point those identified excesses to the arm constitutionally mandated to check the erring arm of government. Deliberation does not mean unilateral decision making; it means engaging the issue, bringing the ills into the light and having it rectified in a mutually beneficial manner. This deliberative framework remains an unfolding art, which requires daily exercise and careful, but cautious moderation. If carefully moderated, the limitation principle is prime for the continued germination of the deliberation within Nigeria's constitutional framework.

[32] CFRN (1999) (as amended), s. 69 and 110.

[33] J.Y. Fashagba, M.A. Ola-Rotimi, and C. Nwankwor, *The Nigerian National Assembly*, 1st ed. (Springer International Publishing: 2019), p. 15.

[34] I. Abdullahi, "Independence of the Judiciary in Nigeria: A Myth or Reality?" (2014) 2(3) *International Journal for Public Administration and Management Research,* p. 55.

1.1.3. Entrenchment Principle

One of the characteristics of a democracy is the opportunity to "update" the Constitution to reflect the current realities that should govern the people. This "updating process" is usually done by the representatives of the people elected under universal suffrage that must have inquired from and documented those desires of the people.[35] The intrinsic role Constitutions play in a democracy underscores the higher threshold necessary for its amendment. Generally, attaining this threshold ought to be complicated. This high threshold is to ensure that the proposed amendment is genuinely reflective of the desires of the citizens. Another reason for this is to forestall arbitrary amendments of the Constitution.

Although the approximate life span of Constitutions is seventeen years,[36] necessities of governance and verisimilitudes of life sometimes mandate earlier amendments. To be deemed proper, the amended Constitution must take into consideration the desires of and involve the citizens in the process of its amendment. Such involvements should not merely be by referendum, where the citizens are beaconed to indicate acceptance or rejection of proposed amendments. Instead, it should encompass detailed, structured, informative and expressive conversations with the citizens on the rationale for the amendments as well as the amendment's collective benefit to the society.

Yaniv Roznai and Richard Albert[37] have written extensively on the proprietary and otherwise of including unamendable provisions in

[35] J. Colón-Ríos, "Deliberative Democracy and the Doctrine of Unconstitutional Constitutional Amendments" in R. Levy, H. Kong, G. Orr and J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, 1st ed. (Cambridge University Press: Cambridge, 2018), p. 271.

[36] Z. Elkins, T. Ginsburg, and J. Melton, *The Endurance of National Constitutions* (Cambridge University Press: New York, 2009).

[37] Y. Roznai, "*Unconstitutional Constitutional Amendments: Study of the Nature and Limits of Constitutional Amendment Powers*", (London School of Economics and Political Science, 2014) [unpublished]; Y. Roznai, "Towards a Theory of Unamendability", (2015), *New York University Public Law and Legal Theory Working Papers*, paper 515; Y. Roznai, "Unamendability and the Genetic Code of Constitution", (2015), *New York University Public Law and Legal Theory Working Papers*, paper 514; R. Albert, "Non Constitutional Amendments" (2009) 22(1) *Canadian Journal of Law & Jurisprudence*, p. 5; R. Albert, "The Difficulty of

Constitutions. The collective deducible rationale for such inclusions is to ensure the non-alteration or jettisoning of the constitutional order absent good reason. The desire to ensure certainty and render immutable underlying constitutional principles had led more countries to include unamendable provisions in their constitutions. Roznai commenting on this wrote that:

> As my research demonstrates, between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions. It seems that just as having a formal constitution virtually became a symbol of modernism following the American and French revolutions, so too nowadays having an unamendable provision is becoming a universal fashion.[38]

However, the downturn of such inclusion is that it constrains deliberations on those unamendable provisions. All provisions of the Nigerian 1999 Constitution are subject to amendments.[39] The only constraint provided is the minimum threshold necessary for such amendment(s). Section 9 of the 1999 Constitution provides that:

> (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is

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Constitutional Amendments in Canada" (2015) 53(1) *Alberta Law Review*, available at https://www.albertalawreview.com/index.php/ALR/article/view/281 (accessed on 14 December 2019); R. Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada." *Queens Law Journal (Forthcoming) (2016)*.

[38] Roznai (2014), *ibid*, at p. 28.

[39] CFRN (1999) (as amended). S. 9 provides that *"The National Assembly may, subject to the provisions of this section, alter any of the provisions of this Constitution"*.

> supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.
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> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third(s) of all States.

Achieving this threshold is easier said than done. Nigeria's national legislative body comprises of a 109-member Senate and a 360-member House of Representatives,[40] and these legislators are representative of the diverse ethnic groups in Nigeria, which ethnic groups have an innate distrust of and for one another. While the 1999 Constitution provides that a minimum of 73 Senators and 240 Representatives must approve the proposed amendment(s) to the Constitution,[41] that threshold is not easily attainable. Generally, members of the legislature jostle to ensure that their respective cultural, religious, social and ethnic peculiarities are accommodated and reflected in any proposed amendment(s) to the Constitution. This jostle to ensure that any proposed amendment(s) reflects the peculiarities of the diverse make-up of Nigeria becomes more pronounced when the National Assembly sends said proposed amendment(s) to the respective Houses of Assembly of the 36 federating units of Nigeria for their approval.

[40] *Ibid*, at s. 48 and 49.

[41] However, if a proposed amendment to the Constitution seeks to affect the structure of the Nigerian State or modify the provisions on the fundamental rights of the citizens, then the threshold differs. In this instance, four-fifth members of each of the Houses of the Nigerian National Assembly, as well as the Houses of Assembly of the federating units in Nigeria, must consent to the said proposed amendment(s). This means a minimum of 88 members of the Senate; 288 members of the House of Representatives and at least 29 Houses of Assembly must consent to such amendment(s).

Members of those respective Houses of Assemblies are elected to represent the interest of their respective local communities. Thus, they broadly view the proposed amendment(s) through the lens of its benefit to their local communities first, and after that to the Nigerian State. Hence, most members of the Houses of Assembly are unlikely to support any proposed amendment(s) that would not ultimately benefit their local community. As a result of this, obtaining the approval of 24 of the 36 Houses of Assembly necessary for any proposed amendment(s) to the Constitution to become law might be a tall hurdle if said proposed amendment(s) are not exhaustively deliberated on. Furthermore, if members of the respective legislative bodies do not envisage the benefit of said amendments to their constituencies, then the passage of the proposed amendment(s) might be stalled.

Although not expressly provided in the Constitution, the respective Houses of Assembly can make recommendations to the National Assembly on issues arising from and about the substance of the proposed amendments. Their recommendations, which could either be accepted or rejected, provides additional deliberation opportunities between the different levels of government. This is premised on the realization that no proposed amendment to the 1999 Constitution would succeed if said proposed amendment(s) is/are not supported by at least 24 Houses of Assembly of the federating units in Nigeria.

Admittedly, the process of amending the existing Constitution of the Federal Republic of Nigeria is an exclusive legislative process.[42] Nigerians are hardly invited to deliberate on the provisions of said proposed amendments. In their stead, the Nigerian government invites civil society groups, labour unions, and professional associations to deliberate on provisions of the proposed amendments. These bodies are perceived to be representatives of all Nigerians and are thus best positioned to embody and present the will and desire of ordinary Nigerians to the government.[43] Also, it is not unusual for members of

[42] CFRN (1999) (as amended), ss. 8 and 9.

[43] For instance, the 1st Alteration of the Nigerian Constitution in 2010 came about as a result of the pressure imposed on the government by members of the

the National Assembly and the respective Houses of Assembly to return to their constituents to explain the purpose of such amendments. The "explanation process" equally provides opportunity for deliberations between the government and Nigerians.

While this is not deliberation as conceived by deliberative constitutionalists,[44] it is nonetheless a step in a positive direction for a country that had been governed by military dictators, including former military dictators for approximately 42 years, since 1960. The entrenchment principle, directly and indirectly, aids in the deliberation process.[45] The strenuous process associated with amending the Constitution provides ample avenue for Nigerians, albeit, in a limited scope, to engage the political actors. It also forces legislators to explain to their constituents their rationale for supporting or refusing to support such proposed amendment(s) to the provisions of the Constitution. This is a noteworthy improvement to Nigeria's Constitutional and deliberative framework.

2.0. REFLECTIONS ON THE DELIBERATION MARKERS WITHIN NIGERIA'S CONSTITUTIONAL FRAMEWORK

Deliberative democracy advocates the willingness to transform erstwhile held opinions, arguments, and beliefs based on reasoning. Sunstein commenting on this stated that: "A central point of deliberation … is to shape both preferences and beliefs, and frequently to alter them".[46] Deliberative democracy does not envisage the complete eradication of one's biases. Instead, it admonishes participants in the democratic space to be willing to modify their

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groups mentioned above. They not only pressured the Nigerian Government but also provided suggestions, inputs and recommendations that were useful to the legislature when the provisions of the 1999 Constitution were subsequently amended.

[44] M. Vargova, "Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jurgen Habermas" (2005) 18(3) *Ratio Juris,* p. 365.

[45] J.E. Fossum and A.J. Menendez, "The Constitution's Gift? A Deliberative Democratic Analysis of Constitution-Making in the European Union" (2005) 11(4) *European Law Journal,* p. 380.

[46] C.R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press: Oxford, 2002), p. 8.

reasoning based on logic and consensus, in the pursuit of democratic ideals.[47] It is against this background that the author inquires whether the three deliberative principles identified in the 1999 Constitution are truly deliberative. Do they, on the one hand, provide the platform within which the arms and levels of government could engage each other and, on the other, permit robust inquiries and conversations between the government and the citizens? If they do, how and to what extent? If they do not, what could be the rationale?

Between 1960 and 1999, Military Dictators ruled Nigeria for approximately 30 years. Since 1999 to date, two men who previously led Nigeria as Military Dictators have been democratically elected to rule Nigeria. One of these men is the current President of Nigeria.[48]As such, for a more substantial part of Nigeria's existence, Nigerians had been governed by military decree that is devoid of citizens' participation and unwelcoming to deliberations.

The federal-presidential system of government currently practised, and the 1999 Constitution is a military construction, conceived, vetted and approved by the military. Although the 1999 Constitution was tailored after the 1979 Constitution, which was professed as citizen-driven, the military made the final decisions regarding what should be included or excluded from both Constitutions.[49] This means that Nigerians were not genuinely the authors of either the 1979 or 1999 Constitutions since neither were the products of deliberations amongst Nigerians.[50] Rather, a 15-member committee appointed by

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[47] C.R. Sunstein, *The Partial Constitution* (Harvard University Press: Cambridge, 1994), pp. 22-23.

[48] In 1999, after sixteen years of uninterrupted military dictatorship, former Military Dictator General Olusegun Obasanjo (who was the military administrator of Nigeria from 1976 – 1979) contested and won the presidential elections. He was in office until 2007. Between 2007 and 2015, Nigeria was led by civilians. However, in 2015, another former Military Dictator, General Muhamadu Buhari (who also led Nigeria as a military administrator from 1983 – 1985), contested and ran for the office of the president. He won and was re-elected in 2019. Thus, since 1999, Nigeria had been ruled by former military dictators for approximately thirteen years.

[49] B.O. Nwabueze, *A constitutional history of Nigeria* (Longman: New York, 1982).

[50] T.I. Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy" (2000) 44(2) *Journal of African*

the Nigerian Military Government under the leadership of General Abubakar Abdulsalam drafted the 1999 Constitution.[51] During that period, Nigerian had a population of about 116 million people,[52] yet the Constitution, in its preamble, commenced by stating that: - "We The People" -, thereby giving the connotation that Nigerians participated in and agreed to be bound by the contents of that Constitution.[53]

As an aberration to what a Constitution should be, its provisions, implementations, and interpretations have been lopsided.[54] The Constitution paid lip service to inclusion, while the drafters deliberately incorporated huddles to restrain the citizen's engagement with the government on its policies. The drafters accomplished this by ensuring among other things that the entirety of Chapter 2 of the Constitution is non-justiciable,[55] that the independence of the judiciary is constrained; that the citizens could not demand the government to account for its governance practices, which practices ought to be in pursuit of the objectives contained in the Fundamental Objectives and Directive Principles of State Policy.[56]

Despite Nigeria's growth under the boots of military dictators, the existing 1999 Constitution, with its many limitations, contains three distinct deliberation principles - public reasoning principle, entrenchment principle, and the limitation principle. The underlying

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Law, p. 135; J. Ihonvbere, "How to Make an Undemocratic Constitution: The Nigerian Example" (2000) 21(2) *Third World Quarterly,* p. 343.

[51] I.A. Akaayar and C.J. Dakas, "Federal Republic of Nigeria" in J. Kincaid and G.A. Tarr (eds.), *Constitutional Origins, Structures, and Change in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2005), p. 241.

[52] "Nigeria – Population", available at https://countryeconomy.com/demography/population/nigeria?year=1998, (accessed 19 October 2019).

[53] CFRN (1999) (as amended), see preamble; Ihonvbere, *supra* n 50.

[54] For an analysis of the failing of the 1999 Constitution and its effect on the Nigerian society, J.I. Elaigwu, *Nigeria: Essays in Governance and Society*, 1st ed. (Adonis & Abbey Publishers: London, 2012); J. Campbell and M.T. Page, *Nigeria: What Everyone Needs to Know* (Oxford University Press: New York, 2018).

[55] CFRN (1999) (as amended), s. 6(6)(c); Alemika, *supra* n 15.

[56] For further general understanding of the failings of the 1999 Constitution, see Ogowewo, *supra* n 50.

theme that runs through these principles is the pursuit of the collective good achievable by Nigerians for Nigeria.

These principles aid in re-emphasising that sovereignty belongs to the people; that government's primary duty is to ensure the security of and cater to the welfare of Nigerians; that the participation of Nigerians in governance of Nigeria is guaranteed; and that the exercise of governmental power must be according to law contained in a document called the Constitution. It further ensures the non-arbitrary amendment of the provisions of said Constitution. The collective good achievable also presupposes that the decision-making process would accommodate the views of all Nigerians based on rationality and impartiality, even if some of the opinions expressed are antithetical to the belief of a section of the Nigerian society.[57]

This collective good pursuit transcends mere proposition of lofty ideas that might be popular[58] or the aggregation of the conflicting, yet important choices sought to be made in the quest of a predetermined goal of democratic importance.[59] Under this collective good achievable, the rationale for adopting a stance on an issue of democratic importance must not be personally held and religious followed; instead, such reasoning must be willing to be clarified, modified, and if need be, transformed for the greater good of the society.[60]

Within the framework of the Nigerian Constitution, this collective good achievable is expressed in interactions between the arms of government on the one hand and between the government in its entirety and the citizens on the other. Most policies sought to be pursued by the government are usually backed by legislation and are

[57] O.K. Ezenyili, "Democracy and Good Governance in Nigeria" in J. Bohman and W. Rehg (Eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press: Cambridge, 1997), pp. 67 and 75.
[58] S. Freeman, "Deliberative Democracy: A Sympathetic Comment" (2000) 29(4) *Journal of Philosophy and Public Affairs,* p. 371.
[59] *Supra* n 57.
[60] T. Christiano, "The Significance of Public Deliberation" in J. Bohman and W. Rehg (Eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press: Cambridge, 1997) 243 at p. 244.

generally in furtherance to the fundamental objectives and directive principles of state policy. The executive generally draft legislation that is presented to the legislature to be deliberated on and amended as appropriate. In situations that warrant it, the judiciary is presented with the subject matter of the legislation to address the disputes that might arise on issues associated with it. Also, the government usually incorporates the input of labour unions, civil society groups, and professional bodies in the substance of the policies to be pursued or in the procedure for its implementation.

Even though the enactment of the 1999 Constitution is innately undemocratic, democratic decisions within the Nigerian State are reached mainly as a product of various deliberations, in the loose sense, amongst the arms of government on the one hand and between the government and the governed on the other. While decisions are not generally reached by consensus as proposed by deliberative democrats, the 1999 Constitution permits the accommodation to varying degrees, the contributions and input of Nigerians, albeit to a limited degree in the decision-making process.

3.0. CONSTRAINTS TO THE VIBRANCY OF THE DELIBERATION PRINCIPLES IDENTIFIED IN THE 1999 CONSTITUTION

Several factors constrain the vibrancy of the deliberation principles identified in the 1999 Constitution. Some of the constraints that are relevant to this paper are:

3.1. Poverty and Illiteracy

Deliberative democracy transcends the mere right to participate freely in the democratic process. Instead, its emphasis is on the principle of equality of participants in the democratic space. It connotes that similar opportunities must be afforded to everybody to contribute to the political discourse. It thus deemphasizes the role money and intellect play in political discourse. Similarly, this principle advocates that access to the deliberation space must not be hindered by anything

except age and mental health.[61] Strata discriminatory factors like economic positions, education, exposure, political and social connections, influence should be irrelevant. Instead, emphasis ought to be placed on ensuring that the views of all and sundry willing to participate are listened to and accommodated.[62]

Nonetheless, in Nigeria, poverty and illiteracy affect deliberation in two ways. First, prospective participants would instead pursue their proverbial daily bread than engage in any form of deliberation. Nigeria was recently crowned as the poverty capital of the world, with over 87 million people living on less than 2 US dollars daily.[63] Those primarily affected by the poverty rate are mostly illiterate. They see neither usefulness nor benefits of deliberative principles found in the Nigerian Constitution. They would instead deliberate on sports and reminisce about the good-old-days they had experienced or that their parents had told them about. They have an innate distrust for and would not discourse with the government. They believe that the government has no real interest in addressing their basic needs. As a result, they generally pledge their votes in exchange for necessities like food, clothing and petty cash.[64] They are also antagonistic to others whom they perceive to be higher than them on the social strata. Amongst their social peers, spewing accusations on the government is preferred to deliberating.

Secondly, poverty and illiteracy contribute to an inferiority complex. Thus, people who perceive themselves to be poor and illiterate believe

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[61] J. Cohen, "Democracy and Liberty" in J. Elster (ed.), *Deliberative Democracy*, Cambridge Studies in the Theory of Democracy (Cambridge University Press: New York, 1998), p. 185.

[62] *Supra* n 57.

[63] B. Adebayo, "Nigeria Overtakes India in Extreme Poverty Ranking" available at https://www.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html (accessed 30 November 2019).

[64] G. Matenga, "Cash for Votes: Political Legitimacy in Nigeria" available at https://www.opendemocracy.net/en/cash-for-votes-political-legitimacy-in-nigeria/ (accessed 20 November 2019); F. Yohanna, "Nigeria: A Democracy Where Votes are for Sale" available at http://www.yourcommonwealth.org/social-development/democracy-participation/nigeria-a-democracy-where-votes-are-for-sale/ (accessed 20 November 2019).

that they have nothing to contribute to the conversation on good governments. They recognize that they lack enough intellect and information to contribute to the discussion on entrenching good government. Most of them have not seen the Nigerian Constitution before. They also mostly lack comprehension of governance and do not understand the rights that they are ordinarily entitled. Hence, they are quick to resort to the power-of-the-fist than that of reasoning. Since daily survival is the principal goal of those Nigerians, they employ any means possible to achieve that goal.

Under this kind of atmosphere, no genuine deliberation is achievable; neither would good government be entrenched unless the government addresses the problems of poverty. More so, most of the government policies, which, if religiously pursued, could lift millions of poor Nigerians out of poverty are contained in the fundamental objectives and directive principles of state policy, which the government continues to pay lip-service.

3.2. Ethnic and Religious Intolerance

Nigeria comprises about 250 ethnic groups with different cultures, distinct temperaments, diverging world views, religious perception, beliefs, political tolerance, and intellectual exposure. Loosely stated, Nigeria is divided along ethnic and religious lines between the predominantly Muslim north and the predominantly Christian south. While the structural division was not a making of the colonialist, the seed of discord and intolerance that emanated from that structural divisions was orchestrated by the British. This orchestration was a reward bestowed on the northerners for their amenability to colonial rule and their less-agitation for independence.

In contrast, the more active southern part of Nigeria led by intellectuals like Nnamdi Azikiwe and Obafemi Awolowo, both of whom had long challenged, and were less amenable to colonial rule, were viewed with contempt by the colonialist. Hence, when the British were departing Nigeria, they ensured that they left the reins of power to the north. That singular act fanned the embers of discord between the north and the south, which discord continues to grow to

date, and is partly responsible for the several ethnoreligious conflicts that Nigeria had experienced and continue to experience.[65]

Some of those ethnoreligious conflicts that had occurred in Nigeria are the Nigerian civil war,[66] the Kafanchan-Kaduna crisis of 1980, the Kaduna Sharia riots of 2000, the Idi-Araba – Oko-Oba conflict of October 2000, and the Jos riot of 2001.[67] The unabating agitation for Biafra's independence in the south[68] and the shameful Boko Haram terrorist menace in the north[69] are a continuing reminder of and reflection upon the ethnoreligious discord that exists in Nigeria. This discord has amplified the inherent distrust between the northern and southern parts of Nigeria, as well as between Muslims and Christians. Undisputedly, no meaningful deliberation can occur under a cloud of suspicion, irrespective of what the subject-matter to be deliberated upon might be.

3.3. Distrust for and in the Government

Reeling from years of military dictatorship, most Nigerians do not trust the government to put the interest of the citizens before that of the government. Most Nigerians feel that the government exists to cater to the desire of the privileged few, to the detriment of the masses. Government policies are primarily geared towards re-entrenching the political elites to ensure their continued dominance in Nigeria's socio-economic space. Additionally, few Nigerians believe

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[65] Canci and Odukoya, *supra* n 20; C. Massaro, "Nigeria Plagued by Ethnic and Religious Violence as Attacks on Christian Rise" available at https://www.foxnews.com/world/nigeria-ethnic-religious-violence-christians (accessed 26 November 2019).

[66] Osaghae et al., *supra* n 1.

[67] V.A. Isumonah, "Migration, land tenure, citizenship and communal conflicts in Africa" (2003) 9(1) *Nationalism and Ethnic Politics,* p. 1; S. Joshua, "Democracy and Violent Conflicts in Nigeria: Implications for National Development" (2013) 7(3) *Africa Research Review*, p. 324; E.E. Osaghae and R.T. Suberu, *A History of Identities, Violence, and Stability in Nigeria*. Oxford: Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford; Edoh, *supra* n 20.

[68] C. Offodile, *Politics of Biafra and the Future of Nigeria* (Lulu Publishing Services: North Carolina, 2016).

[69] C.N. Ibenwa, "Terrorism and Its Management: A Case Study of Boko Haram Islamist Sect in Nigeria" (2016) 4(9) *Global Journal of Arts Humanities and Social Sciences*, p. 43.

that the government could be trusted to cater to the security and welfare of Nigerians. This cloud of distrust is unsuitable for deliberation to thrive.

Furthermore, most Nigerians provide necessities like food, clothing, shelter, electricity, water, education, access to health, and security for themselves, and had long ceased from believing in the promises made by the government to provide these necessities. Most Nigerians do not believe that the government exists for them and as a result, they eschew avenues to interact with the government. They perceive that those avenues are simply an opportunity for the government to present itself as representing the masses. This distrust had permeated all sectors of the Nigerian State, and it is primarily responsible for the unwillingness of Nigerians to engage the government on any issue. This inherent distrust of the government negatively impacts the vibrancy of the deliberative principles contained in the Nigerian Constitution.

3.4. Non-Independence of the Judiciary

An understanding of the concept of independence of the judiciary within Nigeria's deliberative constitutionalism doctrine is multifaceted. It primarily connotes that the judiciary must be independent and immune from external influence either from the other arms of government or from the populace. The converse, however, is the reality. While the judiciary is constitutionally empowered to adjudicate over all persons, entities and governmental structures in Nigeria,[70] it lacks the inherent powers to enforce its judgment and is thus, not truly independent.[71] All instruments of the State capable of ensuring compliance are under the control and direction of the executive. This is a peculiar problem and usually results in a state of hopelessness for the judiciary. When the decisions of the court are against the executive, the judiciary's state of despair becomes obvious. This status-quo had discouraged many Nigerians from approaching the court to interpret and challenge the acts of the executive. Many have

[70] CFRN (1999) (as amended), s. 6(6)(b).
[71] M.A. Ikhariale, "The Independence of the Judiciary under the Third Republican Constitution of Nigeria" (1990) 34(2) *Journal of African Law*, p. 145.

viewed the judiciary as a toothless bulldog whose potency relies mainly on the willingness of the executive to cooperate with the judiciary.

Furthermore, independence of the judiciary envisages that the citizens, including the other organs of government, must be free to comment on the decision and judicial findings of the judiciary. It is within this framework that the principles of deliberative democracy become animated. The decisions of the courts, especially the appellate courts, are analysed, criticized, cited, quoted, and re-submitted to the courts as judicial authorities to be affirmed or upturned. More effort needs to be expended by the government to ensure that the independence of the judiciary is genuinely established and jealously guarded. The power checking principles contained in the 1999 Constitution, including the willingness of the citizens to challenge the acts, actions and activities of government might become more animated when the independence of the Judiciary becomes more established.

3.5. Corruption and Nepotism

The emphasis on obtaining and keeping power in the Nigerian State aids corruption and births nepotism. Nigerians blindly pursue political and financial power because of the protection and prestige it affords. The recognition of these had emboldened political office seekers to employ all mechanisms, including violence, the threat of violence and bribery to secure their victories at elections.[72] This practice of retaining political office by all means possible has permeated all corners of the Nigerian State and continues to be entrenched, based on the benefits that accrue to those elected officials.

Since alliances and allegiances in Nigeria are secured by the promise of and the actual benefit derived from financial and political power, these alliances and allegiances have been known to shift frequently.[73] This shift results in non-coherence of ideologies, and this, in turn, affects the deliberation process. Rather than to be convinced by the

[72] See M.M. Ogbeidi, "Political Leadership and Corruption in Nigeria since 1960: A Socio-Economic Analysis" (2012) 1(2) *Journal of Nigeria Studies*, p. 1. In this article, this author analyses the effect and negative impact of corruption on Nigeria's political clime.
[73] *Ibid*, at pp. 3 – 5.

superiority of another's argument, consensus in Nigeria is primarily reached by calculating the opportunity cost in terms of personal benefits that would accrue to those persons burdened with making such choices. This act has hurt Nigeria's corruption ranking[74] and reveals a worrying trend. No genuine deliberation within any framework, including but not limited to the provisions of the Nigerian Constitution, could be achieved under a corrupt climate.

3.6. Terrorism, Militancy and General Insecurity

Nigeria is metaphorically heading toward Thomas Hobbes' state of nature, where life is solitary, poor, nasty, brutish and short.[75] The country is on a lonely path, the citizens are poor, life is nasty, the reality is brutal, and the intervals between reliefs are getting shorter. The preceding coupled with perceived neglect and negligence of the government to act responsively and responsibly in the face of continued inequality, exploitation, ethnic domination, corruption, nepotism, lawlessness, insecurity and fraud led to the rise of ethnic-based guerrilla forces and militants. These outlaws are made up of members of the exploited communities whose objectives *inter alia* are to defend their communities and natural resources from continued exploitation.

In the northern part of Nigeria, terrorism emerged as a reaction to the government's continued failure to provide necessities to the teeming youth population.[76] Their lack and illiteracy provided a fertile ground upon which the seed of hatred was sown. It also afforded Al-Shabab, members of the Islamic State and other terrorist organizations from northern Africa to infiltrate the north-west part of Nigeria and support the insurgents to wreak havoc in Nigeria. The continued unleashing of biblical hell on the Nigerian populace is mostly a cry for help and a brash demand for a fair shake of the national cake. A similar

[74] Transparency International, *2018 Anti-Corruption Index*, Annual Corruption Perception Index (Transparency International, 2018).
[75] T. Hobbes, *Leviathan: Vol. 1* (CreateSpace Independent Publishing Platform: South Carolina, 2017).
[76] *Supra* n 69.

argument is submitted as the rationale for the increased insecurity state in the country.[77]

No deliberation can genuinely take place when these menaces continue to rise, threatening the territorial integrity of Nigeria, enhancing internal insurrections and weakening Nigeria from its ability to wade off external aggressions. The deep-seated dissatisfaction of the respective ethnicities in Nigeria remains unaddressed. Until the Government embarks on a positive and honest step toward understanding, re-orienting, re-accommodating fears and agitations of these outlaws, those deliberation principles identified in the 1999 Constitution would remain under-optimized.

4.0. RECOMMENDED SOLUTIONS

The preceding problems have hindered the vibrancy of the deliberation principles earlier identified in the 1999 Constitution. Unless rectified, these problems would continue to hamper sincere deliberations on issues pertinent to the continued survival of Nigeria and Nigerians. In this section, the author proposed some recommendations that he believes could solve those identified problems.

4.1. Mandatory Accountability of the Acts, Actions and Activities of Government

One of the essential features of a democratic government is the requirement that power holders account for their exercise of government power. This provides an opportunity to ensure that both substantive and procedural acts of government comply with existing law and, by so doing, ensure that power holders remain bound by, and do not hold themselves to be above the law. Accountability connotes that the acts, actions, and activities of government must be transparent, accessible and justifiable to the citizens. It is also an avenue to certify that the policies of the government, and its

[77] E.I. Obarisiagbon, and E.O. Akintoye, "Insecurity Crisis in Nigeria: The Law Enforcement Agents a Panacea?" (2019) 7(1) *Journal of Sociology and Social Work*, available at http://jsswnet.com/vol-7-no-1-june-2019-abstract-6-jssw (accessed on 24 December 2019).

implementation, are in tandem with the promises made by the government. By this, the citizens and critics of the government are availed with the opportunity and means to highlight the failings of government and propose recommendations that could help address those identified failings.

This demands that the government renders a mandatory account to the citizens is in tandem with the reasoning principle identified in the 1999 Constitution and discussed above. This reasoning principle primarily implies that the power of the Nigerian State exercised by the Nigerian government is derived from Nigerians. Hence, its exercise ought to be beneficial to Nigerians. Since Nigerians are the constitutional donors of State power, then we ought to be entitled to a mandatory account of how the Nigerian government had exercised that power.[78]

For this, the Nigerian legislature could enact the necessary legislation(s) requiring all arms of the Nigerian government, especially the executive, to annually document and publish how it had exercised the powers that had been constitutionally donated to it by Nigerians.

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[78] In 2011, the administration of Goodluck Jonathan signed into law the Freedom of Information Act, Federal Ministry of Information and National Orientation, 28 May 2011 [Freedom of Information Act]. The aim of this Act as stated in its preamble was to "make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matter". However, this Act is inchoate. While it mandates the Nigerian government to publish an account of its acts, actions and activities. It does not prescribe the frequency of such publication, nor does it prescribe/impose sanction(s) for the failure of the Nigerian government to document and publish those records. As a result, public officials in Nigeria have exploited these lacunas to deny the request of many Nigerians. For information on the activities of the government; "Nigeria's Access to Information Law is not Working", available at https://www.icirnigeria.org/nigerias-access-to-information-law-is-not-working/ (accessed 14 November 2019); T. Ilori, "How Nigeria and Uganda are Faring in the Right to Information", available at https://cipesa.org/2018/11/how-nigeria-and-uganda-are-faring-on-the-right-to-information/ (accessed 16 December 2019). This recommendation not only imposes a duty on the government to publish and make publicly available an account of its acts, actions and activities, it also mandates its annual publication.

This way, the Nigerian government would be under a statutory duty to account for its acts, actions, and activities to all Nigerians annually.

Additionally, said legislation must prescribe criminal sanctions on the leadership of any of the ministries, departments or agencies (MDAs) of the Nigerian government that fails to document and publish an account of its acts, actions and activities annually. Also, said legislation must also prescribe the timeframe for publishing those publications. All the preceding would ensure that those MDAs of government timeously document and publish accounts of their acts, actions, and activities.

This annual publication would further avail the government with the opportunity to justify its actions to Nigerians and obtain feedback on areas of its policies that needs to be improved. This mandatory accountability of the acts of government would further help Nigerians better understand the policies pursued by the government, provide comprehensive resources that Nigerians could rely upon to deliberate with the government on its policies and provide means by which the government would better understand its policies.

By demanding that the government renders a mandatory account for its acts, actions, and activities, Nigerians would have the means to measure the extent to which the government had adhered to the constitutional provisions that prescribe that the welfare and security of Nigerians should be the primary aim of government.[79] This mandatory account could serve as a score-card to check the activities of the government and ensure that those activities comply with the rule of law.

To avoid self-bias and checkmate the propensity to produce a mendacious report, the legislature could prescribe that the report be prepared with support and input from auditors, legal practitioners, human rights groups, accountants, public policy experts, security experts, economics, financial experts and other relevant professionals. These professionals would vet and ensure that the annual report to be documented and made available to Nigerians, are a true reflection

[79] CFRN (1999) (as amended), s. 14(2)(b).

of the acts, actions, and activities of government for the year under review.

Admittedly, there are certain aspects of the government's activities that ought not to be publicized. Some of these activities could be on-going law enforcement investigations, defence and national security issues, sensitive policy papers of government, privileged information and other documents sealed on the orders of the court. Nevertheless, the process of compiling, documenting and vetting those documents detailing the acts, activities and actions of government that are not deemed privileged, coupled with the animated conversations, engagements, and arguments that said published report would generate, could rekindle Nigerians' trust for their government and consequently enhance the prospect and process of fruitful deliberations between the Nigerian government and Nigerians.

4.2. Re-orientation of Law Enforcement Agencies

Another bottleneck that stifles the vibrancy of those deliberation principles in Nigeria is the lawlessness of law enforcement agencies. Within the framework of the Nigerian State, law enforcement agencies usually uphold the rules of their appointees, rather than the rule of law. All its members swear allegiance to the Constitution and other relevant statutes, and undertake to uphold the rule of law. However, most of its members have discarded their oath and, in its place, sworn loyalty to their appointer.[80] When the rule of man replaces the rule of law, abuses arise. This is the current situation in Nigeria, where most of the law enforcement agencies have jettisoned adherence to the rule of law and are upholding the rule of their appointer. [81]

This act of upholding the rule of their appointer is based mainly on three premises. First, the notion of the rule of law is practically non-

[80] A.A. Aderinto, "Policing and the Politics of Law Enforcement in Nigeria" in D.E. Agwanwo (ed.), *A Political Economy of Policing in Nigeria* (Aboki Publishers: Makurdi, 2014), p. 59.

[81] E.C. Onyeozili, "Obstacles to Effective Policing in Nigeria" (2005) 1(1) *African Journal of Criminology and Justice Studies*, pp. 40 – 44.

existent in Nigeria.[82] The executive wields excessive power that is generally unchallenged. Because the executive controls all instruments of State power, it has become a law unto itself. Hence, it is not unusual that when the executive directs members of the law enforcement agencies to execute an act, those agencies perceive said directive to be a law that they must obey.

Secondly, most of these law enforcement agencies do not have another means of livelihood. Their sustenance is wholly based on the income they earn from their occupation as members of the law enforcement agencies. Hence, when asked by someone in a position of authority, who equally has the power to determine their appointment, to execute an act, they comply, even when they perceive that such directive might be unlawful.

Finally, a large chunk of members of law enforcement agencies in Nigeria are known as recruits. This is because they are illiterate. Therefore, most of them do not understand what the rule of law is. They have been trained to obey and not question the directives of their superiors. Acting on the impulses of these training, these recruits do not know how to refuse an illegitimate order. Accordingly, they execute the dictates of their superiors and upholds those dictates like they were the rule of law. To ensure that deliberation thrives in Nigeria, members of Nigeria's law enforcement agencies must undergo re-orientation. This proposed re-orientation should primarily focus on explaining the concept of the rule of law, fundamental rights, and civil liberties. Furthermore, this proposed re-orientation must also enlighten members of Nigeria's law enforcement agencies on the nature, scope, and limits of their statutory powers. They must also be made to understand that the executive, including the President, is bound by the rules of law. As such, any order issued by the executive that contravenes the provisions of the law ought to be discarded.

To ensure that members of these law enforcement agencies uphold the rule of law, then the law must be used to secure their employment. This means that relevant legislation must be enacted to protect

[82] E.J. Okon, "The Rule of Law in Nigeria: Myth or Reality?" (2011) 4(1) *Journal of Politics and Law,* pp. 211 – 214.

members of the law enforcement agencies that refuse to execute any unlawful directive. The respective law enforcement agencies ought to have a compliance department saddled with the responsibility of inquiring into the lawfulness of issued directives. If the issued directives are lawful, then they must be executed. If the directives are not, then said, directives could either be discarded or returned to the issuer for necessary modification. This is to ensure that the execution of those directives would be within the ambit of the law. It is only when this is done that Nigerians would be willing to deliberate on issues with the government.

4.3. Safeguarding the Independence of the Judiciary

Another constraint to the power checking principle is that the judiciary depends a lot on the executive for the performance of its duties. This overreliance is neither healthy for a vibrant democracy to thrive, nor for the principles of deliberative democracy to be entrenched. The propensity of this overreliance to destroy Nigeria's nascent democracy had been critically analysed by several authors, many of whom recommended that the appointment, remuneration, security of tenure and pension of members of the judiciary should be done independently of the executive.[83] This author agrees with their recommendations and adopts them as part of his proposed solution to the bottlenecks hindering the vibrancy of deliberative democracy in Nigeria.

In addition to their recommendations, this author also proposes that the judiciary should be empowered to enforce its judgment. While no law constrains the judiciary from enforcing its judgment in Nigeria, the fact that all instruments of State power that could be deployed to enforce the judgment of the court are under the control of the executive usually results in the judiciary having to rely on the executive for the enforcement of its judgment. While this is not a peculiarity of the Nigerian State, the overbearing influence that the executive bears

[83] R.C. Okeke and A.N. Idike, "The Judiciary and Democracy Consolidation in Nigeria under the Buhari Administration" (2017) 2(4) *Specialty Journal of Politics and Law,* pp. 24 – 32; *Supra* n 34; *Supra* n 71; A.A. Olowofoyeku, "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary" (1989) 33(1) *Journal of African Law,* p. 55.

on the notion of the rule of law makes it *sui generis*. This circumstance usually results in a state of hopelessness for the judiciary, especially when the said judgment of the court is against the executive or any of its MDAs. This state of despair also limits the willingness of Nigerians to challenge the acts, activities, and actions of the Nigerian government.

To address this, this author proposes the enactment of statute, empowering the respective law enforcement agencies (particularly the Nigerian Police Force) to create a department within their organizations, whose principal responsibilities would be to give effect to the decisions of the court. While members serving within this department remain part of their respective agencies, their promotion, remuneration, and conditions of service should be outside the hierarchical framework of their principal agencies. By this, the enforcement of the judgments of the judiciary would no longer rely on the willingness of the executive. This could re-animate the trust of Nigerians in the judicial process and, by so doing, re-energize the power checking principles of deliberative democracy as contained in the provisions of the 1999 Constitution.

5.0. CONCLUSION

The potential of deliberative democracy to solve the multifarious problems associated with governance in all constitutional orders is limitless. As this article shows, there already exist deliberation principles within the framework of the existing *1999 Constitution of the Federal Republic of Nigeria*. However, many of these opportunities remain either untapped or under-utilized. While deliberative democracy will have to scale several constraints, including but not limited to, re-orientation of the law enforcement agencies and empowering the judiciary to enforce its own decisions before it could become entrenched, its capacity to address problems of governance that is citizen-focused and citizen-driven is an opportunity that we all as Nigerians must be willing to harness and maximize. Nigeria is at a tipping point, and if the citizens do not rise to deliberate and demand robust deliberations within the tiers and arms of governments on the one hand; and between the government and the citizens on the other, our beloved country might find itself consigned to the history books,

fulfilling the words of the late literary giant – Chinua Achebe – that "there was a Country."