

Limit of Presidential Power of Appointment Under the 1999 Constitution (As Amended): An Appraisal of Section 154

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Abstract

On June 30, 2015 President Muhammadu Buhari announced the appointment of Mrs. Amina Zakari as the Acting Chairman of the Independent National Electoral Commission (INEC). Immediately the news broke, the appointment was attended by a deluge of opinions on the constitutionality and morality of the appointment. While one group argues that the appointment was a gross violation of the Constitution and a subtle interference with the independence of INEC, the other group argues that the President was in order on this matter. This Paper explores the concept of presidential power of appointment under the Nigerian Constitution, particularly in relation to that controversial appointment. This Paper argues that the Constitution must be the final authority from where all men must derive their powers, particularly those charged with the mandate to lead the People. This Paper concludes that every constitutional democracy derive its strength and resilience from the strict obedience to the supreme document of the land and more importantly, in an environment where the rule of law is firmly enthroned.

Introduction

Any attempt at appraising the provisions of the Nigerian Constitution, is like tiptoeing through a land filled with mines. First is that the constitution, just like every other is not an all encompassing legal document. Second is the fact that, the Nigerian constitution having remained under the yoke of illegitimacy since it was delivered by the departing Military junta, has remained a tool in the hands of the desperate politicians of the 4th republic, who in their mortal quest to impose their will on the people, have consistently sought out the inherent loopholes and manipulating same to fit their interest and political aspirations. The highpoint of Nigeria's 16years of democratic rule has been the unfettered display of presidential power in an unimaginable scale, with many abuses. This indecent situation has been so because of a prior 16years of Military interregnum that followed the demise of the 2nd Republic¹. Given the origin of the Constitution as being a product of Military whims and caprices, it has suffered so much illegitimacy. The argument is that the process by which a constitution is entitled to solemnly declare that "*We the people Do hereby make, enact and give to ourselves...*" or by which it receives the affirmative imprimatur of the people are glaringly or patently absent². There have been several efforts to through various National conferences and dialogues, to cure this defect but all to no avail³. To make matters worse the

¹ See Elijah Bello, '16years of Unbroken Democracy', *The Guardian Newspaper* (Lagos: March 27, 2015) available online at <<http://www.nguardiannews.com>>, 'accessed August 17, 2015. In the words of the Author, he had this to say further, "Sixteen years down the line, the reality is still being sustained and even though the country has been having a bumpy ride on the road to perfection especially in attempts by politicians to thwart the process, the experience gathered so far is already strengthening the system to create a mechanism for protection." See also, Samson Eze, '16years Democracy: The Travails and Trials', *The Guardian Newspaper* (Lagos: May 30, 2015) available online at <<http://www.nguardiannews.com>>, 'accessed August 17, 2015; See further Ayo Esan, 'Mixed Feelings Trail 16years of Democracy in Nigeria', *The National Mirror Newspaper* (Lagos: April 12, 2015) available online at <<http://nationalmirroronline.net/new/mixed-feelings-trail-16-years-of-democracy-in-nigeria>>, 'accessed August 17, 2015.

² See Alade Rotimi-Johnson, 'Getting it right on Constitution Reform', *The Guardian Newspaper* (Lagos: April 26, 2015) available online at <<http://www.nguardiannews.com/2015/04/getting-it-right-on-constitution-reform>>, 'accessed August 18, 2015'.

³ See Ben Nwabueze, 'Between Jonathan's National Conference and Obasanjo's Reform Confab', *The Vanguard Newspaper* (Lagos: November 17, 2013) available online at <<http://www.vanguardngr.com/2013/11/jonathans-national-conference-obasanjos-reform-confab-prof-ben-nwabueze>>, 'accessed August 18, 2015'. See also John Ikubaje, 'The Endless Nigeria Constitution Review process', *The Nigerian Voice Online Newspaper* (May 31, 2012) available online at <<http://www.thenigerianvoice.com/news/91492/1/the-endless-nigerian-constitution-review-process.html>>, 'accessed August 18, 2015'. These Conferences have come under different nomenclatures such as the 400-member National Political Reform Conference (NPRC) convened by President Olusegun Obasanjo in February 2005 and the 492-member National conference inaugurated by President Goodluck Jonathan on March 17, 2014. The work of convoking the President Jonathan National Conference was packaged by a 13-member Presidential Advisory Committee on National Dialogue headed by Senator Femi Okurounmu and apart from its 492 members drawn from different spheres of the country the Conference was supervised and managed by a secretariat whose six members were also nominated by the Federal Government. The others, besides Hon. Justice Idris Legbo Kutigi, were Prof. Bolaji Akinyemi, (Deputy chairman), Mrs. Valerie-Janette Azinge (Secretary), Akilu Ndabawa (Assistant Secretary, Conference Proceedings), Mahmood Yakubu (Assistant Secretary, Administration and

document in its 16 years of existence has been plagued by series of controversies, one after the other¹. One of such controversies is the perennial exercise of presidential appointment power outside the perimeters of the constitution.

Notwithstanding the several safeguards provided as checks on the powers of the President, the country's experience so far has shown that much as these safeguards appear to be many in number, the reverse has been the case in their potent fierceness. One of those safeguards, is that provided for in Section 154 cum 160(2) of the Constitution², which seeks to secure the independence of the Independent National Electoral Commission (INEC), particularly as regards the regulation of its powers and function and make it free from the control of a sitting President. The unqualified supremacy of this section in relation to the exercise of the appointment power of a Nigerian President came under focus when Amina Zakari was appointed as the Acting Chairman of the INEC.

Presidential power and the Nigerian Constitution

The concept of presidential power has been a subject of intense debate amongst scholars over the years. Scholars are of the opinion that the executive branch has become too powerful, so vastly powerful that in recent years Presidents have made strong claims as to their constitutional powers³. At a time, it was argued that the powers of the president, as the dominant figure in the executive arm of government, was entirely personal and should therefore be exercised in consonance with his personal attributes and qualities⁴. Drivers of this thought, painted a grand and enticing picture that appear to suggest that the success of government and constitutional order is a consequence of electing a fine gentleman as President⁵. Supporting this view, Richard Neustadt, a researcher on the growth and development of the American Presidency, argued that presidents have very little formal power, far less than necessary to meet the enormous expectations heaped on them under modern governments, to which he then posits that the key to strong presidential leadership, lies not in formal power, but in the skills, temperament, and experience of the man occupying the office and in his ability to put these personal qualities to use in enhancing his own reputation and prestige⁶.

However, this notion of the 'personal presidency' has since clashed head long with the constitutionally desired concept of 'institutional presidency', where the President is seen as a steward of the people, who is bound by his Oath of Office to follow laid down laws and other extant regulations as contained in the Constitution, as an executioner of some sort of this principal legal document⁷. Under the 21st Century Presidency, particularly in countries that practice the Presidential system of government, the notion is more of an institutional presidency, where though presidents come and go, the Office is strictly confined to the exercise of certain powers, with attendant discretionary niceties, but with an adherence to the constitution.

However, even institutional presidency does not seem to have succeeded much in curtailing presidential excesses for a myriad of reasons. The President as the symbol of executive power is saddled with the very

Finance), and Akpandem James (Assistant Secretary, Media and Communications).

¹ This is due principally to the inability of the constitution to attract the needed respect that should be the first quality of any of such supreme document.

² The Constitution in view here is "The Constitution of the Federal Republic of Nigeria, 1999 (as amended) 3rd Alteration".

³ Eric A. Posner, 'Balance of Power's Argument and the Structural Constitution', (2012) *The University of Chicago Institute for Law and Economics Working Paper Series Index No.622 (2D Series)*, available online at: <<http://www.law.uchicago.edu/Lawecon/index.html>>, 'accessed August 17, 2015.

⁴ Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership*, (New York: John Wiley & Sons) 1960. See also See Sadie. F.Dingfelder, 'A Presidential Personality', American Psychological Association (APA), available online at <<http://www.apa.org/monitor/nov04/presidential-personality>>, 'accessed August 17, 2015'.

⁵ In recent times, President Muhammadu Buhari has enjoyed much of this sort of approval rating in which many hinged their expectation concerning the success of the Presidency on the President being a 'fine gentleman'.

⁶ Terry M. Moe and William G. Howell, 'Unilateral Action and Presidential Power: A Theory', (1999) Vol. 29, No. 4, *Presidential Studies Quarterly*, p. 850. Neustadt's conclusion on Presidential power is as follows: "Effective influence for the man in the White House stems from three related sources: first are the bargaining advantages inherent in his job with which to persuade other men that what he wants of them is what their own responsibilities require them to do. Second are the expectations of those other men regarding his ability and will to use the various advantages they think he has. Third are those men's estimates of how his public views him and of how their publics may view them if they do what he wants. In short, his power is the product of his vantage points in government, together with his reputation in the Washington community and his prestige outside".

"A President, himself, affects the flow of power from these sources, though whether they flow freely or run dry he never will decide alone. He makes his personal impact by the things he says and does. Accordingly, his choices of what he should say and do, and how and when, are his means to conserve and tap the sources of his power. Alternatively, choices are the means by which he dissipates his power. The outcome, case by case, will often turn on whether he perceives his risk in power terms and takes account of what he sees before he makes his choice. A President is so uniquely situated and his power so bound up with the uniqueness of his place, that he can count on no one else to be perceptive for him".

⁷ John Burke, *The Institutional Presidency*, (Baltimore: Johns Hopkins University Press) 1992.

difficult task of managing and coordinating the affairs of government, dealing with problems cum crisis situations, and giving the country direction, all of which gives the holder of the office tremendous discretion in the exercise of power, a situation that may itself breed presidential imperialism¹. For instance, there has been the argument that the essence of presidential power is the ability to enlist public support for national policies². Thus, when a president feels a matter is germane to the success of his government, he may put whatever decisions he likes to strategic use, both in gaining policy advantage and in pushing out the boundaries of the exercise of his powers. Better put, a necessary outcome of this, is that because of the wide discretion, resources and opportunities at a President's disposal, if he so purposes in his mind, or based on the strategic political agenda of his party, he may take advantage of a lacuna in the constitution by exercising wide powers, whether or not that authority is clearly established in law, which will seek to foist a *fait accompli* on the nation³.

Presidential power is a major feature of the Nigerian 1999 constitution. It provides that subject to the provisions of this Constitution, the executive powers of the Federation:

- (a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and
- (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws⁴.

Further down, the constitution adds that:

- (1) There shall be for the Federation a President; and
- (2) The President shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation⁵.

The executive power of the President is not limited to these twin sections alone. As a matter of fact, the entire length and breadth of the Nigerian constitution and other extant Federal legislations, appears to donate one power or the other to the President⁶. There is therefore no gainsaying the fact that the concept has found fertile ground in Nigeria's constitutional jurisprudence, however the bigger picture that continues to confront the nation is this, "how has presidential power been deployed so far in Nigeria, particularly as it concerns the power to appoint the heads of certain sensitive agencies of the State?"

Presidential power of appointment under the Nigerian Constitution

Under any Constitution, a principal way the President influences the departments and agencies of State is through his power to make strategic appointments. The Nigerian Constitution provides that the President has the authority to fill the most critical positions within executive departments and agencies with the people he thinks will best implement his manifesto and promise to the people. These appointments could either be political appointments⁷ or statutory appointments⁸. This is called executive powers⁹. But this authority is not absolute; the Nigerian Senate, which is the flagship of the National Assembly, is authorised to confirm some of these appointments¹⁰. One of such is the appointment of the INEC Chairman, which is purely a statutory appointment. The sections that allots to the President various appointment powers, is one of the least specific yet potentially

¹ Terry M. Moe and William G. Howell, *op.cit.*

² William P. Rogers, 'Congress, the President and the War Powers', (September 1971), Vol.59, Issue 5, *California Law Review*, p.1208, available online at <http://scholarship.law.berkeley.edu/californiareview>, 'accessed August 17, 2015.

³ Terry.M.Moe and William G.Howell, *op.cit*

⁴ Section 5, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁵ Section 130, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁶ The following brief descriptions cover the chief categories of presidential powers created by the Constitution.

(a) The power of the president as commander-in-chief of the Armed Forces.

(b) President's power of appointment.

(c) President's power of prosecution and pardon.

(d) President power to spend or not to spend.

(e) President veto power.

(f) President's power to legislate.

⁷ These are appointments made to fill ad-hoc bodies, agencies and other political establishments of government, which are usually not necessarily and expressly spelt out in the Constitution. They derive their existence from the exercise of the President's executive powers.

⁸ These kinds of appointments are statutorily provided for in the Constitution and other enabling laws, with a stipulation of the procedure for how such appointments are to be made. Any modification of such appointment will mandatorily require an amendment of the relevant enabling laws or sections of the constitution.

⁹ See Section 5 of the 1999 Constitution, earlier cited.

¹⁰ See Section 154(1) of the 1999 Constitution (as amended).

most important in the Nigerian constitution. Section 154 provides for a special class of presidential appointments, which are entirely statutory in nature. It says:

(1) Except in the case of ex officio members or where other provisions are made in this Constitution, the Chairman and members of any of the bodies so established shall, subject to the provisions of this Constitution, be appointed by the President and the appointment shall be subject to confirmation by the Senate.

(2) In exercising his powers to appoint a person as Chairman or member of the Council of State or the National Defence Council or the National Security Council, the President shall not be required to obtain the confirmation of the Senate.

(3) In exercising his powers to appoint a person as Chairman or member of the Independent National Electoral Commission, National Judicial Council, the Federal Judicial Service Commission or the National Population Commission, the President shall consult the Council of State¹.

The special bodies so referred to in Section 154 above include:

- (a) Code of Conduct Bureau;
- (b) Council of State;
- (c) Federal Character Commission;
- (d) Federal Civil Service Commission;
- (e) Federal Judicial Service Commission;
- (f) Independent National Electoral Commission;
- (g) National Defence Council;
- (h) National Economic Council;
- (i) National Judicial Council;
- (j) National Population Commission;
- (k) National Security Council;
- (l) Nigeria Police Council;
- (m) Police Service Commission; and
- (n) Revenue Mobilisation Allocation and Fiscal Commission.

Of this special class, one stands out as *sui generis*², and that is the Independent National Electoral Commissions (INEC). The earlier uncertainty and controversial nature of Section 160(1) as concerning the curtailed independence of INEC, was a major issue that reflected the ambivalence of the framers of the Constitution. This matter was however finally laid to rest with the alteration of section 160(1) of the constitution³. Specifically, the said section was altered as follows:

Section 160 of the Principal Act is altered, in subsection (1), line 4, by inserting immediately after the word 'functions', the words, provided that in the case of the Independent National Electoral Commission, its powers to make its own rules or otherwise regulate its own procedure shall not be subject to the approval or control of the President⁴.

This alteration became necessary following the seeming general silence of the Constitution on the uncomfortable question of Presidential control of INEC and the relentless effort of Civil Society groups who in the course of all the constitution reform conferences advocated for constitutionally entrenched independent commissions⁵. Long before modern government, the necessity of such alterations had been captured in the opinion of the first President of the United States, George Washington, who in his farewell address on September 17, 1796 had this to say:

If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates, but let there be no change by usurpation.

Upon the alteration, the other bodies listed in Section 153 were left to operate with the President remaining as the final approving authority in the regulation of their business, while INEC was totally removed from under any form of Presidential control, leaving no gap whatsoever for the earlier discretionary oversight. This was to further strengthen the Commission, secure its independence and concretise its impartiality.

¹ Constitution of the Federal Republic of Nigeria, 1999 (as amended).

² In Latin, this means, 'in a class by itself'.

³ The Nationally Assembly eventually bowed to pressure when it amended Section 160 (1) in 2010.

⁴ See Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.

⁵ See Otiye Igbuzor, 'Constitutional Reform in Nigeria's Fourth Republic: Challenges to Civil Society organisations', ActionAid International Nigeria, *Being a Paper presented at a General Meeting of Citizens Forum for Constitutional Reform held in Abuja, Nigeria on September 24, 2005*, available online at <http://www.gamji.com/article5000/NEWS5168.htm>, 'accessed August 18, 2015'.

The recent Appointment of an Acting INEC Chairman: *The Genesis and controversies.*

President Muhammadu Buhari's decision to appoint as Acting Chairman of INEC, Mrs. Amina Bala Zakari, who had been a National Commissioner of the body, and had served with the immediate past Chairman, Prof. Attahiru Jega, did set in motion a whirlwind of controversy, both legal and political¹. The President while announcing the appointment in a letter conveyed by the Head of the Civil Service of the Federation, Mr. Danladi Kifasi said it was with effect from June 30, 2015 until the appointment of a substantive Chairman². Meanwhile, prior to the appointment of Amina Zakari, Prof. Jega had at a brief ceremony in his office handed over the affairs of the commission to another of the National Commissioners, Ambassador Mohammed Ahmad Wali, but as it was subsequently revealed, the President's choice of Zakari might not be unconnected with the fact that Wali's tenure as National Commissioner was to expire on August 11, 2015³, and the fact that his background in partisan politics may have been a huge dent⁴.

Before President Buhari's controversial appointment, a precedent had earlier been created under the immediate past President, Dr. Goodluck Jonathan, whilst he was Acting President. While the then INEC Chairman, Prof. Maurice Iwu was proceeding on pre-disengagement leave in 2010, a tussle had ensued over who was to serve as acting chair⁵. Mr. Philip Umeadi stepped up in what many considered as self-appointment before the presidency directed Prof. Maurice Iwu to hand over to Mr. Solomon Soyebi, who at that time was the longest serving National Commissioner and consequent upon this Mr. Soyebi served as the Acting Chairman, until the substantive chairman, Prof. Attahiru Jega was appointed⁶.

Strangely, nothing in the Third Schedule of the Constitution provided President Jonathan with powers to so appoint an INEC Chairman in acting capacity as he did then⁷. An overwhelming desire for massive electoral reforms later heralded the inauguration of a new Independent National Electoral Commission (INEC) in June 2010, which led to appointment of Prof. Attahiru Jega, a former member of the widely applauded Hon. Justice Muhammad Lawal Uwais Electoral Reform Committee as substantive INEC Chairman⁸.

Since Amina Zakari's appointment, the criticism has been unprecedented. The main opposition party, the Peoples' Democratic Party (PDP) has described the appointment as unacceptable. In an official statement released by the party through its then Publicity Secretary, Mr. Olisa Metuh, it said:

The situation in INEC since the PDP government reformed and granted it operational autonomy has been peaceful, but Tuesday's untidy overruling of Prof. Jega and appointing of Mrs. Amina Zakari as acting chairman which, we gathered was influenced by personal relationship with the Presidency and one of the new governors of the North West, ostensibly to

¹ Segun Gbadegesin, 'Much Ado about INEC Chair', *The Nation's Newspaper*, (Lagos: July 24, 2015), available online at <<http://thenationonlineng.net/much-ado-about-acting-inec-chair>>, 'accessed August 10, 2015'.

² See 'Buhari appoint Amina Zakari Acting INEC Chairman as Jega steps down', *THISDAY Newspaper*, available online at <<http://www.thisdaylive.com/articles/buhari-appoints-amina-zakari-acting-inec-chairman-as-jega-steps-down>>, 'accessed August 10, 2015'.

³ *Ibid.*

⁴ Ambassador Wali who obtained his first degree from Usman Danfodiyo University, Sokoto and an MBA from Ahmadu Bello University, Zaira, was elected into the Nigerian Senate at the return of democracy in 1999 and was appointed to Senate Committees on election, senate services, public accounts, defense and federal character and also served as the Senate Leader between June 1999 and November 1999. He subsequently contested governorship election under the platform of the Peoples' Democratic Party (PDP) in 2003 and was appointed as Minister for the National Planning Commission (NPC) and later as a Deputy-Chairman in 2007. He has also served as Nigeria's Ambassador to Morocco.

⁵ Segun Gbadegesin, *op.cit.*

⁶ See 'Soyebi named Acting Chairman of INEC', Transparency Nigeria, available online at <<http://www.transparencynigeria.com/news/117-politics/1047-soyebi-named-ag-inec-chairman.html>> 'accessed August 10, 2015'; See also 'Jonathan Appoints Soyebi Acting INEC Chairman', Nigeria Best Forum, available online at <<http://www.nigerianbestforum.com>>, 'accessed August 10, 2015'. A four-paragraph statement from the then INEC Secretary, Abdullahi Kaugama, read thus;

"The President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, Dr. Goodluck Ebele Jonathan has approved the appointment of Prince Solomon Adedeji Soyebi as the Acting Chairman of INEC pending the appointment of a substantive chairman. This appointment has been made in conformity with Section 14 (1) (a) of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria. Specially, the section stipulates that the Independent National Electoral Commission shall be headed by a chairman, who among other considerations must not be less than fifty years of age. Of the three National Commissioners serving in the Commission at the moment, only Prince Solomon Adedeji Soyebi, who is over fifty years old, has met this requirement, hence the basis for his appointment. The Acting Chairman will address the directing staff of the Commission on Wednesday, May 12, 2010 in the conference Hall of the Commission at 11 a.m prompt."

⁷ See further the provisions of the Third Schedule to the 1999 Constitution.

⁸ Samuel O. Udeala, 'Building Legitimacy in democratic process through Electoral Reforms: Prognosis and Prospects', *Being INEC Conference Paper by Samuel Udeala, Ph.D.*, available online at <<http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-paper-by-Samuel-Udeala.pdf>>, 'accessed August 10, 2015'.

pave the way for the APC at the electoral tribunals, has completely eroded public trust in the commission. In INEC, the PDP states in unequivocal terms that we cannot, as critical stakeholders fold our hands and watch while the Presidency perpetuates actions that diminish the independence of the electoral commission¹.

In a swift reaction, the Presidency denied that Amina Zakari's appointment was constitutionally defective. In an official statement, by the President's spokesman, Mr. Femi Adesina, the Presidency said:

We have noted with regret, the latest tirade against President Muhammadu Buhari issued today by the PDP's Spokesman, Mr Olisa Metuh. Other than boring reporters at his press conference with a rehash of baseless allegations of inaction against the President, Mr Metuh clearly had nothing new to say apart from his charge of nepotism and partisanship in the appointment of the Acting INEC Chairman, which also lacks any factual foundation. President Buhari certainly did not "overrule" Prof. Attahiru Jega in appointing Mrs Amina Zakari as the Acting INEC Chairman, as Mr Metuh alleged. Prof. Jega's purported handing over to another Commissioner cannot be construed as an "appointment" because only the President has the constitutional authority, which he exercised to appoint Mrs Zakari as acting Chairman of INEC. Contrary to Mr Metuh's allegations, President Buhari's appointment of Mrs Zakari as Acting INEC Chariman was based entirely on merit, her vast experience in the internal operations of INEC and the President's commitment to affirmative action in support of gender equality, because, apart from being fully qualified for the position, Mrs Zakari was the only woman among the six Commissioners considered. Due Process was certainly followed in Mrs Zakari's appointment. Mr Metuh's spurious claims of her appointment having been influenced by "personal relationship with the Presidency" and a Governor in the North-West "to pave the way for the APC" at election tribunals should be disregarded by the public. The allegations are nothing but falsehoods contrived by Mr Metuh to unjustly denigrate a President popularly elected by Nigerians to undo the damage done to the nation by years of PDP rule. His claim that the PDP has rejected Mrs Zakari's appointment is also laughable after he had admitted that the right and power of the President to make such appointments cannot be questioned².

The PDP later said it will not recognize any election conducted by Amina Zakari³. To trail the PDP stand, was the venomous outburst of the Governor of Ekiti state, Mr. Ayodele Fayose. The Governor in a statement by his Special Assistant on Public Communications and New Media, Mr. Lere Olayinka, alleged that given that Zakari was President Muhammadu Buhari's in-law, her appointment was dangerous to democracy and he also said that Section 153 of the 1999 Constitution (as amended), which established INEC and other federal commissions, did not make any provision for the appointment of Acting Chairman⁴. He said since Zakari's tenure as INEC National Electoral Commissioner had expired, she could not continue to preside legally on INEC affairs, except if duly appointed as substantive chairman of the commission as provided in Section 154 (1) and (3) of the 1999 Constitution (as amended)⁵. In the midst of the Constitutional crisis, a Lagos Lawyer, Mr. Egun Olu Adegboruwa, also dragged Amina Zakari and the Federal Government before a Federal High Court in Lagos, seeking an order of the court compelling the removal of Zakari from her position⁶. There is no doubt that all of

¹ Henry Umoru, 'PDP rejects Buhari's appointment of Zakari as INEC Acting Chairman', *Vanguard Newspaper* (Lagos July 1, 2015), available online at <www.vanguardngr.com>, 'accessed August 3, 2015'. See also 'PDP Insist on removal of INEC Chair, says Zakari in strong relationship with Buhari', *Premium Times Newspaper*, (Lagos July 4, 2015), available online at <www.premiumtimesng.com>, 'accessed August 3, 2015'.

² See 'INEC Chair: Buhari defends choice of Zakari, lambast PDP', *Premium Times Newspaper*, (Lagos July 1, 2015), available online at <www.premiumtimesng.com>, 'accessed 03 August, 2015'.

³ See 'PDP vows to reject any election conducted by INEC Chair Zakari if it loses', *Premium Times Newspaper*, (Lagos July 16, 2015), available online at <www.premiumtimesng.com>, 'accessed 03 August, 2015'.

⁴ See 'Fayose asks Buhari to remove INEC Boss', *The Punch Newspaper* (Lagos...) available online at <www.punchng.com> Declaring the appointment as illegal, The Ekiti Governor further stated that: "Section 154 (3) provided that the President shall consult the Council of State in exercising his powers to appoint a person as the chairman of INEC and there is no record of such consultation before the appointment of Mrs Zakari as INEC 'acting chairperson. The only requisite condition for Mrs Zakari to be acting as the chairman of INEC is that she must be a National Electoral Commissioner and her tenure as National Electoral Commissioner ended on July 21, 2015". However, in countering Governor Fayose's claim, one of the National Commissioners in INEC, Ambassador Lawrence Nwuruku justified her appointment saying, "she is legally appointed by the president with a letter from the head of service to back it up until either a substantive chairman is appointed in her place or she is cleared by the Senate until that happens she is the acting INEC National Chairman."

⁵ *Ibid.*

⁶ See Ikechukwu Nnichiri, 'INEC Crisis of Legitimacy: Even Lawyers don't agree on Zakari's Appointment', *The Vanguard Newspaper* (Lagos: August 9, 2015) available online at <<http://www.vanguardngr.com/2015/08/even-lawyers-dont-agree-on>>

the issues raised enjoy so form of merit. What then was the constitutional infraction the President procured by making that controversial appointment?

Deconstructing Section 157/160(1) alongside Amina Zakari's appointment: A Legal Analysis.

Under the Nigerian constitution, every power exercised by all elected officials such as the President, Vice-President, Governors and Deputy-Governors, and other such appointed State officials, must be derived from the constitution and the reverse is the case, such exercise will be a nullity¹. As earlier mentioned INEC is established under section 153 of the constitution, while the procedure for the appointment of the chairman and national commissioners, comes under Section 154(1) and (2) of the constitution, where the President is charged with the power of appointment, subject to him consulting the Council of State and a final confirmation by the Senate. Section 160(1) provides that INEC is not subject to any Presidential control in the regulation of its internal affairs. To begin this interrogation, what the constitution provides for must first be considered. In writing an unconstitutional letter, through the Head of Service, purporting to appoint Amina Zakari in an 'acting capacity' as Chairman of INEC, a position which is in itself unknown to the constitution, did the President act according to the above provisions of the constitution?

Much of the literature critiquing the Amina Zakari's appointment argue that her tenure should have ended on July 21, 2015 and any other day she further stays in office is a flagrant violation of the demands of the 1999 Constitution. They also argue that her removal from office, before the expiration of five years, can only be done in accordance with Section 157(1), and not through an unconstitutional letter that her tenure ended with Prof. Attahiru Jega on June 30, 2015, and this the President did not follow². Therefore, the letter that stated that her tenure should be deemed as completed with those of Jega and others whereas, her tenure comes to an end on July 21, 2015, is unconstitutional, null and void and of no effect. The Nigerian constitution does not provide for any form of presidential discretion in this matter, largely because of the sensitive nature of the role of INEC in sustaining the country's nascent democracy.

A Legal practitioner, Nwankwo Obuma gave a brilliant analysis of the situation. He averred that only the constitution and no other law, covers the field on issues relating to the appointment and removal from office of INEC members. He then concluded by saying that the letter written to the "acting chairman" requesting her to consider her term of office to have come to an end is written in violation of Sections 157(1) of the Constitution. In his words:

There is no provision for the position of INEC chairmanship in an 'acting capacity' under the Constitution exercisable by the President, but power to appoint a substantive chairman and members of INEC here is no implied removal from or elongation of term of office under the Constitution. Therefore, when the term of office of the acting INEC chairman constitutionally lapsed on July 21, 2015; she automatically ceased to be a member of the electoral body and as such, ceased to occupy the hitherto unconstitutional office of 'acting chairman' because she cannot be acting in that capacity from outside the body.

Proponents of the President's action also argued that there is absolutely nothing unconstitutional about the President's act. They argue that incidental powers to appoint are a necessary consequence of the express powers to appoint. This is to mean that if the President is constitutionally empowered to appoint an INEC Chairman in 'substantive capacity', he must necessarily have the powers to appoint in 'acting capacity'. The argument is that even though it can be seen from the combined provisions of Sections 157 and 160(1) that there

amina-zakaris-appointment> , 'accessed August 18, 2015'; See also Chibuzo Ukaibe, 'INEC Chair: Dust continue to rise over Zakari's suitability', *The Leadership Newspaper* (Abuja: August 9, 2015) available at <<http://leadership.ng/features/452745/inec-chair-dust-continues-to-rise-over-zakaris-suitability>> , 'accessed August 18, 2015'; See further Jola Sotubo, 'Lagos Lawyer sues INEC Chairman following tenure expiration', *The Pulse*, available online at <<http://pulse.ng/local/amina-zakari-lagos-lawyer-sues-inec-chairman-following-tenure-expiration>> , 'accessed August 18, 2015. In the suit, he prayed the court to, among other things; restrain Zakari from presiding over the conduct of any election in Nigeria, including the governorship elections of Kogi and Bayelsa states

¹ See Section 1(1) & 1(3), Constitution of the Federal Republic of Nigeria, 1999 (as amended).

² Under the Constitution, to remove a National Commissioner of INEC, Section 157 (2) states, "Subject to the provision of subsection (3) of this section, a person holding any of the offices to which this section applies may only be removed from that office by the president acting on an address supported by two-thirds majority of the Senate praying that he be so removed for inability to discharge the functions of the office (whether arising from infirmity of mind or body or any other cause) or for misconduct." Sub-section 2 states "This section applies to the office of the chairman and member of the Code of Conduct Bureau, the Federal Civil Service Commission, the Independent National Electoral Commission, the National Judicial Council, the Federal Judicial Service Commission, the Federal Character Commission, the Nigeria Police Force, the National Population Commission, the Revenue Mobilisation Allocation and Fiscal Commission and the Police Service Commission."

is nowhere that power is expressly donated to the President to appoint a Chairman for INEC in acting capacity, there is equally no provision in the constitution stipulating that the President cannot appoint anyone as INEC Chairman in acting capacity. The questions to be asked then is, “when a lacuna of this nature is created, especially one dealing with the appointment of a top ranking official in a highly sensitive position like the INEC Chairman, what then must the parties so concerned do?” Resort to self-help or use personal wisdom? The Law abhors and frowns heavily at such existentialist interventions.

Two options would appear to suffice. First, would be to approach the Court for a judicial pronouncement to take care of the lacuna and give a constitutional direction. Second will be to examine the extant provisions of the law, particularly as regards the express appointment powers provided for the appointing authority, in this case the President, with a view to determining whether certain incidental powers can be said to have been derived from the express powers given. Of course, the first option would seem problematic given the usually long and laborious process of adjudication in the Court; such a constitutional body may just be rendered incapacitated by an absence of leadership. This therefore makes the second option a winking temptation for any appointing authority.

If this option is then to be considered, the questions that must necessarily be asked are the following – What are the express appointment powers of the President in relation to that of an INEC Chairman? Are those powers as provided for, ONLY to be exercised in the appointment of a substantive INEC Chairman or can it be made to extend to the appointment of an Acting INEC Chairman? If the power can be made to extend to the appointment of an Acting INEC Chairman, would there still be need for the necessary validating authority in this case the Senate, to perform its job of confirmation, just as if it were to be a substantive appointment? If the powers in question cannot be extended, who then assumes such appointment powers, where a substituting INEC Chairman’s tenure has come to an end and it is legally impossible to appoint a substantive Chairman at that material time, without being in breach of the Constitution?

To answer the two interrogations above, it must be said that there can be no substitute for the supremacy of the constitution. It is not enough to say that the Constitution does not state anywhere that the President cannot appoint an INEC chairman in ‘acting capacity’, as long as the constitution has expressly stipulated the procedure for appointing only in ‘substantive capacity’ that effectively nullifies any other form of appointment. The constitution need not re-echo itself. Unfortunately, over the years nearly all of the presidential appointments provided for in the constitution have been unconstitutionally filled from the outset, without any one challenging these actions. It has become a notorious fact that most appointment provided for only to be in substantive capacity, has featured severally in our democratic experience, first as appointments in acting capacity, only to later become substantive appointment upon the recommended confirmation by the Senate. This has been made to appear as a norm and without any regard for extant constitution provisions, successive governments have acted in like manner, repeating the same mistake over and over again. In line with this reasoning, recent events in the country has seen appointments such as that of acting Inspectors-General of Police, Acting Service Chiefs, e.t.c all been made purportedly in line with the law. Under the Nigerian situation, presidential power of appointment has come to be regarded erroneously, as to mean that a yet to be confirmed appointment is one in ‘acting capacity’, while the one that has been confirmed is one in ‘substantive capacity’. This is legally wrong and it is a constitutional aberration.

The President was entirely wrong in the appointment of Amina Zakari. That presidential power of appointment has been used by successive Nigerian Presidents in a manner suggesting that it provides for a range of implied powers whose extent are indeterminable and whose potency have grown beyond what the framers of the Constitution intended does not excuse the President. After all, if past regimes have acted wrongly out of totally disrespect for the law, now should have being the time to do things properly. Firstly, elementary law establishes that, “the express mention of a thing, is to the exclusion of all others”¹. Thus, where the Constitution expressly provides the procedure for an appointment, not until the entire chain of transaction in the procedure is met; it is still an inchoate process that cannot enjoy validity under the law. Such cannot be brought under the heading of ‘acting’ or any other nomenclature. There is plainly and unambiguously no provision under the Nigerian constitution, not under any guise, for the position of an INEC chairman in an ‘acting capacity’.

The preponderance of the term ‘Acting’ is a mere conventional administrative routine in governmental circle, by which the head of an executive body would request the next Official in terms of seniority to ‘act’ in situations where the head is unavailable or indisposed. It does not and can never constitute an ‘appointment’. In the same breadth, the word ‘acting’ is also used where the tenure of a subsisting head of an executive body comes to an end, and in order not to allow a vacuum, he hands over to the most senior official who continues to act, pending the appointment of a substantive head by the appropriate appointing authority. This was what transpired on June 30, 2015 when the erstwhile INEC Chairman, Prof. Attahiru Jega handed over to Ambassador Wali and that should have been allowed to stand. There could also be instances where the Constitution or an

¹ This is represented in the Latin maxim, “*Expressio unius est exclusio alterius*”

enabling law will provide specifically for an appointment in ‘Acting Capacity’. For instance, the Constitution provides for an ‘Acting President’¹. Another relevant example is Section 5(13) of the University Autonomy Act, which provides that the appointment of a University Vice-Chancellor can be made in ‘acting capacity’ for a period of Six months².

In addition, the constitution is clear on the removal from office of an INEC Commissioner and there can be no implied removal from or elongation of term of office under the Constitution. Therefore, with the expiration of the term of office of Amina Zakari on July 21, 2015, she had ceased to be a National Commissioner in INEC and cannot continue to occupy the unconstitutional office of ‘acting chairman’, as she cannot be acting in that capacity from outside the Commission, and if the government had wanted to reappoint her as a Commissioner, then the procedure in Section 154(1) should have been undertaken all over again. Moreso, the purported letter written by the Presidency through the Head of service asking Amina Zakari to consider her term of office ended is a gross violation of Section 157(1) of the Constitution. The ‘acting chairman’ having not been re-appointed as a National Commissioner or substantive Chairman, could not have been conducting the affairs of the Commission as a non-member and everyday she had remained in office, before her eventual removal was violation of the letters and spirit of the constitution.

It needs emphasizing that the rigid appointment procedure provided for in Section 154, and its corollary in Section 160(2) is to impose the needed constitutional check on the wide exercise of presidential appointment power. This rigidity was deemed necessary so that the power of the President to make a substantive appointment of the Chairman and other members of the commission is not at large, but rather circumscribed by the Constitution. The Nigerian Presidential system of government modeled heavily after American Presidentialism derives so much similarity from the US system of checks and balances. It was in furtherance of this that Madison³ famously articulated a functional account of constitutional structure, where the framers of the American Constitution envisioned a government based on overlapping authority to prevent any single branch from governing unilaterally⁴. In particular, the system of checks and balances that the framers envisioned is supposed to be one that would prevent the president from making policy and appointments unilaterally, whether through action or inaction⁵.

Presidential obedience to Section 154, Rule of law and the Supremacy of the constitution.

Amina Zakari has since been removed from office following the substantive appointment of Prof.Mahmoud Yakubu, which has effectively laid the matter to rest and consigned it to the past. This however does not end the matter, as a scrutiny of the controversial issues therein will still remain the concern of scholars for some-time to come. This is because, if such scrutiny was not to happen, the possibility of such an ugly precedence still been followed remains grim. To this end, it then becomes necessary to further enrich our constitutionalism by advancing the needed legal scholarship that will ensure that those that will still exercise this sort of power in future, will not be lost in the usual corruption that power breeds, but rather will have themselves accordingly guided.

Consequently, this Paper considers it important to again re-echo with all bluntness, the non-negotiability of the time-honoured doctrines of supremacy of the constitution and the rule of law. These two instruments of all civilized nations are known to breed the purest forms of democracies, given that unbridled democracy or unmediated rule by the ‘people’, is perceived as a potential source of arbitrary power, and thus, of domination⁶. Beyond Montesquieu⁷ and A.V.dicey⁸, both doctrines have come to be regarded under modern governments, as a sort of legal Siamese twins that is the best format for holding executive power to account. It is the epitome of the English Bill of Rights⁹, American Declaration of Independence¹, the French Declaration of

¹ See Section 145 of the Constitution of The Federal Republic of Nigeria, 1999 (as amended).

² See the Universities (Miscellaneous Provisions) (Amendment) Act 2003, otherwise called The Universities Autonomy Act No.1, 2007 and The Universities (Miscellaneous Provisions) (Amendment) Act 2012. See further The Universities (Miscellaneous Provisions) Act No.11, 1993 as amended by The Universities (Miscellaneous Provisions) (Amendment) Act No.55 of 1993; The Universities (Miscellaneous Provision) (Amendment) Act No.25 of 1996. This section provides that, “*In any case of a vacancy in the office of the Vice-chancellor, the Council shall appoint an Acting Vice-chancellor on recommendation of the Senate*”. Section 5(14) then adds that, “*An Acting Vice-Chancellor in all circumstances shall not be in office for more than 6months*”.

³ James Madison was the 4th President of the United States of America. He was political theorist and an American Statesman.

⁴ Jeffrey.A.Love and Arpit.A.Garg, ‘Presidential Inaction and the Separation of Powers’, (2014) Vol.112, Issue 7, *Michigan Law Review*, available online at <http://repository.law.umich.edu/mlr>, ‘accessed August 18, 2015’.

⁵ *Ibid*.

⁶ Eoin Daly, “A Republican Defence of Constitutional Referendum”, (2015) Vol.35, No.1, *Legal Studies*, pp.30-54.

⁷ [1689-1755] *L’Esprit des lois Book XI pp.3-6*.

⁸ Prof.Albert Venn Dicey [1835 – 1922] Constitutional Theorist and Venerian Professor of English Law, Oxford University, England; Author, Introduction to the Study of the Law of the Constitution, 1885.

⁹ Passed on December 16, 1689.

Rights of man and the Citizen², and the United Nations Declaration of Human Rights³. The twin concepts are well embedded in our Constitutional Jurisprudence and have been consistently applied with profound courage and correctness, by Nigerian courts in a plethora of cases, where it had sought to curb any tendency towards arbitrary rule by leaders, both under military dictatorships and civilian governments⁴. With particular importance, the Supreme Court of Nigeria had occasion to stress this with vehemence in its authoritative decision taken in *Seidu Garba v. Federal Civil Service Commission & Anor*⁵, where it said:

The rule of law knows no fear, it is never cowed down, it can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence.

To aptly typify this point further, the Court re-affirmed the pride of place of the constitution, when it subsequently opined as follows:

It must be recognised that our Constitution is an organic instrument which confer powers and also creates rights and limitations. It is the supreme law in which certain first principles of fundamental nature are established. Once the powers, rights and limitations under the Constitution are identified as having been created, their existence cannot be disputed in a court of law. But their extent and implications may be sought to be interpreted and explained by the court in cases properly brought before it. All agencies of government are organs of initiative whose powers are derived either directly from the Constitution or from laws enacted there-under. They therefore stand in relationship to the Constitution as it permits of their existence and functions⁶.

Prior to the above interventions, the same Court per Kayode Eso, J.S.C. had earlier gave one of the greatest judgements enthroneing the indispensability of these principles, as a *sine qua non* for the survival of any democracy in the *locus classicus* called *Military Governor of Lagos State v. Ojukwu*⁷. This case now referred to as the Nigerian Magna Carta⁸, is one in which the statements made by the Justices of that Court, has become legendary in legal circles and they constitute the backbone of the rule of law in Nigeria today⁹. Giving the lead judgement, Eso, JSC, had this to say:

I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in a higher court, while still in contempt of the lower. It is more serious when the act of flouting the order of the court, the contempt of court, is by the Executive. Under the constitution of the Federal Republic of Nigeria, 1979, the Executive, the Legislature (while it lasts) and the Judiciary are equal partners in the running of a successful government. The powers

¹ Adopted as the unanimous declaration of the thirteen United States of America, July 4, 1776.

² Adopted August 26, 1789.

³ The Universal Declaration of Human Rights (UDHR) was adopted December 10, 1945; See further Oju-Oju Kekemeke, Esq. 'Rule of Law and Constitutional Democracy: Whither Nigeria?' (Vol.2) *Journal of Law and Politics in Honour of Hon. Justice Ayodele Akinwalere* p.23.

⁴ The twin principles have been deplored with consistency in the following cases: *DPP v. Chike Obi* (1961) All NLR 194; *Doherty v. Balewa* (1961) All NLR 604; *Fajinni v. The Speaker, Western House of Assembly* (1962) 1 SCNLR 300, (1962) vol. 4 NSCC 144; *Lakanmi v. Attorney-General of Western-state* (1971) 1 UILR 201, (1974) ESCLR 713; *Council of University of Ibadan v. Adamolekun* (1967) 1 All NLR 213, (1968) NMLR 253; *Ikonke v. Commissioner of Police & Anor* (1986) 4 NWLR 473; *Labiya v. Anretiola* (1992) 8 NWLR (pt.258) 139 at 160; *Ibidapo v. Lufthansa Airways* (1997) 4 NWLR (pt.498) 124; *Federal Civil Service Commission & 2 Ors v. J.O.Laoye* (1989) INWLR (pt.106) 652 at 681, 787; *Obayuwana v. Governor of Bendel-state & Anor* (1983) 4 NCLR; *Uwaijo v. Attorney-General of Bendel-state* (1982) 7 SC, 124; *Sokefun v. N.O.A. Akinyemi & Ors* (1980) 5/7 SC 1; *Brigadier Oluwale Rotimi v. McGregor* (1971) NMLR 289; *Obih v. Mbakwe* (1984) 1 SCNLR 192 at 211; *Gani Fawehinmi v. Inspector-General of Police & 2 Ors* (2000) 7 NWLR (pt.665) 481; *Gani Fawehinmi v. General Sani Abacha & 3 Ors* (1996) 9 NWLR (pt.475) 710; *Garba v. University of Maiduguri* (1986) 1 NWLR (pt.18) 550; *Ihenacho v. Uzochukwu* (1997) 2 NWLR (pt.487) 287; *Obeya Memorial Specialist Hospital & Anor v. The Attorney-General of the Federation & Anor* (1987) 3 NWLR (pt.60) 325; *Military Governor of Ondo-state v. Adewunmi* (1988) 3 NWLR (pt.82) 208, 299 & 300; *Attorney-General of Bendel-state v. Attorney-General of the Federation & 18 Ors* (1981) 10 SC 1 AT 113-114; *Attorney-General of Ogun-state v. Attorney-General of the Federation & Ors* (1982) 1-2SC 13 (1982) 3 NCLR, 166; *Nafiu Rabi v. Kano-state* (1980) 8/11 SC 130; *Minister of Internal Affairs v. Abdulrahman Shugaba Darman* (1982) 3 NCLR 915 at 997; *Paul Unongo v. Aper Aku* (1983) 2 SCNLR, 332; *Sallide v. Abdullahi* (1989) 4 NWLR (pt. 116) 387 at 418-419; *Attorney-General of Ogun State v. Attorney-General of the Federation* (2003) 12 SC 1; *Attorney-General of Lagos-State v. Attorney-General of the Federation* (2003) 6 SC (Pt. 1) 61; *Bailey v. Diexel Furniture Co.* 259 US (1921) at pages 449 to 453 and 450; *Attorney-General of Ogun State v. Attorney-General of the Federation* (1982) 13 NSCC 1..

⁵ (1988) 1 NWLR (pt.71) 449-470.

⁶ *Attorney-General of Ondo-state v. Attorney-General of the Federation* (2002) 9NWLR (pt.772).

⁷ (1986) 1NWLR (pt.18) p.621.

⁸ Itse.E. Sagay, SAN, 'Justice Eso: A colossus departs', *The Guardian Newspaper*, (Lagos: December 11, 2012) p.68.

⁹ *Ibid.*

granted by the Constitution to these organs by S.4 (Legislative powers) S.5 (Executive powers) and S.6 (Judiciary powers) are classified under an omnibus umbrella known under Part II to the Constitution as 'Powers of the Federal Republic of Nigeria'. The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed, there will be no Federal Government. I think for one organ and more especially the Executive, which holds all the physical powers to put up itself in sabotage or deliberate contempt of the other is to stage an executive subversion of the Constitution it is to uphold. Executive lawlessness is tantamount to a deliberate violation of the Constitution. When the Executive is the Military government which blends both the Executive and the Legislature together and which permits the Judiciary to co-exist with it in the administration of the country, then it is more serious than imagined¹.

The above opinion of the Apex court encompasses both the legalistic and moralistic expectations of the constitution and it is one this Paper shares without reservation. One can daresay that when this is juxtaposed line by line with all the issues raised so far, it brings to the fore the dangerousness in any perceived act of presidential contempt for the constitution. In the instant case, one important part of Eso's statement that needs stressing, is that which says, "Executive lawlessness is tantamount to a deliberate violation of the Constitution".

Conclusion

This Paper has offered a socio-legal analysis of a how the limit of presidential power was crossed in the now infamous decision to at a time appoint Ms.Amina Zakari as an Acting National Chairman of INEC. This Paper has shown through the lens of legal consciousness how the President was wrong in his action, even if others before him had made similarly wrong decisions and notwithstanding that it was for a brief period. This Paper has also demonstrated, in a forward-looking sense, the constitutional significance of allowing the Constitution and the rule of law to stand supreme over all and sundry, including the President. As a country, we have had the greatest turnover of leadership anywhere in the world, such that we have produced a staggering 14 Presidents, harvested over ten military coups and not counting those who were aborted by failed coups². Yet not much has changed in terms of the constitutional education of our leaders.

This Paper concludes that it is a moral turpitude for a leader brought to power through the constitution to find it so convenient to seek to bypass the same constitution. There can be no alternative to the Constitution. One cannot but agree with learned Justices of the Supreme Court who at different times had perceived this in a plethora of cases. Ekundayo Ogundare,JSC., while pinpointing the importance of the Constitution had this to say, "For now the 1999 Constitution remains the legal document by which Nigeria is governed and as imperfect and gratuitous as the constitution may be, its existence cannot be ignored"³. In line with Ogundare's thinking, his learned brother Okay Achike,JSC., took the matter further when he said, "The Constitution is the supreme law of the land: it is the grundnorm and its supremacy has never been called to question in ordinary circumstances"⁴. Re-echoing the combined thoughts of the duo, Niki Tobi,JSC., had this to say:

The Constitution of a nation is the fons et origo, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and the omega. It is the barometer in which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution, not in the sense of undergoing servitude or bondage, but in the sense of total obeisance and loyalty to it⁵.

This Paper is inclined to agree with his lordships and it is submitted with respect, that the President must not be seen as a symbol of disobedience to the law and a willful saboteur of the most important legal document in the land. No President must give the impression that he is a man who has no identification with constitutional values. In a final analysis, the last duty is that of the People who must stand in eternal vigilance to protect the Constitution. There are ubiquitous reasons for this, as history as shown that the peoples' error of

¹ Supporting Eso,JSC on the matter, his learned brother Oputa,JSC also had this to say, "I can safely say that here in Nigeria, even under a Military government, the Law is no respecter of persons, principalities or powers and the courts stand between the citizens and the governments alert to see that the state or government is bound by the law and respects the law".

² Matthew Hassan Kukah, 'Nigeria as an emerging democracy: The Dilemma and the Promise', (2012) Vol.12, No.4, *The Constitution - A Journal of Constitutional Development*, p.5.

³ See M.Ekundayo Ogundare,JSC, 'The Role of the Judiciary in the 21st Century', in *Legal Thoughts: Essays in Honour of Prof.Babatunde Oloyede Ilyomade*, I.Ademola Yakubu. ed., (Ibadan: Demyaxs Law Books, 2 Agodi GRA, P.O.Box 22862, U.I Post Office, Ibadan/Ile-Ife: Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria, 2007) pp.159-160.

⁴ *General Sani Abacha & Ors v. Chief Gani Fawehinmi* (1997) SC 45.

⁵ *Attorney-General of Abia-state & Anor v. Attorney-General of the Federation & 34 Ors* (2005) S.C.99/2005, S.C. 121/2005, S.C. 216/2005.

silence has been the greatest contributory factor to the expansion and abuse of Presidential power. As Prof.Arthur M. Schlesinger has rightly observed:

A Constitutional Presidency, as the great Presidents had shown, could be a very strong Presidency indeed. But what kept a strong President constitutional, in addition to checks and balances incorporated within his own breast, was the vigilance of the nation. Neither impeachment nor repentance would make much difference if the people themselves had come to an unconscious acceptance of the imperial Presidency. The Constitution could not hold the nation to ideals it was determined to betray.¹

¹ Arthur.M.Schlesinger,Jr., *The Imperial Presidency*, (Boston: Houghton Mifflin Company) 1973.pp. 417-418. ISBN 0-395-17713-8.