

De-constitutionalising? Democratic Governance in Nigeria: Assessing executive-legislative handling of executive-power vacuum in the fourth republic

Joseph Yinka Fashagba, Ph.D.¹

Key words: Nigeria, power vacuum, Executive, Legislature, constitutionalism, kitchen cabinet, military

Abstract

Nigeria returned to constitutional democracy anchored on the presidential system in 1999. Under the new fourth republic constitution, while there are three distinct institutions of government, each organ of government is vested with certain responsibilities. To avoid disruption in the running of the state's affairs, certain constitutional obligations and duties are given to the executive and the legislature. This is particularly so with respect to the exercise of executive-power in the absence of the elected president. However, the absence of the Nigerian president from the country without complying with

¹ Dr Fashagba teaches in the Department of Political Science at Redeemer's University, Ogun State, Nigeria. He is one of the few emerging legislative/executive scholars in Nigeria. His work on the Nigerian legislature has appeared in a number of outlets including a recent edition of the 'British' Journal of Legislative Studies.

the provisions of the 1999 constitution did not only put the country's democracy on the path of reversal in early 2010, but it also exposed the weak disposition of the politicians towards constitutionalism. Thus, this study examines executive-legislative handling of the executive-power vacuum that was precipitated by the absence of the ailing Nigerian president between late 2009 and the first quarter of 2010. The study combines both primary and secondary sources, and argues that while the provisions of the constitution are clear on power succession, the politicians have trampled the provisions for private gains and sectional interests.

Introduction

Unlike the military regime which it succeeded, the fourth republic is anchored on the 1999 democratic constitution which is predicated on the presidential arrangement. The constitution created certain political institutions; through and within which governance is conducted. Like any other American modeled presidential system, the constitution established three separate institutions of government, namely legislature, executive and the judiciary, for the purpose of efficient conduct of the affairs of the state. Each of the institutions has distinct personnel, as well as having certain responsibilities vested in it. Since each institution was created and empowered by the constitution, the observance of the provisions in the exercise of power vested in each arm is meant to ensure not only stability in governance, but also to guarantee that officers of government can be responsible and accountable for their actions under the new democratic regime. This is, perhaps, where the difference

lies between a government ruling by coercive force, especially under successive military rules in Nigeria, and one guided by the constitution-rule of laws (Osaghae, 1998). This explains why it is difficult to talk of democracy where constitutionalism is not properly rooted and institutionalized (Omotola, 2008).

Indeed, democracy as a practical political process and a governance mechanism, which determines the nature of relationships between the government and the governed on the one hand, as well as amongst the organs of government on the other, is lubricated by some inherent principles. The functional efficiency of the democratic elements and principles that comprise the rule of laws, competitive electoral arrangement, free and fair contest, multiparty system, protection of individuals' rights, freedom of choice, universal adult suffrage, constitutionalism and orderly succession to power, among others, are facilitated when they are not only institutionalized but also deepened as political actors to comply with the rules of the game. In the opinion of Posner and Young (2007), institutionalized rules are increasingly becoming relevant in regulating the behaviors of political actors across sub-saharan Africa. This development seems heartwarming because it aligns with the thinking of Schumpeter who sees democracy as entailing an institutionalized arrangement for arriving at political decisions. However, while some states in sub-saharan Africa have deepened the institutionalization of constitutional democracy and its attendant principles, the political realities in Nigeria appears to suggest otherwise.

This is particularly so considering the level of constitutional crisis that the political class, particularly members of the executive and the legislative organs, exposed

the new democracy to over the manner in which they handled the executive-power vacuum that was precipitated by the absence of the Nigerian ailing president between November 23, 2009 and February 24, 2010. To be sure, apart from the impeachment attempt on former president Obasanjo in 2001, there has been no other political development that has exposed the fourth republic's democratic governance to an evident threat of reversal other than the executive-power vacuum caused by the unofficial vacation and the prolonged absence from duty of the ailing president. (The Punch, 23 March, 2010: p.64)

Constitutionally, the president, like any other government official, is entitled to certain prescribed vacation. However, in embarking on such vacation the president is constitutionally required to inform the national assembly through a written declaration. Such written declaration is required to temporarily transfer executive power to the vice president so that the ship of state will stay afloat during the vacation of the President. By this, the political configuration seeks to achieve horizontal accountability and institutional responsibility under the democratic government and presidential constitution. Despite the provisions taken for a smooth power transfer in the 1999 constitution, during the absence of the Nigerian president within the period engendered a constitutional crisis, the new democracy did not only become directionless but also enmeshed in political tension that could have served as alibi for another military intervention.

The constitution is the working manual and the political compass for any democratic government. The constitution is considered essential to secure orderliness in the

state, and constitutionality in the conduct of governmental business. By the provisions of the constitution, the responsibilities and powers of the institutions of government are spelt out. Consequently, while it may be difficult to come by a perfect constitution, particularly a constitution designed and handed over to politicians by a departing military ruler, as is the case in Nigeria, compliance with the basic rules of whatever constitution is operational in such a new democratic state may be enough to ensure some minimum level of political stability. However, from the first republic to the current fourth Nigerian republic, the major challenge that has often put democracy at risk in Nigeria is the penchant of the political actors to disregard constitutional provisions for personal aggrandizement and private gains. Indeed, Nwosu (1998) and Ajayi (2007) point out that the previous republics collapsed largely not because the constitutions were bad. Rather, the demise of these republics resulted from the inability of the governing elites to comply with the basic rules of the game.

While the indiscretion of the politicians of the previous republics was in part a reason for the termination of those republics, such attitudes were least expected to be repeated on the restoration of democracy after a prolonged military rule. However, such attitudinal change appears far from being realized. This is evident by the controversial and unimpressive handling of the executive-power vacuum by the Nigerian politicians between November 2009 and February 2010. The poor handling of the power vacuum precipitated a constitutional crisis and political tension that, perhaps, suggests that the political environment is still as volatile as ever to encourage democratic sustainability and

constitutionalism. It is against this background that this study examines executive-legislature handling of the executive-power vacuum vis-à-vis the provisions of the 1999 constitution.

Thus, the questions that this study seeks to answer are as follows: Can the vice president perform the executive-power roles during a prolonged absence of the substantive president? Can flagrant disobedience of the constitution deepen democratic governance or rather erode democracy? How constitutional is the legislative intervention and the making of an acting president under the 1999 constitution? Can or should extra-constitutional means be employed to resolve purely constitutional issues? What are the implications of the legislative actions and the emergence of the acting president on governance and constitutional democracy in Nigeria? To answer these questions, the data for the study was derived partially from the personal observation of the political-drama by the researcher. This was complimented with data retrieved from written sources. The data was analyzed using the descriptive and analytical methods. The study has five sections. The next section focuses on the provisions of the 1999 constitution on executive incumbency.

1999 Constitutional provisions on Incumbency

The 1999 constitution appears not to encourage power vacuum in the office of the President. This is so because the ship of state must not be halted or go adrift due to the unavailability or incapacitation of the occupant of the office. Consequently, there are basically two ways by which power vacuum is intended to be avoided in the office by the constitution. In the first instance, under the democratic

environment, the president of Nigeria must be elected through a universal adult suffrage. The criterion for election is one of the universal and standard political yardstick for measuring the level of democratization in any polity professing to be democratic. Wherever political actors comply with the rules of the game, power transfers becomes less rancorous and the outcome of the contest is generally accepted. While commenting on the importance of elections, Wanyande (1987:80) avers that 'election represents a way of making a change that is fair to all'. What this suggests, therefore, is that the leadership that emerges in free and fair elections derives its legitimacy from popular consent. This accounts for the constitutional provisions that suggest the president should be elected by the people under the 1999 constitution.

The various constitutional prescriptions for the election of the president are captured by section 132, subsection 4 of the 1999 constitution which provides that 'For the purpose of an election to the office of the president the whole of the Federation shall be regarded as one constituency'. In addition to this, section 133 provides that:

A candidate for an election to the office of President shall be deemed to have been

duly elected to such office where, being the only candidate nominated for the election-

- (a) he has a majority of Yes votes over No votes cast at the election; and
- (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the states in the Federation and the Federal Capital Territory of Abuja,

but where the only candidate fails to be elected in accordance with this section, then there shall be fresh nominations.

However, while section 133 focuses on circumstances where only one candidate contests, section 134 focuses on when there are more than one candidates. By the provisions of section 134, the candidate who receives the majority of the votes cast at the elections and who also wins in at least two-thirds of the constituent states of the federation and the Federal Capital Territory, Abuja will be deemed duly elected. Once elected, the office holder is expected to hold office until a new election is conducted and a successor emerges. This is underlined by the provisions of section 135 (1) which states that:

Subject to the provisions of this constitution, a person shall hold the office of President until-

- (a) When his successor in office takes the oath of that office.
- (b) he dies whilst holding such office; or
- (c) the date when his resignation from office takes effect; or
- (d) he otherwise ceases to hold office in accordance with the provisions of this constitution.

Although the 1999 constitution, being a presidential constitution, only vests executive power in the president, it nevertheless establishes the office of vice-president. The provisions of section 141 state that, 'There shall be for the Federation a Vice-President'. The vice president is jointly elected on the same ticket with the president. However, in the

opinion of Nwabuaze, a renowned Nigerian constitutional lawyer, while the constitution creates the office of vice president, the office was not made for the purpose of diffusing power among independent executive functionaries. A vice president with constitutionally prescribed functions, as Nwabuaze further notes, is a negation of the principle of a single executive authority upon which the presidential system is organized, and will create more problems than it has solved. In fact, the presidential constitutional arrangement, as Nwabuaze contends, completely subordinates the vice president to the president.

While the foregoing provisions, especially sections 133 and 134, clearly state how to elect the president and the vice president, certain steps were also taken by the constitution to ensure that no power vacuum results from the non-availability or incapacitation of the chief executive to perform the functions of the office of the president. In fact, this appears to be a conscious effort from the designers of the constitution to not only prevent constitutional crisis, but also to achieve a crisis-free succession or transfer of executive-power in the event of a vacuum in the executive office. Irrespective of what may account for the non-availability of the incumbent president or his deputy in office, governance should not ground to a halt; hence the provisions for an acting president. In the provisions of section 144, the first condition under which a replacement is required in the executive office is described as being when either the president or the vice president is declared incapacitated and thereby, unable to perform the duty of the named office. The constitution vests in the cabinet (executive council) the responsibility of declaring an executive incapacitated when he can no longer discharge

the duty of his office on medical grounds. This is intended to be carried out through a resolution passed by two-thirds of the members of the cabinet. However, such a resolution must be verified by a duly constituted medical panel; the report of which must be submitted to the president of the senate and the speaker of the house of representatives. On publishing the notice in the official gazette of the government of the federation by the National Assembly, the occupant of the named office ceases to hold office from the day of the publication. In this case, if the president is removed due to incapacitation, the vice-president takes over as president.

Additionally, section 145 of the constitution requires the president to transmit a written declaration to the president of the senate and the speaker of the house of representatives when he is proceeding on vocation or is unable to discharge the duty of his office. Until another written declaration to the contrary is made, the functions of the office shall be discharged by the vice-president as acting president. The vice-president may be made a substantive president, if the office of president becomes vacant because of death, resignation, impeachment, permanent incapacitation or the removal of the president from office for any other reason. This is provided for in section 146 of the constitution.

Under the constitution's arrangement, the legislature may only intervene by way of instituting impeachment proceeding against the executive. The constitution clearly provides in section 143 that the executive may be impeached on the grounds of gross misconduct. However, one major problem facing anyone interpreting the constitution is discerning what constitutes gross misconducts. For instance, can a president who left the country for medical treatment in a

foreign country for 93 days without complying with the provisions of the constitution on vacation, thereby fostering on the nation in the process executive-power vacuum, be charged with misconduct? Answering the question in the affirmative may generate political tension in a highly complex and polarized society like Nigeria. Yet, taking a contrary view may raise pertinent questions about the law, constitutionality and action.

Evident from the foregoing provisions is that the presidential constitution appears to foreclose the possibility of a power vacuum by stating in clear terms how political succession or transfer of power should be executed within the ambit of the constitution. This is to avert a possible breakdown of constitutional order, particularly when the president is unavailable to perform the duty of his office. Given the position of the constitution on the transfer of executive power, to what extent have the provisions been complied during the power vacuum to cause the inability of the Nigerian president to perform his functions and his failure to transmit a letter to the leadership of the national assembly as constitutionally required? The next section seeks to answer this question.

Power vacuum and the imperative for executive-power

The deliberate refusal of the president to transmit a written declaration to the national assembly to inform it that he was proceeding on vacation did not only create power vacuum in governance, particularly in the executive and thereby leading to severe political confusion and avoidable interethnic tensions, but it also exposed the nation to the danger of constitutional breakdown. The prolonged absence of the president meant that administrative and political decisions

requiring executive actions remained unattended during the period.

This contravenes the thinking of writers like Laski (1967) who see the executive as occupying a very crucial position in the administration of a state. Laski avers that the executive in all democratic systems exists to first and foremost, decide on the final choice of policy to be submitted for acceptance to the legislative assembly; secondly, it is its business to see to it that the public services fully apply to that policy as intended by the legislature; and thirdly it ensures that it delimits and also coordinates the activities of the different departments of state. By this, the executive initiates policies and programs, executes them when passed into laws by the assembly, and equally coordinates government policies to ensure that policy execution is done within the framework of the original plan and legislature's approved policy. These enormous responsibilities and their strategic importance to the attainment of democratic goods, especially in a fragile democracy like Nigeria, suggests that the office of the chief executive cannot be left vacant for a long time.

This is, perhaps, underscored by the fact that despite the pretext among the political class that the absence of the president did not impact negatively on governance, there is evidence of several actions, requiring executive action or approval, that could not be carried out. This resulted largely from the failure of the president to officially transfer power to his vice-president in line with the dictate of the constitution. Consequently, in the face of evidence stagnation and imminent democratic reversal, it became most imperative that urgent steps be taken to transfer executive power to the vice

president. This underlines the calls and the hot debates about the necessity to transfer power. Although public agitations and pressure from the media eventually resulted in the transfer of executive power, such transfer did not just happen without some pockets of opposition, based largely on personal interest and ethnic consideration rather than the pursuit of collective goods.

Thus, one of the major reasons that make the vesting of executive power in the vice president to function as the acting president imperative is the fact that the thirty six states of the federation, which depend heavily on the central government for funding, found the non-release of government funds increasingly unbearable. Considering the distributive character of the Nigerian state, revenue allocation to states is usually made from the federal government to the constituent states. Many of the states cannot survive over a long period of time without the funds (handed out) from the center. The revenue generated from the oil wells of the Niger delta areas of the country is thus distributed among all the states. It is important to point out that most of the states of the federation, particularly in the northern geopolitical zone, are unviable on their own. Consequently, in the face of threatening case crunch and the likelihood of the failure of the 2010 budgets, the governors forum came together to mount pressure on the legislature to make the vice president an acting president through a house resolution. The governors' forum is a pressure group formed by the 36 states governors in Nigeria, irrespective of their political affiliation. No single governor elected from the opposition parties opposed the decision to transfer power because that would have translated into economic suicide, particularly considering that not all the

states are equally endowed. An effort to avoid the crippling of the federating states' economies prompted the state executives to mount pressure on their representatives in the national assembly to support the motion vesting full executive power in the vice president.

Similarly, consequent of the unofficial absence of the president, several appointments into boards and commissions that should have been made could not be carried out. The problem became more complicated because in the absence of the president, and following the reality of the refusal of the president to temporarily transfer executive power to his vice-president, political nominations to fill certain public offices could not be made. Similarly, some permanent secretaries could not be sworn in after two months of being appointed because the president who would have administered the oath of office to them was unavailable. Evident from the foregoing is that there was also no one specifically empowered to exercise executive power, nor was there any known official step taken by the ailing president to prevent power vacuum in his absence. By this, executing and coordinating certain strategic government programs and responsibilities was crippled. Indeed, the scenario was captured by Akunyili (2010) (a former federal minister of information), in her memo from 4 February, 2010 directed to the Federal Executive Council (FEC) on the imperative of making the vice president an acting president. In the memo, she points out that: we should remember that permanent secretaries have been waiting to be sworn in for two months, meaning some ministers don't even have permanent secretaries now... the vice president has no constitutional power to take any bill to the National

Assembly... though the VP deployed troops to quell Jos riot, many Nigerians said it was unconstitutional.

The executive power vacuum was such that important public offices which needed to be filled by executive appointment could not be filled because the vice president enjoyed no real executive power until certain provisions of the constitution are met. The executive vacuum did not only leave certain offices unfilled, but also encouraged the pillaging of the national resources by government office holders. (TELL, March 8, 2010, P.27). This was possible because not only was there nobody officially authorized to oversee the running of government business, but there were also some ministers, who unsure if they would survive the likely shake up in cabinet dissolution that would result from a transfer of power, felt the need to mop up whatever they could before they were removed from office (TELL, March 8, 2010, P.27).

In addition, there was controversy surrounding the signing of the 2009 supplementary budgets in December of that year. Despite the rising political tension due to the executive-power vacuum, none of the efforts and visits of the different groups (including the representatives of the governors' forum, selected members of the house of representatives, selected members of the federal executive council, as well as the leadership of the ruling People Democratic Party) to Saudi Arabia where the president was hospitalized yielded any results. In fact, no single person among the people who made the trip Saudi Arabia sighted the president. The political machinations engaged in by members of the kitchen cabinet of the president ensured that the 'probably' incapacitated president was shielded from the public. Shielding the president from the public appears to

point to one possible conclusion: that the president may no longer be in a position to discharge the functions of his office.

Yet, because of the desperation of certain members of the cabinet, as well as the wife of the president, to remain relevant in politics until when another general election is held in 2011, the members of the kitchen cabinet of the president placed personal interests above national interest. This line of thinking seems justified by the unconfirmed rumors that suggest that the political tension created was largely due to the calculated efforts of members of the kitchen cabinet to hide the letter written by the ailing president to intimate the legislature of his absence and equally transfer executive power to the vice president pending his arrival. Hence, shielding the president from the already outraged public facilitated the manipulation of governance and public affairs by the members of the president's kitchen cabinet, particularly the former Attorney General of the Federation, Michael Aondoakaa. Evidence that there was already a crack in the seat of power was the sudden transformation of Aondoakaa to government a spokesman, while there was a serving minister of information. To underscore the eroding impact of the power struggle in governance while the scenario lasted, the situation resulted not only in the ascendance of personal interests in the national politics, but also degenerated into politics of alienation. By this, not only was the crack in the cabinet widened, but also the minister of information became irrelevant to the powerful kitchen cabinet largely because of her insistence that the constitution's provisions for the transfer of power be followed.

Although the federal cabinet abdicated its responsibility by failing to declare the president incapacitated, as stipulated by the constitution, the pressure on other

institutions of government, particularly on the national assembly, and the tension that the constitutional crisis engendered were sufficient to spur actions from various directions. For instance, having been convinced that all efforts made to see the sick president proved abortive, which perhaps suggests that the president was incapacitated, some enlightened members of the public demanded that the members of the executive council should urgently ensure that a written declaration transferring power to the vice president be transmitted for legislative processing. The demand was anchored on the position that if the president actually signed the controversial 2009 supplementary budget as claimed by some cabinet members, then writing and signing a letter on his sick bed to temporarily transfer power to the vice president to act in his absence should not be a problem. With such a move not only would the problem over the power vacuum be resolved but also, a constitutional transfer of power would have been achieved to douse the rising political temperature.

While the politics of the hide and seek game unfolds both between the executive and the assembly, between the members of the executive council and the public, as well as between all formal democratic institutions and the larger society, the political tension was reaching a disastrous point. This is largely because the public believed that a handful of members of the executive council were not only exploiting the ailment of the president to control the affairs of the state for their selfish interests and private gains, but also that what was happening in the presidency had turned into president by proxy. The resultant effect was the intensification of pressure on the cabinet to make the president transmit a written declaration to temporarily transfer power to the vice

president, and on the legislature to intervene before the democratic enterprise crashes (TELL, March 8, 2010: p. 20-27; March 15, 2010: pp.32-34). Apart from this pressure, the Attorney General, who all the while had courted political resentment from the public over the way he weakened the formal institutions for fighting corruption in Nigeria, was sued in court for falsifying the signature of the president. Evidently, there was a clear gap in expected executive actions as the absence of the executive translates into manipulation of the political process by some people pursuing personal agenda. This further necessitated the immediate need for whatever realistic actions that could be taken to resolve the problem by appropriately transferring executive power.

Consequently, despite the manipulations from the kitchen cabinet, comprising the ministers of Agriculture, Justice, Finance, Federal Capital Territory; and the National Security Adviser as well as the wife of the ailing president among others, the pressure from the public meant that the president by proxy foisted on the state will not survive for too long. To be sure, while attempts were made to wipe up ethnic sentiment for personal gain, it became clear that the tension on the ground could only be doused by drastic actions. Consequently, the stage was set and the coast was clear for the transfer of executive-power to ensure that the issues requiring constitutionally and politically authorized person to act could attend matters of the state as at when due. What form of actions was taken in that regard? This is the question that the next section addresses.

The constitutional challenge of legislative intervention and making acting president

Although there was pressure on the legislature to intervene, it was under severe constitutional constraint. In fact, constitutionally, the legislature could only intervene through impeachment, but that constitutional option was considered inexpedient partly because of the likely negative implications it would have on the largely divided society and also, because of the existing political tension that already enveloped the state. This was not helped by the moral dilemma and the controversy that may be induced by interpreting the non-transmission of written declaration by a sick president as constituting gross misconduct. The only option left to the assembly under the circumstances, which would also translate into extra-constitutional instrument, was to invoke house resolution. Although the resolution option is recognized by the constitution, it is specifically prescribed for purposes other than transfer of executive power. But the political tension already enveloping the state required drastic solution, if only for the purpose of discouraging the desperate military from intervening in the political process. This explains the protests and calls by various groups for the intervention of the largely constitutionally and politically constrained national assembly. Indeed, the assembly was politically constrained because the ruling party controlled more than two-thirds majority in the two-chamber assembly.

Thus, while the first intervention of the assembly took the form of a legislative summon of the secretary to the government of the federation to the assembly to furnish the legislators with the detailed information on the health status of the president, the second intervention of the senate was a

resolution that gave the executive council fourteen days to declare the president incapacitated through a resolution. The second option was prompted by the inability of the government secretary to give any detailed information about the health status of his boss. It is necessary to point out, however, that the secretary had been out of the kitchen cabinet because he had expressed resentment against the new tenure policy of the government on offices of the permanent secretaries and directors in the public service.

Consequently, while the legislature released different motions in successions, the motions were perhaps meant to test the pulse of the members of the executive council and the agitated public. The devastating blow of the house resolutions seems to provide the basis for further legislative intervention as the two resolutions appeared timely and in fact arrived when the game of deceit employed by the members of the kitchen cabinet was no longer strong enough to deter legislative intervention. Indeed, legislative motions compelling executive actions which would ordinarily have been interpreted as interfering in the activities of the executive arm became an instrument that the public clamored for to transfer executive power to the vice president. Making a resolution then would make the vice president become an acting president.

The major issue still remains unresolved. Making an acting president with a legislative resolution is alien to the 1999 constitution, which is operational in the Nigerian fourth republic. However, the inability of the substantive president to perform his duties for weeks and the absence of any explanation on the status of his health should not have attracted so much attention, but the tendency to put personal

interests above corporate interests in Nigeria accounts for the disregard of constitutionality. Except for when the president was unconscious while he was taken abroad, there should not have been any justification for not transferring power to the vice president on a temporary basis. This is more so considering the severity of the ailment of the president and the necessity of continuing government business.

Despite this observation, perhaps due to the influence of tribal politics in Nigeria, there are some who think that power transfer is unconstitutional. In fact, such thinking dates back to pre-second republic (1979 - 1983) politics. During the build up to the second republic, perhaps because of his foresight as a constitutional lawyer, Ben Nwabuzare's proposal to the constituent assembly on the need to include a clause in the 1979 constitution to make the vice president an acting president any time the president is out of the country was rejected. This perhaps underlines why Nwabuzare (2004: 79) avers that the office of the vice president was not established for the 'purpose of avoidance of a vacuum in leadership during the president's absence'. Similarly, as Nwabuzare further contends, the title of the vice president by itself alone implies no constitutional authority to exercise the president's power in his absence without a specific provision in the constitution authorizing the vice president to do so. This further raises the constitutionality of transferring executive power to his vice president without any specific constitutional provisions authorizing that or in the absence of evident consent of the chief executive. This is more so when the instrument used in transferring the power is not provided for under the constitution being operated by the country.

Consequently, while conferring real executive power on the vice president to serve in acting capacity should not be problematic, the constitutional basis to anchor the legislative actions was missing. This was so largely because a few of the 42 member-federal-executive council held the nation to ransom due to their unwillingness to ensure constitutionality. The failure of the council to declare the president incapacitated was understandable because of the past insubordination of some members of the kitchen cabinet to the vice president who would have emerged the acting president. While the vice president office had been looked down upon in the past, it was feared that the vice president might demote or remove them if he was made the acting president. Similarly, the attitudes of the members of the kitchen cabinet also resulted from the governmental system in operation in Nigeria.

Unlike in the Parliamentary arrangement, the executive council members in Nigeria have insecure tenure, as they are not members of the legislature. Thus, a change in leadership often translates to the loss of seat. In parliamentary democracy a change in leadership may only cost the members of the cabinet their position for they remain in the assembly and continue to earn their income. It is the unwillingness of the members of the kitchen cabinet to lose their source of income and political influence that partly accounts for their failure to activate the necessary portion of the constitution. This underscores the desperation of Nigerian politicians for power, as well as their sit tight mentality in public office. Such actions were openly displayed in the public, first, in disregard for the constitution and, second, despite the agitations for transfer of power to put the nation which was evidently drifting back on track. It appears that where private interest clashes with public

interest, that private interest prevails among the operators of Nigerian democracy.

The fear expressed by members of the cabinet seems not misplaced as the cabinet was subsequently dissolved following the transfer of executive power to the vice president through a legislative resolution {THISDAY, March 18, 2010}. Indeed, the last minute efforts of the members of the kitchen cabinet to maintain their hold on power by bringing the ailing president into the country at about 2am on February 20, 2010 in an ambulance was not enough to save them. This is because not only have the kitchen cabinet members made enemies from the larger society, but also they have worked to undermine the efforts of the legislature to stabilize the polity. However, the preemptive efforts of the kitchen cabinet did little to help them, as the events that followed proved. At the re-composition of the cabinet, not only were less than 25 percent of the former forty two ministers returned to the cabinet, but also none of the members of the kitchen cabinet made the new cabinet. Although the dissolution of the cabinet was in part the result of the evident polarization among members, it was not unconnected from the roles played by the members of the president kitchen cabinet to stop the emergence of the vice president as acting president (The Guardian, March 18, 2010; The Punch, March 18, 2010: p.1 -2).

However, the cabinet dissolution also generated its own controversy. This was not unexpected in politics where ethnic loyalty and parochial consideration take precedence over national interests. This underlines the controversy stirred up by Tanko Yakassai, a northern conservative. He contends that an acting president made outside the provisions of the constitution cannot dissolve a cabinet duly constituted by the

ailing elected president. Perhaps, it was in anticipation of such controversy that some people had rejected the legislative resolution and rather called on the legislature to impeach the ailing president so that executive power can be validly and constitutionally transferred to the vice president. It is clear from the nature of the Nigerian politics that the legislature will find it difficult to impeach the president because northerners, from the region in which the president emerged, constitute the majority in the two chamber assembly.

The fear of a possible breakdown of the constitution therefore prompted the calls from the Save Nigeria Group, led by Professor Wole Soyinka, and a coalition of various civil society groups that urgent steps were needed to save the hard earned constitutional democracy from collapsing (TELL, March 22, 2010: P33). The agitation was perhaps boosted by the fact that there were rumors that some military apologists among the politicians were already meeting with some top military officials and calling for their intervention. This underlines the character and personalities of people which constitute the political class in Nigeria. Although, through its public relations department, the military denied the allegation of nursing the ambition of intervening in the political process, if the military had intervened the politicians who invited them would have secured public appointment as ministers or in other important positions in the military cabinet. It appears that the Nigerian democracy is being operated by politicians who are not only opposed to constitutional rule, but who also fail to allow the culture of constitutionalism to flourish. This perhaps explains why Sawyerr (2010: P33) avers that "The President's ailment and the failure of the National Assembly as well as Federal Executive Council, FEC, to do what is right

constitutionally have fired some patriotic zeal among various civil society groups in the country.”

The culminated tension, the imminent challenge of possible disrupted revenue flow from the center, and the pressure from the various groups spurred the Governors forum, which is already seeing itself as an emerging power broker, to confer with the leadership of the national assembly on the need to make the vice president an acting president. To be sure, in the face of the thick cloud of confusion hovering over the running of the affairs of the state, such intervention became inevitable if constitutional democracy would not be jeopardized. As Soyinka (2010) avers, ‘Nigerians should rescue the nation from the cabal of reprobate gangsters, extortionists, and even political murderer.’ Utomi (2010) also adds his voice to this when he notes that ‘the only thing that will save Nigeria is for the people of Nigeria taking over the streets of Nigeria, demanding that the constitution be upheld; that the rule of law be respected.’ (p.33)

The reluctance of the members of the executive council to activate the provisions of section 144 of the 1999 constitution resulted in the polarization of the council. The crack and evident absence of consensus among the cabinet members was underscored by the crises that resulted from the memo addressed to the council, by the minister of information, on February 4, 2010. In the memo, the then minister of information, Prof Dora Akunyili, sought to implore the council to toe the line of constitutionality by invoking the relevant section of the constitution to empower the vice president to become acting president, pending the full recovery of the president. While this was meant to put the nation on the effective path to constitutional order, the

kitchen cabinet members of the council challenged the minister of information for daring to request that constitutionality be adhere to. This culminated in the forced withdrawal of the memo (THISDAY, 4 February, 2010).

The attitude of the members of the council was in contrast with the expectations of the citizenry and the politicians in general who were the greatest beneficiaries of the democratic regime. The 'politico-drama' was captured by TELL (March 15, 2010: p.20) in its editorial thus, 'if Yar'Adua is unable to resign from office as a result of incapacitation, FEC and the parliament should rise up to their constitutional responsibility and assist him to disengage from office so there can be a serious attempt at governance'. What is most evident from the actions of the cabinet members is that, while they took oaths to execute and protect the constitutions, they clearly undermined it, perhaps with impunity. This accounts for why TELL further avers that, 'it is appalling that politicians would find great service and glory in the defense of party power and aggrandizement at the expense of peace and constitutional growth, particularly where such party power renders impotent the succession process dictated by the constitution' (p. 21).

Embolden by the support from the public, the Governors forum and the international community, the only possible option to be employed, given the unwillingness of the members of the FEC to declare the president incapacitated as well as the unwillingness of the assembly to employ the impeachment instrument, was resorting to legislative resolution. While legislative resolution is a universal legislative instrument, it lacks the legal bite of legislation. Indeed, experiences have shown in Nigeria that executive

disregards for house resolutions in both states and federal levels are enough justification of the limitation of the utility of the instrument (Fashagba, 2009a). While opting for the legislative resolution option appears to have given the ailing president a soft landing, as desired by the northern ethnic group, the Governors forum and the members of the ruling party, on a legal note the legislative instrument constitute negation of the provisions of the 1999 constitution (TELL, March 15, 2010: p.20). It is little surprising that the constitutionality of the legislative resolution has become a subject of litigation in courts.

Nevertheless, while the foregoing seems to suggest that the actions of the national assembly amount to illegality, particularly when considered against the argument of Nwabuzue (2004) that executive power cannot be transferred without an explicit constitutional provisions, the fact that the legislature represents various constituencies to which the country is delimited suggests that the actions reflect the wishes of the constituents. This is evidenced by the fact that not only were the earlier pockets of criticisms and opposition against the method adopted in conferring executive power in the acting president declined, but the tension that resulted from the power vacuum equally subsided. More importantly, the protests of the public, while the political tension lasted, were directed to the legislature when all entreaties to make the cabinet do the right thing failed.

Perhaps, not oblivious to the frailty of the legislative resolution employed in vesting full executive power in the acting president, and the absence of specific provisions of the constitution authorizing the use of such medium, the legislature had to invoke the 'doctrine of necessity' to give a

semblance of legality to an action that was alien to the 1999 constitution. This appears inevitable, particularly in the absence of executive council resolution, as well as the failure of the president to transmit to the assembly a written declaration of his inability to perform the duties of his office. Nevertheless, irrespective of whatever means used to achieve stability, the invocation of the doctrine of necessity, justified on the broadcast of the British Broadcasting Corporation to the effected the president granted an interview from his sick claiming that he was receiving treatment in Saudi Arabia and that the vice president should oversee administration pending his full recovery, appeared not only to have pulled the country out of a political abyss, but also suggests that the legislature may in fact serve as a major anchor for sustainable democracy. This perhaps explains why Fish (2006) contends that democracy is deepened where the legislature is strong.

Although the need to stabilize the system was a factor in the legislative intervention, the fear of losing their seats in the event of military intervention appeared to be the major reason for the legislative action. Thus, the intervention became inevitable mainly to deepen democracy, and also to secure the sources of income of the politicians (legislators and members of the executive organ in both central and states).

Implications of the legislative resolution and emergency of the acting president for democratic governance

While the transferring of power through a medium that is alien to the constitution seems the easiest path to resolve the crises in the estimation of the politicians, the general perception that the acting president may exercise executive power with restraint, particularly with regard to

acting as president and taking over the position of the Commander in Chief, remains a major concern. The initial fear has been dispelled with the removal of the National Security Adviser to the ailing president and the appointment of another one in his place. In addition, the dissolution of the federal executive council (the cabinet) which he inherited on March 18, 2010 and the composition of another cabinet by the acting president point to the fact that the political tension was giving way to stability.

To remove the cloud of unconstitutionality hanging over the transfer of power to the acting president, the legislature, which has been faced with criticisms for using extra-constitutional means to resolve a constitutional matter, has initiated amendments to the relevant sections of the constitution to ensure that no president ever travels or abandon his duty post indefinitely again while creating power vacuum. To be sure, in the legislative amendments to the constitution already passed by the senate, the vice president automatically becomes the acting president if the president travels or is unable to perform the responsibilities of his office for two weeks. Such amendments would not have been considered necessary but for the vacuum created by the ill health of the president and the failure of the president and the council of ministers to comply with the provisions of the constitution on vacation and succession. The amendments suggest that not only is the Nigerian democracy maturing, but they also indicate that constitutional democracy is getting more practical and rooted.

Sometimes, it appears that a mature democracy must learn from its faltering steps to improve the lapses in its constitution. This is where the ongoing amendments of the

1999 constitution of Nigeria by the assembly find justification. Suffice it to say that the action was reminiscent of the twenty fifth amendment to the United States Constitution in 1967 on succession. The amendment was carried out after the murder of President John F. Kennedy in 1963. By the amendment, the vice president becomes the president whenever the incumbent is incapacitated or dead. Such amendments are capable of deepening democracy and preventing power vacuum that could endanger democracy in a fragile democracy like Nigeria.

Although the legislature sought to defuse the political tension, the members of the kitchen cabinet, who perhaps felt threatened by the imminent power shift, took a pre-emptive step by rushing the sick president back to the country. This was not only meant to rattle the acting president and the national assembly, but also to ensure that the decision of the legislature transferring executive/presidential power, which hitherto had been exercised by proxy, to the acting president was frustrated. Indeed, this largely suggests that the interests of the politicians come first whenever they have to choose between good governance, stability and democratic sustainability. This perhaps explains why it has been difficult for democracy to be sustained in Nigeria. This seems to underline the lack of faith in the current democratic enterprise in Nigeria. As Burns, Peltason, Cronin, and Magleby (1995: 7) aver, 'New democracy often fail. It is one thing to espouse democratic value, another to put them into practice.' Similarly, given the antecedent of the Nigerian political class to place ethnic consideration and personal interests above collective interests as well as their insensitivity and the threat that their actions posed to democratic sustainability, the United States Assistant Secretary, Bureau of African Affairs,

Johnnie Carson, during his interaction with the sub-committee of foreign affair notes that 'Nigeria is among African states where democracy remains "fragile or tenuous." The Nigerian politicians seems not to see holding public office as a call to service, rather it is perceived to be call to take one's share of the national cake (Fashagba, 2009b).

The challenge that power struggle between competing ethnic and political groups posed to democratic governance and sustainability since the creation of the legislative resolution that transferred power to the acting president is equally evident in the attempt to undermine the political arrangement adopted to calm the raging political tension. The sudden return of the president to the nation spurred another round of tension. For instance, the return in the first place was a calculated political attempt to invalidate the position of the acting president. No point justifies this view more than the press address of the media assistant to the president where he referred to the acting president as vice president, instead of addressing him as acting president. This suggests that as far as the 'camp' of the ailing president was concerned the acting president was not recognized in that capacity. Hence, the secret and unofficial return of the president did not only deepen division in the cabinet, it also further increased political tension. It is important to note that such cabinet polarization and misunderstanding took place despite the fact that all members of the executive council were appointed from the ruling People Democratic Party, which also controlled both the executive and legislative organs. Evidently, the political parties under the presidential democracy in Nigeria have been very weak in controlling members elected under their platforms. The reason for this may not be unconnected with

the fact that the arms were elected through separate elections. Also a problem was the crippling executive-legislature conflict.

The deepening constitutional crisis in Nigeria is further captured by the fact that contrary to the provisions of the 1999 constitution, there exists side by side an acting president and a president. Although the constitutionality of this has been challenged by some members of the Nigerian public, but the reality of extraneous consideration has overridden constitutional imperative.

The issue of the true status of both Jonathan and Yar'Adua will be the next stage for the constitutional battle ahead for the country. A minister in the Yar'Adua government told the magazine that Yar'Adua had assumed the role of president as soon as he returned last week. Considering the fact that the members of the federal cabinet who took an oath to defend the constitution were subverting it in a bid to perpetuate governance by proxy, as well as to maintain their ministerial portfolio, it is not out of place to deduce that the attitude is either the result of their ignorance of what constitutional democracy entails or that they simply have a disregard for constitutionalism. This perhaps explains why some politicians were rumored to have consulted with the military to take over power.

Further evidence that some members of the cabinet were not only bent on undermining the constitution to maintain their hold on power, but also to prove that the decision of the national assembly to elevate the vice president to acting president was not binding was the deployment of soldiers to the street of Abuja on the night that the president was brought into the country. The salient fact suggested by

the unofficial military deployment is that of a situation of constitutional crisis. One, the acting president was never told that the resident would return on the said date, hence the arrival of the president caught the acting president unaware. Two, even though the acting president was vested with full power of the presidency as well as the Commander in Chief of the Nigerian armed forces, the deployment of troops was done without his knowledge or consent. In fact, the residents of the Federal Capital Territory, Abuja had thought that the military had at last returned into politics.

The deployment was possible because the appointment of the Chief of Army Staff was done by the ailing president. Equally important is that the Chief of Army Staff, General Danbazzau is a northerner just like the president. The loyalty of General Danbazzau was therefore to president Yar'Adua, who appointed him the Chief of Army Staff. Because of this, he did not feel obliged to consult the acting president before deploying soldiers to the street to ensure the security of the returning president. Thus, rather than taking instruction from the acting president, General Danbazzau took directions from members of the kitchen cabinet. In particular, he took directions from the National Security Adviser to President Yar'Adua, General Muktar. It is little surprising that General Muktar was the first major victim of the power change as he was subsequently relieved of the position over an alleged intelligence failure.

Evident in the attitudes of the operators of the new democracy is that personal ambitions, private gains and sectional interests are major determinants of when to obey or comply with the constitutions. The operators' compliance with the simple provisions of the constitution would have

saved the country from the threatening tension that almost crashed the fledgling democracy between November 2009 and March 2010. It is perhaps the prevalence of such anti-democratic tendency in a new democracy like Nigeria that makes Burns, Peltason, Cronin and Magleby (1995: 7) to say that 'New democracy often fail. It is one thing to espouse democratic value, another to put them into practice'. Similarly, it is also clear that much still needed to be done to attune the mind of the politicians to the dictates and working of democracy. The prolonged years of military rule has resulted in an almost complete absence of democratic culture. This portends grave danger for the new democracy, particularly considering the nature of ethnic politics; the cut throat competition for political office; and the desperation for public office as means to state funds.

The representative assembly is believed in modern democracy to be the main symbol of the sovereignty of the state. If the legislature utilizes extra-constitutional means to achieve an expedient political objective with a broad based support from the different segments of the public, then politicians who subscribe to the tenets of constitutional democracy should have no problem complying with its decision. It is the absence of such political will to activate the constitution as occasions demand, playing the games according to the set democratic rules and being observant of constitutional provisions that translate into de-constitutionalising the democratic governance by the operators of the Nigerian democracy. Such attitudes may have only one implication: exposing Nigerian democracy to the danger of reversal considering the fragility of the political terrain in Nigeria.

Conclusion

It appears the greatest threat to the survival of constitutional democracy in Nigeria is the undemocratic tendencies and behaviors of the politicians. The penchant of the politicians to place extra-consideration above common goods has had a great undermining impact on constitutionalism in Nigeria both in the past and under the current democratic governance. However, the fact that the public and some members of the political class worked in conjunction with the National Assembly to restore stability after the tension soaked moment suggests that there is hope to deepen democracy. However, much depends on the ability and the readiness of the political class to imbibe democratic tenets and comply with the rules of the game. Nigerian democracy will remain insecure if operators are opposed to constitutionality. Therefore, the extent to which democracy is deepened in Nigeria will remain a function of the degree to which the politicians imbibe the culture of constitutionalism. The legislature has however succeeded in using its power to ensure the survival of democracy, starting with the way it truncated the ambition of the former president. This it achieved by killing the proposed constitution amendment bill of 2006 through which the former president sought to extend his tenure. Thus, while the legislature has been less impressive in law-making and oversight, it has intervened at two different times to protect the Nigerian democracy. If the legislature continues the way it has been intervening in the critical period, as well as improve its performance in law-

making and oversight, it may be able to counter balance the divisive and subverting tendencies of public office holders particularly, the executive arm, the political parties and the ethnic groups.

REFERENCES

- Burns, J. M., Peltason, J. W., Cronin, T. E. and Magleby, D. B. Fashagba, J. Y. 2009. *Executive – legislature relations in Kwara and Oyo states, Nigeria* (1999 - 2007). Ph. D. Thesis submitted to the Political Science dept, University of Ilorin, Ilorin, Nigeria.
-2009. Legislative oversight under the Nigerian presidential system. *Journal of Legislative Studies*. 15 (4), 439 – 459.
- Fish, M. S. (2006). Stronger legislatures, stronger democracies. *British Journal of Politics*, 17(1), 5-20.
- Laski, H. 1992. *A grammar of politics*. London: George Allen & Unwin
- Nwabuzue, B. 2004. *Constitutional development in Africa*. Vol. 4. Ibadan: Spectrum publisher
- Nwosu, N. I. 1998. The military and constitutional engineering in Nigeria. *Ilorin Journal of Business and Social Sciences*, 1998, vol. 5, 31 – 49.
- Omotola, J. S. 2008. Democracy and constitutionalism under the fourth republic, 1999-2007. *Africana*, 2(2), 1-29.
- Osaghae, E. E. 1998 *Crippled giant: Nigeria since Independence*: London Horst and company.
- Wanyande, P (1987) *Democracy and the one-party state :The African Experience in Oyugi and A Gilolnga leds, Democracy Theory and Practice in Africa*, Nairobi, Heineman.
- Sawyer Stella (2010). *Now the People Power*, TELL Communication Ltd, Lagos.

Soyinka, W. 2010. An address during public protest of the absence of the president in Abuja.

TELL communication, Lagos.

The Guardian, Lagos, 2010.

The Punch newspaper, Lagos 2010.

THISDAY, Lagos. 2010.