

## DISCOURSE

# General overview of the 1999 Constitution

Conclusion of a paper presented by Prof. Itse Sagay (SAN) at the retreat of the Joint Committee of the National Assembly on The Review of the 1999 Constitution Held at Hydro Hotel, Minna, Niger State

Continued from yesterday

It is for this reason that the National Political Reform Conference, 2005 made the following modest recommendations on the question of ownership, management and control of petroleum resources:

#### Oil and Mineral Resources

(a) The various mineral resources should be controlled and managed by the Government of the Federation through an arrangement which involves Oil Producing States and Communities, in particular, the rights and privileges which the Mineral and Mining Act of 1999 confers on States, Local Government, Communities and land owners should equally be extended to the case of petroleum resources;

(b) Derivation principle should be given greater prominence than as it now is in the distribution of the Federation Account;

(c) On resource control, in addition to the points on which agreement was reached in the Committee on Revenue Allocation and Fiscal Federalism, the Conference recommends the following package:

i) A clear affirmation of the inherent right of the people of the oil producing areas of the country not to remain mere spectators but to be actively involved in the management and control of the resources in their communities by having assured places in the Federal government machinery for the management of the oil and gas exploration and marketing;

This provision constitutes some improvement on the current constitutional provisions and will need to be formulated in a legal drafting language.

In addition to the above, I recommended the total incorporation of Section 140 and 141 of the 1963 (Republican) Constitution into the 1999 Constitution. I reproduce Sections 140 and 141 (with minor alterations) below thus:

"140. (1) There shall be paid by the Federation to each State a sum equal to fifty per cent of -

(a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that State; and

(b) any mining rents derived by the Federation

(c) any petroleum profits tax, (i) bonuses, (premium), (ii) licensing, (iv) prospecting, (v) mining and other fees, (vi) rents, (vii) oil terminal dues, etc from within that State

(2) The Federation shall credit to the Distributable Pool Account a sum equal to thirty per cent of -

(a) the proceeds of any royalty received by the Federation in respect of minerals extracted in any State; and

(b) any mining rents derived by the Federation

(c) any petroleum profits tax, (i) bonuses,

(premium), (ii) licensing, (iv) prospecting, (v) mining and other fees, (vi) rents, (vii) oil terminal dues, etc from within any State

(3) For the purposes of this section the proceeds of a royalty shall be the amount remaining from the receipts of that royalty after any refunds or other repayments relating to those receipts have been deducted therefrom or allowed for.

(4) Parliament may prescribe the periods in relation to which the proceeds of any royalty or mining rents shall be calculated for the purposes of this section.

(5) In this section "minerals" includes mineral oil.

(6) For the purposes of this section the continental shelf of a State shall be deemed to be part of that State.

Distribution: 141 - There shall be paid by the Federation to of funds in

each State at the end of each quarter since Distributable equal to the fraction arrived at by dividing the Pool Account amount standing to the credit of the Distributable Pool Account by the number of States in the Federation -

(e) Police and other government security services (item 45) in all Federations all over the World, both the Federal and State authorities have their own police forces. In the U.S.A., the Federal authorities have the F.B.I. and the state and municipal authorities, have Police Forces. Towns, municipalities, even universities, have police establishments. In the U.K. which is not a federation, counties have their own Police establishments. There is therefore no reason why States cannot have their own Police Forces in Nigeria, particularly since the Nigeria Police Force is put under the exclusive control of the Federal Government. The frequent claims by the Government of Lagos State that the increasing incidents of armed/ethnic violence and armed robbery in the State was compounded by the fact that while the Governor was invested with responsibility for security in the State, the Police, was exclusively under the control of the Federal Government, cannot be faulted. In depriving States of the right to establish their own Police Forces, or have operational command of the Nigeria Police in their States, the Governors are given responsibility without power.

(f) Police: Operational Control, Discipline and Promotion  
Police Force By this Section 214, the Police Force in Nigeria shall be the Nigeria Police under the full and exclusive control of the Federal Government. The following section (215) establishes clearly not only that the Nigeria Police is owned and controlled exclusively by the Federal Government, but that the State Governors have no authority whatsoever over the Police. Section 215(4) provides as follows:

(4) Subject to the provisions of this section, the Governor of a State or such Commissioner of the Government of the State as he may authorize in that behalf, may give to the Commissioner of Police of that State such lawful directions with respect to the maintenance and securing of public safety and public order within the State as he may consider necessary, and the Commissioner of Police shall comply with those directions or cause them to be complied with.

Provided that before carrying out any such directions under the foregoing provisions of this subsection the Commissioner of Police may request that the matter be referred to the President or such Minister of the Government of the Federation as may be authorized in that behalf by the President for his directions.

Here again, there is a clear undermining of the Federal status of this country. In the 1954 Constitution, the Regions (States) were empowered to establish local government police authorities and the Northern and Western Regions established them.

The total impotence of states regarding the control and operation and discipline of the Police Force is confirmed by Powers given the Nigeria Police Council of which the State Governors



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are members.

This body is merely advisory to the President on the organization and administration of the Nigeria Police presided over by the President with a membership which includes all the State Governors. The functions expressly exclude matters relating to the use and operational control of the Force or appointments, and discipline of its men. The exclusive Federal control of the Police Force is sustained, thus strengthening the case for a State Police Force.

(g) Profit and Capital Gains (Item 59) These in fact should be exclusively state subjects, because they arise primarily from succession, which is a matter under State jurisdiction.

(h) Prescription of Minimum Standards of Education at all Levels. This should be a joint Federal/States responsibility, and not exclusively a Federal matter.

(i) Registration of Business Names. It is puzzling why this routine type of exercise concerning establishments which are going to operate in States, should be an exclusive Federal subject matter.

Other matters which ought to be transferred from the Exclusive Legislative List to the Concurrent Legislative List are: Prisons, Railway and stamp duties. (See items 48, 55, 58, respectively) Value Added Tax being a tax on goods and services within a State, should be a State tax and not a Federal tax.

The V.A.T. which was first introduced by the Military Regime in 1993. It is essentially a sales tax in that it is a tax based on sales of goods, services. It is therefore essentially a subject for States, rather than the Federal Government. It is not listed in either the Exclusive Legislative List nor in the Concurrent Legislative List. It is therefore a residual matter, i.e. within the exclusive jurisdiction of States. The present administration of VAT by the Federal Government is therefore illegal.

(j) The Concurrent Legislative List. Many matters which should be exclusively state controlled can be found in this shared subject list. These include:

a) Division of revenue among the local governments in the States (item (1) (a) (iv))

Federal Government's intervention in the process of the division of revenue between the local governments within a State, (S. 162(5)) is an infringement of federalism, though valid under the present constitution.

In this regard, it is heartening that the Supreme Court declared in A.C. Abia & Ors vs. AG, Federation [2002] 6 NWLR (Pt 763) 234 that the direct funding of primary education by the Federal Government, through local governments is an infringement of the

autonomy of states and that such funds should be paid directly to state governments.

b) Electric Power  
Although Electrical Power is placed in the concurrent list as Item 14(b) of the List, it limits the State Governments' powers in electricity generation, transmission and distribution to "areas not covered by the national grid system within that State". In other words States, can only organise the generation, transmission and distribution of electricity under a rural electricity scheme. They use in effect prohibited from establishing or organising any system of electricity supply in competition with the dead Power Holdings Company Nigeria (PHCN). States are thus condemned to the underdevelopment which PHCN represents. This explains why the Federal Government has had to play such a major role in the independent power project of the Lagos State Government intended to provide uninterrupted electrical power to the people of Lagos State through its agreement with Ercon. The Constitutional need for the consent of the Federal Government before this project could be implemented, led to undue Federal Government intervention, and obstructions almost amounting to sabotage by some Federal operatives and agencies, including the monster PHCN itself.

Acting in total abuse of its power, the Federal Government arbitrarily and whimsically suspended the power project agreement within 9 days of signing it, thus frustrating the Lagos State Government's tremendous endeavours in this regard, but also creating a major contractual liability for itself and Lagos State.

There is no reason why the right to generate and distribute electrical power cannot be made an open one for the Federal Government, States and private companies. Each can then invest in the generation, of power, which could be sold to consumers (industries, enterprises, households) on a commercial basis. If the right to generate and distribute power is liberalized, Nigeria will emerge out of its present dark ages nightmare, and our economy and standard of living will be tremendously improved.

(k) Whole Sale Transfer of Subject Matter from the 1963 Concurrent Legislative List to the 1999 Exclusive Legislative List

The source of the overwhelming legislative powers of the Federal Government is established by a comparison between the 1963 (Republican Constitution) and the 1999 Constitution. This reveals that the matters of the 1999 Constitution, transferred legislative matters whole sale from the Concurrent Legislative list of the 1963 Constitution, to the Exclusive Legislative list of the 1999 Constitution. The subjects affected are listed in the table below.

1963 Constitution  
1999 Constitution

1234 56 78 9 10 11 12 13 14 15  
Subject Item No. Arms and Ammunition 2 Bankruptcy and Insolvency 3 Census 4 Commercial and Industrial Monopolies 5 Combines and Trusts 6 Drugs and Poisons 8 Fingerprints Identification and Criminal Records 9 Higher Education 10 Labour, Conditions of Labour, Industrial Relations, Trade Unions and Welfare of Labour 12 Legal, Medical and other professions 13 Prison, etc 16 Securing Public Order and Public Safety 18 Quarantine 19 Registration of Business Names 20 Service and Execution of Court process 21 Traffic on Federal Roads 24

Item No. 2 5 8 10 21 23 27  
(Concurrent List) 34 49 48 11, 214, 215, 305 54 57 63 3 Establish-

ment and control over Local Governments

By Section 3(6)

The 1999 Constitution specifically provides that "there shall be 763 Local Government Areas in Nigeria". It then goes in the first schedule, to list most meticulously the names of all the 763 Local Government areas and their individual capital cities. By section 3(6) even after a state has completed the process of the creation of local governments, the names and headquarters of such local governments must be approved by the National Assembly.

Again, this provision, constitutes a violation of Federalism. This means that the creation of local government is a Federal and State matter and not State exclusive matter. In a true Federation, states are the only competent local government creating bodies and not the Federal Government. States are free to create as many local governments as they wish in a true Federation. Fixing the number of local government areas as has been done in section 3(6) effectively takes local government out of the hands of states into the hands of the Federal Government because local government creation becomes a constitutional matter, involving the National Assembly in a decisive manner. - Section 8(5)

"The tedious and rigid procedures for the creation of local governments confirms that in spite of the provisions of section 7(6) purportedly granting states powers to create local governments this, can never be realized in practice under this Constitution. The following obstacles must be surmounted before a local government area can be created.

i) Request by at least two-thirds of the representatives of the area in the State House of Assembly.

ii) At least two-thirds of the representatives of the area in the local government council or councils concerned.

iii) Referendum in which at least two-thirds of the electorate of that area approve the creation of the local government.

iv) Approval by a simple majority of the local governments in the State.

v) Approval by two-thirds majority of each House of the National Assembly.

Section 162(5) - (7) states how amounts due to the local governments from the Federation should be divided and allocated. The National Assembly is empowered to prescribe the manner in which these monies will be disbursed to local governments. Again this constitutes a subversion of federal principles. Local governments in a Federation are supposed to be a matter exclusively within the domain of state authority. The Federal Government should not have direct dealing with local governments in a Federation. The confusion arising from this dualisation of authority in State creation, became manifest in the attempt by the Government of Lagos State to create new local government areas in 2004. In AG of Lagos State v. AG, Federation [2005] 2 NWLR 1 the Supreme Court declared that although the Government of Lagos State had validly created the new local governments, the latter remained inchoate (formant) until their creation was approved by each House of the National Assembly.

According to Uwa, CJN, in that case (p. 69)

"What follows from this is that the Laws enacted by Lagos State that is Law No. 5 of 2002 and the 2004 Law are both valid Laws since the House of Assembly of Lagos State has the power under sections 4 subsections (6) and (7), 7 subsection (1) and 8 subsection (5) of the Constitution to legislate in respect of the creation of new local government areas and local government councils which are one and the same for the purpose of section 162 subsections (3) and (5) of the Constitution. However, in the context of section 8 subsection (5) and section 3 subsection (6) such Laws cannot be operative or have full effect until the National As-

There is no reason why the right to generate and distribute electrical power cannot be made an open one for the Federal Government, States and private companies. Each can then invest in the generation, of power, which could be sold to consumers (industries, enterprises, households) on a commercial basis. If the right to generate and distribute power is liberalized, Nigeria will emerge out of its present dark ages nightmare, and our economy and standard of living will be tremendously improved'

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sembly makes the necessary amendment to section 3 subsection (6) and part I of the first schedule to the Constitution. The effect of this is that the Laws are valid but inchoate until the necessary steps as provided by the Constitution are taken by the National Assembly.

This has resulted in utter confusion. The creation of local governments should be a matter exclusively for the States. Local government areas should not be listed or reflected anywhere in the Constitution. The Federal Government should not allocate any funds to local governments. They should be created and funded exclusively by State Governments. It follows therefore that a State should be entitled to create as many local governments as it wishes, and that the Federation of Nigeria like all other federations in the world, should be one between a central (federal) government and regional entities (states). There is nothing like a 3-tiered federation, involving local governments, States and the Federal Government. The 3-tiered Federation is an illegitimate Nigerian creation.

4. Election of the President and Governors

- (12) (2) to be deleted
- (i) The term of office of a President or Governor shall expire 3 years and 9 months after he takes the oath of office.
- (ii) The Chief Justice of the Federation or the Chief Judge of a State, as the case may be, shall act as President or Governor until elections for President or Governor have been held and all election petitions against such elections have been concluded.
- (iii) Elections for the offices of President or Governor will only be held after the end of the term of office of an incumbent President or Governor.

5. Appointment of a National Electoral Commission

There shall be a National Electoral Commission, constituted by a Chairman and other members. The chairman and members of the Commission shall be nominated by an Electoral Commission Selection Assembly composed of:

- 1. The Chief Justice of Nigeria as Chairman.
- 2. 5 Representatives of the Senate
- 3. 5 Representatives of the House of Representatives

2 Representatives from each of the following bodies:

- (i) The Nigerian Bar Association
- (ii) The Nigerian Union of Journalists
- (iii) Council of Women Societies
- (iv) Nigerian Labour Congress.
- (5) 1 Representative from each of the following:
  - (i) National Association of Nigerian Students
  - (ii) Academic Staff Union of Universities
  - (iii) Christian Association of Nigeria
  - (iv) National Council of Islamic Affairs

(6) The Electoral Commission Selection Assembly shall invite nominations for membership of the National Electoral Commission from the public. Based on the list of persons so nominated by the general public and members of the Commission, the Election Commission Selection Assembly will nominate the Chairman and the six other members of the National Electoral Commission, and forward these names to the Senate for approval. If any of the nominees fails to receive Senate approval, the Selection Assembly will meet to send a replacement to the Senate for approval.



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proval. (7) (i) A member of the National Electoral Commission will be removed from office, only for misconduct in carrying out his duties, or for any incapacity, making it impossible for him to perform his duties.

(ii) For the removal of a member of the National Electoral Commission to take effect, there must be a resolution to that effect passed by a majority of the members of the Commission which is then approved by the Senate.

(8) (i) There shall be appointed by the National Electoral Commission, one State Electoral Commissioner for each State of the Federation.

(ii) A State Electoral Commissioner may be removed from office or transferred to from one State to the other by the National Electoral Commission. However removal from office can only arise from misconduct in the discharge of his duties or due to functional incapacity.

(9) The National Electoral Commission shall be funded directly from

the Consolidated Revenue Fund of the Federal Government, as approved by the National Assembly.

(10) The term 'independent' is hereby deleted from the Commission's name. 'Independence' is determined from the record and achievement of the Commission, not from nomenclature.

6. Conclusion

I am attaching an appendix containing my recommendations for a modified schedule of Legislative powers. This conforms with or is a return to the original idea of what a federation of Nigerian communities should be like. Under this scheme the Federal Government is assigned subject matter of a universal character, in which centralized operation will be more beneficial for the whole country, whilst others are assigned either to the concurrent list or left out as residual matters which are better handled by States, the federating units in which the people actually live.

In view of the increased responsibility of the States and the lighter burden on the centre, it is suggested that a new revenue allocation formula should be adopted. In my view, this should roughly be 30% Federal and 70% for States. Local Government Councils are eliminated entirely, since they are to be funded exclusively by State Governments under this scheme. If anyone should feel that the State share is too large, then I must point out that the 70% is to be shared by 36 States. This means technically that the share per State would be 1.94%.

Appendix: APPENDIX

RECOMMENDED SCHEDULE OF LEGISLATIVE POWERS
EXCLUSIVE LEGISLATIVE
CONCURRENT LEGISLATIVE
LISTS (Federal
CONCURRENT LEGISLATIVE

LIST (Federal and State)

- 1. Aviation
- 2. Banking, Currency, Mint, and Promissory Notes, Control of Capital Issues
- 3. Citizenship
- 4. Copyrights, Patents, Designs, Trade Marks
- 5. Customs
- 6. Defence
- 7. Extradition
- 8. Federal Court, including the Supreme Court
- 9. Foreign Affairs
- 10. Immigration
- 11. Incorporation and regulation
- 12. Insurance of Corporate Bodies, Winding up, etc
- 13. Maritime, Shipping and Navigation
- 14. Marriages other than Moslem and customary marriages
- 15. Meteorology
- 16. Nuclear Energy
- 17. Posts, Telegraph, Telephone
- 18. Weights and Measures
- 1. Allocation of wave-lengths for wireless, broadcasting and television transmission by joint Federal/State Commission
- 2. Antiquities and monuments
- 3. Arms and Ammunition
- 4. Census
- 5. Commercial and Industrial Monopolies combines and trusts
- 6. Community Banking
- 7. Drugs and Poisons
- 8. Electricity
- 9. Environment
- 10. Establishment, Regulation and co-ordination of research institutions, except nuclear research
- 11. Evidence
- 12. Fingerprints, identification and criminal records
- 13. Higher Education
- 14. Incorporation, regulation and winding up of cooperative societies and local government councils
- 15. Mines, Minerals, Oil fields, oil mining, natural gas
- 16. Labour, including trade unions industrial relations; conditions, safety and welfare of labour; industrial disputes and industrial arbitrations
- 17. Pensions and gratuities
- 18. Police and other Government Security Services
- 19. Prisons
- 20. Public Holidays
- 21. Railways, Road and other infra-structures
- 22. Regulation of political parties
- 23. Stamp Duties
- 24. Taxation of incomes, profits and capital gains, except Value Added Tax
- 25. Wireless, broadcasting and television

NEWS

## Activists to demand Iwu's removal

CIVIL society groups are finalising plans to press for the removal of Prof. Maurice Iwu as the Chairman, Independent National Electoral Commission (INEC), the Chairman, Transition Monitoring Group (TMG), Comrade Mashood Eubanni, said in a statement yesterday. He said the decision to seek Iwu's removal is not that of the Nigeria Labour Congress (NLC) alone, noting that it is of great concern to all progressives and civil society groups, who observed the 2007 elections. Eubanni said civil society groups had, at one time or the other, called for Iwu's removal, robing that plans were on to seek political and judicial

From Bisi Olanode, *Leadings* means to enforce his removal following his woeful performance at the elections. The statement reads in part: "The TMG, NLC, TUC, MBA, UDA, and NANS have expressed opposition to Iwu's leadership of INEC and have for many times called for his removal, except that the Federal Government has been indifferent. We still stand on our calls that Iwu's exist should be hastened. The battle to make Iwu yield position will not be restricted to press releases but will soon assume a new dimension, as it will now be fought on

other fronts, politically and judicially. "As a civil society coalition in the forefront of election monitoring, the TMG will mobilise its over 360 NGO members nationwide and 36 states branches to join hands with NLC, TUC, NEA and other pro-democracy groups to legally express our discomfiture for Iwu's continuation in office and politically press for his removal. Eubanni said the position of the National Association of Nigerian Students (NANS), the Senate and other beneficiaries of the 2007 elections contradict that of the independent voters and cannot be correct in the face of local and international observers' reports.

## Yar'Adua refers Land Use Act Bill to NASS

### • Reps to debate state of naira

PRESIDENT Umaru Yar'Adua has forwarded a bill for the amendment of the Land Use Act to the National Assembly for passage into law. Speaker of the House of Representatives, Dimeji Bankole, read the letter of the bill to members of the House yesterday. Yar'Adua prayed the House to consider and pass the bill expeditiously.

From: Onyeji Ojabor, *Assistant Editor* Also yesterday, the House resolved to debate the state of the naira. This followed a motion of matter of urgent national importance by Hon. Abdullaziz Yar. Yar said he was alarmed at the rate the value of the naira was depreciating against other currencies. He said its value was

sliding at alarming rate, noting that measures must be taken urgently to stop its free fall. Yar, who said the situation had continued for over two weeks, urged the House to save the naira. When Bankole put the question to the lawmakers, the House unanimously resolved to debate the issue with a view to stabilise the currency.



TRANSFER NOTICE

CENTRAL BANK OF NIGERIA  
NIGERIAN TREASURY BILLS

Notice is hereby given by the Central Bank of Nigeria that the Federal Government of Nigeria Treasury Bills of 91, 182 and 364-day tenors amounting to N10,000,000,000, N10,000,000,000 and N20,000,000,000 respectively would be issued by Dutch auction on Wednesday, 12/03/2009.

All Money Market dealers should submit bids through the CBN TEMENOS INTERNET BANKING between 9.00 a.m and 11.00 am on Wednesday, 11/03/2009.

Each Bid must be in multiple of N1,000 subject to a minimum of N10,000. Authorized Money Market Dealers are allowed to submit multiple bids. A bid may be for authorized Money Market Dealers own account, Non-Money Market Dealers or interested members of the public. The result of the auction would be announced by 11:30 a.m. on Wednesday, 11/03/2009. The Bank reserves the right to reject any bid.

Allotment letters would be issued for successful bids on Thursday, 12/03/2009, while payment for the successful bids should be made to your account with Central Bank of Nigeria not later than 11.00 am on Thursday, 12/03/2009.

\*The reserves the right to vary the amount of offer in line with market realities prevailing as at the period of auction of the Nigeria Treasury bills.

ISSUES OFFICE  
CENTRAL BANK OF NIGERIA  
TINUBU SQUARE  
LAGOS.