

CONSTITUTIONALISM AND SUCCESSION POLITICS IN NIGERIA

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Abstract

Even though sections 144 and 189 of the 1999 Nigerian constitution clearly spell out the procedure for succession in case of medical incapacity of the president or a state governor, experiences in the case of late President Umar Yar'adua and now Governor Suntai in Taraba state have shown that the legal framework may not be sufficient to resolve political and governance issues in a country like Nigeria.

This paper will examine the complications surrounding Yar'adua and Suntai cases, why the constitution has not proved sufficient in both cases, and the different interests involved in both cases.

The paper will conclude that the 1999 constitution as it is presently written, and the nature of Nigeria's political elite will make it impossible for a hitch-free succession whenever the President or a state governor is incapable of discharging the functions of his office on account of medical incapacity. Hence, there is the need to amend the constitution and strengthen the legislative and judicial arms of government.

1. INTRODUCTION

The constitution is the bedrock of every democracy. Where there is no constitution, then what you have is autocracy whereby people are ruled by decrees made by the ruling junta. To be sure, the first thing a military leader does on taking over power is to suspend the constitution. In other words, there is no democracy without the constitution. Each Nigeria's different attempts at democracy has always been preceded with constitutional committees as was the case in 1978/79 that gave birth to the 1979 constitution as well as 1998/1999 that gave birth to the 1999 constitution.

Hence, the 1999 constitution is the bedrock of the 4th republic. The constitution is all about playing by the rules and once the constitution is ignored, democracy will be sidestepped and then oligarchy will set in.

The 1999 Nigerian constitution is unambiguous about what should happen in the event of the president or the governor of a state being incapacitated on health ground.

Why then did Nigeria experience a near constitutional crisis when late president Umaru Yar'adua took ill for months in 2009? Why was the constitution not followed to the letter in handling this

case? Why is the same situation repeating itself in the case of Taraba state where the state governor has literally become a vegetable as a result of a plane crash that left him brain dead since 2012? This is the burden of this paper.

This paper has two legs; the crisis that enveloped the last 6 months of Yar'adua's presidency and the ongoing crisis in Taraba state. We will look at the 1999 constitution, then the failure of the major actors, the ruling elite to play by the constitution and the reasons for their actions, as well as what should be done to avert a recurrence in the future.

Constitutionalism is hereby used as the principles of constitutional government or adherence to them. It embodies constitutional rule or adherence to the rule of law in governance. Succession politics here refers to the power play that ensued during the period under study.

2. THE 1999 CONSTITUTION

The 1999 Constitution of the Federal Republic of Nigeria is not silent about what should happen should the president or a state governor becomes incapable to discharge the functions of his office on account of medical incapacity.

Section 144 states that (1) The President or Vice-President shall cease to hold office, if -

(a) by a resolution passed by two-thirds majority of all the members of the executive council of the Federation it is declared that the President or Vice-President is incapable of discharging the functions of his office; and

(b) the declaration is verified, after such medical examination as may be necessary, by a medical panel established under subsection (4) of this section in its report to the President of the Senate and the Speaker of the House of Representatives.

(2) Where the medical panel certifies in the report that in its opinion the President or Vice-President is suffering from such infirmity of body or mind as renders him permanently incapable of discharging the functions of his office, a notice thereof signed by the President of the Senate and the Speaker of the House of Representatives shall be published in the Official Gazette of the Government of the Federation.

(3) The President or Vice-President shall cease to hold office as from the date of publication of the notice of the medical report pursuant to subsection (2) of this section.

(4) the medical panel to which this section relates shall be appointed by the President of the Senate, and shall comprise five medical practitioners in Nigeria:-

(a) one of whom shall be the personal physician of the holder of the office concerned; and

(b) four other medical practitioners who have, in the opinion of the President of the Senate, attained a high degree of eminence in the field of medicine relative to the nature of the examination to be conducted in accordance with the foregoing provisions.

(5) In this section, the reference to "executive council of the Federation" is a reference to the body of Ministers of the Government of the Federation, howsoever called, established by the President and charged with such responsibilities for the functions of government as the President may direct.

145. Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President.

146. (1) The Vice-President shall hold the office of President if the office of President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with section 143 of this Constitution.

(2) Where any vacancy occurs in the circumstances mentioned in subsection (1) of this section during a period when the office of Vice-President is also vacant, the President of the Senate shall

hold the office of President for a period of not more than three months, during which there shall be an election of a new President, who shall hold office for the unexpired term of office of the last holder of the office.

Section 189 is a replica of section 144 except that it pertains specifically to the state level. It states that;

(1) The Governor or Deputy Governor of a State shall cease to hold office if

(a) by a resolution passed by two-thirds majority of all members of the executive council of the State, it is declared that the Governor or Deputy Governor is incapable of discharging the functions of his office; and

(b) the declaration in paragraph (a) of this subsection is verified, after such medical examination as may be necessary, by a medical panel established under subsection (4) of this section in its report to the speaker of the House of Assembly.

(2) Where the medical panel certifies in its report that in its opinion the Governor or Deputy Governor is suffering from such infirmity of body or mind as renders him permanently incapable of discharging the functions of his office, a notice thereof signed by the Speaker of the House of Assembly shall be published in the Official Gazette of the Government of the State.

(3) The Governor or Deputy Governor shall cease to hold office as from the date of publication of the notice of the medical report pursuant to subsection (2) of this section.

(4) The medical panel to which this section relates shall be appointed by the Speaker of the House of Assembly of the State, and shall comprise five medical practitioners in Nigeria -

(a) one of whom shall be the personal physician of the holder of the office concerned; and

(b) four other medical practitioners who have, in the opinion of the Speaker of the House of Assembly, attained a high degree of eminence in the field of medicine relative to the nature of the examination to be conducted in accordance with the foregoing provisions of this section.

(5) In this section, the reference to "executive council of the State" is a reference to the body of Commissioners of the Government of the State, howsoever called, established by the Governor and charged with such responsibilities for the functions of Government as the Governor may direct.

190. Whenever the Governor transmits to the Speaker of the House of Assembly a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to the Speaker of the House of Assembly a written declaration to the contrary such functions shall be discharged by the Deputy Governor as Acting Governor.

Even though the 1999 constitution clearly spells out the procedure for succession in case of medical incapacity of the president or a state governor, experiences in the case of late President Umar Yar'adua and now Governor Suntai in Taraba state have shown that the legal framework may not be sufficient to resolve political and governance issues in a country like Nigeria.

3. YAR'ADUA'S HEALTH AND ITS IMPLICATIONS FOR GOVERNANCE

Yar'adua's health history was an open book. He had a kidney problem, underwent kidney transplant when he was governor of Katsina state, he was under dialysis and was rumoured dead at a time during the 2007 presidential campaign.

As early as January 2009, the centre could no longer hold as far as the president's health was concerned.

- His work schedule had reduced considerably to three to four hours in the office daily
- He could no longer even walk a distance of less than 100 metres to his office

- By August of 2009, after a one week medical trip to Saudi Arabia, there was no major improvement in his health and he could only manage to go to the office about three times a week for only a few hours.
- Between August and November 2009, the president visited Saudi Arabia thrice to attend to his fast failing health.ⁱ

The implications were numerous;

- **He could not sign the 2010 appropriation bill on time.** Even when it was signed allegedly by him on his hospital bed in Saudi Arabia, doubts still remains whether he was actually the one who appended his signature or someone did on his behalf. He could not personally present the 2010 appropriation bill before the National Assembly as is the usual tradition.
- **He could not attend to the crisis in Jos, Plateau state**
The 2010 Jos riots were clashes between Muslim and Christian ethnic groups in central Nigeria near the city of Jos. The clashes have been characterised as "religious violence" by many news sources, although others cite ethnic and economic differences as the root of the violence. Hundreds of people died in fresh clashes in March 2010. According to the New York Times, the slaughtered villagers were mostly Christians, slain by machete attacks from the Hausa-Fulani, a group of Muslim herdsmen. Mr. president was in far away Saudi Arabia's hospital at the time.
- **He could not swear in the new Chief Justice of the federation**
On 30th December 2009, Hon Justice Idris Legbo Kutigi, the out-going Chief Justice of Nigeria, swore in Hon Justice Aloysius Iyorgyer Katsina-Alu as the new Chief Justice. Kutigi did this because President Yar'Adua was bed-ridden in faraway Saudi Arabia without empowering his Deputy, Goodluck Jonathan to act for him by his refusal to transmit a letter to the National Assembly regarding his unavailability contrary to Section 145 of the 1999 constitution. While Justice Kutigi admitted that this was the first occasion an out-going CJN swore in the in-coming one, he had said: "If you look at the Oaths Act 2004, you will see the provision there where the CJN, Justices of the Supreme Court, President of the Court of Appeal and the Justices of the Court of Appeal, among others, are all listed in a column, all of them, according to the Act are to be sworn in by the President or the Chief Justice of Nigeria. The provision is there and it has always been there. That the out-going CJN has never done it does not make it wrong. The law is clear. If you also look at the 1999 constitution, it also makes it clear that the person who has the responsibility of swearing in the new CJN is the Chief Justice of Nigeria". His alibi was termed a constitutional façade by some senior members of the bar.ⁱⁱ
- **He could not attend the UN General Assembly for two years in a row** Established in 1945 under the Charter of the United Nations, the General Assembly occupies a central position as the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of international issues covered by the Charter. It also plays a significant role in the process of standard-setting and the codification of international law. The Assembly meets in regular session intensively from September to December each year,

and thereafter as required. Nigeria could not take its pride of place in the committee of nations because Mr. President was medically unfit.

- **He almost collapsed during the ECOWAS summit in Togo in 2009.**

What would have turned out to be a national embarrassment was averted by the astuteness and the professionalism of his ADC who put his hand under his *Babariga* and literally carried him to a safe place.ⁱⁱⁱ

- Meetings were routinely cancelled including the weekly FSC meetings

“In a nation where so much power was concentrated in the hands of the president, where even routine decisions sometimes require the sanction of the big man, things were gradually coming to a halt in Aso Rock. Meetings were routinely cancelled and crucial decisions could not be taken because ministers and heads of agencies could not secure the approval of the president”.^{iv}

4. THE POWERPLAY

On the advice of his “handlers”, the president refused to transmit a letter to the National Assembly to inform them he was going on a medical leave and that his deputy, the Vice-President should act in his absence. At one time in 2009, he was said to have signed the letter but was prevailed upon by his advisors to jettison the idea telling him that such an act was not mandatory and could prove dangerous since he would lose his powers until he is able to transmit another letter to regain his powers. The Attorney General, Michael Aondoakaa was said to be the arrowhead of this move. His wife, Turai was also believed to be in support.

Prominent Nigerians including Chief Olu Falae, Col. Abubakar Umar and some opposition politicians advised the president to resign on account of his health which continues to impact on the business of governance negatively. They called on the FEC to pass a resolution pursuant to section 144(1) of the 1999 Constitution to the effect that the president appeared incapable of discharging the functions of his office.

However, The Federal Executive Council could not take such an action for a number of reasons; the ministers were not sure they would not lose their position should Jonathan be empowered to take over. Besides, they felt that it would amount to a betrayal to declare the president who had appointed them permanently incapacitated rather than pray for his recovery.

Another issue was that of the unwritten power Sharing arrangement. The power sharing arrangement would be altered as power would revert to the South before the North could have it for 8 years. No wonder the Governors forum led by then Kwara state governor, Bukola Saraki said there was no power vacuum.

The National Assembly could not take a decisive action for the same reason. So, it was not only the president that violated the constitution by not transmitting a letter to the National assembly as per section 145 of the 1999 constitution, but also the FEC by not acting when they knew that the president has become incapable on account of his health, what of the National Assembly that refused to start an impeachment proceeding?

The judiciary was manoeuvred to declare through a High court judgement by Justice Dan Abatu that the Vice President was already acting for the president and that there was no power vacuum whatsoever in the discharge of the functions of the president’s office. He however gave the FEC 14 days to prove medically that the president was fit to perform his duties. This last order was never carried out by the FEC.

The senate was sharply divided amongst the pro Yar'adua group, the pro Jonathan group, and the anti-Yar'adua but not pro-Jonathan.

Those who felt protected from prosecution like former Delta State governor and very close ally of the President, James Ibori would risk being prosecuted should power change hand so soon. He was the brain behind some of the clergymen who visited the president in camera and alleged he was getting better.

Exact same thing is playing out in Taraba state where the governor, Danbaba Suntai, who has suffered a brain damage from a plane crash has refused, courtesy of his allies, to completely cede power to the acting governor even when he admitted that he was not medically fit to govern, and the state executive, the legislature and the judiciary appeared incapable to invoke the constitution.^v The power play in Taraba, just as in the Yar'adua's case borders on power sharing politics, and religious bigotry among others.

5. CONCLUSION AND RECOMMENDATIONS

Is there something wrong with the 1999 constitution?

There are two positions. A group of 41 politicians led by former Senate president, Anyim Pius Anyim and his deputy, Ibrahim Mantu have observed that the Yar'adua situation had exposed the weakness of the 1999 constitution, hence the need to begin a process of amendment to prevent a future reoccurrence. Another position is that there is nothing wrong with the constitution. Rather, it is the operators of the constitution that have not made the constitution to work as conceived.

The submission of this paper is that both positions are correct. There is the need for an amendment to section 144 and section 189 of the 1999 constitution. The Executive councils at both the Federal and the State levels will find it difficult to declare their principal who appointed them medically unfit, even when it is glaringly so as in the case of Yar'adua and that of Suntai in Taraba.

Section 143 of the 1999 Constitution also made provision for removal of the president in case of gross misconduct on his part. Why was president Yar'adua not impeached when he refused to transmit a letter to the National Assembly and when he glaringly failed in performing the functions of his office? It was because the political elite lacked the political will to do the right thing because of personal interests that are asymmetrical to the public interest. Second, our position is that the different institutions of democracy; the legislative and judicial arms proved too weak and compromised to act in the overall interest of the nation because of the same reasons. Power is highly personalised in Nigeria resulting in a situation whereby the winner of the election as the President or governor dominates the political system. This situation could be mitigated when the legislative arm is powerful. Contributing to the debate on how to foster democracy in a country like Nigeria with "daunting structural and cultural obstacles; poverty, inequality, and deep ethnic, national, or religious divisions?" Andrew Reynolds asserted that "institutional engineering is one possibility"^{vi}.

When the legislature is weak, the executive typically encounter little effective opposition.

We will contend that the Yar'adua and Suntai sagas were part of the teething problems of a developing democracy.

Developed democracies like the USA and France went through similar experiences in their developmental stages. In a paper by a former British foreign Secretary David Owen at a lecture he delivered to the Autumn Scientific Meeting of the Association of British Neurologists and the British Neuropsychiatry Association on 3 October 2002, "The most serious case of incapacity in a Head of State or Government over the last 100 years was that of President Woodrow Wilson. He had had hypertension for many years, and retinal changes had been recorded in 1906. He suffered a right middle cerebral artery stroke in 1919 while in his second term as President of the US. His

consciousness became impaired on 2 October, with a complete paralysis of the left side of his body and a left homonymous hemianopia, his speech was weak and dysarthric, and he developed hemi-inattention and anosognosia. In not facing up to the seriousness of his illness, he referred to himself as being 'lame'. This denial by the President was buttressed by his wife and by his personal physician, Admiral Grayson, who told the Cabinet on 6 October that Wilson was only suffering from a 'nervous breakdown, indigestion and a depleted nervous system'. Grayson had made it clear he would not sign any certificate of disability. There is little doubt that Wilson should have stepped down at least for a period of time from October, until it was clear whether or not he was going to recover. Had he done so, it might have been possible to persuade Congress to ratify the Treaty establishing the League of Nations, which might have helped stop World War II. Between his wife and his doctor, the false image was given of a working President. As a result his wife is often spoken of as America's only woman President and his doctor has been much criticized for putting his patient before the needs of the country. In the same year in France, President Paul Deschanel's wife was signing official acts for her husband"^{vii}.

It has been argued that "the more challenges a system has survived and successfully managed, the more stable it will be, while the more crises and conflicts cumulate over time without successful resolution, the more unstable the system will be"^{viii}. The fact that Nigeria's democracy was able to pull through the Yar'adua saga without any threat of a military coup is a positive signal that Nigeria's democracy is developing. With the Yar'adua saga, the National Assembly was able to invoke the "doctrine of necessity" which made it possible for the Vice President, Goodluck Jonathan to become the Acting President without a letter from Yar'adua, and he eventually became the president on Yar'adua's demise in May 2010.

The Taraba case will likely be resolved not necessarily by the constitution but by the fact that Suntai's regime will run out in 2015. Until then, the Deputy Governor, Garba Umar will remain the Acting Governor while Suntai, who is apparently medically incapacitated, remains the substantive Governor.

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^{iv} *ibid*, p.186

^v <http://www.thisdaylive.com/articles/suntai-admits-he-s-not-fit-to-govern-taraba-state/169914>

^{vi} Andrew Reynolds (2002), in Andrew Reynolds (ed.), *The Architecture of Democracy, Constitutional Design, Conflict Management, and Democracy*, p.3.

^{vii} In 2002 Lord Owen gave a lecture to the Annual Meeting of the Association of British Neurologists and the British Neuropsychiatry Association on "The effect of serious illness on Heads of State or Government". This was later published as an Occasional paper in the QJM (Q J Med 2003; 96:325-336) entitled "Diseased, demented, depressed: serious illness in Heads of State. In February 2005, as Chancellor of Liverpool University, Lord Owen delivered the Lord Henry Cohen History of Medicine Lecture on "The effect of Prime Minister Anthony Eden's illness on his decision-making during the Suez Crisis". This too was subsequently published as an Occasional Paper in the QJM (Q J Med 2005 98(6): 387-402). In November 2006 an article by Lord Owen on "Hubris and Nemesis in Heads of Government" was published by the Journal of the Royal Society of Medicine (J R Soc Med 2006, 99:548-551). (<http://www.lorddavidowen.co.uk/hubris-syndrome>).

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