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PART ONE

I. National Objectives and Public Accountability: An Analysis of the Draft Constitution

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The issues discussed in this essay - the fundamental objectives of the Nigerian state, public accountability, and a code of conduct for state officials - have been central concerns throughout its post-colonial history. Underlying these debates have been differing views about the best political economy model for Nigeria. The March 1977 conference brought together an impressive array of political, professional, and civic leaders to discuss with academic scholars the draft constitution for the Second Republic.

The usual approach of most contributors to the debate on the draft constitution has been to focus on one or a few key issues and then argue their agreement or disagreement with the positions taken by the Constitution Drafting Committee (CDC). The general question which concerns me is what kind of constitution has the CDC produced. To this end, attention has also been devoted to the Report of the CDC which seeks to explain and justify the central provisions of the draft.

Constitutions, as we know, differ not only in their provisions but also in their purpose and scope. For example, although the Nigerian draft constitution resembles the United States constitution, the former is over five times as long. Many contemporary dictatorships have constitutions that serve to camouflage the exercise of power rather than guide and determine it. In short, an important part of the debate on the draft constitution should involve understanding what kind of document we have before us. The CDC has taken an ambitious and innovative approach to constitution-making. By its own admission, it has sought to go beyond producing a constitution that is a code of rules and regulations (the fundamental law of the land), and includes a second dimension: the constitution as a charter of government. In this latter role, the constitution should embody "immediate specific policy goals…or long-term ideals" (p. vi).

The traditional perspective was deemed too narrow to meet the needs of Nigeria: "Unless the goals and the fundamental attitudes and values that should inform the behavior of its members and institutions are clearly stated and accepted, a new nation is likely to find itself rudderless, with no sense of purpose and direction" (p. vi). It can be argued that the CDC fails to recognize that its draft constitution includes a third dimension, namely an embryonic political program. Some commentators (including the Sub-Committee on National Objectives and Public Accountability) have grouped perspectives two and three under the rubric of "ideology." The reason for distinguishing them here is that, whereas the scope of the second dimension is

unexceptionable in any modern state - showing concern for the welfare and social advancement of the people - the third dimension is ideologically more specific.

In response to the suggestion of the National Objectives Sub-Committee that "socialism operating within the framework of participatory democracy" should be enshrined in the constitution (Vol. II, P.36), the CDC instead proposed "an economic system in which (i) there is not a concentration of economic power in a few hands or group; (ii) there is a population of moderately wealthy people and there are no extremes of poverty or wealth; and (iii) the economy will be open and participatory; that is to say, there will be opportunity for public and private enterprise to co-operate,.." (pp. xiv-xv). *One of the striking aspects of this draft constitution is that while social welfare objectives are non-justiciable, private economic rights are made enforceable.* The CDC argued this point by contrasting the constitution as a code of rules with that of a charter of government: "To insist that the right to freedom of expression is the same kind of "right" as a "right" to free medical facilities and can be treated alike in a constitutional document is, the majority of us feel, basically unsound." (p. xvi).

It should be noticed that the CDC majority was not consistent in applying the argument that economic and social rights require different constitutional treatment from "fundamental rights." This can be seen in the provision conferring on individuals the right to acquire plots of State land for investment purposes.

Fundamental Objectives and Directive Principles

As mentioned above, a bold departure in this draft constitution has been the attempt to spell out in detail "the principles on which the State is organized" and the "ideals and objectives of the social order." (p. vi). Most constitution-drafters usually content themselves with a few bland phrases in the preamble to satisfy this function. Nevertheless, there was a fundamental contradiction embedded in Chapter II: the declared non-justiciability of its stipulations and the fact that the more a set of ideals and objectives are spelled out, the less of "ideals" and "objectives" they become. In explaining the rationale behind this Chapter, the CDC contended that a major defect of previous Nigerian constitutions was their silence on "the duties of the government towards its subjects." It was now essential, therefore, to "cast on the State definite duties towards its subjects" (pp. v-vi). This use of the term "duties" to refer to non-enforceable objectives would pose problems for most political philosophers, beginning with John Stuart Mill: "It is a part of the notion of Duty, in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing which may be exacted from a person as one exacts a debt, Unless we think that it may be exacted from him, we do not call it his duty…"

On the second point, there is an obvious difference between announcing that "food and drink will be served," and the listing of choice dishes and beverages which may or could or

should be served. The latter only tantalizes without actually guaranteeing more than the former. One is left to wonder if the members of the CDC considered satisfactorily the question: Where does the work of constitution-drafters end and that of political parties and legislatures begin? Moreover, a three-way complication (which runs throughout the constitution) is created by first specifying in detail what principles and objectives should guide subsequent governments, then insisting that no means of compelling compliance can be entertained. Further, it is assured that these stipulations remain operative (i.e. may not simply be disregarded).

To illustrate the above argument, we can examine S.10 of Chapter II. After stipulating that the State shall operate "the major sectors of the economy," and protect the right of Nigerians to operate outside these, it is then stated that these "major sectors" will be determined periodically by resolution of both houses of the National Assembly. [Constitutional language was used to bridge the aspirations for a socialist and capitalist Nigeria by essentially allowing for both, simultaneously.] Or take S.10(4), which stipulates that the Assembly "shall" set up by law a body to review the ownership and control of business enterprises and make recommendations to the President, and administer any law "for the regulation of the ownership and control of such enterprises." Here again we find specific duties being "cast on" State institutions but without any means of exacting fulfillment.

If it is deemed important that such a regulatory body be established, why is it not in the enforceable section of the Constitution along with the other commissions and supervisory organs? And is not a juristic quagmire being created by providing for bodies to be established to administer laws when the actual provision on which the body is itself created is only a "principle" or "objective"? Here as elsewhere we find the CDC trying to create a bridge between the general principles and the substantive sections of the draft. Even to someone who is not a student of jurisprudence, it appears that these very specific codes in Chapter II, which fall between the general principles of S. 10 regarding the public and private economic domains, and the enforceable provisions of S.36 and 37, are likely to create significant problems for the new polity.

A related problem, partly linguistic in nature, is to be found both in Chapter II as well as other parts of the draft. For instance, in S.11 on the ideals of freedom, equality and justice, it is stated that its provisions "shall not invalidate a rule of Islamic Law or Customary Law." How could a list of principles and objectives invalidate anything, especially when these are declared non-justiciable? Or, in S.13 of this Chapter where it is stated that "local government by democratically elected local government councils is guaranteed," it may be asked: How can a particular practice be *guaranteed* in a constitution and yet not be enforceable? To understand that this writer is not simply "splitting hairs," it must be seen that the list of Objectives and Principles does not stand apart from the main body of the constitution in the way of conventional preambles. Just to take one of many examples, in S.123(3) regarding the appointment of

commissioners by State Governors, it is stated that "in making such appointments the Governor shall conform with the provisions of sub-section (3) of section 8 of this Constitution." Section 8, of course, falls within Chapter II on Objectives and Principles. Here as elsewhere, we find the contradiction of having to conform with a principle that a public official cannot be made to conform with (i.e. that is non-justiciable).

A more specifically linguistic problem is the use of the word "shall" in the draft constitution, and particularly Chapter II, either singly or as part of a compound verb. An unambiguous use of it with regard to the directive principles is to be found in SS. 146 and 147 on civil service appointments by the President and Governors, where it is stated that they "shall have regard to the federal character of Nigeria" and "shall have regard to the diversity of the people…" This looser usage must be distinguished from the "shall conform with" mentioned above, which parallels the similarly problematic "shall observe and conform to" in S.148 linking the enforceable Code of Conduct with the Objectives and Principles. This ambiguity can be found both within Chapter II and wherever the former is referred to elsewhere in the draft. The important point is that Chapter II includes statements of differing degrees of obligatoriness. On education, for example, we find merely directive statements: "shall endeavor to," "shall take all possible steps to" and "shall strive to." Elsewhere in the same Chapter, however, we get more obligatory statements: "A body shall be set up by a law" (S.10) and "every State shall ensure their existence under a law" (S.13 referring to local councils), where the meaning parallels such commands in the rest of the constitution as "there shall be a National Assembly" and "there shall be a President."

I will return in the concluding section to the ambiguities created by the CDC's attempt to write a constitution that would combine a code of formal regulations, a charter of "good government," and its own [and conflicting] socio-economic preferences. The point to note here is that Chapter II follows closely in many respects the Report of the National Objectives Sub-Committee. One striking difference between the two is that whereas the CDC introduced into the political system the various contradictions and ambiguities cited above between the non-justiciable and enforceable sections of the constitution, the Sub-Committee had attempted to confer on the judicial system a role in mitigating and resolving the inevitable disputes. Thus, Art. 2 of its Report gave citizens the power to apply to the Court for a declaration concerning the conformity of an authority's actions and the Directive Principles, Art. 3 stipulated that such a power of the Court does not extend to invalidating a law, and Art. 4 positively stated that the Court's declarations can serve as grounds for the impeachment of the functionaries concerned.

The CDC threw out Art. 2 and 4, and extended Art. 4 to exclude the courts from this domain altogether. Judicial officers may breathe a sigh of relief in being spared involvement in no-win situations with the executive and legislative organs of the State. Yet one cannot but feel concerned if the new Republic is ushered in with such an open invitation to raise constitutional

challenges to legislative and executive actions, but with no means of effecting even temporary settlements of the disputes in favor of one or the other party.

Public Accountability

A term much in vogue in contemporary political discourse in Nigeria is that of "public accountability." As understood by most commentators, this term usually refers to the need for curbing the widespread abuse of office by public officials. Attention has therefore been focused on the introduction of some variant of the Ombudsman system and a code of conduct for public officers. "Public Accountability" can also be seen as one of the general determining features of democratic government: those holding political office should be held accountable to the public for their actions. This accountability is usually manifested at the time of elections, but not necessarily so. In parliamentary or semi-parliamentary systems, the executive is also held accountable in a more continuous fashion by the legislature. In the case of the draft constitution, special attempts to ensure public accountability can be seen in the establishment of the Public Complaints Commissions (PCC) and the codes of conduct, and also in the large number of supervisory commissions whose function, membership and often procedures are spelled out in the constitution. Unfortunately, the reader who wades through the many provisions in the draft regarding these commissions is likely to encounter striking inconsistencies and ambiguities. Let us first look at the Public Complaints Commissions which are to be established at the federal and state level. These commissions would receive complaints regarding "corruption, inefficiency or waste," investigate such charges, and submit reports to the appropriate authorities (SS. 81-89).

The first problem to notice is the sheer breadth of the PCC's domain, including the actions not only of all government departments and parastatal institutions and officers thereof, but also all private firms and associations. In fact, the purview of the PCC has been made as wide as that of the National Assembly, and covers a field that in some western countries is divided between Citizens' Complaints Bureaus and variants of the Ombudsman system. It is the prerogative of the President and Governors to appoint members of the respective PCC (S.84). If they fail to do so within three months, these members, including the chairman, shall be appointed by the Senate or State House of Assembly. Yet there are no provisions regarding how these Houses are to make these appointments (compared with the clear details in 55. 91-91 regarding the appointment and removal of the Auditor-General). In S. 87 it is stipulated that the PCC shall submit reports on any investigations and inquiries to the National Assembly and State Assemblies as well as annual reports to the President and Governors, yet there is no provision regarding what should follow from the submission of these reports. Considerable powers for the purpose of carrying out its investigations are given to the PCC in S.89, including the power to "prescribe penalties," yet there is no indication as to how, or by whom, these penalties are to be imposed.

In the case of Part II of Chapter VI, with its long list of commissions, we enter a dimension in which textual analysis must be supplemented by a fair amount of guesswork. The first point to note is that there are four major bodies for which the President will enjoy absolute power of appointment, i.e. without the need to obtain confirmation by the Senate: the Council of State, the National Defense Council, the National Economic Planning Commission and the National Security Council (S.129). The institution, however, whose purpose is most unclear to this reader, is that of the Council of State (5.137). Here we have a very large body consisting of Chief Justice, Grand Muftis, State Governors, Traditional Rulers, etc., presided over by the President and Vice-President – in short, a second upper house. Its duties are at the same time specific and broad, including Mercy, National Honors, keeping abreast of the Electoral, Judicial and National Population Commissions, as well as public order and any other matter delegated to it by the President. Its basic responsibility is to advise the President in all these areas. Now, the proposal to establish this Council obviously derives from the recent creation of a Council of States in Nigeria to provide for consultation between the Supreme Military Council and the State Governors.

In the draft constitution, this basic principle has evolved to include consultation with all present and past senior state and judicial officers and traditional and religious rulers of the Federation. There are three questions that can be raised regarding this Council of State. First, if its duty is to advise the President, is it not too large, too unwieldy, too heterogeneous a body to do so effectively? Second, if consultation with the major social and institutional forces in the country is its *raison d'être*, would this not conflict in principle with the existence of two elected Houses? And third, has sufficient attention been paid to the French *Conseil d'Etat* which is an independent and more streamlined body with power to rule in legal and administrative actions of the government, as well as provide some measure of protection to individuals against the government's abuse of its powers? In S. 158(3), for example, it is stated that if the Council advises the President to reject a census report, "he shall declare the report so rejected." In this case, the Council's authority appears to go beyond the normal understanding of the word "advise," yet it closely parallels the *Conseil d'Etat's* power to invalidate election results in France.

One would normally expect legal drafters to be more precise in their use of certain terms. For the Judicial Service Commission (pp. 56-57), a list is given of twelve categories of persons who would constitute its membership. Yet we read (in category xi) "four persons not being persons qualified as legal practitioners in Nigeria… and (xii) "four persons not being qualified lawyers." The distinction being made here completely escapes this reader. Another similar, albeit broader, problem concerns the use of the terms "public" and "private." In discussing the Public Complaints Commission above, we saw that its domain includes "any company, firm or association of persons" whether owned by the Government or private individuals." Yet, in the stated functions of the National Council on Establishments, it is specified that the term public

services "does not include state-owned companies and statutory corporations engaged in business enterprises which are substantially the same as those in the private sector of the economy." There may be an underlying principle here, regarding just how we define what is "public," but it is certainly not apparent or consistent from one section of the draft to another.

The Commission whose purpose and functioning is made unexpectedly confusing is that of the Police Service Commission (PSC). This Commission is of reasonable size, 8-10 members, and its duties are specific: to advise the President on the appointment of the Inspector-General of Police, to appoint other persons in the Police Force, and to dismiss and discipline any of the latter (p.60). Yet, in S.163, it is stipulated that the PSC may delegate any of its powers to any of its members or to the Inspector-General or any other member of the Force. The first question to ask is why this provision has been included enabling a statutory commission to divest itself of any, or all, of its stipulated duties? Secondly, why did the CDC not specify which of these powers, or related to which ranks of the Police, they felt the PSC may wish to delegate its supervisory duties (and to whom)? The final point to be made here, and perhaps derives from a certain sloppiness in the drafting of this section, is that it is stated in S.163(2) that the PSC shall consult the President (or Governor) before appointing or removing from office the Inspector-General (or Commissioner of Police). Yet this contradicts S.137 where it is specifically stipulated that the PSC shall only *advise* the President regarding the Inspector-General's appointment and play a role only in the dismissal of *other officers*.

The Code of Conduct

It is to be expected that some of these supervisory commissions, assuming their duties and membership are more clearly spelled-out (and they are not permitted to delegate too many of their duties to the persons they are meant to supervise) can come to play an important role in ensuring the public accountability of state officials. More specifically, however, the latter are expected to live up to the "Code of Conduct for Public Officers" or the "Fourth Schedule" of the Constitution (pp.95-100). Once again, unfortunately, some difficulty is encountered in relating the assumed principles to the actual provisions of this section. A foreign company or enterprise in this Schedule is understood to be firms "in which persons other than the government, its agencies or Nigerian citizens, own controlling shares" (p. 95). Yet, in view of the current Indigenization Program, it can be expected that such firms would significantly decrease in number over time. When we look at Article 5, however, we find a very restricted list of former public officers barred from employment in these "foreign companies": President, Vice-President, Federal Chief Justice, Governor and Deputy Governor. What is the rationale, it may be asked, behind this provision? If the aim is (1) to avoid undue influence on senior state officials by the lure of post-retirement jobs, (2) the exercise of undue influence by the use of these former public officers in dealing with the State, and (3) considerations of state security (economic as well as political) in the subsequent employment of highly knowledgeable citizens, it must be asked why

the list of officers so debarred does not also include permanent secretaries, senior military officers, and others.

A longer list of specific public officers who fall under other sections of this Schedule is given on p. 100. Article 4 stipulates that such officers may not hold after retirement more than one "remunerative position as chairman, director of employee of a company owned or controlled by the government or public authority or receive any other remuneration from public funds in addition to his pension…." Article 11 also lays down requirements for the periodic disclosure of assets by such officers before, during and after their state employment. Now, Article 14 modifies 4 and 11 by granting to the National Assembly the power to exclude from these provisions any cadre of public officers "if it appears to it that their position in the public service is below the rank which it considers appropriate for the application of these provisions." Such a power of exemption should be examined closely for the following reasons. Article 4 in actual practice will only have a bearing on public officers of high or moderately high rank, since it is unlikely that those of lower rank could procure more than one post-retirement job with a public or parastatal company, or further remuneration from public funds. On Article 11, since recent investigations into corruption and abuse of office have revealed cases of misconduct even among lower ranked public officers, there appears to be no *a priori* argument for excluding any of the cadres listed among the specified offices. If anything, and following what appears to be a more fundamental principle in this Schedule, authority should have been conferred on the legislature to *add* to the list of specified officers as it deems appropriate.

Another thorny problem tackled in this Schedule, but not with notable success, is the disguising of improper favors under the rubric of "custom." Public officers under Article 5(3) may accept personal gifts or benefits only "to such extent and on such occasions as recognized by custom." Moreover when such gifts or donations are made "on any public or ceremonial occasion" such gifts must be treated as being made "to the appropriate institution represented by the public officer." On reflection, this section manifestly fails to achieve its apparent purpose. The bestowing of "customary gifts" to persons of authority has not only continued with the transition from traditional to modern Africa, it has also been transformed and magnified with the increase in disposable wealth. The CDC has settled for a firm proscription of individual appropriation by public officers of gifts made to them during public ceremonial occasions, yet it has registered no advance in the need to lay down a distinction between a "bribe" to a public officer and a customary gift to such an officer.

For part of the answer to the question why the Fourth Schedule of the draft constitution is so unsatisfactory, it is helpful to contrast it with the relevant section of the Report of the Sub-Committee on National Objectives and Public Accountability. The Sub Committee began this section of its Report by summarizing the principles and provisions of the existing Leadership Codes of Tanzania and Zambia. It apparently sought to apply to the Nigerian situation the

fundamental philosophy behind these Codes: high and middle-level public servants, called "Leaders," should not place themselves in situations where their personal interests may conflict with their public responsibilities, or which enable them "to exploit others." Such leaders and their spouses should therefore draw only one salary, should not employ workers in any trade, profession or vocation, and should not run or rent houses or hotels for profit. Despite certain exemptions, we have here a very clear code of conduct.

For Nigeria the Sub-Committee adopted the proposal proscribing additional sources of income for public servants. The CDC, however, discarded it. The Sub-Committee barred public servants on the Specified List from accepting *any* remunerative position after retirement in a public company, or drawing on public funds other than their pensions. The CDC greatly modified this position to read "more than one remunerative position." And whereas the Sub-Committee proscribed receipt by specified public servants of any property, benefits, or "gifts of whatever nature," the CDC permitted the receipt of customary gifts. While the Sub-Committee was silent on the question of "foreign companies," the CDC introduced it to no apparent effect. The conclusion appears that, through the dilution of certain provisions of the Sub-Committee's code of conduct, any real bite it may have had has been significantly reduced. Instead, the CDC has submitted a "Fourth Schedule" which hardly rates as a satisfactory check on the disproportionate appropriation by political elites of the national wealth.

Conclusion

To return to the central theme of this paper, a hallmark of this draft constitution is that the socio-economic system desired by the CDC majority has not been left implicit in the way of most liberal constitutions. The CDC sought to ensure that the economic system that should prevail in the new polity will be as explicitly stated as the political system. If Tanzania's 1967 Arusha Declaration sought to exclude public officials from real-estate speculation, the present draft constitution seeks the very opposite. It is no exaggeration to say that this draft includes a charter for the urban and rural *rentier* class in Nigeria. This is made explicit in pp. x – xiii of the CDC Report regarding private entitlement to state land for investment purposes. The National Objectives Sub Committee had included among its proposals that "the state shall, as a long term goal, strive towards a socialist order based on public ownership of the means of production and distribution" (p.36). In rejecting this proposal the CDC majority contended that Nigeria "has always had its own ideology, namely Mixed Economy."

Socialism is dismissed as "conceived in a foreign political and social climate" (p.xiii). One wonders where "Mixed Economy" was conceived. The use of terms in this section of the Report is fanciful. The Nigerian economy, we are told, is "socialist" in certain areas, by which the CDC means that the state has assumed control of particular sectors of the economy when it has felt an overriding reason to do so. On the basis of this understanding of "socialist," no

country on earth is socialist. Some, like Brazil, with extensive state ownership and control in the economy, would be considered highly "socialist" despite the nature of the political system and the disproportionate appropriation of the national wealth by the ruling classes. The CDC majority appears to favor the same ideological justification as the contemporary government in Kenya: "It is through investment and effort that we can increase the accumulation of the goods to distribute to all" (p. xiii). The problem with this approach is that the more accumulation takes place in private hands, the more difficult it becomes to arrange for their redistribution to the masses of the people.

In short, the CDC majority was sure about what it wanted in the economic domain. The right to private property is clearly stated (S. 36), and there shall be no expropriation without proper compensation. The degree of consensus is even remarkable in such cases as the decision to revoke the monopoly on the export and foreign purchase of certain commodities by the Marketing Board. Exploitation is no longer a process by which the surplus product of certain classes of the society is appropriated through various means by other classes, but merely the use of "human or natural resources for selfish ends." Therefore, on economic matters, the CDC majority can be said to have articulated the principles of a bourgeois-liberal system and one in which the state will intervene largely to "mitigate the harsher effects of private competition."

It is with some difficulty that one sees this draft constitution as having taken full account of the social, educational, and material situation of the millions of Nigerians for whom it is also supposed to represent, as *their* Charter of good government and a just society. Moreover, it is pertinent to ask if such a provision as the one requiring periodic disclosure of assets is likely to pose a significant challenge to a class of individuals who, according to Professor R. K. Udo of the University of Ibadan, have rendered ineffective all previous attempts to impose "rent control, price control and fraud control." For the National Objectives Sub-Committee, "the values and objectives declared should be "the really fundamental ones widely shared in the community, and not the sectional objectives and goals of a particular group or the particular social and economic policies of a ruling party." (Vol. II, p.36). It is manifestly clear to this writer that the CDC has failed to pass this test in its provisions for ensuring optimum public accountability of those with innumerable means to use the public patrimony as their private estate.