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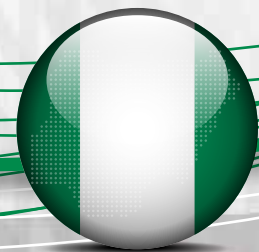
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NIGERIA

The Colonial Legacy and Transitional Justice

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The Colonial Legacy and Transitional Justice

Authored by DR Hakeem Yusuf (Consultant)




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ACRONYMS

ACJA	Administration of Criminal Justice Act
MOSOP	Movement for the Survival of the Ogoni People
NDP	National Development Plan
POGG	'peace and good government'
3Rs	rehabilitation, reconstruction and reconciliation'
SMTs	Special Military Tribunals
TIA	Tribunals of Inquiry Act

I INTRODUCTION

Nigeria is a multi-religious and multi-ethnic country with over 250 ethnic groups.¹ The people of the various kingdoms and empires in the territories now known as Nigeria, first came into contact with Europeans from about 1450 through the trade in slaves. British colonial rule in Nigeria commenced with the annexation of Lagos as a Crown Colony in 1861.² Nigeria as we now know it, was created in 1914 with the amalgamation of Northern and Southern Protectorates of Nigeria. These Protectorates had been separately subjected to colonial rule until that point. Nigeria achieved independence from British colonial rule on 1 October 1960. It became a republic in 1963, which meant the Queen was no longer head of state. Over the course of time, the country has been transformed into a federation with a central government and thirty-six sub-national units (states).³

The current injustices in Nigeria are strongly connected to the country's colonial history. Colonial policies, laws and structures have continued in use, either directly or indirectly and to various extents, long after independence.

This report provides an overview of the legacies of colonisation and demonstrates its impact on transitional justice in Nigeria. It argues that the current injustices in Nigeria are strongly connected to the country's colonial history. Colonial policies, laws and structures have continued in use, either directly or indirectly and to various extents, long after independence. These 'legacies' play a fundamental role in the limited success of transitional justice movements in Nigeria. The first part sets out

the colonial experience in the country. The second part examines the post-colonial era and the authoritarian rule that followed closely on the heels of colonial rule. There is an examination of the political transition to democratic governance and the need, at that point, for transitional justice mechanisms and processes to address gross violations of human rights. The third part examines the engagement with transitional justice mechanisms and processes deriving from the dynamics of the two previous periods.

¹ Chinonye Obiagwu and Chidi Anselm Odinkalu 'Nigeria: Combating Legacies of Colonialism and Militarism' in Abdullah A. An-Na'im *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (University of Pennsylvania Press 2003) 211 at 212.

² A narrative of how the cession came about is provided in *Attorney General of Southern Nigeria v John Holt and Company (Liverpool) Limited and Others* [1915] A.C 1, 4-7.

³ At independence, there were four strong regional governments which were progressively broken down for the current 36- state structure.

II THE COLONIAL LEGACY

Law and Justice Framework

The use of the ‘peace and good government’ (POGG) power was an important feature of British imperial rule all over the world. In the famous colonial law case, *Ibralebbe v The Queen*,⁴ Viscount Radcliffe, stated that “The words ‘peace, order and good government’ connote, in British institutional language, the widest law-making powers appropriate to a Sovereign.”⁵ POGG is a term of art: whoever was conferred with the power – whether a colonial governor or a legislative body – could not be questioned.⁶ POGG has been used for furthering the cause of British imperialism (to facilitate direct or indirect control and governance of its overseas possessions). It has also been used for granting powers of self-rule (and later independence) at some point, to various parts of the British Empire.

POGG served as a linchpin for legalising British colonial rule in Nigeria too. It was introduced into Nigerian law in 1872, through an Order in Council, which was granted power to the British Consul over British subjects in the Niger Delta territories⁷ as well as other parts of the country. For instance, Section 6 of the Northern Nigeria Order in Council of 1899 provided that the High Commissioner may, in the exercise of the powers and authorities conferred upon him through Proclamation:

“The words ‘peace, order and good government’ connote, in British institutional language, the widest law-making powers appropriate to a Sovereign.”

“...provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of Northern Nigeria, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace.”

Following the amalgamation of the Northern and Southern Protectorates in 1914, the country was governed as a unitary state.⁸ However, the McPherson Constitution of 1951 introduced a modified federal system for the administration of the country.⁹ Nigeria became a full-fledged federation under the 1954 Lyttleton Constitution.¹⁰

Each of the country’s colonial constitutions, from 1914, to the Independence Constitution of 1960, provided for ‘peace, order and good government’ of the country. Similar provision for ‘peace, order and good government’ is contained in the post-colonial constitutions, from 1960, to the current 1999 Constitution. However, the Independence Constitution and the 1963 Republican Constitution further linked the ‘peace, order and good government’ clause to the declaration of a state of emergency, by the federal (central) government. Sections 65 (1) and 70 (1) of the Independence and Republican Constitutions respectively provided that Parliament is empowered

⁴ 1964] A.C. 900 P.C.

⁵ Ibid. at 923.

⁶ See Hakeem O. Yusuf *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge Abingdon 2016).

⁷ See Benjamin Obi Nwabueze *A Constitutional History of Nigeria* (C. Hurst and Co. London 1982) 6.

⁸ Isawa Elaigwu ‘Federalism in Nigeria’s New Democratic Polity’ (2002) 32 (2) *Publius* 73, 74.

⁹ Ignatius Akaayar Ayua and Dakas J. Dakas ‘Federal Republic of Nigeria’ in John Kincaid and G. Allan Tarr *Constitutional Origins, Structure and Change in Federal Countries* (McGill University Press Montreal & Kingston 2005).

¹⁰ A. Inegbedion and E. Omoregie ‘Federalism in Nigeria: A Re-Appraisal’ (2006) 4 (1) *Journal of Commonwealth Law and Legal Education* 69, 71; Ignatius Akaayar Ayua and Dakas J. Dakas ‘Federal Republic of Nigeria’ in John Kincaid and G. Allan Tarr *Constitutional Origins, Structure and Change in Federal Countries* (McGill University Press Montreal & Kingston 2005) 242

to make laws for the country or any part of it which is not covered by the legislative lists¹¹ but which Parliament considers “necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.”

Law Enforcement and Security

The British established decentralised military and police forces in the various territories that became Nigeria at the inception of colonial rule. This was with a view to expand its control over the territories.¹² The first of such forces was the Consular Guard established in Lagos, South West Nigeria in 1861. This was an armed force with the mandate to protect the colonial government’s interest. The British had established a police force drawn from the northern part of the country to protect its rule in the South West, which was made up of the Yoruba ethnic group. This police force was consequently also known as the ‘Hausa Force’.¹³ Thus, the British set out to promote discord among ethnic groups in the country. In that way, the Nigerian Police, right from its inception,¹⁴ suffered from a cultural dislocation.

Colonialism played a critical role in police culture in Nigeria.¹⁵ Police forces were employed as agents of repression and violence following piecemeal conquests of indigenous populations.¹⁶ The duty of the police was to enforce law and order, subdue and subjugate the local communities and foster the interests of the British Empire. Thus, the Police, accountable only to the colonialists, engaged in excessive killing, maiming and looting. This approach to policing remains a prominent feature of not just policing, but also virtually all of military and security agencies and forces in the country to date. It is pertinent in this regard, to note that the military and other security forces in the country grew out of the initial colonial forces.

Colonial Political Economy

On the political front, British colonial rule in what is now Nigeria, essentially began from coastal areas with the establishment of ‘Crown’ colonies. What came to be referred to as ‘direct rule’ was established in these Crown colonies. ‘Direct rule’ was a system which involved the use of British institutions implementing British ideas of government. However, British Colonial rule in many territories that became Nigeria, was conducted through a system of ‘indirect rule.’ ‘Indirect rule’ involved governing the local population through indigenous political institutions. As the opposite of ‘direct rule’, it referred to rule through the deliberate exclusion of British institutions and ideas.

Colonialism played a critical role in police culture in Nigeria. Police forces were employed as agents of repression and violence following piecemeal conquests of indigenous populations.

This took different forms, being dictated by local circumstances in the estimation of the colonialists. The particular form from place to place was dependent on the nature of the political institutions of the respective peoples.¹⁷

¹¹ Similar to many federal systems, there is an allocation of legislative powers between the two tiers of government in the Nigerian Constitution. There is the ‘Exclusive Legislative List’ which outlines the matters in under the exclusive jurisdiction of the federal (central) government and the ‘Concurrent Legislative List’ which sets out the matters over which the federal and state governments have shared legislative powers.

¹² Tekena Tamuno *The Evolution of the Nigerian State* (Longman London 1972) 33-35. Amnesty International ‘Rest in Pieces’. Available at: <http://hrw.org/reports/2005/nigeria0705/1.htm>

¹³ The Hausa (along with the Fulani) is the major ethnic group in Northern Nigeria.

¹⁴ It was officially created by the merger in 1930 of the Lagos Police Force, the Southern Police Force and the Northern Police Force under Inspector-General Duncan.

¹⁵ Etanibi O. Alemika & Innocent C. Chukwuma *Analysis of Police and Policing in Nigeria: A Desk Study on the Role of Policing as a Barrier to Change or Driver of Change in Nigeria* (CLEEN FOUNDATION Lagos Nigeria) 9-11.

¹⁶ Ibid.

¹⁷ E. A Afigbo *The Warrant Chiefs- Indirect Rule in Southeastern Nigeria 1891-1929* (Longman London 1972) 2-5.

Broadly stated – as there were gradations¹⁸ – under indirect rule, the authority of traditional rulers (kings or chiefs) was officially recognised by the British. Such rulers were then allowed to maintain their power and govern their people through the various local systems and ideas to which the people were accustomed. In return for such recognition, the traditional rulers were themselves subjected to the authority and control of a colonial administrator.¹⁹

The imposition of indirect rule was however not always a smooth process. Notwithstanding the military might of the colonial authorities, there were several instances of resistance to the subjugation of the traditional rulers in the process of indirect rule.²⁰ Indeed, the rulers of notable empires and kingdoms, including the rulers of Oyo, Sokoto, Benin, Ijaw, Itsekiri, Opobo, and Lagos, resisted colonial imposition. Most of the resistance from these rulers was derailed with military force and a considerable amount of violence. Many of these rulers were deposed and banished through the imposed colonial justice system.²¹

The colonial economy was centred on the export of cash crops. Such crops notably included: cocoa, cotton, palm produce, and groundnuts. There was also export of various minerals, most prominently tin, but “to a lesser degree, gold, silver, lead and diamonds.”²² The production of cash-crops was dominated by small-scale farmers. The whole structure of the trade largely benefitted British traders. There was, in turn, the importation of cheap textiles and sundry items, like matches, tobacco, electronic goods and medicines from Britain as well as the rest of Europe. The colonialists developed transportation infrastructure to facilitate the movement of these goods from the hinterland to the coastal areas. However, there was little substantial investment in the long-term development of the country.²³

¹⁸ Ibid.

¹⁹ Toyin Falola and Mathew M. Heaton *A History of Nigeria* (Cambridge University Press Cambridge 2008) 110-112.

²⁰ Falola and Heaton note 19 at 110-111; Roger Blench, Selbut Longtau, Umar Hassan and Martin Walsh *The Role of Traditional Rulers in Conflict Prevention and Mediation in Nigeria: Final Report* (DFID 2006) 76 detailing six such instances in Northern Nigeria. Available at: <http://www.rogerblench.info/Development/Nigeria/Conflict%20resolution/Final%20Report%20TRs%20September%202006.pdf>.

²¹ A prominent example is the case of Oba Eshugbayi Eleko who resisted the authority of the Colonial Governor of Lagos and was deposed, arrested and removed from the colony. See *Eshugbayi Eleko v The Officer Adminstrating the Government of Nigeria and Another* [1931] UKPC 37; *Eshugbayi Eleko v The Officer Adminstrating the Government of Nigeria and Another* ([1928] 3 WWR 437, [1928] AC 459, [1928] UKPC 63.

²² Falola and Heaton note 19 at 119

²³ Ibid. at 118-124.

III POST-COLONIAL NIGERIA: AUTHORITARIANISM AND POLITICAL TRANSITION

Authoritarian Rule and Civil War 1966-1999

Despite being one of the first countries to gain independence in West Africa, Nigeria has had an irregular history of democratic governance. The elected government at independence was cut short on 15 January 1966 by a military rebellion master-minded by army officers, mainly from the Eastern part of the country. The rebellion led to the death of some national leaders including the Prime Minister and others, mainly from the northern, but also the south-western part of the country. The military coup was followed by another one six months later. This time, it was led by army officers from the northern part of the country. After the second military coup, a secession bid by the eastern part of the country led to a thirty-month civil war from 1967 to 1970, and nearly thirty years of military dictatorship under seven military regimes between January 1966 and May 1999.²⁴ The secession bid was violently put down and millions of lives, as well as properties, were lost. The infrastructure of vast areas of the eastern part of the country was destroyed.

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At the end of the civil war, the federal government declared that there was no ‘victor, no vanquished’; that no side won or lost. In his ‘victory’ speech, military Head of State, General Yakubu Gowon, announced plans for rehabilitating, civil and public servants, and the self-employed.²⁵ The programme for ‘rehabilitation, reconstruction and reconciliation’ (3Rs) in the country²⁶ was embedded in the country’s Second National Development Plan (2 nd NDP).²⁷ However, the 3Rs had very limited implementation at best and many victims were not compensated or rehabilitated at the time or at all.

Law and Justice

The military, as mentioned above, came to power shortly after the end of colonial rule in Nigeria. Military regimes in the country handed down ‘enabling constitutional’ legislation, in which the POGG clause prominently featured.²⁸ The colonial roots of the POGG power, set the stage for its subsequent adoption of the abuse of political power by successive military regimes. The first military legislation, Decree No.1 of 1966, illegally abolished the Parliament.²⁹ Section 3 of the Decree provided that the Federal Military Government “shall have power to make laws for the peace, order and good government of Nigeria, or any part on any matter whatsoever.”³⁰ The purport of all such laws was either to prohibit or limit the power of the courts to question the actions and legislation made by the military regime. Some of these laws violated national, regional and international human rights provisions and standards. Such laws were sometimes retroactive while others prohibited appeals from military tribunals to higher or regular courts. The tendency of the

²⁴ There was four years of civil democratic rule between 1 October 1979 and 31 December 1983.

²⁵ ‘The Dawn of National Reconciliation’ - Gowon’s Victory Message to the Nation, 15 January 1970 available at: <https://maxsiollun.wordpress.com/great-speeches-in-nigerias-history/> (accessed 05 December 2016).

²⁶ Olukunle Ojeleye *The Politics of Post-War Demobilisation and Reintegration in Nigeria* (Ashgate Farnham 2010) xiii.

²⁷ *Ibid.* at 2.

²⁸ Isawa Elaigwu ‘Federalism under Civilian and Military Regimes’ (1988) 18 (1) *Publius* 173, 183

²⁹ The military named federal and state legislation Decree and Edict respectively.

³⁰ See also section 2 (1) of the Constitution (Suspension and Modification) Decree No.1 of 1983.

military to legislate for the country under the POGG power also promoted a permanent state of emergency in the country for almost thirty years.

Successive military regimes perfected plunder, compromised all institutions of state and generally directed them towards flagrant violations of human rights of the people.³¹ The population suffered repression, state-sponsored murder, restrictions on civil liberties and other forms of human rights violations. There was widespread use of lethal force by security agents and the police against the civilian populace. Between 1966 and 1993, over two hundred military officers and civilians were brought before military tribunals on charges related to at least seven instances of actual or alleged coup plots and were convicted and sentenced to death. While the military did sometimes direct its guns at its own, it was mainly the civilian population that was at the receiving end of military repression. For example, in the 1990s, protests against unpopular economic policies were met with the shooting and killing of hundreds of demonstrators.

Special Military Tribunals (SMTs) were established to try a number of civil offences, including armed robbery, drug trafficking, corruption in public office and ‘economic sabotage.’ SMTs were almost invariably chaired by serving senior military officers, and composed mainly of members of the military and security agencies, as well as a few civilians. They commonly imposed the death penalty and the convicted were, in some instances, summarily executed in breach of their constitutional right of appeal. Others were sentenced to long terms of imprisonment. Cases of public execution, in defiance of due process, included that of Ogoni rights activist and renowned author, Kenule Saro-Wiwa, and some other members of the Movement for the Survival of the Ogoni People (MOSOP), referred to as the ‘Ogoni nine.’³² The administration of General Abacha (November 1993 – June 1998) gained notoriety for been the cruellest.³³

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Various human rights violations were perpetrated by the army, the security agencies and the police.³⁴ Arbitrary and long periods of detention were rampant. Gross human rights violations were common in the prisons. The Nigerian Prison Service itself described thus:

“...under the conditions of chronic prison congestion, perennial neglect of the services and delay in justice delivery, certain basic rights of prisoners are violated. The right to life and integrity of the person, to health and respect for human dignity are largely un-guaranteed.”³⁵

³¹ *Foreword by the Chairman, Synoptic Overview Oputa Panel Report: Summary, Conclusions and Recommendations* (2004) available at: <http://www.nigerianmuse.com/nigeriawatch/oputa/>. The site also has the full report.

³² For a more detailed account of the judicial murder of the Ken Saro-Wiwa and some members of the Movement for the Survival of the Ogoni People (MOSOP) see A Maja-Pearce *From Khaki to Agbada: A Handbook for the February 1999 Elections in Nigeria* (Civil Liberties Organisation Lagos 1999) 12-17.

³³ P C Aka ‘Nigeria since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations in Nigeria under President Olusegun Obasanjo’ (2003) 4 *San Diego International Law Journal* 209, 223.

³⁴ *Synoptic Overview* note 31, 48-49.

³⁵ *Oputa Panel Report* Vol.3 Chapter 7, 183, emphasis mine.

As an institution, the Nigeria Prisons Service, like many other civil institutions of the Nigerian society, suffered serious neglect during the period of military rule. New prisons were not built for decades. This was at a time when there was a phenomenal increase in the number of inmates, especially suspects awaiting trial. Prison authorities lacked medical facilities and were required to seek leave of the military authorities before obtaining medical attention for inmates. On many occasions, inmates died before such clearances were obtained.³⁶ Detained persons lacked practically every necessity required for day-to-day living.³⁷ In addition, juveniles were lumped with adult detainees and suffered similar deprivations.³⁸ The special needs of female detainees were

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not met. Their reproductive rights were violated in addition to the violations suffered by their male counterparts. Some female inmates had babies in custody. Some were sexually assaulted. There were reports of female prisoners who were raped or had to provide sexual gratification to prison officials in exchange for essentials.³⁹

The police force as an institution was neglected by successive military regimes. In frustration, the police took vengeance against the civil populace.⁴⁰ Violations of rights by the police

included illegal arrests, detention without trial⁴¹ and various forms of torture in the course of investigations to elicit ‘confessions.’⁴² Extra-judicial killings of suspects in custody, hapless motorists, passengers and pedestrians on the roads by the police were also common.⁴³ The police were in the habit of killing people unlawfully and in the bid to cover up, they usually alleged such victims were armed robbers.⁴⁴

There were also economic-related cases of gross violations of human rights. Cases of compulsory acquisition of land from individuals and communities by the state and ‘powerful’ individuals, without consultation or compensation were also common. There were some instances of corporate or individual violations of rights too. Arbitrary dismissal and retirement of workers by government without appropriate compensation, discrimination against ‘non-indigenes’, and extortion of peasant farmers by traditional rulers were also frequent in some parts of the country.⁴⁵ In some cases, unpopular economic policies, like the Bretton Woods institutions imposed structural adjustment programmes precipitated the deprivation of the right to life. This was manifested in the shooting and killing of demonstrators at public protests – a common incidence in the 1990s.⁴⁶

Political Economy

Military incursions into power were proclaimed to be in pursuit of economic rectitude, unity, and peace of the country.⁴⁷ Arguably, none of these was achieved by the numerous military regimes.⁴⁸ Rather, the military institutionalised corruption, which has remained a formidable challenge to development and good governance in the country.

³⁶ Ibid. at 185

³⁷ *Oputa Panel Report*, note 35 at 190.

³⁸ Ibid. at 192-194.

³⁹ Ibid. at 194-195.

⁴⁰ *Oputa Panel Report*, note 35 at 214-219.

⁴¹ Ibid. at 220-223.

⁴² Ibid at 223.

⁴³ *Oputa Panel Report*, note 35 at 227-228.

⁴⁴ *Oputa Panel Report*, Volume 2 Chapter 5, 193.

⁴⁵ *Oputa Panel Report*, note 35 Chapter 1, 11-27 and Chapter 4, 115-120

⁴⁶ Ibid. at 26-27.

⁴⁷ G N K Vukor-Quarshie ‘Criminal Justice Administration in Nigeria: Saro-Wiwa in Review’ (1997) 8 Criminal Law Forum 87, 104.

⁴⁸ Tunde I Ogowewo ‘Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria’s Democracy’ (2000) 44 Journal of African Law 135, 141

On the economic front, the country's dependence on oil was problematic for sustainable economic development. The country's 37.9 billion barrels of proven reserves places it at the vantage position of being the largest producer of oil in Africa, and tenth largest in the world.⁴⁹ With the experience of soaring oil prices in the late 1960s and early 1970s, successive military regimes quickly shifted emphasis from agriculture to crude oil exploitation. The government replaced agriculture as the leading foreign exchange earner; a situation that has persisted since then. Crude oil has come to account for over 90% of the country's total exports.

Most of the oil reserves are located within the country's Niger Delta area, in the south, but most of the area lacks basic infrastructure. Oil exploration activities in the Niger Delta added another dimension to the experience of human rights violations in the country namely, environmental rights. A classic example is the environmental degradation of Ogoniland and violation of group rights in the oil producing community. Successive military regimes militarised the area in order to contain expressions of social discontent. Ethnic and regional militia sprung up and have remained in this area especially, and the country as a whole. The ethnic militias mainly demand more autonomy of their respective areas, in the virtually military unitarised federal polity.

The situation in Ogoniland attracted international attention and was the subject of a communication to the African Commission on Human and Peoples' Rights entitled *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*.⁵⁰ The applicants alleged that the oil exploration activities of Shell caused environmental degradation and health problems, resulting from the contamination of the environment among the Ogoni people.⁵¹ The ecological devastation and degradation resulted from the neglect of international standards in oil exploration activities.⁵² The African Commission on Human and Peoples' Rights ruled in favour of the applicants. The Nigerian government recently initiated a clean-up of Ogoniland.

The situation in Ogoniland attracted international attention and was the subject of a communication to the African Commission on Human and Peoples' Rights entitled *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*.

Extra-judicial killings and alleged state-sponsored, politically-motivated assassinations were markedly common in some parts of the country. Politically-motivated murder was directed at various leading political figures.⁵³ This was particularly rife between 1984 and 1999. Virtually all such cases remain unresolved to date. In some cases, perpetrators have not been identified. In others, they have not been prosecuted despite identification. There are also cases where the prosecutions have been stalled. Notable in this last category is the trial of some very high-ranking military officers for murder and attempted murder of some leading political figures in the zone.⁵⁴ The press was also a victim, as freedom of expression came under severe attack during the long years of military rule. The violations in this regard ranged from arrests and detention of journalists, arraignment for serious but unfounded offences, arson attacks on media houses to proscription of publications.

⁴⁹ 'Worldwide Look at Reserves and Production' *Oil & Gas Journal* (January 1, 2015).

⁵⁰ African Commission on Human and Peoples' Rights' Comm. No. 155/96 (2001).

⁵¹ For a discussion of this communication and the issue of economic, social and cultural rights in the area, see Hakeem O. Yusuf "Oil on Authoritarian Waters-Multinational Corporations and Realising Human Rights in the Developing World: A Nigerian Case Study" *African Human Rights Law Journal* (2008) 8 (1) 79.

⁵² *Oputa Panel Report*, note 35 at 32-33, see page 55-59 for few examples.

⁵³ *Oputa Panel Report*, note 35 Chapter 5, 124-126.

⁵⁴ *The State v. Lt. General Ishaya Baimayi & 4Ors* (ID78/C/99), Criminal Division High Court of Lagos State. The accused on trial were a former chief of army staff, an ex-state military administrator, a retired state commissioner of police, chief security officer to General Abacha and the head of the late dictator's mobile police team. In a separate trial following severance of the charge, the former Chief of Army Staff was recently acquitted. K Ketefe "Court Sets Baimayi Free after Nine Years in Detention" *The Punch on the Web* (Lagos Friday 4 April 2008).

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The military eventually handed over power to an elected government on 29 May 1999, with the promulgation of a hurriedly produced and imposed constitution. By the time it left office, the military establishment had instituted a vicious cycle of violence which found expression in domestic violence, armed robbery, brigandage, religious riots, impunity, and lawlessness in the polity. The transition to civil rule followed a period of strong and sometimes violent agitation, but the eventual transition programme was accidental at best, and completely unnegotiated between the civil populace and the military rulers.

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IV DEMOCRATIC TRANSITION AND CHALLENGES TO TRANSITIONAL JUSTICE

Political transition in Nigeria was largely brought about by the sudden death of the country's military leader, General Sanni Abacha (in 1998), who was succeeded by General Abdusalam Abubakar. The latter was unequivocal in his resolve to deliver a prompt transition to civil democratic governance in the country. This context accounts, at least in part, for the subsequent uncoordinated approach to transitional justice in the country. One important consequence has been how it limited the opportunities for civil society to set an agenda for the transition, including, for instance, an engagement with the impact of colonial rule. Nonetheless, there was the recognition across the polity for a need to implement transitional justice measures, after the country transitioned to civil rule on 29 May 1999.

Transitional Justice

Trials and Lustration

The first steps toward transitional justice were taken by the last military regime led by General Abubakar, who commenced the prosecution of a handful of notorious military and security operatives of the penultimate military regime. About fifteen notorious members of the Abacha regime alleged to have played prominent roles in state-sponsored killings and violence, were arraigned for various serious offences ranging from murder and kidnapping to arson. Some of those arrested and charged included his son Mohammed, a former chief of army staff, chief security officer of the former head of state, his chief police detail, his former chief security adviser, and a former military administrator of one of the states in the country. While some of the trials became moribund due to the absence of political will to proceed, many others have (except in two instances) not been concluded.

The delay in the trial process of cases forming part of the transitional justice measures, is due largely to the exploitation of a very weak criminal justice procedure, which remains largely unreformed since the colonial era.

The delay in the trial process of cases forming part of the transitional justice measures, is due largely to the exploitation of a very weak criminal justice procedure, which remains largely unreformed since the colonial era. The colonial government had made 'received English law' a source of law in the Nigerian legal system. Received English law comprises of English common law, equity, statutes of general application in force in England on 1 January 1900 statutes and subsidiary legislation on specified matters and English law consisting of statutes (that is Acts of the United Kingdom Parliament and prerogative Orders in Council), which were introduced into Nigeria by English legislation, before 1 October 1960 and not yet repealed by an appropriate authority in Nigeria. In England, over the years, some common law principles have been amended or superseded by legislation. Also, some of the laws referred to as 'statutes of general application', have been amended or repealed in view of the various developments in the nature of crimes, technological advancements and realities of the times. However, this has not been the case in Nigeria.

The continuing application of these antiquated common law principles in Nigeria, without substantive amendments, despite contemporary realities, has a negative impact on the effective and speedy trial of criminal cases.

Defence counsels, especially experienced senior lawyers, often exploit the state of the law. Many objections to the trials of former members of the Abacha regime have been raised, in response to the notorious practice of prolonging the trial processes. This involved appealing virtually every interlocutory issue or objection, all the way to the Supreme Court, while insisting on a stay of the trial, while awaiting the appeal decision. Once the issue on appeal is decided, new applications are made, and a vicious cycle of long-standing trials is maintained. In one

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instance, after frustrating the continuation of his trial for more than seven years through such a process, the accused brought an application to challenge the delay (he) occasioned in the trial as an injustice.⁵⁵

In canvassing the passage of the Criminal Justice Act in 2015, then Chief Justice of Nigeria, Justice Mahmud Mohammed had lamented that laws regulating the criminal justice system were obsolete. “We face prolonged delays in the trial of criminal cases leading to

an increase in detainees awaiting trial and the congestion of the prisons. I believe we are well aware of these and other problems. The situation is made more precarious due to the archaic and obsolete nature of the laws regulating the criminal justice system.”⁵⁶ An important step in addressing the challenges was the recent passage of the Administration of Criminal Justice Act (ACJA) 2015. The ACJA is aimed at promoting the “efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crimes and protection of the rights and interests of the suspect, the defendant and victims in Nigeria”. However, due both to its recent passage and the slow pace of adaptation to its provisions by the judiciary and criminal justice agencies, it is yet to make a significant impact on the criminal justice administration in the country.

The foregoing state of affairs in the judiciary calls further attention to the institutional heritage of the judiciary from its colonial founding. To the average citizen, the judiciary, to a large extent, constitutes one of the most prominent symbols of a colonial heritage. It is usually considered as being somewhat removed from the regular day-to-day activities of the common folk. Even in the post-authoritarian period in Nigeria, the courts continue to suffer from a serious ‘social legitimacy’ deficit, enjoying limited recognition from society⁵⁷ – certainly much less than the two political branches of government. The public trust in the judiciary as an institution for securing rights and abating impunity is understandably low.

In any event, the initial move to try, even the few individuals, for violations of human rights, was half-hearted at best. The move was perhaps conditioned by the reality of the precarious balance of power in the short life of that ‘transitional regime’ itself.⁵⁸ General Abubakar was acutely aware of the high-level of domestic and international opposition to continued military rule in the country. From a pragmatic point of view, the fact was also not lost on him, that the minions of his predecessor

⁵⁵ The author was part of the prosecution team in these cases from 2000-2006.

⁵⁶ Ikechukwu Inochiri ‘Laws Regulating Criminal Trials in Nigeria Archaic – CJNI’ *Vanguard Newspaper* (23 March 2015) available at: <http://www.vanguardngr.com/2015/03/laws-regulating-criminal-trials-in-nigeria-archaic-cjni/> (accessed 14 March 2017).

⁵⁷ H Kwasi Prempeh ‘Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa’ (2006) 80 *Tulane Law Review* 1239, 1301.

⁵⁸ The Abubakar regime spent less than a year in office (from 9 June 1998- 29May 1999).

remained in the corridors of power and could attempt to oust him from power through a coup, if the opportunity presented itself.

Further more, an important feature of the Abubakar regime was the symbolic lustration of about two hundred ‘political’ military officers from active service. These officers had held political appointments as governors or administrators of the various states, cabinet ministers and chairmen of important state agencies, public corporations and similar government institutions. Many of them had been corrupt and accumulated fabulous wealth well beyond their legitimate earnings. The experience had made holding political office, rather than military service for which they were engaged, very attractive and an incentive for coup-plotting.

The absence of an armed struggle for independence in Nigeria made the imperative of transitional justice measures less pressing, even if arguably relevant.

The circumstances of the judiciary, trials and limited application of lustration highlighted above in the process of political transition from authoritarian rule, raise wider issues of institutional legacies from the colonial experience. There are issues that could be considered in this regard across the spectrum of government institutions like the civil service, the security agencies; the military and intelligence services, the police and so on, at the point of independence. There was generally no recourse to what would today, be regarded as transitional justice measures or processes. There were no trials for human rights violations just as there was no record of the use of lustration at the time. There are number of possible explanations for this. For one thing, transitional justice had not assumed the prominence it now has at that period in world history, despite the Nuremberg precedent. Another possible explanation could be that the absence of an armed struggle for independence in Nigeria made the imperative of transitional justice measures less pressing, even if arguably relevant. There are other angles that could plausibly be explored and unpacked on the issue but are outside the scope of the present paper due, in part at least, to size constraints.

The Truth-Telling Process

The truth-telling process is the most important transitional justice mechanism adopted in the post-authoritarian/military era in Nigeria. Barely three weeks after its inauguration in 1999, the newly elected administration of President Olusegun Obasanjo took their cue from the various truth processes in Latin America and South Africa, by establishing the Human Rights Violations Investigation Commission.⁵⁹ The Commission came to be popularly known as the ‘Oputa Panel.’⁶⁰ However, the Oputa Panel’s remit did not include consideration of the colonial period. In fact, it was initially empowered to examine only violations of human rights committed during the period from 1 October 1979 when the incumbent president had handed over to a democratic government, to 1999 when he re-emerged as an elected President. The Oputa Panel was later granted an extended remit that covered the whole of the period of military rule. It is also relevant to note that the Oputa Panel had rather shaky legal foundations, as the Tribunals of Inquiry Act under which it was established was a colonial legacy principally designed for specialised inquiries. It fell well short of the more extensive remit of a truth commission, in a post-military transitional society like Nigeria, at the end of the 20th century.

The truth-telling process is the most important transitional justice mechanism adopted in the post-authoritarian/military era in Nigeria.

⁵⁹. By Statutory Instrument No.8 of 1999 (as amended by Statutory Instrument No.13 of 1999) pursuant to Tribunals of Inquiry Act (TIA) No. 447, Laws of the Federation of Nigeria, 1990.

⁶⁰. So named after the chairman. For an exposition on the work of the Oputa Panel See Hakeem O. Yusuf ‘Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria’ (2007) 1 (2) International Journal of Transitional Justice 268.

There is a continuing disconnect between the police and the society. The Oputa Panel found that there is an historical perspective to human rights violations by the Nigerian Police. In furtherance of the colonial divide and rule strategy, the recruitment policy was to employ individuals to police ethnic groups whose language the police officers did not understand, and who were in fact, historically hostile to the latter's places of origin. The inherited recruitment strategy effectively secured the loyalty of the police as an occupational force rather than one for social service. At independence, the national government found it expedient to maintain the *status quo*. This impacted negatively on police-public relations, with the police continuing to act as an imperial force. A careful audit of the petitions on violations of human rights by the police, notably on extra-judicial killings, revealed that most policemen alleged to have been involved were indeed from ethnic groups different from those of victims. The experience of the people with the military is the same as with the police and sometimes worse in a number of ways. Like the police, the military forces were established by the British colonial government and the initial elements of what became the Nigerian army were formerly part of the police.

The Oputa Panel submitted its report in June 2003 but the report remains officially unpublished and unimplemented as a formal project. The government that set up the Oputa Panel refused to publish the report. The refusal to publish the report was premised on a Supreme Court decision that the 1999 Constitution did not make provisions for such a commission of inquiry, and that the law that the Oputa Panel was created under, was no longer applicable. The case in point

In dumping the Oputa Panel's Report, with its wide-ranging and far-reaching recommendations for accountability and institutional reforms, the Nigerian state set the stage for real and potential conflicts and gross violations of human rights in the country, both by public and private actors.

is *Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission and Gani Fawehinmi, v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun*.⁶¹ The crux of the case was a challenge brought against the powers of the Oputa Panel to summon witnesses. The case was instituted by a former military Head of State, General Ibrahim Babangida (1985-1993), and two of his military security chiefs. They had been summoned to testify in a petition alleging conspiracy and murder by letter bomb of a prominent investigative journalist in the country, Dele Giwa.

The life and professional career of Dele Giwa was cut short in 1986 by a letter-bomb, allegedly delivered by military intelligence on the orders of then military ruler General Ibrahim Babangida. Giwa was noted for his seminal and credible reporting of sensitive matters of public interest in the 80's. Investigation into his murder was abandoned by the police and closed prematurely. His solicitor brought a petition to the Oputa Panel as part of efforts to secure justice in the matter. The former head of state and his intelligence chiefs refused to appear to the summons of the Oputa Panel and challenged it in court. Eventually, the Supreme Court held that President Obasanjo lacked the powers to set up a body like the Oputa Panel, with a remit that extended to the whole country to enquire into human rights violations. Further, it held that the powers of the Panel to summon the Plaintiffs were a violation of their right to liberty. At that point, the Oputa Panel had concluded and submitted its work.

In dumping the Oputa Panel's Report, with its wide-ranging and far-reaching recommendations for accountability and institutional reforms, the Nigerian state set the stage for real and potential

⁶¹ [2003] M.J.S.C 63. See Hakeem O. Yusuf 'The Judiciary and Constitutionalism in Transitions: A Critique' (2007) 7 (3) Global Jurist 1

conflicts and gross violations of human rights in the country, both by public and private actors. The country has, since 1999, witnessed several ethnic and inter-communal conflicts, resulting in the loss of hundreds of lives and millions of dollars in property. This has led to the view in certain quarters that not only has the transition to democracy failed to deliver on justice and restoration of the rule of law, but also that impunity and violence have remained unchecked, if not increased, in the country.

Colonialism and Challenges to Transitional Justice

The legacy of authoritarian rule connects closely with the colonial past. Both are marked by violence and exploitation. Both are major factors in the failed project of transitional justice in Nigeria. Even if only indirectly, the military establishment still wields considerable influence after the political transition. Consider in this regard, that Nigeria has had four presidents in the period of transition to civil democratic governance. Two have been former military Heads of State, Olusegun Obasanjo (1999-2007) and Muhammadu Buhari (2015-). Obasanjo openly imposed the two others on the ruling party at the time; late Musa Yar'Adua (2007-2009) and Goodluck Jonathan (2009-2015). Thus, in the whole period of the political transition from military rule to date, the country has had either an erstwhile military ruler

Not only has the transition to democracy failed to deliver on justice and restoration of the rule of law, but also that impunity and violence have remained unchecked, if not increased, in the country.

or his designated candidate as the elected executive president of Nigeria. It is important to bear in mind that Nigeria is a federal state, modelled after the United States' presidential system. A critical issue for any attempt at social transformation is the fact that the Nigerian President enjoys wider constitutional powers than the American President. This is a product also of military rule which imposed a lopsided federation on the country due to years of accumulated power at the centre for the military head of state. The lopsided nature of the current federal arrangement remains an issue in Nigeria's political discourse, and which remains unaddressed, generating tension, from time to time among the political elite and different levels of government. This is the case because among others, the federal structure directly impacts fiscal arrangements, control, and distribution of national revenue, especially income from oil but also from taxes like value added tax. However, at best, the current structure has an indirect connection to the colonial legacy at best; it is a product of military rule.

The military have been gate-keepers of their legacy of political misrule. They remain keen to ensure only one of their numbers or designated candidates that can be trusted, hold the reins of political power where it matters most. This is to ensure that those responsible for impunity in the past are not brought to account.

The military have been gate-keepers of their legacy of political misrule. They remain keen to ensure only one of their numbers or designated candidates that can be trusted, hold the reins of political power where it matters most. This is to ensure that those responsible for impunity in the past are not brought to account. That aim has been generally achieved – especially at the federal level. In the first elections after military rule, former military rulers contested and won elections as

state governors and members of the federal parliament. Rich, retired senior military officers, who had held political office, played active, and usually leading roles in supporting and sponsoring candidates for elections. A former military governor and minister was Senate President for eight years and is still a member of the Senate.

Neotism has also added to maintaining a status quo of unaccountability for gross violations of human rights. A former Chief of Naval Staff became a State Governor. Recently, his son was elected into the federal Senate. Some military apologists, contractors, business acolytes or relations of former military officers who had held public office, contested and won elections. This was an important feature of the first decade of the post-authoritarian political transition. The son-in-law of a former military head of state is currently a governor of their state, in the northern part of the country. Another ex-Head of State's son-in-law was governor in a state in the north for eight years. Even the judiciary is not immune from the influence of the military. Quite apart from the fact that many judges appointed by the military across the hierarchy of the state and federal judiciary (including its highest levels) remain on the bench, some are family members and close relations of the former military rulers. For example, the wife of a former head of state only recently retired as a Chief Judge of a State, and a wife of the former Chief of Naval Staff mentioned earlier, is a judge of the federal high court.

Two, among a number of important disconcerting features of the legal and statutory framework of governance in Nigeria's political transition, can be discerned in the Oputa Panel case. First, is the continued extensive reliance on autocratic legislation by all branches of government deriving from the colonial past and authoritarian military rule. It is relevant to observe that there is now consciousness on the undesirability of the situation but positive action to displace it has been marginal at best. Deriving from this, an elected transition government placed reliance on the Tribunals of Inquiry Act (TIA), a pre-republican legislation, to set up a truth commission by executive action rather than custom-made legislation. This was at a time when the latter approach

Two, among a number of important disconcerting features of the legal and statutory framework of governance in Nigeria's political transition, can be discerned in the Oputa Panel case. First, is the continued extensive reliance on autocratic legislation, by all branches of government deriving from the colonial past and authoritarian military rule. Second, is the conventional, uncritical judicial observance of precedents based on principles of the common law, imported into the country as part of the colonial legal system.

had become standard practice elsewhere as was in Ghana and South Africa, for instance. This anomaly has continued with truth processes that have been initiated in the country (principally at the state level like that in Rivers and Osun states).

Second, is the conventional, uncritical judicial observance of precedents based on principles of the common law, imported into the country as part of the colonial legal system. This attitude explains the extensive reliance by the Supreme Court on the case of *Sir Abubakar Tafawa Balewa & Others v Doherty & Others (Balewa v Doherty)*⁶² in the Oputa Panel case. In *Balewa v Doherty*, the Federal Supreme Court as well as the Privy Council upheld objections to the powers and the jurisdictional scope of the Commissions of Enquiry Act, 1961 which had similar provisions to the TIA. The adoption of

⁶² (1963) 1 WLR 949.

⁶³ Human Rights Watch Rest in Pieces (2005) Vol. 17, No. 11(A) <https://www.hrw.org/reports/2005/nigeria0705/> (accessed 16 January 2017)

⁶⁴ Parry Osayande 'Creating Awareness on Concept and Principles of Civilian Oversight of Police' in I Chukwuma (ed) *Civilian Oversight and Accountability of Police in Nigeria* (Centre for Law Enforcement Education Lagos 2003) chp.9, p.2.

⁶⁵ Andrew Walker 'What Is Boko Haram?' (2012) United States Institute for Peace Special Report 308, 9-10.

a plain-fact approach by the Court, to which it was no doubt accustomed, hit at the root of the transitional context and implicitly, at the least, undermined the rule of law.

The historical background of the police as a force established to protect British economic interest and political domination of the local communities, largely shaped its attitude and conduct to date.⁶³ As noted by a former Deputy Inspector General of Police, Parry Osayande, “From the very first day the police was established, it became estranged and alienated from Nigerians.”⁶⁴

The violence is a product of social displacement and neglect, abject poverty, and gross disenchantment with government and the state, by some elements from that least developed part of the country.

Since 2009, Nigeria has been caught in the grip of serious acts of violence; bombings, killings and destruction of property linked to the *Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad*, commonly known as *Boko Haram* (western education/civilisation is evil). The North East Nigeria-based Islamist insurgent group demands the establishment of an 'Islamic State', at least in the northern part of the country as well as the unconditional release of its detained members. Some accounts attribute the group's violence to religious fanaticism or Islamic 'revivalism'; typical of wider international narratives of terrorism.⁶⁵ The official narrative between 2010 and 2015, was that the group was set up by forces opposed to the administration then in power. The government was lead by President Goodluck Jonathan, a Christian from the minority Ijaw ethnic group from the southern part of the country. Significantly, however, relevant stakeholders, local voices at, close to, or otherwise connected to the epicentre of the violence, have maintained an alternative narrative. On this account, the violence is a product of social displacement and neglect, abject poverty and gross disenchantment with government and the state by some elements from that least developed part of the country.

The handling of the *Boko Haram* insurgency provides insight into the dynamics of the handling of security matters in the country. In 2012, Bukar Abba Ibrahim, a Senator (and former Governor of Yobe State) representing parts of the epicentre of the *Boko Haram* insurgency, denounced security agencies for killing more people than the *Boko Haram* and making matters worse for the people, contrary to official claims. He noted that *Boko Haram* had existed for 'ages' as a peaceful group but the impunity of the security agencies, particularly the police, provoked it to violence against the state. He lamented that whenever a security agent was harmed in any way, the security forces respond by cordoning off such an area and burning down all property there. “What,” he wondered “has [burning] property got to do with people killing security agents on the road?”⁶⁶

Beyond adroit lip-service, little by way of substantial institutional reform of policing has taken place in Nigeria in the post-colonial period. Policing arrangements are such that despite the large population running into an estimated 150 million people, there is only one police force in the country. It is under the control of the federal government. Calls for State control and community policing to enhance effectiveness and legitimacy of the police have remained largely ignored for decades. Concerned by this disconnect, President Obasanjo, when he came to power in 1999, attempted to change the negative culture by moving unsuccessfully for a name change from 'Nigeria Police Force' to the 'Nigeria Police.'⁶⁷

⁶⁶ Onyedi Ojabor and Sanni Onogu 'Buhari's Stand on Boko Haram Rattles Presidency' *The Nation* (9 November 2012) available at: <http://thenationonlineeng.net/buharis-stand-on-boko-haram-rattles-presidency/> (accessed 16 February 2017).

⁶⁷ The move was challenged on the basis that the name was a constitutionally stipulated one and only a constitutional amendment change it.

V CONCLUSION

The implementation of transitional justice in the post-authoritarian/military era in Nigeria has been a failure. Even the symbolic trials commenced soon after the political transition have been largely moribund due to political and technical factors. The lustration measure that was implemented has,

The implementation of transitional justice in the post-authoritarian/military era in Nigeria has been a failure.

at best, produced a crop of very powerful ex-military officers. The group emerged as key political players in the transition to civil governance, with largely ill-gotten wealth secured from years of authoritarian rule. The lustration process was only directed at disengaging this crop of officers from active

military service and nothing else. Since they were not barred from seeking elective office, they have emerged as a strong force on the political front. Benefitting from their deep-pockets, they have assumed key elective positions or sponsored candidates for elections to protect their interests.

Worse still, the major mechanism for obtaining accountability and justice for victims of impunity—the truth-telling process—has been frustrated by a combination of dynamics. The most prominent of the dynamics is the deficiency of sincerity on the part of the initiating regime. As a process, the truth-telling mechanism did a commendable job of seeking to establish the *truth* about the course of executive and legislative governance in the authoritarian period. It assisted the bid to legitimise the post-authoritarian civilian administration, but the value of its well-received work remains questionable. The search for justice, truth and reconciliation through the Oputa Panel suffered a fundamental setback in its lack of tailor-made legislation. Such legislation would have made provisions for its functions as a truth commission for the whole country with the power to summon witnesses as required. Further, the law would have specified the duty of the government to cooperate with the truth commission and respect Nigeria’s obligations under international law. The instrumental use of the legal system and the holes therein, is a consequence and product of the colonial regime’s imposition of English Common Law on Nigeria and the post-colonial

The instrumental use of the legal system and the holes therein, is a consequence and product of the colonial regime’s imposition of English Common Law on Nigeria, and the post-colonial regimes’ failures to appropriate revise and update the legal frameworks.

regimes’ failures to appropriate revise and update the legal frameworks. The Nigerian society continues to pay a heavy price for the failure of transitional justice. More than a decade and half after the military left power, a myriad of conflicts that have since ensued to challenge institutional reform, good governance and development in the country. The situation provides ample evidence of the danger inherent in neglecting to address the impunity that was the defining feature and legacy of the colonial and authoritarian period.

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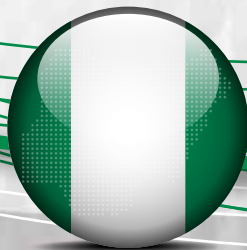
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