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An Appraisal of the Constitutionality of the Amnesty Programme for Members of Boko Haram Sect in Northern Nigeria

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Abstract

This paper is intended to make an indepth analysis and examination of the constitutionality and basis of the amnesty programme designed by the Federal Government of Nigeria for members of the Boko Haram sect (an Islamist sect) in the Northern part of Nigeria. The paper is aimed at finding out whether by the provisions of the Constitution of the Federal Republic of Nigeria, it is legal and legitimate on the part of the government to introduce an amnesty programme as part of State policy considering their criminal and heinous activities which are not only threatening the security in the Northern part of the country but also the security and unity of the entire country. The paper is also intended to find out some of the basic challenges the programme may face bearing in mind that the Federal Government has not approached the legislature to legalize the programme. It is further intended in this paper to find out whether the government is taking any step to come up with an enactment to give legal backing to the amnesty programme. Primary and secondary sources will be used. The paper will be concluded by finding out whether the programme can continue without a legal support to it.

Keywords: Constitutionality, Amnesty and Boko Haram Sect.

Introduction

Nigeria is one of the States in the West African sub-region endowed with huge natural resources and this being so, it is expected that the citizens of the country will, for many years live in affluence but the contrary is the position. Though, Nigeria as a State is faced with several challenges ranging from

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collapsed social values, failure of leadership, neglect of the youths, women and children, corruption, increased spate of unemployment, abject poverty, illiteracy and other frustrations, the greatest, most repressive and devastating challenge faced by the country of late is the rising insurgence of terrorist groups.

The country has been threatened before now by groups like the Niger Delta Militants, the Odua People's Congress (OPC), and the Movement for the Actualization of the Sovereign State of Biafra (MASSOB). However, these groups are far less dreaded and are indeed civilized than the group called Boko Haram sect in Northern Nigeria. This group has the philosophy, as they insist, that western education is evil and go to the very extreme to commit series of crimes in the Northern part of the country with reckless impunity for government to recognize their ideology as part of State policy. The activity of the sect has become a serious threat to the security and unity of Nigeria and is now an embarrassment to the country's image abroad. Owing to this, many suggestions and recommendations were made to the Federal Government of Nigeria including the amnesty programme for members of the sect as solution to the menace and in response, the government inaugurated the Presidential Amnesty Committee on Boko Haram in 2013.

The essence of this work is to examine the constitutionality or otherwise of the proposed amnesty programme of Government of the Federal Republic of Nigeria to members of the Boko Haram sect disturbing the peace, stability and tranquility in the Northern part of Nigeria which is perceived to, likely in the shortest space of time, extend to other parts of the country.

The paper considers the amnesty programme for Boko Haram sect vis-à-vis the provisions of the Constitution and draws a legal opinion or stand whether going by the Constitution of the Federal Republic of Nigeria, the amnesty programme for the group is not unconstitutional or null and void and should accordingly be disbanded. The paper assesses further, whether the amnesty programme will or can provide lasting solution to the security situation in the region which is likely to spread to other parts of the country as well as act as a check to the dwindling human rights situation in the area which is already rising fast to what can best be described as genocide. The paper concludes that since the amnesty programme as it is presently constituted for the sect is not contemplated by the Nigerian Constitution, it is unconstitutional and can only be constitutional if a legal framework is enacted by the National Assembly to permit the President to grant Amnesty to the members of the

Boko Haram sect and other related groups who may be willing to make peace in Nigeria. As it is now, the sect members who are perpetrating several crimes against the Nigerian people (innocent and unarmed civilians) are not yet ready for peace and no law has been made to legitimize and legalize the programme. This being so, the programme remains unconstitutional and void in Nigeria.

At the beginning, the government's idea of amnesty was total disarmament of the militants and thereafter re-integration and encouragement or support. The programme took off amidst negative reactions and agitations by the citizenry, civil society groups, non-governmental organizations as well as international community on the legality or validity of the programme bearing, in mind that there is no constitutional provision giving life to the programme in Nigeria. The Federal Government led by Late President Umaru Musa Yar'Adua (GCON) went on with the amnesty programme particularly for the Niger Delta Militants who have before now become terrors from the creeks and indeed a thorn in the flesh of the entire nation. The demise of Yar'Adua did not stop the programme as initiated and facilitated by him and the implementation is still on till date and indeed by May 2014, another team of Niger Deltans sent overseas completed a scholarship training, courtesy of the Chief Kuku Kingsley - led Presidential Implementation Committee on Amnesty for Niger Delta Militants.

It is interesting that similar programme has been canvassed and demanded for other groups like the Odua People Congress (OPC) in the Southwest and for members of the Movement for the Actualization of the Sovereign State of Biafra (MASSOB). However, it may seem as it appears to be correct that nothing is being done in respect of amnesty for members of MASSOB and OPC by the government because the members of the groups more or less are inclined at the earliest opportunity towards self-determination, secession and emancipation of their people from Nigeria motivated by regional impulse. The Federal Government has much trust and belief in the unity of Nigeria hence any group inclined to secession should be treated as heinous criminals not deserving amnesty.

Our poser in this paper which calls for serious consideration is what can be described as heinous in the acts of members of MASSOB and OPC when compared with the acts of the Boko Haram Islamist Sect in Northern Nigeria against the State, Nigeria and her citizens as a people.

It is the writer's view, that there is no act or acts that are dastardly heinous in the acts of MASSOB and OPC to be put side by side in the form of comparism with the acts of the Boko Haram sect. As the sect continues her war against the whole country, their members have been condemned virtually by all and sundry except those sharing the ignominious view in this millennium century that western education is evil. The challenge by Boko Haram Sect against the government of Nigeria of late has gone out of control and proportion. In fact, it has reached a point where it seems the government has become helpless and does not demonstrate any positive will to end the Boko Haram imbroglio in the country. Faced with this, government called its best brains in the areas of economy, security, policy formulation and peace experts for a way out and at the end of the sessions on the issue, the government came up with two options agreed to be executed concurrently or simultaneously or one after the other to end the insurgence by the sect including:

a. amnesty for members of the sect;
b. use of Military option with support from the international community and regional front.

Looking at Nigeria today, it is clear that the country is applying the above two strategies concurrently, first with the formal inauguration of the amnesty committee for members of the Boko Haram sect in 2013 and secondly with the recent invitation of international and regional forces to assist the country in checking and fighting the acts and excesses of the Boko Haram sect which have been declared by government as acts of terrorism. With the inauguration of the amnesty committee for the sect by the President, it signified the implementation of amnesty programme by the government of the Federation for members of the sect, a programme which many criticized as lacking any form of constitutional flavor. The criticism of the programme heightened the need for this paper which is to resolve questions pertaining the programme for the sect in Nigeria in line with the clear provisions of the Nigerian Constitution.

From the beginning of time in Nigeria as it is in other States, whenever amnesty is granted by a government, it implies that the offender is excused or exonerated of all liabilities incidental to the offence or crime which he allegedly committed. Amnesty in some countries allows the government of a nation or a state to "forget" criminal acts sometimes before prosecution has started but most often after trial and the offender convicted and sentenced.

In most States including the United States,[1] Amnesty has traditionally been used as a political tool of compromise and reunion following a war. Thus, an act of amnesty by government in those States was granted generally to a group of people who have committed crimes against the State such as treason, rebellion or desertion from the military. The first amnesty in U.S history was offered by President George Washington in 1795 to participants in the Whiskey Rebellion, a series of riots caused by an unpopular tax on liquor, and it was a conditional amnesty which allowed the U.S government to forget the crimes of those involved, in exchange for their signatures on an oath of loyalty to the United States.

In the Philippines, amnesty is granted by the State to excuse the criminal acts of erstwhile enemies of the State. Amnesty is also known to South African Laws as well as those of El Salvador hence it is contended that international law encourages amnesty instead of restricting it.[2]
In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (as amended 2010) is the supreme legal order. Members of Boko Haram Sect in Nigeria are not and cannot be classified as persons entitled to the benefits contemplated by the Constitution in the exercise of prerogative powers either by the President or by Governors to support the amnesty programme of the Federal Government. This is the crux of the issue. Where then did the government get the power to embark on the amnesty programme?

Definition of Terms

In order to consider the concept of amnesty for the Boko Haram Islamist sect in Northern Nigeria, there are three key words which their meanings have to be ascertained from the onset. They are "constitutionality", "Amnesty" and "Boko Haram Sect".

i. Constitutionality

According to the Cambridge Advanced Learner's Dictionary, Third Edition (2008), the word constitutionality means "the quality of being allowed by or contained in a Constitution"[3] The same Dictionary further amplified the meaning of the word, constitutionality to include the attitude and practice of

[1] P. Barcroff. "The Presidential Pardon – A Flawed Solution" *Human Rights Journal* 31 December 1993: 381-94.
[2] J. Dugard "Dealing with Crimes of a Past Regime. Is Amnesty still an option? Article delivered at Peace Palace, The Hague on 15th April, 1999.
[3] Cambridge Advanced Learner's Dictionary, (3rd Edition: Cambridge University Press Ltd, 2008).

acting constitutionally or according to the rules in a Constitution. In a similar respect, Bryan (1999)[4] defined the term constitutionality to mean "the quality or state of being constitutional and proper under the constitution."

We completely associate our position with the meaning given above and state that constitutionality means the quality of being within the rules and stipulations contained in a constitution.

ii. Amnesty

The word, 'amnesty' is defined by the Cambridge Advanced Learner's Dictionary, Third Edition to mean "a decision by a government that allows political prisoners to be free"[5] and further as "a fixed period of time during which people are not punished for committing a particular crime"[6] On the other hand, the word, 'amnesty' is defined in Black's Law Dictionary (1999)[7] as:

> A pardon extended by a government to a group or class of persons usually for a political offence. The act of a sovereign power officially forgiving certain classes of offenders who are subject to trial but have not yet been convicted.

In our considered view, amnesty means a decision by a government supported by a legislative act forgiving persons who committed a crime and found to have done so by a Court or tribunal for a certain period of time in the State.

iii. Boko Haram Islamist Sect

A sect is defined by the 3rd edition of the Cambridge Advanced Learner's Dictionary as "a religious group which has developed from a larger religion and is considered to have extreme or unusual beliefs or customs."[8] Boko Haram Islamist sect in Northern Nigeria is a religious sect with the extreme belief that Western education is evil. The sect describes Western education as a contamination of Islam particularly its culture, custom, tradition and its ideology and any effort aimed at or intended to spread the values of Western

[4] B.A Garner (ed.), Black's Law Dictionary (7th ed, Thomson West: St. Paul-Minnesota, 1999) p. 306.
[5] Cambridge Advanced Learner's Dictionary, *op. cit.*

[6] Ibid.
[7] B.A. Garner, *op. cit,* p. 89..
[8] Cambridge Advance Learner's Dictionary, (3rd Edition: Cambridge University Press Ltd).

education to the community of Moslem faithful should not only be resisted but should be seen as an attack against Prophet Mohammed, the Supreme leader of Islamic faith on earth and beyond.[9]

According to Haroon Balogun, Boko Haram sect refers to "unbelievers" and they are what is described in Alahzab Verse 58 as those who hurt unbelieving men and women undeservedly and bear on themselves the crime of slander and plain sin"[10] The Boko Haram Sect in Northern Nigeria as Balogun amplified means:

> persons who are anti Islam because of their belief that education is evil and do not accept the obligatory need for education in Islam. Knowledge in Islam is compulsory as exemplified by the saying of Prophet: *tolabul – ilimi faridotum ala kuli – l- Muslimen* "meaning that the pursuance of knowledge is compulsory for all muslims. Hence, the Boko Haram Sect perpetrating the heinous crimes against muslims and Christians in Nigeria are not representing Islam[11].

It is the writer's view, that the Boko Haram Islamist sect in Nigeria means a group of ruthless criminals perpetrating heinous crimes against the Nigerian State in the misguided pretence of propagating an ideology unknown to Islam that Western education is evil aided by people who think as they do and those who do not mean well for Nigeria.

The Face of Amnesty in other Jurisdictions

A look at the laws on amnesty in other selected jurisdictions will be of immense assistance in the appreciation of this paper. For this purpose, we shall restrict ourselves to amnesty in the United States, amnesty in the United Kingdom and amnesty in South Africa. This will afford a balanced view or position on the issue forming the crux of the paper, bearing in mind that the three states above are key players among the OAS States, the European League and the African Union respectively.

[9] A.U Abonyi Commentaries online "Boko Haram and Nigerian Unity", available at htp.uk.com. assessed on 5/3/2014.
[10] H.I Balogun "Facing the Kaiaba" Vanguard 30/5/2014 p.38.
[11] Ibid.

a. Amnesty in the United States

Amnesty was first offered in the United States by President George Washington in 1795 to participants in the Whiskey Rebellion, a series of riots caused by an unpopular excise tax on liquor. It was a conditional amnesty which allowed the US government to forget the crimes of those involved in exchange for their signature on an Oath of loyalty to the United States.[12] Other amnesties in the history of US were granted on account of civil and Vietnam wars.

It is important to note that in the United States, there is no specific legislative or constitutional mention of amnesty, hence, the concept is ambiguous.[13] The legal justification of amnesty in the United States is drawn from Article 2 Section 2 of the Constitution which states thus: "The President... shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment."[14] Owing to the common basis of amnesty and pardon, the difference between the two words has been particularly vexing in the US legal history.

In theory, in the United States, amnesty is granted before prosecution takes place whereas a pardon is granted after conviction. Even at that, there is still confusion because, President Gerald R. Ford, for example, granted a pardon to President Richard M. Nixon before he was charged with any crime. However, Courts in the United States have allowed the two terms to be used interchangeably.[15]

In other nations where amnesty is part of governance, the power to grant amnesty lies with legislative bodies. In United States however, the power of granting amnesties lies with the executive although in some instances, the Congress may initiate amnesties as part of a legislation as was the case in the Immigration Act Reform and Control Act of 1986 that punished employers who knowingly hired illegal aliens into US. The concerns voiced by employers and immigrant community leaders made the Congress to make a provision under the Act for amnesty and also giving citizenship to illegal immigrants who had been residents for a specific period of time.

The United States' Supreme Court has given an opinion that Congress can

[12] P. Barcroff, *op. cit*, 381-94.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

grant an independent amnesty but has not expressly given a ruling on it. Most of the amnesties granted so far in the United States have always been based on the pardoning powers vested on the President's office by the Constitution.[16]

b. Amnesty in the United Kingdom

The earliest recorded case of amnesty in the United Kingdom was that of the Thrasybulus at Athens where thirty tyrants were expressly excluded from the operation of the said amnesty. The other amnesty granted was the one proclaimed which restored Charles II of England but this did not extend to those who had taken part in the execution of their father. Other famous and popular amnesties in UK included the Napoleon's amnesty of March 13, 1815 from which thirteen eminent persons including Tallyrand were exempted. There is also the Prussian amnesty of August 10th 1840, and the general amnesty proclaimed by Fraz Joesef 1 of Austria in 1857 and so on.[17]

It is important to note that in the United Kingdom, amnesties are granted by the proclamation of the Crown or the Parliament mainly to political criminals but with specific exceptions such that both the Crown and Parliament have the right to grant amnesty in the State though each reserves the right and power to refuse to extend such amnesties to a certain category of criminals. It appears that whereas in the United States amnesty is grantable under the pardoning powers of the President who leads the executive arm or branch of government, in the United Kingdom both the Crown and Parliament can, by proclamation, grant amnesty but with restricted powers not to extend it to all manners of criminals. It is also clear that in the two jurisdictions above, amnesty is granted to those who have been found to have committed the crime whether against the State or private citizens and rarely is amnesty granted before prosecution and without conviction.

c. Amnesty in South Africa

In South Africa, democracy was founded on an agreement between the National party Apartheid regime and the African National Congress (ANC) based on conditional amnesty.[18]

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[16] *Ibid.*

[17] Amnesty in United Kingdom online, accessed on 1/6/ 2013.

[18] J. Dugard "Dealing with the Crime of the Past Regime: Is Amnesty Still the Option" Article presented at Manfred Ladio Memorial Lecture Peace Palace, Hague, 15th April 1999.

According to the scholar Priscilia Hayner as restated by John Dugard, prosecutions were "very rare" after the Truth Commission Report even when the identity of the perpetrators is known. In some of the cases, there was an amnesty law passed explicitly preventing the trial of the criminals while in most other cases, there was in effect a de facto amnesty where prosecutions were never seriously considered. In practice, Truth Commissions and Prosecutions in South Africa are competing mechanisms for dealing with crimes of the past.

In South Africa, blanket unconditional amnesty unaccompanied by a Truth Commission is no longer an acceptable option. Hence, in South Africa, it is not allowed for a criminal to be told to go free for all the crimes he committed in the past without a Truth Commission to unravel the truth as to what really happened. The acceptable option therefore in the state of South Africa is prosecution or amnesty accompanied with Truth Commission. Without doubt, each of the two options above has its merits. While prosecution emphasizes the right to justice and society's demand for retribution, the Truth Commission seeks to satisfy the right to know and understand the past and hence aims at reconciliation rather than retribution.

The question still remains as to which one out of the two options that will heal a divided society; this is still unclear and a controversy. In response to the above question, it does appear that while the international opinion increasingly demands prosecution and justice, domestic opinion has other priorities in South Africa.

However, in piercing the controversy, one has to read the eloquent judgment of South Africa's Chief Justice Ismail Mahomed on the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo vs. President of the Republic of South Africa* **[19]** to understand why society prefers truth to prosecution:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes nor the methods and culture which

[19](1996) 4 SA 671 at 683 – 685.

> informed such investigation were easily open to public investigation, verification and correction. Much of what happened in this period is shrouded in secrecy and is not easily capable of objective demonstration and proof. Loved ones disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. Secrecy and authoritarianism have concealed the truth in little crevice of obscurity in our history. Records are not easily accessible or people are unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicious, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Promotion of National Unity and Reconciliation Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly to receive collective recognition of a new nation that were wronged and crucially, to help them discover what did in truth happen to their loved ones, where and under whose responsibility. The truth which the victims and their families need to know in the circumstances is if the perpetrators can be known. What is the incentive for them to disclose the whole truth of what happened? The incentive is the fact that they will not be punished, which ordinarily they deserve. Without the incentive, they cannot disclose the truth and hence the truth which the victims desire will never come.

The Truth Commission in South Africa has worked better than prosecution but unlike in United States and United Kingdom, the option is not strictly the making of the executive branch but is supported and backed by an Act of the Parliament or Congress of South Africa as case may be.

We have taken our time to consider the face of amnesty in the United States, United kingdom, and South Africa because these States are recognized as viable democracies especially among the "OAS League of States", the "European League", and the "African League" respectively. It appears that the three countries recognize amnesty and grant same mostly for offences already committed. As a resumé, while in United States, amnesty flows from the pardoning powers of the President; in the United Kingdom, there is a

concurrent power of the Crown and the Parliament to proclaim amnesty. There is an exception to the effect that either the Crown or Parliament can refuse extension to certain categories of criminals. In South Africa, amnesty is expressly permitted by law and in some instances, a law may be made excluding prosecution or trial of persons who have committed certain crimes. Unconditional or blanket amnesty is not allowed. What is accepted is prosecution for justice without Truth Commission or Truth Commission without prosecution but for there to be Truth Commission precluding prosecution, there must be an Act enabling it like the Promotion of National Unity and Reconciliation Act and a crime must have been committed which the Commission seeks to find out what really happened. Thus, in South Africa, unless an amnesty project comes within the issues contemplated by the Act or there is some other law permitting the programme, such amnesty project or initiative is a nullity.

History, Content and Face of Amnesty in Nigeria

According to O.F. Mbalisi *et al*[20] amnesty in Nigeria was a brain-child of the Technical Committee on Niger Delta inaugurated on September 2008 by Late President Umaru Musa Yar'Adua. This committee, among other things recommended amnesty for militant groups which shall proceed from disarmament through demobilization to reintegration into the Nigeria society. (DDR). It is vital to restate that the first phase of the programme was disarmament running for (a period of 60 days), demobilization and the post-amnesty phase which is reintegration. From the available records accessed from Wikipedia 2009,[21] the amnesty programme initiated by President Yar'Adua for Niger Delta Militants and other groups involved:

1. Disarmament Programme

This is a comprehensive way of recovering arms, ammunitions, explosives and allied equipment and preventing their recirculation in the society. At the end of the disarmament which was for 60days, the following arms were recovered:

a. 2,760 guns of different types;
b. 287,445 round of ammunitions;
c. 18 gun boats;
d. 763 explosives; and
e. 1,090 dynamite caps.

[20] O.F. Mbalisi etal Academic Research International Vol 2 No 3 May 2012.
[21] *Ibid.*

2. Demobilization Programme

This came shortly after disarmament and involved registration and gathering of necessary information from members of the militant groups that voluntarily surrounded arms, ammunitions and explosives. This phase was to prepare them for reintegration.[22] Camps were opened and members of the group were admitted and documented with requisite identity cards and then counseling and training on non violence commenced with combined teams of experts, medical, psychological and legal personnel.

3. Reintegration

In this phase, the group which voluntarily surrendered arms were reintegrated into the social and economic spheres of the society. This stage was coordinated through a design process of partnership of government institutions and participation of stakeholders. It was intended to make the groups not only economically independent but to be prepared to deploy their talents and potentials into more lucrative economic ends.[23] This phase placed them in schools and skill acquisition centers within and outside Nigeria.

Though the Amnesty Programme for the Niger Delta Militant groups did not have any constitutional flavour or legitimacy, the government adopted the policy as a panacea for peace to address the instability threatening the polity at the time. With the seeming success and achievements made by the President Yar'Adua administration through the illegitimate and unconstitutional programme of amnesty, the present administration of Dr. Goodluck Ebele Jonathan saw nothing bad in the programme but rather continued from where Yar'Adua stopped. President Jonathan, in making amnesty part of his transformation agenda consolidated the programme and created the office of the Presidential Adviser on Niger Delta led by Hon Kingsley Kuku who works in partnership with the Chairman of the Presidential Amnesty Programme to realize the objectives of government in the programme. The programme has continued till date and indeed around May 14th 2014, the Office of the Presidential Adviser on Niger Delta and Chairman of the Amnesty Programme presented another batch of about 160 Niger Delta youths that successfully completed a one-year pathway programme in United States as coordinated by the Kaplan International

[22] *Ibid.*
[23] *Ibid.*

College in Lagos, Nigeria.[24] With the insurgence by the Niger Delta Militants being seriously controlled by the unconstitutional project of amnesty by the Federal Government, a yet more fearful and most dreaded group came knocking in what is called the Boko Haram sect. The sect staged series of bombings from one city to another, destroying markets, schools, public institutions, police commands, courts and churches.

According to Mike O. Akpati:[25]

> Nigerians were unaware when the group became bold and identified themselves as Boko Haram, they took the people and the security operative unawares, struck in Bauchi, then Jos, Kano, Sokoto, and most recently infiltrated into many other Northern towns; there was and there are still deaths in large numbers, a destruction of private and public properties. Christians and Muslims are not left out. They were in Mandala in Niger State, Borno (several times), Mubi, Nyanya in Federal Capital Territory (FCT) and most recently in Chibok where over two hundred school girls were abducted since April 2014 and since then, the group has kept the girls away from their parents amidst domestic out-cry and protests from international community for their release.

The operation of the Amnesty Programme in Nigeria has received criticisms from Nigerians though many have also applauded it. Apart from the strong point of its questionable birth on the premise of illegality, there is also strong contention that the programme has become another veritable ground for corruption in the land. Encouraged and persuaded by those who admit its illegality but support it on political grounds as panacea for peace, the present administration bowed to pressure to introduce and grant amnesty for the Boko Haram Islamist Sect in the Northern Nigeria, a group that is more dreaded than Niger Delta Militants groups and any other such group when it constituted the Presidential Amnesty Committee for Boko Haram Sect on the

[24] Vanguard, May 27th, 2014, p. 29

[25] M.O. Akpati "Serial Bombing: Boko Haram, Massob, Niger Delta Militants: Amnesty and Security System" Public Analysis Mike-O- Akpati., available at Uk .com, accessed on 20/6/2011.

5th of April 2013[26].

In a statement by the Government of the Federation through the Presidential Adviser on Media and Publicity, Dr Reuben Abati, the 26-Member Committee is headed by the Minister of Special duties, Kabiru Tanimu Turaki and is expected to develop a framework that could lead to disarmament and compensation for victims of the Boko Haram insurgency within 60 days.[27] Although the government announced amnesty for members of Boko Haram sect, mixed reactions trailed the decision of government. While some stakeholders receive it as a welcome development especially from the perspective of those preaching peace and stability of the country, others see it as an absurdity as well as unreasonable, bearing in mind that its implementation is devoid of the following:

a. any legal framework on ground arising from a legislative enactment in support of amnesty for the sect in Nigeria,
b. constitutional provision giving it a foundation or support.

Besides the above, the amnesty programme has been described as:

i. a process of legalizing terrorism; and
ii. a policy that cannot be premised under any pretence within the pardoning powers of the President of the Federal Republic of Nigeria as contemplated in the prerogative powers of mercy of the President under section 175 of the 1999 Constitution (as amended).

In the light of the above issues, it is obvious that the question of constitutionality becomes a challenge to the amnesty programme for the Boko Haram Islamist sect in Nigeria and further makes this paper a necessity in the present reality of things in the country.

The Constitutionality or Otherwise of the Amnesty Programme for the Boko Haram Islamist Sect in Northern Nigeria

Understandably, the view and opinion of this paper before addressing the issue of constitutionality or otherwise of amnesty for Boko Haram sect is that the group Boko Haram in Nigeria may be classed into two:

a. The Political/ Business Boko Haram which comprises of the political elites and business class in the North who instigate insurgency and

[26]"Boko Haram Amnesty; Best Decision at the Moment" Vanguard April 6th, 2013 p.7."
[27]"Mixed Reactions trail Boko Haram Committee" Vanguard April 18th, 2013, p.5

agitate or support amnesty or propose it as alternative for peace and see it as avenue to enrich themselves. In this group are some politicians and elders who publicly condemn insurgence but propose amnesty to the government instead of military option so as to benefit from the implementation.

b. The Sectarian/Real and criminal Boko Haram comprising of members of the sect who profess to be Muslims but hold the anti-Islamic belief that Western education is evil. They also include a bunch of fundamentalists who have been psyched to commit heinous crimes that will lead to many deaths as a recognition of the supremacy of Allah, the Most High.

In our view, the germane question is to find out whether amnesty for the Boko Haram sect by whatever name or class they are called is backed by the Constitution of Nigeria.

Looking at the 1999 Constitution of the Federal Republic of Nigeria (as amended), precisely Section 1(3), the Constitution is the highest law of the land, being the organic law, and is above all governments, agencies and parastatals of government, all persons and indeed all principalities and powers. Any act not in conformity with the Constitution is void. Similarly, assuming there is any law prescribing what the Constitution does not support, such law is a nullity. This is an elementary principle and nothing further should be said about it.

Amnesty for Boko Haram in the Northern Nigeria is an act or action or decision by the Federal Government of Nigeria intended to forget and waive the criminal activities of this group that has resulted not only in the deaths of many innocent Nigerians (children, women and men) but has also led to destruction of many public institutions (courts, police formations, churches) as well as private concerns. The mayhem is still going on and the most recent and most disturbing is the abduction of over 300 teenage school girls in Chibok, Borno State since April 2014 with no clear information of their whereabouts and possible time of release. In the case of *NIG.PLC v FBIR*[28] and *N.U.E.E v B.P.E*[29] the Court held that Amnesty is not provided for in our Constitution which is the grundnorm or the law organic of our land. What the Constitution provides for is the prerogative of mercy. Our legal jurisprudence accepts the powers of prerogative of mercy under the Constitution and the

[28] (2010) 2 NWLR (Pt 1179) 561 at 579 para a. — d..
[29](2010) 7 NWLR (Pt 1193) 538 at 570-571 Para F.

courts by the judicial powers conferred on them by Section 6 of the Constitution have given meaning of prerogative of mercy as contained in Section 175 of the 1999 Constitution of the Federal Republic of Nigeria (as it relates to the President of the country and Section 212 of the same Constitution as it relates to the Governor of the State respectively).

The Court of Appeal also recognized the prerogative powers of mercy as entrenched in the sections of the Constitution above referred to in the case of *Obidike v State***.**[30] In the said case, Olagunju JCA (of blessed memory) viewed as follows:

> This court is not unmindful of the power of the President of this country under Section 161 of the Constitution 1979 (now 175 of 1999 CFRN) to grant pardon or grant respite or remission of punishment as similar powers are also vested in the State Governor by section 192 of 1979 Constitution (now section 212 of 1999 CFRN); the powers granted by the sections are described as prerogative of mercy.

The contention that amnesty may be accommodated under the pardoning powers of the President by virtue of the phrase "any person concerned with" cannot stand going by the rule of interpretation of statutes otherwise known as the *ejusdem generis rule* meaning "things of the same kind". Put in simple form, where a particular class goes with a general word, the particular class is taken to be comprehensive and the general word as referring to matters falling within such class.[31]

What the above shows is that the phrase "any person concerned with" must be read with the particular class of "people convicted of an offence". It means that what is later mentioned must be of the same kind with the former and hence the Boko Haram militants or sect members who are yet to be seen, known, arrested, tried and/or convicted of any offence cannot fit into the provision contemplated in the phrase under section 175 of the 1999 Constitution. It is important for emphasis to note the fact that under section 175, the persons entitled to benefit from the pardoning powers of the president are persons who have been convicted for an offence. Looking at the clear and express provisions of the Constitution and the judicial

[30](2001) 7 NWLR (Pt 743) 601 at 639 para G- H.

[31]J.O Olatoke "Constitutionality of Amnesty Programme for Niger Delta Region of Federal Republic of Nigeria" *Journal of Law; Policy and Globalization* Vol 5, 2012.

interpretation of the prerogative of mercy grantable by the President or Governor of the State as case may be, what the Nigerian Constitution intends or contemplates is pardon to someone who has been convicted of an offence or crime or someone who is related thereto.

Arguments have been made and raised in support of amnesty both for Boko Haram and other Militia groups in the country with insistence that by the phrase "any person concerned with" under section 175 of the 1999 constitution, persons who though have committed a crime but have not been convicted can be accommodated. Nonetheless, this argument may at best described as being based on interest and not based on law. The problem still remains that members of the Boko Haram Sect still remain faceless and are yet to be identified; the offence, crime or calamities they claim responsibility for notwithstanding. Indeed, it becomes elementary that by the *ejusdem generis rule* of statutory interpretation, persons concerned with persons convicted for an offence cannot go out to be or to include persons not yet convicted.

The word 'pardon' should be appreciated for a better understanding of the issue discussed. The Black's Law Dictionary defines pardon to mean "an act or instance of officially nullifying punishment or other legal consequences of crime. In a nutshell, pardon is "to forgive or excuse". From the definition above, you cannot nullify punishment against a person for a crime if that person has not been tried and convicted. There are notable cases of State pardons granted by the Government of Nigeria including:

1. Pardon granted to former President Obasanjo prior to his becoming President in 1999 (from prison custody to Aso Rock).
2. Pardon granted to Alameiseiya recently by Federal Government and others.

The above cases are clear cases of persons who committed crimes and offences and were convicted and subsequently pardoned and their punishment nullified and they were forgiven by the State in the form of permanent exoneration of all liability as it relates to the crime for which they were convicted. Although the people may criticize the government for such pardons especially from the moral perspective considering the devastating injury or havoc the crime committed by the person pardoned may have caused the community, the truth still remains that once the pardoning power is exercised in line with Section 175, it is legal. Thus, even though many criticized President Jonathan for the pardon granted Alameseiya, he acted

within the confines of the Constitution.

The concept of pardon has received judicial interpretation by the Nigerian Courts including the cases of *Ojukwu v Obasanjo*,[32] and *Falae v Obasanjo*[33] where Musdapher JCA (as he then was) opined as follows:

> A pardon is an act of grace by the appropriate authority which mitigate or obliterate the punishment the law demands for the offence and restores the rights and privileges forfeited on account to the offence .... The effect of the pardon is to make the offender a new man, to acquit him of all corporal penalties and forfeiture to the offence pardoned.[34]

A serious and critical view of pardon will show that it is an official act and is usually given after offence is established to have been committed. While we strongly hold the view that the concept of prerogative of mercy and amnesty by nature relate to State pardon, their legal implications are not the same and cannot be interpreted by any stroke of pretence or imagination to be one thing.

The Black's Law Dictionary distinguished the word, amnesty from the general pardon provided in the Constitution by stating that unlike ordinary pardon, Amnesty is addressed to crimes against State sovereignty i.e. political offence with which forgiveness is received and which is more expedient for the public welfare than prosecution.[35] The scenario described and given by the Black's Law Dictionary is similar to the South African example of the Truth Commission where the State would prefer to get to the root or truth of the situation, i.e. the revelation of what happened, so that the victims living or relations of the victims dead will see what really happened[36] and the perpetrators open up to tell the truth and they are pardoned instead of being prosecuted.

Having shown that amnesty operates in the nature of a pardon and so also does the prerogative of mercy, the question now is whether the prerogative of mercy contemplated by the Constitution is the same thing or could

[32](2004) FWLR (Pt 222) 1666.
[33](2003) 15 NWLR (Pt 842) 113.
[34](1973) ALL NLR 823.

[35] B.A. Garner, *op. cit,* 1137.
[36] *Journal of Law, Policy and Globalization* Vol 5, 2012.

incorporate amnesty since both operate in the nature of a pardon.

In considering the applicability of the prerogative of mercy in the Constitution by the President, the court in *Amanchukwu vs FRN No 2*[37] per Justice Udow Azogu (JCA) held *inter alia* that:

> ...by virtue of section 175(1) of the CFRN 1999 the President has power in consultation with the Council of State to grant a pardon to any person convicted of any offence or to remit the whole or any part of any punishment imposed on that person for such an offence.

It is clear from the above that the prerogative powers of mercy i.e. 'pardon' is exercised by the President in consultation with the Council of State and such is usually done in favor of persons who are convicts by virtue of findings of a competent Court that such a person is guilty of an offence or has been proved to have committed an offence in line with the requirements of the law of the land. The Supreme Court of Nigeria in the case of *Solola v The State*[38] per Edozie JSC stated situations in which the president or the governor cannot exercise the prerogative powers of mercy thus:

> Where a person who committed the offence of murder and is convicted by a High Court and whose appeal is dismissed by the Court of Appeal has lodged an appeal at the Supreme Court, then until that his appeal is determined, the Head of State or Governor cannot pursuant to section 175 and 212 of 1999 CFRN respectively exercise powers of prerogative of mercy.

The implication therefore is that the powers of pardon or the exercise of prerogative of mercy applies only when a matter has been concluded and the person convicted. In case there is appeal, the power cannot be exercised until appeal is disposed off and there cannot be execution of a convict by the Court below if there is an appeal until the appeal is concluded.

In distinguishing amnesty from the powers of the President under the prerogative of mercy, it is our candid view that for there to be prerogative of mercy under sections 175 and 212 of 1999 CFRN, the following conditions must exist:

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[37] (1999) 4 NWLR (Pt 599) 479 at 495.

[38](2007) 6 NWLR (Pt 1029) at 24.

1. the person to be granted prerogative of mercy must have been tried and convicted of an offence;
2. the President or Governor must have consulted the Council of State or the Advisory Council of State as case may be;
3. the prerogative of mercy cannot be granted to a person still undergoing trial and not yet convicted or a person whose conviction has further been appealed against to the Supreme Court;
4. such a person granted the prerogative of mercy or to be granted pardon cannot be subjected to another trial but is immuned from re-prosecution as was held by court in *James Onanefe Ibori v FRN*[39] as this will amount to double jeopardy condemned by the CFRN 1999 (as amended).

In the case of amnesty, the conditions necessary are:

a. the people concerned must be a community or group not an individual;
b. they must have committed a political offence and subject to trial but have not yet been convicted;
c. such group once granted pardon cannot be prosecuted.

It is critically submitted that looking at the above conditions for exercise of prerogative of mercy and application of amnesty, it is my fair and considered view that amnesty can never be the same thing with prerogative of mercy.

Relating it to the issue discussed in this paper, the amnesty programme constituted by Federal Government for members of the Boko Haram Islamist sect in Northern Nigeria does not and cannot meet the condition precedent for granting amnesty assuming without conceding that amnesty was even provided for in the 1999 Constitution. The members of the Boko Haram Sect apart from the fact that they still remain faceless miscreants whose identities are still unknown and vague, have not been shown to have committed a political offence; and assuming they did, they are still presumed innocent until the contrary is proved. They have not yet been arrested let alone being subject to any trial. In *COP v Tobin*[40] and in a plethora of cases in Nigerian courts, the courts have taken the position which has not changed that "any person accused of criminal offence is presumed innocent until the contrary is proved." This principle is sacrosanct under the Nigerian Constitution. One important point to be noted about amnesty in Nigeria is that most people

[39](2009) 3 NWLR (Pt 1127) 94.
[40](2005) 11 NWLR (Pt 932) 640 at 488.

granted it have not been accused of any offence by way of lodging of complaint before the police or conventional authorities for prosecution and investigation of alleged commission of offence not to talk of standing trial before any Court or being convicted by any Court of competent jurisdiction.

Findings

Going by the analysis above, it becomes germane to submit and conclude that the amnesty programme for Boko Haram Sect Islamist group in Nigeria as well as for other groups related to the sect is unconstitutional based on the following findings:

1. The programme is against the principle of presumption of innocent as the members of the Sect can never be pardoned unless there is an offence for which the person has been tried and convicted. Members of the sect are faceless, are unknown, and have not been arrested. They have even rejected amnesty, despite having been requested to come out voluntarily, surrender their arms and get amnesty ("pardon") from the Presidency. The questions that are begging for answers from the above points are:
   i. have the members of the Sect been accused of any offence?
   ii. which Court is trying them for the offence or offences if any?
   iii. have they been convicted; if yes, by which Court?

2. The powers of the President under section 175 of the Constitution to grant pardon do not extend to power to grant amnesty and there is no other provision in the Constitution or in any other existing law to grant amnesty from the conditions for amnesty earlier raised in this paper. In applying the *ejusdem generis rule* of interpretation, we also call to mind the *expression unius et exclusion alterus rule* which is to the effect that "the express mention of a thing is the exclusion of others not mentioned". In the marginal notes under the provisions in CFRN 1999 particularly section 175, only prerogative of mercy is expressly mentioned and since the word amnesty is not, it is excluded. The cases of *Obidike v State*[41] and *PDP v INEC*[42] are all important reference point on this issue.

[41](1989) 2 NWLR (Pt 101 1) at 18 para A.
[42](1999) 11 NWLR (Pt 626) at 200.

The poser is from where then, did the President and his government derive the powers and right to grant amnesty to the members of the Boko Haram Islamist sect? Where does the legitimacy for amnesty programme for the sect rest? There is no enactment legalizing it and the Constitution itself does not support it. The implication is that the members of the sect, notwithstanding the amnesty and without any enabling legislation or provision of such nature in the Constitution, could still be arrested and arraigned before the Court for whatever offence they may have committed before now and they cannot be heard raising any defense under section 36(10) of the Constitution as anything that is unconstitutional cannot be covered by the same Constitution. Section 36(10) cannot be allowed to operate because to do so will amount to building something on nothing with the inevitable consequence of a collapse of the structure. The government can still, if it decides to be a promoter of constitutionalism, achieve whatever it plans through the powers of the Attorney General of the Federation to enter what is called *"Nolle Prosequi"* which is the power to discontinue or abdicate criminal prosecution against a person or persons standing trial for alleged commission of offence. However, *Nolle Prosequi* can only be a discharge and not an acquittal so as to serve as an estoppel of criminal relitigation under section 36(10) of the CFRN 1999. Indeed, for there to be a *Nolle*, the person concerned must have been arraigned in Court.

The following points should be noted in respect of amnesty for the Boko Haram sect in Nigeria:

1. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) makes provision for prerogative of mercy – i.e pardon after conviction for an offence.
2. The Constitution does not provide for amnesty and amnesty though a pardon is not the same thing as prerogative of mercy.
3. There is no existing enactment of the National Assembly legalizing amnesty in Nigeria for the Boko Haram sect and other related groups.
4. The President has not approached the National Assembly for such enactment.
5. The conditions for granting amnesty have not been satisfied nor does the situation provide the basis for such conditions under the present realities and prevailing circumstances in the country.

In the face of the above issues, it is our reasoned finding and conclusion that the amnesty programme for Boko Haram Islamist sect, not having been provided for by the Constitution of Federal Republic of Nigeria, 1999 (as amended) nor by any enactment of the National Assembly of Nigeria is unconstitutional and void.

Recommendations

The Federal Government must in a bid to move Nigeria forward particularly on the issue of insurgency arising from emergence of groups like Boko Haram sect do the following:

1. The Federal government must, if she is sincere that amnesty will bring peace and stability as part of political solution to the problems in the State, approach the National Assembly for a legal framework to give amnesty for the Sect and other related groups a foundation. This can be done either by a further review or amendment of the Constitution or by bringing into existence a new enactment of the National Assembly legalizing amnesty programme like the South African Peace Promotion and Reconciliation Act which created the Truth Commission.
2. Government should strengthen its effort towards arms control by ensuring a quick passage of an Act to regulate arms inflow into the country, its use or distribution etc.
3. Government should strengthen our security, intelligence and operational strategy for countering terrorism. She should de-emphasize Western involvement since either the West is not sincere to help Africa or States in Africa operate policies or laws contrary to Western values and tradition but suitable for their own environment. We should ask why the Chibok girls have not returned in spite of the Western forces and troops assembled for their rescue in Nigeria.
4. Government should strengthen the principle of Rule of Law as a cardinal tenet and pivot of democracy.
5. Nigerians should dedicate themselves to the core values of fairness and equality in governance. None of the regions should see itself or themselves as more superior entities than the others. The Presidency and juicy public offices should not be seen as exclusive for a particular region. We must unite as a people and face the challenges targeted against 2015 election. We should practice true federalism, not in mouth, but in real terms. Without these, the centre can never hold and this is the painful truth.

Conclusion

We note and submit with finality that amnesty has no foundation under the Constitution of Federal Republic of Nigeria. This being so, there is no basis for it and it cannot stand the test of the law. It has no legal backing and cannot strengthen democracy nor can it restore the confidence of the people in the Government and where confidence is lacking, there is bound to be doom for any democracy and democratic order as it will fail as amplified in *Olotu v Itodo 1*[43] where Mohammed JSC succinctly restated that there is need to strengthen the confidence of our people in our democracy.

For us, there is no better way to achieve this than the fact that we all have to subordinate ourselves, our actions and our behaviours as well as decisions including our leaders and governments to the dictates of our constitution; the only organic and supreme law in the land against which any act is void and a nullity.

[43] [2010] 18 NWLR (pt 1225) 545 at 579 – 580