

The (Un)Constitutional Appropriation and Expenditure of Public Funds in Nigeria: Analysing the “Security Vote” Paradigm through the Law

Joy Ngozi Ezeilo*

University of Nigeria
ezeilojoy@yahoo.co.uk

Uchechukwu Nwoke**

University of Nigeria
stanuccimcoke@yahoo.com; uchechukwu.nwoke@unn.edu.ng

Sylvester Ndubuisi Anya***

University of Nigeria
anyasyvester@yahoo.com

Abstract

Security challenges have continued to trouble governments internationally. From the Islamic State terrorists in the Gulf region, to the murderous activities of Boko Haram and “herdsmen” in Nigeria in recent times, it has become imperative for those entrusted with maintaining security to redefine the conditions of national security. In this context, it is now conventional for various governments in Nigeria to appropriate enormous amounts of money in their budgets for “national security” (“tagged security vote”). This article explores the emergence, configuration, constitutionality and abuses of security votes in Nigeria. It also explores the appropriation and expenditure of security funds in the USA and attempts to draw lessons from this jurisdiction. It argues that there is a robust connection between security votes and corruption and, thus, attempts to identify legal structures for preventing the mispending and embezzlement of public funds (security votes) in the country’s monetary appropriation and expenditure.

Keywords

Security vote, national security, appropriation and expenditure, corruption, unconstitutionality, Nigeria

-
- * LLB (Nig), BL, LLM (London) PhD (Nig). Professor of law and associate dean, Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.
- ** LLB (Nig), BL, LLM (Wales), PhD (Kent). Lecturer, Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.
- *** LLB, BL, LLM, PhD (Nig). Lecturer, Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.

INTRODUCTION

Security challenges, whether internal or at the cross-border level, have been generating much concern for governments all over the world. With the proliferation of terrorist activities (in the Middle East, northern Africa, Nigeria and other parts of Africa), kidnappings, robberies and inter-ethnic conflicts, the need for adequate security to cater for the safety of humanity has become a governance imperative. The transnational operations of militant groups waging wars of religious and ethnic affiliations have definitely altered the basic rudiments of security. As a result, the universal classification of threats and risks is forcing countries to redefine their conditions of national security. Crucially, it appears reasonable to think that threats to national security are the particular dynamic to propel governments into expending huge resources for the preservation of both internal and external security. In this context, the various tiers of government in Nigeria have continued to set aside enormous amounts of money in their budgets for defence and national security.¹

The prerequisite for adequate security in any society cannot be over-emphasized. This is because it is practically impossible to achieve sustainable development in an environment that lacks the security arrangements necessary for development. In general, security is a cross-cutting and multi-faceted notion, which has for many years been the topic of critical analysis. In this sense, the narrative of human development has always been pre-occupied with identifying the best means of guaranteeing the security of people, their property, territories and institutions. This is because security is seen as a pre-condition for realizing developmental objectives.² Therefore, both ancient and contemporary societies see security as a “first order” priority to be protected by every means possible.³

This is true for many African countries, including Nigeria. In this context, Aikaeli and Mlamka report that the African share of global security funding exhibited a 70 per cent increase between 1988 and 2008.⁴ In 2014 alone, security spending in Africa increased by 5.9 per cent, with the top two spenders, Algeria and Angola (both major oil producers), increasing their spending by 12 and 6.7 per cent respectively.⁵ In South

1 MA Adebakin and L Raimi “National security challenges and sustainable economic development: Evidence from Nigeria” (2012) 1/1 *Journal of Studies in Social Sciences* 1 at 2.

2 EI Okechukwu and N Anyadike “Security challenges and security votes in Nigeria: 2008–2013” (2013) 2/8 *Kuwait Chapter of Arabian Journal of Business and Management Review* 1 at 25.

3 Ibid.

4 J Aikaeli and B Mlamka “Military expenditure and economic growth in Africa: A cross country study of 48 states” (2011) 4/2 *International Journal of Economic Issues* 279 at 279–80.

5 Stockholm International Peace Research Institute “US military spending falls, increases in eastern Europe, Middle East, Africa and Asia says SIPRI” (2015), available at: <<https://www.sipri.org/media/2015/13-apr-2015-us-military-spending-falls-increases-eastern-europe-middle-east-africa-and-asia-says>> (last accessed 4 April 2018). See also “African military spending rose in Africa in 2014: Report” (21 April 2015) *Defence Web*, available

Africa,⁶ Tanzania, Ghana and Cape Verde, higher military expenditure appears to be the norm, notwithstanding that these countries are not at war.⁷ This is justified on the basis that higher security funding protects national security and acts as a deterrent to invasion by potential aggressors.⁸

The “security vote” concept (the custom of reserving vast funds, under the excuse of enhancing state security) has continued to gain primacy and “notoriety” in Nigeria’s public spending and contemporary governance mechanism and, as noted above, other African countries are following the same path. Recently, the propensity of most of the Nigerian political elite, especially those in the executive arm of government, to manipulate the security vote for political and economic gains has become the subject of high octane debates across the country. Ibeanu and Momoh contend that these debates have “been fuelled by the abuse of security votes, an ‘opaque fund’ reserved for the Executive, which is not appropriated, accounted for or audited through the Legislature”.⁹ In many of the 36 federating states in Nigeria, such “slush funds” are channelled into the secret funding of private armies and mobs for political actors.¹⁰

Notwithstanding the disturbing rise in the use and abuse of security votes in Nigeria, no empirical work has been carried out in this area. As a result, very little is known about the fundamental influences that have shaped the emergence of the phenomenon. This article attempts to answer some questions, which might help to unravel the mystery surrounding security votes and their use (and abuse) in the country. For instance, what is a security vote? How and when was the idea introduced into the country’s political environment? Is there any justification for it in Nigeria’s socio-political economy? Are there legal structures for preventing its abuse?

contd

at: <http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=38874:african-military-spending-rose-in-africa-in-2014-report&catid=7:Industry&Itemid=116> (last accessed 4 April 2018); C McClelland “Angola at peace is sub-Saharan Africa’s top defense spender” (12 June 2015) *Bloomberg*, available at: <<https://www.bloomberg.com/news/articles/2015-06-12/angola-in-peacetime-is-sub-saharan-africa-s-top-defense-spender>> (last accessed 4 April 2018).

- 6 See P Stalenheim, D Fruchart, W Omitoogun and C Perdomo *Military Expenditure: Stockholm International Peace Research Institute, Yearbook* (2006, Oxford University Press) 1 at 295. See also P Batchelor, P Dunne and G Lamb “The demand for military spending in South Africa” (2002) 39/3 *Journal of Peace Research* 315 at 315; *Defence in a Democracy: White Paper on National Defence for the Republic of South Africa* (May 1996), available at: <<http://www.dod.mil.za/documents/WhitePaperonDef/whitepaper%20on%20defence1996.pdf>> (last accessed 4 April 2018).
- 7 Aikaeli and Mlamka “Military expenditure”, above at note 4 at 279–80.
- 8 *Ibid.*
- 9 O Ibeanu and A Momoh “State responsiveness to public security needs: The politics of security decision-making: Nigeria country study” (2008, Conflict, Security and Development Group paper 14) 69 at 70.
- 10 *Ibid.*

The article explores the emergence and configuration of security votes in Nigeria, their application and abuses, their inherent connection with corruption and ways of preventing the embezzlement and misspending of public funds in government monetary appropriation and expenditure (in the name of security votes). It begins with an examination of national security, its relationship with security votes and the various connotations of security votes. The article proceeds to explore the country's progression towards the security vote paradigm and its eventual hegemony in Nigeria. It highlights the concept's robust connection with corruption and analyses its constitutionality. It also examines the processes for appropriation and oversight of security and intelligence spending in the US to ascertain whether Nigeria can derive benefits from that country's practice. Finally, the article attempts to identify legal structures for the prevention of misspending and embezzlement of security votes in Nigeria.

NATIONAL SECURITY AND THE VALIDATION OF SECURITY VOTES

Government's principal responsibility is to protect the lives and property of its citizens. Indeed, section 14(2)(b) of the Constitution of the Federal Republic of Nigeria 1999, as amended (the Constitution), provides that "the security and welfare of the people shall be the primary purpose of government". This responsibility of the state to provide security for itself and its citizens permits the state to impose certain regulatory measures on society (such as conscription, official secret acts and earmarking sums of money as security votes).¹¹

The notion of "national security" is uncertain and its focus is shaped by the peculiarities of each nation-state.¹² It is not easily defined and can mean different things to different people. For Carey, it is an eccentric experience, a subjective feeling that is relational or qualified, rather than factual or real.¹³ The indefinite character of the concept is succinctly captured in a Canadian Police report (commissioned to decipher ways of promoting national security in the country), where it was submitted that:

"[We do] not know what national security means. But then, neither does the government. The Solicitor General stated in early June, 1978, before the House of Commons Standing Committee on Justice and Legal Affairs: 'There is no definition of the term *national security* because in effect national security is basically a term that refers to protection of sovereignty, and activities related

11 Okechukwu and Anyadike "Security challenges", above at note 2.

12 A Wolfers "'National security' as an ambiguous symbol" (1952) 67/4 *Political Science Quarterly* 481 at 499.

13 R Carey "The contemporary nature of security" in TC Salom (ed) *Issues in International Relations* (2000, Routledge) 1 at 52.

to the protection of sovereignty.' It is one of those terms after which one should add the phrase 'whatever that means'.¹⁴

The intrinsically unpredictable connotation of the notion permits any state actor "to label whatever state policy he or she favours with an attractive and possibly deceptive name".¹⁵ As a result, "it is not surprising that the funding of security matters also exhibits some of the characteristics of national security itself".¹⁶ Nevertheless, attempts have been made to define national security in a "broad and less state-centric fashion", notably in South Africa. In this context, the *White Paper of National Defence for South Africa* defines national security as, "an all-encompassing condition in which individual citizens live in freedom, peace and safety; participate fully in the process of governance; enjoy the protection of fundamental rights; have access to resources and the basic necessities of life; and inhabit an environment which is not detrimental to their health and well-being".¹⁷

It appears that there are currently two divergent views in Nigeria on the nature of national security and the need to preserve it. Accordingly, the debate on the character and meaning of national security has polarized around two different positions. One focuses on strategic characterization, while the other emphasizes the non-strategic approach, through a concentration on socio-economic factors. According to Okechukwu and Anyadike, "the strategic - 'realist' perspective conceptualizes national security in terms of self-defense by amassing arms to deter aggression".¹⁸ This scholarship, which has dominated the international system for a long time, evolved from the Westphalia state system after 1648.¹⁹ The viewpoint sees disputes between men and states as ubiquitous. In this regard, the struggle for power and the control of resources is central to national security. In this state of affairs, states are only restrained by agreements, treaties and tenets of international law that they believe promote their own interests. National security, in this context, focuses on the military, military values and strategies, capabilities and the survival of the state.²⁰

On the other hand, the non-strategic position argues that security that flows only from armed belligerence (the barrel of a gun) has failed mankind. As a

14 Quoted in H Relyea "National security and information" (1987) 4 *Government Information Quarterly* 11 at 12 (emphasis original).

15 Wolfers "National security", above at note 12 at 481.

16 O Egbo, I Nwakoby, J Onwumere and C Uche "Security votes in Nigeria: Disguising stealing from the public purse" 111/445 *African Affairs* 597 at 614.

17 *Defence in a Democracy*, above at note 6 at 6.

18 Okechukwu and Anyadike "Security challenges", above at note 2 at 16.

19 C Nwangwu and AO Ononogbu "National security and sustainable economic development in Nigeria since 1999: Implication for the vision 20:2020" (2014) 4/5 *Journal of Educational and Social Research* 130 at 132.

20 M Odeh and N Umoh "State policing and national security in Nigeria" (2015) 6/1 *Mediterranean Journal of Social Sciences* 412 at 418.

result, national security should concern itself with much more than strategic characterization and cannot be understood in isolation from the interests of social forces as they struggle with one another.²¹ For Al-Mashat, national security should be construed beyond territorial protection and should be directed towards “the physical, social and psychological quality of life of a society and its members, both in the domestic setting and within the larger regional and global system”.²²

Supporting this perspective, the United Nations Development Programme (UNDP) theorizes that national security envelops vital aspects of human existence and development, including economic, food, health, environmental, personal, community and political security. Accordingly, national security is the capacity of the government to protect its citizens from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards.²³ In this context, “building a functioning state requires a basic level of security and by being responsive to the need for security, democratic governance can help lay the foundations for maintaining order and managing development”.²⁴

McNamara argues that, “[i]n a modernizing society, security means development. Security is not military force though it may involve it; security is not military hardware, though it may include it. Security is development and without development, there can be no security ... the security of any nation lies not solely or even primarily in its military capacity; but equally in developing relatively stable patterns of economic and political growth”.²⁵

National security in this sense will encompass not just the military defence of territory, but also internal stability, socio-economic development, and protection of the country’s life, property and economic resources by constituted authorities. In this regard, it is now obvious that the concept of national security does not just mean security from external or internal attacks. It is not just a military or police affair that can be handled by arms and ammunition, but rather goes beyond all these, converging also on how governments rule, how media intelligence is shaped, on whether the people are malnourished, on whether soldiers, policemen, teachers and civil servants are remunerated appropriately, and on how government performs its function in relation to other countries.²⁶

Apparently, national security in Nigeria is still conceived from the prism of the realist paradigm. Thus, the strategy often adopted by the Nigerian state to tackle insecurity consists of, and is anchored on, the deployment of superior

21 O Nnoli *National Security in Africa: A Radical New Perspective* (2006, Snaap Press Ltd) at 13.

22 AM Al-Mashat *National Security in the Third World* (1985, Westview Press) at 14.

23 UNDP *Human Development Report, 1994* (1994, Oxford University Press) at 229.

24 UNDP *Human Development Report, 2002: Deepening Democracy in a Fragmented World* (2002, Oxford University Press) at 86.

25 R McNamara *The Essence of Security* (1968, Harper and Row) at 149.

26 SO Idowu *Media in Nigeria's Security and Development Vision* (1999, Spectrum Books Limited) at 129.

fire power to contain what the state has identified as threats to it, which often coincide with the interests of the ruling elite.²⁷

THE CONNOTATIONS OF “SECURITY VOTE”

Predictably, much like national security, there is no precise, empirical or generally accepted definition of the term “security vote”.²⁸ As noted above, however, security itself is associated with the safety and survival of the state. It is the protection of the nation and its citizens from harm or destruction or from dangerous threats. In this context, adequate security measures will ensure the absence of threats in the acquisition of values and the absence of fear in the enjoyment of such values. Thus, a nation is only secure when it is not in danger of sacrificing its core values if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such a war.²⁹ Following this line of thought, the argument is that the state is the only functional institution endowed with the power and authority to safeguard its territory and people.³⁰ In this sense, therefore, security consists of a functional and inter-dependent body of supervisory services and institutions, and security vote becomes the mechanism through which security is realized.

Ibeanu and Momoh have deprecatingly portrayed security vote as “an opaque fund reserved for the executive arm at various levels of government, to manipulate security issues for political and economic gains”.³¹ To Egbo, Nwakoby, Onwumere and Uche, it involves the “misappropriating and stealing of public money under the guise of enhancing national security”.³² For Kumolu, it refers to “funds unconstitutionally appropriated by government at all levels in Nigeria for the purpose of enhancing national security”.³³ For Dada, however, a more temperate view of security vote may yield a less derisive definition than those given above. According to him:

“Security vote may thus be defined as the budgetary or extra-budgetary allocations ostensibly [earmarked] for security, received by the President, Governors and Local Government Chairmen which they spend without legal obligation to account for how it is spent. It is an amount spent by heads of government,

27 A Nwozor “National security, religious anarchism and the politics of amnesty in Nigeria” (2013) 1/1 *Covenant University Journal of Politics and International Affairs* 1 at 4.

28 O Egbo, I Nwakoby, J Onwumere and C Uche *Legitimizing Corruption in Government: Security Votes in Nigeria* (2010, African Studies Centre) at 14.

29 Z Moulaye *Democratic Governance of Security in Mali: A Sustainable Development Challenge* (2006, Friedrich Ebert Stiftung) at 17–18.

30 SI Zabadi *Understanding Security and Security Sector Dynamics* (2005, John Hopkins University Press) at 3.

31 Ibeanu and Momoh “State responsiveness”, above at note 9 at 69.

32 Egbo et al *Legitimizing Corruption*, above at note 28 at 4.

33 C Kumolu “Insecurity: What has the security votes [sic] secured?” (15 May 2013) *Vanguard*, available at: <<http://www.vanguardngr.com/2013/05/insecurity-what-has-the-security-votes-secured/>> (last accessed 4 April 2018).

with or without legislative appropriation, supposedly - on security without the requirement of disclosure on how the money is spent. Thus, what constitutes security vote may not have been appropriated by the relevant legislature; and even where the amount is appropriated, how it is spent, why it is spent and when it is spent are matters within the exclusive prerogative of the particular head of government who is not under any imperative duty of making any disclosure.”³⁴

Ordinarily, as its name indicates, security vote is meant for the augmentation of security matters in states and at the federal level, where innumerable challenges arise by the day. In view of the fact that Nigeria operates under “pseudo-federalism”, security agencies (such as the police and civil defence) operating in the states have barely sufficient funds and so often go cap-in-hand to state governments to solicit assistance in the purchase of security equipment, automobiles and for operational costs. The justification for the security votes is that heads of government should be unencumbered by bureaucracy and should be empowered to act speedily to attack security challenges in their domains. In this sense, an aggregation of security concerns, such as ethnic insurrections that need urgent fiscal attention to be curbed, break-out continuously in different parts of the country, thus necessitating the setting aside of funds for tackling them head-on. Security votes, thereby, become funds expected to be used to cater for these emergency occurrences.

For the purposes of this article, therefore, “security vote” may be taken to cover the appropriation of funds for national security and how these funds are disbursed and expended.

PROGRESSION TOWARDS THE SECURITY VOTE PARADIGM

Generally, Iriekpen observes that, in one school of thought, the security vote idea had its origins in the USA, particularly under President Richard Nixon.³⁵ However, even before the time of Nixon, US Congress had partaken in the planning, financing and implementation of some national security issues. In this context, it has been reported that:

“Congress is not without some past experience in clandestine legislative performance and lawmaking. In 1811, during the third session of the 11th Congress, two statutes and a joint resolution pertaining to Florida ... were enacted by both Houses in secret session ... Congress also has a long history of confidential funding - burying lump sums of money in an

34 JA Dada “Security votes in Nigeria: A desideratum for security or recipe for corruption?” (2015) 5/7 *Public Policy and Administration Research* 1 at 26.

35 D Iriekpen “Nigeria: Plugging the security vote leakage” (16 October 2012) *All Africa*, available at: <<http://allafrica.com/stories/201210160402.html>> (last accessed 4 April 2018).

appropriation ... A memorable example of this kind of financial arrangement is the Manhattan Project, which developed and produced the atomic bomb.”³⁶

Following President McKinley’s assassination in 1901, the leaders of Congress asked the Secret Service to protect the president. Five years later, Congress, for the first time, appropriated funds for the protection of the president with the passage of the Sundry Civil Expenses Act of 1907 (enacted in 1906). In 1943, Congress appropriated funding for protection missions. The appropriation was for protecting the president, the president-elect and their immediate families, and providing funding for the White House Police Force.³⁷

The Second World War and the onset of the Cold War inevitably elevated state covert security operations to a new level. The promulgation of the US National Security Act of 1947 (with its principal tool of secrecy) set the stage for the rise of the national security state.³⁸ After the assassination of President John F Kennedy in 1963, “US Congress started to include, in the country’s annual appropriations, large sums of money for presidential protection (Nigeria’s example of security votes for Presidents and Governors) [and] when Nixon became President, he converted part of the allocation to develop his country home, including the provision of an exotic, state-of-the-art swimming pool”.³⁹ On the accusation that he misappropriated public funds, Nixon contended that the president could not be said to be protected if his country home was not fortified. Believing that Nixon had got the better of them, Congress hurriedly enacted the Impoundment Act of 1974, which makes it mandatory for proceeds of crime to be impounded.⁴⁰ The act was intended to reorganize budgetary procedures and place limits on presidents who refused to spend funds for the purposes set forth in appropriations bills. In conjunction with other statutes, including the Gramm-Rudman-Hollings Act of 1985 (Gramm-Rudman), the Budget Enforcement Act of 1990 and the Line Item Veto Act of 1996, Congress has been able to restore legislative control over the president’s arbitrary appropriation of the country’s finances under the guise of security.⁴¹

Congress’s concern in restoring legislative control over security expenses is not difficult to understand. Most historical narratives are replete with misuses occasioned by secrecy, leading to abuses in issues of security. In this context, there has been a seemingly unending tussle between harmonizing the requirements for secrecy in security matters and the liberty of the general public to obtain information regarding how they are governed. The apparent

36 H Relyea “The coming of secret law” (1988) 5 *Government Information Quarterly* 97 at 116.

37 S Reese *The US Secret Service: History and Missions* (2014, Congressional Research Service) at 7–8.

38 *Ibid.*

39 Iriekpen “Nigeria”, above at note 35.

40 *Ibid.*

41 L Fisher “Congressional budget and Impoundment Control Act (1974)” (2004) *Encyclopedia.com*, available at: <<http://www.encyclopedia.com/doc/1G2-3407400062.html>> (last accessed 4 April 2018).

conflict in Nigeria between the Official Secrets Act⁴² and the more recent Freedom of Information Act (FoI) Act⁴³ comes to mind.

Section 1(1) the Official Secrets Act, prohibits *any person* from revealing official facts and figures, and any person who transmits, obtains, reproduces or retains any classified matter would be guilty of an offence. According to the provisions of section 1(2), a public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter that by virtue of his office is obtained by him or under his control, is also guilty of an offence. So impenetrable is the veil of secrecy, that government departments withhold information even from each other under the guise of official secrets legislation. As a result, the Official Secrets Act is widely identified as the reason for the secrecy in government dealings and the ease with which funds are constantly siphoned under security votes.⁴⁴

However, with the passing into law of the FoI Act, it can be argued that the absolute hegemony of the Official Secrets Act in Nigeria has come to an end. In this regard, section 1 of the FoI Act provides:

- (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.
- (2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.
- (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.”⁴⁵

A straightforward interpretation of this provision (among others) will show that every Nigerian, be they a person, corporate body or the media, has the legal right to make an application to any public institution to request access to public information and records. Where the public institution is unable to provide the requested information within seven days, this would amount to refusal, unless the institution seeks an additional seven days because of the volume of records requested. If the institution turns down a request, it must state the reason for doing so.⁴⁶

42 Cap O3, Laws of the Federation of Nigeria (LFN), 2004.

43 FoI Act, LFN, 2011.

44 K Ajulo “Freedom of Information Act: The challenge of Official Secret [sic] Act” (2011) *Logbaby.com*, available at: <http://logbaby.com/news/foi-the-challenge-of-official-secret-act_8457.html#.Wsk9OGflSmw> (last accessed 4 April 2018).

45 Again, the provisions of sec 28 of the act are clear on the fact that even a classified document is not exempt from disclosure and, where an official decides not to disclose, that official must give a reason for doing so. Similarly, sec 30(3) of the act defines the meaning of a public institution for the purposes of the act.

46 Ajulo “Freedom of Information Act”, above at note 44.

The contention is that, since the FoI Act provides that Nigerian citizens have the right to seek information regarding how their government is run (including the amounts allocated to security votes and how such monies are expended), there is no reason for a government official to use the Official Secrets Act as an excuse for withholding information on the use of security votes.⁴⁷ Ajulo contends that, since the provisions of the Official Secrets Act are in direct conflict with some of the provisions of the FoI Act (for example sections 1 and 28) and “the canon of interpretation is that where two statutes or laws are in conflict with each other, the latter in time will prevail (since the latter law will be deemed to have come into existence to correct the mischief and anomalies of the earlier)”,⁴⁸ the promulgation of the FoI Act (which is later in time) has sounded the death knell for the application of the Official Secrets Act. More importantly, he argues that the FoI Act has constitutional flavour in the sense that it derives from and has its foundation in sections 22⁴⁹ and 39⁵⁰ of the Constitution. Since section 1(3) of the Constitution unambiguously states that “where any enactment is inconsistent with its provisions, the Constitution would prevail” and that any “other law to the contrary would be null and void to the extent of the said inconsistency”, any provisions of the Official Secrets Act that are inconsistent with the FoI Act will be null and void to the extent of that inconsistency.⁵¹

No matter what the inspiration behind the promotion of secrecy in security matters may be, Ball has suggested that, in the past, nation-states have assumed and implemented four major mechanisms for concealing their security disbursements. These include: keeping two sets of accounts; creating revenue sources for security funding that are not included in the national budget; disaggregating security expenses in a way that is not useful or understandable to the general public; and incomplete disclosure and repatriation of foreign exchange earnings.⁵² In this situation, governments are hardly ever troubled by the need to rationalize security votes or the ensuing proliferation and unaccountability in the use of these votes.⁵³ The Nigerian condition is not an exception.

47 Under sec 11(1) of the FoI Act, disclosure of information may be denied if it will be injurious to the conduct of international affairs and the defence of the country. Nevertheless, this exception is qualified because, under sec 11(2), the act states that “notwithstanding subsection (1), an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause”.

48 Ibid.

49 Freedom of the press, radio, television and other agencies of the mass media.

50 Fundamental right of freedom of expression.

51 Ajulo “Freedom of Information Act”, above at note 44.

52 N Ball “Measuring third world security expenditure: A research note” (1984) 12/2 *World Development* 157 at 164.

53 Egbo et al “Security votes in Nigeria”, above at note 16 at 601.

THE HEGEMONY OF SECURITY VOTES IN NIGERIA

As a matter of fact, information on exactly when the idea of security votes was introduced into the country's political lexicon is difficult to obtain. As noted above, issues surrounding national security and the security vote concept are usually shrouded in secrecy. The common argument usually proffered for taking this stand is that such discussions and the attendant revelations may endanger national security.⁵⁴ As Dickson submits, "[t]he essence of secrecy in security matters ... has been defended on the basis of the need to accommodate 'plausible deniability', to provide 'cover' for operations, to elicit cooperation from national intelligence agencies in other countries, and, finally, to facilitate counterintelligence and counterespionage activities".⁵⁵

Page, writing in *Premium Times*, suggests that security votes became prominent (though not necessarily established)⁵⁶ during Nigeria's Second Republic from 1979 to 1983, when politicians used the concept to siphon public funds for personal gain.⁵⁷ According to him, this was the major reason why Buhari clamped many of them into detention when Shagari's civilian government was overthrown on 31 December 1983.⁵⁸

What is not in doubt, however, is that it was during the military regimes of Generals Babangida and Abacha that the notion was perfected and institutionalized. In this context, Osahon insists that there is publicly available evidence corroborating the large scale abuse of security votes during the military junta of General Babangida.⁵⁹ The height of corruption in the junta certainly encouraged insecurity and provoked many challenges to government authority.⁶⁰ Supporting this line of argument, Mähler suggests that "the military rulers, in particular Babangida and Abacha, utilized oil rents to engage traditional rulers and draft them into their governments, in order to strengthen their political legitimacy. In the process, the culture of rent seeking and endemic corruption was greatly encouraged".⁶¹ Regardless of the extensive

54 D Goldberg "Executive secrecy, national security and freedom of information in the United Kingdom" (1987) 4/1 *Government Information Quarterly* 43 at 44.

55 D Gibson "Secrecy: The communication dilemma of CIA" (1987) 13/2 *Public Relations Review* 27 at 29.

56 They may have been employed in a limited form by the military between 1966 and 1979.

57 M Page "Nigeria: Buhari's 2016 budget continues use of secretive 'security votes'" (15 January 2016) *Premium Times*, available at: <<http://blogs.premiumtimesng.com/2016/01/15/nigeria-buharis-2016-budget-continues-use-of-secretive-security-votes-by-matthew-page/>> (last accessed 4 April 2018).

58 Ibid.

59 N Osahon "The evil candidate: General Ibrahim Badamosi Babangida" (24 May 2014) *African Orbit*, available at: <<http://africanorbit.com/news/245/the-evil-genius-general-ibrahim-badamosi-babangida.html>> (last accessed 10 April 2018).

60 P Arinze "An examination of corruption in Nigerian economy" (2008) 23 *Hemispheres: Studies on Cultures and Societies* 61 at 66.

61 A Mähler "Nigeria: A prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta" (German Institute of Global and Area Studies Research

corruption witnessed under the regime, the centralized nature of military administrations ensured that the abuse of security votes was limited to the top hierarchy of the administration.⁶²

In 1993, General Abacha toppled the Shonekan interim government. Egbo and others maintain that Abacha's government continued with the Babangida legacy on issues such as security votes. Given the secretive nature of security votes, however, very little was known about his escapades in this subject until after his death in 1998. In one of the panels established after his death to scrutinize the activities of his government, it was observed that:

“Peter Gana, an Assistant Commissioner of the Nigerian Police, for example, was able to point to some of the methods used by Abacha to extract cash from the Government. In particular, he cited what has become known as the Security Vote Monies method. It was used by Abacha together with Alhaji Ismaila Gwarzo, his former National Security Adviser. Gwarzo would write letters to Abacha requesting payment of sums of money to meet ‘urgent’ national security needs. Around 30 of these letters were written over a three-year period from 1995 to 1998. The sums requested started at around \$0.8 million and progressively increased - the highest was around \$200 million. The Central Bank was then constrained by order of the Head of State to make available huge sums in cash or by way of transfer through the banking system. The monies extracted from the Central Bank amounted to nearly \$2 billion”.⁶³

Again, while validating the allegation that the security vote was essentially used for private gains during the regime, the US government (in a document filed by the States’ Department in the District and Bankruptcy Courts for the District of Columbia) states that, “Abacha together with Mohammed Sanni Abacha, Bagudu and others, systematically embezzled public funds worth billions of dollars from the CBN on the pretext that the funds were necessary for national security. After causing the CBN to release the funds often in cash, Gen Abacha and Bagudu then moved the funds overseas, including through US financial institutions”.⁶⁴

General Abdulsalami Abubakar succeeded Abacha and lasted about ten months. Although the regime did not last for long, it was tainted by the rate at which the country's foreign reserves were depleted, from \$7.1 billion at its inception to \$3.1 billion by the time it left office.⁶⁵

contd

Programme: Violence and Security, January 2010), available at: <<https://www.ciaonet.org/attachments/15531/uploads>> (last accessed 4 April 2018).

62 Egbo et al *Legitimizing Corruption*, above at note 28 at 20.

63 Quoted in id at 21.

64 See Dada “Security votes in Nigeria”, above at note 34 at 26.

65 Egbo et al *Legitimizing Corruption*, above at note 28 at 21.

Following the country's return to civilian rule in 1999, public officials, such as President Olusegun Obasanjo and former National Security Adviser Aliyu Mohammed Gusau, continued with the trend of appropriating large sums of money as security vote. For instance, it is alleged that Obasanjo used funds from his security votes to finance his botched third term agenda. According to Ali Ndume (now the majority leader in the Senate), "[i]s it not Obasanjo who bred corruption in this country? It was during his tenure that corruption moved from low level to high level. It was during his tenure that he gave ₦50 million each to members of this House to extend his tenure".⁶⁶ Obasanjo handed over to the late President Yar'Adua and the abuse of security votes continued. In this regard, it was reported that billions of naira designated as security votes vanished without trace under dubious conditions while the president was away in Saudi Arabia, receiving treatment. The allegation is that a cabal close to the sick president was responsible for this action. The suggestion is that the monies were stashed away in foreign bank accounts in Mauritius, Saudi Arabia and the Isle of Man.⁶⁷

The immediate past administration of Goodluck Jonathan is not exempt from the "security vote party". The case of former National Security Adviser Sambo Dasuki and the \$2.1 billion arms deal is a matter of common knowledge. Here, funds (earmarked as security votes) meant to be used to acquire military equipment in the fight against terrorism, were methodically diverted by top government officials for personal gain, in negation of the functionalist requirement of the state to curb insecurity and protect the people.⁶⁸

Various security vote accounts have also been uncovered, not only in the offices of the national security adviser or of the state security service and the military, but even in the accounts of the Nigeria National Petroleum Corporation (NNPC).⁶⁹ In one specific case, it is alleged that the former president authorized a contentious disbursement of ₦2.4 billion in a day for the lease of 13 houseboats for military operations by the Joint Task Force (Operation Pulo Shield) in the Niger Delta. In the official communication for the disbursement, the former president directly requested the then petroleum minister to "release the sum from NNPC security vote".⁷⁰

66 "Obasanjo bribed lawmakers to extend tenure, says house leader" (6 August 2010) *Next Newspapers*, quoted in id at 24.

67 "₦70bn security vote: US bans late Yar'adua's men" (16 July 2010) *Vanguard*, available at: <<https://www.vanguardngr.com/2010/07/n70bn-security-vote-us-bans-late-yaraduas-men/>> (last accessed 10 April 2018).

68 A Ademoyo "Dasuki-gate and the looting of Nigeria: Why we must look beyond Buhari" (20 December 2015) *Premium Times*, available at: <<http://blogs.premiumtimesng.com/2015/12/20/dasuki-gate-and-the-looting-of-nigeria-why-nigeria-must-look-beyond-buhari-by-adeolu-ademoyo/>> (last accessed 4 April 2018).

69 "Buhari has scrapped security vote to top federal officials" (23 February 2016) *Sahara Reporters*, available at: <<http://saharareporters.com/2016/02/23/buhari-has-scrapped-security-vote-top-federal-officials-sources>> (last accessed 10 April 2018).

70 *Ibid.*

The security vote idea has also been the topic of impassioned deliberations in many states and their Houses of Assembly. While conceding that no empirical data corroborate or substantiate some of these allegations, they are nevertheless suggestive of the amount of public funds that goes into security votes. In Edo State, “the Governor, Adams Oshiomole, was once accused of collecting ₦911 million ‘between November 12 to December 31, 2008’ as security vote without decline in extra judicial killings, kidnapping, and cultism in the state”.⁷¹ In the same way, the Ondo State governor was alleged to have appropriated ₦4 billion annually as security vote.⁷² Again, there was consternation in Abia State, not long ago, when the deputy speaker of the house, while denying the accusation that the house had approved the monthly sum of ₦700 million as the governor’s security vote, stated that, “[t]his House has not approved ... ₦700 million for the governor. Assuming it is passed the way it is in the budget estimate, it is only going to be ₦667 million and not ₦700 million”.⁷³ The house approved ₦667 million monthly and not ₦700 million! As Dada has queried, what is the difference?⁷⁴

Similarly, the current Bauchi State government has accused the immediate past state governor, Isa Yuguda, of receiving and misspending the sum of ₦91 billion as security vote over eight years.⁷⁵ Furthermore, the illegal impeachment of Rashidi Ladoja, when he was governor of Oyo State, was alleged to have been predicated on a disagreement between him and his political godfather, Lamidi Adedibu, regarding their share of the monthly security votes accruing to the governor.⁷⁶ The same story replicates itself in other states of the federation, including Rivers, Anambra, Lagos and Bayelsa.⁷⁷

Local governments are not left out of this jamboree. In this regard, chairmen of local government areas (which are not normally regarded as an autonomous layer of government in Nigeria)⁷⁸ who are not constitutionally saddled with any security task are regularly apportioned security votes. In a 2007 study on local governments and security votes in Rivers State, for instance, Human Rights Watch alleges that:

71 M Nnebe “Squandering of riches”, cited in Dada “Security votes in Nigeria”, above at note 34 at 26.

72 Ibid.

73 Id at 27.

74 Ibid.

75 S Edeh “Yuguda spent ₦91bn security vote in 8 years: Bauchi govt” (16 December 2015) *Vanguard*, available at: <<http://www.vanguardngr.com/2015/12/yuguda-spent-n91bn-security-vote-in-8-yrs-bauchi-govt/>> (last accessed 4 April 2018).

76 A Abdul-Jelil “‘Godfatherism’ and Nigeria’s fourth republic: Violence and political insecurity in Ibadan”, cited in Egbo et al *Legitimizing Corruption*, above at note 28 at 28.

77 Egbo et al, id at 24–28.

78 See R Achara “Can Nigerian local government councils autonomously impose rates?” (2003) 47 *Journal of African Law* 221 at 221.

“The security vote is one of the most opaque items in any local government budget; and it is also typically one of the largest single allocations ... According to a Commission of Inquiry convened in 2006, Khano Local Government’s Chair has received an average of ₦60 Million (\$461,000) annually for his security vote ... Tai local government’s chair had a security vote of ₦40 million (\$300,000) in 2006. Opobo / Nkoro Local government’s security vote was ₦36 million (\$280,000.00) in 2006. In each of these cases, the security votes exceeded the total capital budget for either health or education.”⁷⁹

From this, it is clear that there is no limit to, or regulation of, what may be spent as security vote and, sadly, the amount involved is neither accounted for nor subject to any form of legislative scrutiny or accountability.

SECURITY VOTE AS “A CATALYST” FOR CORRUPTION

Many would argue that a precise definition of corruption is impracticable since it is a notion that is culturally delineated and differs from one society to another. For instance, the act of giving gifts to officials may be considered normal in one country and forbidden by law in another.⁸⁰ Nevertheless, a simple formulation sees the concept as the abuse or inappropriate utilization of power and influence, intentionally and wilfully for private reward or group advantage. In this sense, corruption connotes the abuse of public roles or resources, or the use of illegitimate forms of political power and influence by public or private individuals.⁸¹

The personal advantages acquired by corrupt public officials, delegated to manage and direct public governance, are usually to the detriment of both the common good and of those who refuse to “cheat the system”.⁸² For Koffi Annan, corruption is an “insidious plague that has a wide range of corrosive effects on societies”, and those that engage in it “divert funds intended for development, undermine the ability of governments to provide basic services, feed inequalities and injustice, and discourage foreign aid investment”.⁸³

Corruption denotes depravity, perversion, or taint; it is an impairment of integrity, virtue or moral principles, especially the impairment of a public

79 Human Rights Watch “Chop fine: The human rights impact of local government corruption and mismanagement in Rivers State” (31 January 2007), available at: <<https://www.hrw.org/report/2007/01/31/chop-fine/human-rights-impact-local-government-corruption-and-mismanagement-rivers>> (last accessed 4 April 2018).

80 *Governance Corruption and Conflict* (2010, US Institute of Peace) at 4.

81 IS Ogundiya “Political corruption in Nigeria: Theoretical perspectives and some explanations” (2009) 11/4 *Anthropologist* 281 at 292.

82 *Governance*, above at note 80.

83 UN Convention Against Corruption (UN Office on Drugs and Crime, 2004), available at: <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> (last accessed 4 April 2018).

official's duties.⁸⁴ Familomi says that "corruption broadly entails the perversion of a person's integrity or the injection of additional but improper transactions aimed at changing the normal course of events and altering judgment."⁸⁵ Corruption is the dishonest use of a person's position or power to his own advantage, especially for money or money's worth. Corruption often involves abuse of office, to wit, the illegal, improper or harmful use of office. According to McMullan, a broad definition of the term will include a range of activities. Thus, "a public official is corrupt if he accepts money or money's worth for doing something he is under a duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons".⁸⁶ The UN Convention Against Corruption⁸⁷ defines a "public official" to mean any person who performs a public function or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party.⁸⁸

The extraordinary increase in security vote appropriation not only broadened the resources available to national security administrators, but also acted as a vital mechanism for the emergence of corruption.⁸⁹ As was discussed earlier, there is no tool for either the auditing or verification of how security votes in Nigeria are expended. Once the security vote is encapsulated in the budget (that is if it is included at all),⁹⁰ its disbursement is within the discretion of the "government officials authorized to spend it and the manner in which they deem its spending necessary is beyond audit query".⁹¹ The

84 BA Garner *Black's Law Dictionary* (8th ed, 2004, Thomson West) at 371.

85 K Familomi "Political economy of corruption", quoted in JF Olorumfemi "Unbundling or merger of the Economic and Financial Crimes Commission and the independent Corrupt Practices Commission: Which way" in CG Nnona (ed) *Law, Security and Development: Commemorative Essays of the University of Nigerian Law Faculty* (2013, Snaap Press Nigeria Ltd) 205 at 210.

86 T Newburn "Understanding and preventing police corruption: Lessons from the literature" (1999) 110 *Police Research Series* 1 at 6.

87 See also UN Office on Drugs and Crime *United Nations Convention against Corruption* (2004, UN Publications) at 7.

88 Id at 7–8.

89 D Elombah "Corruption: How the president and governors steal from security votes" (24 December 2010), available at: <<https://www.facebook.com/notes/watchdog-nigeria/corruption-how-the-president-and-governors-steal-from-security-votes/115288581893503/>> (last accessed 4 April 2018).

90 What usually happens in practice is that a particular amount will be included in the appropriation budget for security issues; however, government officials will expend ten times more than the captured amount and claim that the funds are expended as security vote. They are not questioned as to how they could have spent funds in excess of the approved amount. They are not even questioned as to how they spent even the small amount that was captured in the budget.

91 A Akume and J Godswill "The challenge of managing insurgency in Nigeria: 2009–2015" (2016) 7/1 *Mediterranean Journal of Social Sciences* 145 at 149.

unaccountable character of security vote must have pre-occupied El Rufai's mind when he labelled it a "slush fund".⁹² According to Human Rights Watch:

"The security vote is a budget line that is meant to act as a source of discretionary spending that the executive arms of government can use to respond quickly and effectively to threats to peace and security in their jurisdictions. However the use of those funds is notoriously opaque; there is generally no requirement that governors or local government chairpersons account for their use of those funds. In many cases, security vote money ... has been lost to graft and patronage."⁹³

Those who introduced the idea into Nigeria's political dictionary apparently neglected to take into account the intolerable greed of eminent Nigerian politicians. As Alabi and Fashagba have argued, it could not have been poverty that led General Sanni Abacha to divert several billions of public funds into foreign private accounts. For them, the only explanation for such an inordinate thirst for wealth acquisition in Nigeria is greed.⁹⁴ Concealed under the provision that its beneficiaries are not obligated to rationalize how it is expended, the security vote has become a conduit through which public officials and their cronies channel vast amounts of Nigerian finances into illegitimate private desires.

Analysts have identified a robust connection between security vote and corruption. In this context, there is an overwhelming understanding that security vote is an opportunity for embezzling public funds in Nigeria. The Legal Defence and Assistance Project, a non-governmental organization, states that "security votes, as well as local government allocations, are the two windows through which state executives loot public treasuries".⁹⁵ Accordingly, the initiative of allocating millions of naira to unaccountable political elites, under the guise of dealing with security challenges, is a formula for invasive sleaze and fraud. The concept offers an effective mandate to public officials to dissipate public funds without examination, analysis or responsibility and without providing "security" for anyone except the executives' pockets and their bank accounts.⁹⁶

92 N El Rufai "Budget 2012: The security spending spree" (2 February 2012) *Sahara Reporters*, available at: <<http://saharareporters.com/2012/02/02/budget-2012-3-security-spending-spre-nasir-ahmad-el-rufai>> (last accessed 4 April 2018).

93 Human Rights Watch "Chop fine", above at note 79.

94 MOA Alabi and JY Fashagba "The legislature and anti-corruption crusade under the fourth republic of Nigeria: Constitutional imperatives and practical realities" (2010) 1/1 *International Journal of Politics and Good Governance* 1 at 8.

95 Quoted in Dada "Security votes in Nigeria", above at note 34 at 26.

96 Id at 27.

(UN)CONSTITUTIONALITY OF SECURITY VOTES: A CALL FOR CLARIFICATION

In its preamble, the Constitution declares: “[w]e the people of Nigeria... and to provide for a Constitution for the purpose of *promoting the good government and welfare of all persons in our country*, on the principles of freedom, equality and justice ...; do hereby make; enact and give to ourselves the following Constitution”.⁹⁷ Again, under section 14(1), the Constitution provides that “[t]he Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice”; section 14(2)(b) declares that “the security and welfare of the people shall be the primary purpose of government”; more specifically, section 15(5) provides that, “[t]he State shall abolish all corrupt practices and abuse of office”. In this sense, while section 14(2)(b) enjoins government to ensure and guarantee the security and welfare of Nigerian citizens as a primary purpose, the latter section insists that it shall do so while eliminating all forms of corruption and abuse of office (including the embezzlement of public funds through security votes).⁹⁸

Other sections of the Constitution also deal with issues of transparency and accountability in the appropriation, disbursement and accounting of public funds expended by the government. However, none of these sections authorizes the disbursement of funds under the security vote umbrella, as is currently the norm in Nigeria. In this context, although the second schedule of the Constitution bestows on the federal government exclusive authority for the country’s security, it did not provide for the creation of a distinct pool of funds as security vote. Again, the Constitution neither provides for a governor nor a local government chairman to be the chief security officer of the state or local government, as the case may be (in practice, state governors and local government chairmen are made ceremonial chief security officers while commissioners of police and divisional police officers, who are agents of the national leadership and government, wield the real powers and functions in the states and local governments).⁹⁹ Although the president (under item K of part I of the third schedule of the Constitution) is the chairman of the National Security Council, no such provision was made for the governor. By implication, all instruments of security (the military and the police, state security services, even road safety personnel and traffic wardens) are federal institutions, because they are under the exclusive legislative list in the Constitution. It is, therefore, surprising that a state governor or a local

97 The emphasis here is on promoting the good governance and welfare of all persons in Nigeria (emphasis added).

98 However, it should be noted that the provisions of secs 14(2) and 15 are contained in chap II (fundamental objectives and directive principles of state policy), which are apparently rendered “non-justiciable” by the provisions of sec 6(6)(c) of the Constitution.

99 OI Eme and H Ede “The politics of intergovernmental relations in Nigeria: Perspectives of the south-east geopolitical zone” in G Onu, C Umezurike, MB Nnabugwu and OBC Nwankwo (eds) *Issues in Politics and Governance in Nigeria* (2009, Quintagon) 1 at 12.

government chairman is labelled “the chief security officer” of his state or local government.

Furthermore, part C (sections 163–68) of the Constitution deals with issues of public revenue. While section 163 establishes the federation account, section 164 provides for the distribution of tax duties among the states on the basis of derivation, where tax or duty is imposed in matters specified in item D of part II of the second schedule. Section 164 deals with how the federal government may make grants to states, while section 165 provides that states must pay to the federation any amount incurred by the federation for the purpose of collecting tax. Section 166 deals with set-off on payments to be made by the federal government to state governments, section 167 provides for sums charged on the consolidated revenue fund and section 168 deals with provisions relating to payments to be made under the part. Again, no section of part C, dealing with public revenue, provides for a separate purse to be kept, to be known as “security vote”.

Generally, under the legislative function, section 4 of the Constitution stipulates that the National Assembly shall have the power to make laws for the peace, order and good governance of the country. Specifically, section 4 and sections 80–88 (sections 120–28 for state Houses of Assembly) of the Constitution empower the legislature to perform oversight functions regarding the budget and expenditure of the executive arm of government. Oversight functions require the supervision of the executive branch and how it implements the laws passed by the legislature in order to check possible abuses of power by its officials. Legislative oversight therefore refers to the power of the legislature to appraise, scrutinize and oversee the activities of agencies, policies, actions and strategies of the executive arm of government.

In carrying out this mandate, the legislature is empowered to audit both the “before and after” expenditure of government agencies, to give appropriate direction on the administration and disbursement of funds and the execution of policies and projects under the Appropriation Act. More importantly, the Public Accounts Committees of both houses of the National Assembly have the specific mandate to review the disbursement and administration of public funds by ministries, departments and agencies.

In this context, section 80(3) of the Constitution states that “no money shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the appropriation of those moneys has been authorized by an Act of the National Assembly”. This withdrawal has to be done following the procedure laid down by the National Assembly as provided for in section 80(4) of the Constitution.

Again, section 81 of the Constitution (or section 121 in the case of State Assemblies) gives the president (or the governor of a state) the power to cause to be prepared and laid before each House of the National Assembly (or State House of Assembly) at any time in each financial year, estimates of the federation’s revenues and expenditure for the following financial year.

Section 85 (or section 125 in the case of a state) also insists that the accounts of all offices of the federation (and the states as the case may be) shall be audited by the auditor general who shall submit his reports to the National Assembly (or State House of Assembly). Under sections 88(1) and 128(1), each House of the National Assembly or State House of Assembly, respectively, shall have the power, by resolution published in its journal or in the *Official Gazette* of the government of the federation or of the state, to direct or cause to be directed investigations into the conduct of affairs of any person, authority, ministry or government department charged, or intended to be charged, with the duty of or responsibility for disbursing or administering moneys appropriated or to be appropriated by the National Assembly or the relevant state.¹⁰⁰

The implication of these provisions is that the legislative arm of government is empowered to carry out oversight functions over the entire process of budgeting and its implementation. Unfortunately, as things currently stand, the legislature appears to have failed in its constitutional responsibility of ensuring transparency and accountability in the use of security votes in Nigeria. This is because funds expended under security votes seldom pass through the National Assembly for the purposes of accountability. The legislature never audits how these monies are disbursed and implemented and, even though the legislature has been able to conduct several hearings to probe certain activities of some government agencies,¹⁰¹ no such probe or investigation has ever been conducted on the use (or abuse) of security votes by government officials.¹⁰²

It appears reasonable to think, therefore, that the security vote concept and its application in Nigeria derogates from the letter and spirit of the Constitution. This raises questions regarding transparency, accountability and constitutionality. This is because payments are not subjected to legislative audit and oversight, physical records of payments are not usually kept and disbursements are simply at the discretion of the president, governors, heads of ministries and departments or any other person to whom they delegate the disbursement of funds. The local government chairmen have also invented

100 Nevertheless, it is pertinent to note the provisions of sec 83 of the Constitution. The salient point here is that, although this provision may justify the appropriation of funds for security purposes, this can only be done for urgent and unforeseen needs and expenditure, and not for the “monthly allocation bonanza” executive officers receive in the name of security votes.

101 O Eme and TA Onyishi “The legislature and anti-corruption crusade under Nigeria’s fourth republic, 1999–2013” (2014) 5/15 *Mediterranean Journal of Social Sciences* 28 at 33.

102 This appears to be the case because, in most cases, the legislature works in alliance with the executive arm of government to misappropriate public funds. Alabi and Fashagba report various examples of this collusion between the executive and legislature. See Alabi and Fashagba “The legislature”, above at note 94 at 26–31. The implication of this is that the legislature is rendered incapable of discharging its oversight functions.

mechanisms through which they keep their own security votes without the knowledge of their state governors.¹⁰³

Essentially, within the three tiers of government, the security vote has become the executive arm's "pocket money".¹⁰⁴ Undoubtedly, therefore, the fact that security votes are not subject to the normal channels of budgetary constitutionality and accountability appears to be the major reason for the widespread allegation that they are abused by the executive arm of government.

APPROPRIATION AND EXPENDITURE OF SECURITY FUNDS IN THE UNITED STATES

In the USA, responsibility for authorizing and appropriating funds for security and intelligence purposes lies within the exclusive jurisdiction of Congress.¹⁰⁵ This oversight function is a powerful tool used by the US legislature to ensure that funds allocated for national security and intelligence are expended for the uses to which they have been appropriated.¹⁰⁶ Accordingly, there is a two-step process of appropriation and authorization over security spending, which enhances accountability and prevents abuse by those entrusted with security and intelligence fund spending. In this regard, while preparing the annual budget, there is a provision for intelligence funds that encompasses all security and intelligence activities of the US government. This budget is made up of two parts: the Military Intelligence Program (MIP) and the National Intelligence Program (NIP). As a general rule, the MIP is devoted to intelligence activities and analysis that support US military operations, most of which are conducted by intelligence agencies in the Defense Department. The NIP includes all other intelligence activities, which predominantly focus on national level security efforts, but include significant activities conducted by the National Security Agency, National Geospatial-Intelligence Agency and National Reconnaissance Office.¹⁰⁷

Following the standard congressional budgetary process, the Congressional Intelligence Committees first authorize funds before they are disbursed by the

103 O Nzeshi "Budget 2012: Paradox of cutting cost of governance" (4 March 2012) *Pro-Share*, available at: <<https://www.proshareng.com/news/Nigeria%20Economy/Budget-2012-Paradox-of-Cutting-Cost-of-Governance/16495>> (last accessed 4 April 2018).

104 E Eyieyen "On the \$2 billion arms purchase funds" (5 December 2015) *Selah*, available at: <<http://eghes.blogspot.com.ng/2015/12/on-2billion-arms-purchase-funds.html>> (last accessed 4 April 2018).

105 K King "Congress and national security" (2010) 58 *Council on Foreign Relations Special Report* 1 at 6.

106 E Rosenbach and AJ Peritz "Confrontation or collaboration? Congress and the intelligence community" (2009, Belfer Center for Science and International Affairs and Harvard Kennedy School), available at: <<http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf>> (last accessed 4 April 2018).

107 AJ O'Connell "The architecture of smart intelligence: Structuring and overseeing agencies in the post-9/11 world" (2006) 94/6 *California Law Review* 1655 at 1661.

Appropriations Committees. In this context, intelligence authorization legislation can establish, continue or change security and intelligence funding and expenditure. The authorization process begins with the director of national intelligence drafting an initial version of the NIP budget. This initial draft is prepared in conjunction with the under-secretary of defense for intelligence. The budget is subsequently submitted to the Office of Management and Budget for review and approval. That office then forwards the proposals to Congress in the form of congressional budget justification books.¹⁰⁸

When the draft reaches Congress, the Senate and House simultaneously review the security budget. The Senate Select Intelligence Committee, in conjunction with the Senate Armed Services Committee, and the House Permanent Select Committee on Intelligence, together with the House Armed Services Committee, carry out oversight functions over the MIP and NIP. Once the Senate and House Committees vote on their versions of the Security and Intelligence Authorization Bill, the entire Congress then votes on the bills. Differences between the bills are reconciled in a conference session before the legislation returns to the House and Senate for its final passage. Congress then sends the final bill to the president to be signed into law or vetoed.¹⁰⁹

Nevertheless, the budget process is not complete until the appropriations process provides the actual funding for the activities and programmes established through the authorization process. The majority of the security budget appears as a secret lump-sum amount in the Defense Appropriations Bill. The House and Senate Appropriations Committees both have Defense Subcommittees, which have control over a substantial part of the funds. The development of appropriations legislation follows the earlier security and intelligence authorization. The subcommittees of the House and Senate Appropriations Committees first draft their own versions, which are voted on in the subcommittee and then within the Appropriations Committee.¹¹⁰ After Congress has voted on the initial draft, reconciled any differences and voted again on the revised version, the legislation is conveyed to the president for approval or veto.¹¹¹

One of Congress's favoured techniques for keeping tabs on the executive branch is the "reporting requirement". This has been identified as a useful tool for gaining insights into policy implementation, executive branch agency operations, and compliance with legislative language, especially in the area of security and intelligence funding.¹¹² With this technique, Congress insists that

108 Rosenbach and Peritz "Confrontation", above at note 106.

109 Ibid.

110 US Senate Committee on Intelligence *Report of the Select Committee on Intelligence, United States Senate: Covering the Period January 4, 2007 to January 2, 2009* (9 March 2009), available at: <https://fas.org/irp/congress/2009_rpt/ssci.pdf> (last accessed 4 April 2018).

111 Ibid.

112 King "Congress and national security", above at note 105 at 13.

executive officials must account for the use and expenditure of funds allocated to them. As a result, there is a significant element of transparency and accountability on the part of those executive members who are aware that they will be called upon by Congress to report on their activities.¹¹³

Congressional oversight functions in the US continue to be reviewed from time to time, to ensure accountability and transparency in the appropriation and expenditure of security funds. For instance, after the 11 September 2001 terrorist attacks on the US, the National Commission on Terrorist Attacks (the 9/11 Commission) was established to review congressional oversight of security and intelligence matters in the US.¹¹⁴ The 9/11 Commission made recommendations regarding security and intelligence funding in the country, one of which was that issues of security funding should be de-classified. The commission's argument was that de-classifying information on security funding would eliminate inefficiency and increase government transparency (this has been countered with the argument that disclosing the budget would assist states and groups hostile to the US by providing them with insight into sensitive national security priorities).¹¹⁵ Notwithstanding the fact that this commission recommendation has not been implemented, the thinking is that it is a reasonable means for encouraging transparency and accountability in the disbursement of funds used for security and intelligence.

It therefore appears reasonable to hold that the process of legislative oversight in the US permits Congress to monitor the appropriation and expenditure of security budgets effectively and subjects the executive arm of government to the tenets of probity, transparency and accountability.

PREVENTING ABUSE OF SECURITY VOTES THROUGH THE LAW

It was noted above that the security vote concept (as it is practiced in contemporary Nigeria) is unconstitutional. It seems reasonable to think, therefore, that the best measure for preventing the misspending and embezzlement of security votes is to end the practice and abolish it entirely from the country's political lexicon. However, since it appears that total abolition is impossible or is overridden by the perceived need to combat actual security challenges, this article now recommends constitutional structures that could help in preventing the abuse of public funds in the name of security vote.

As was noted above, the legislative arm of government has the constitutional mandate to carry out oversight functions on the budget and expenditure of the executive arm of government. Oversight functions require supervision of the executive branch and how it implements the laws passed

113 Ibid.

114 National Commission on Terrorist Attacks *The 9/11 Commission Report* (2004), available at: <<https://9-11commission.gov/report/911Report.pdf>> (last accessed 4 April 2018).

115 Ibid.

by the legislature in order to check possible abuses of power by these officials. According to the US Congressional Research Service:

“A fundamental objective of congressional oversight is to hold executive officials accountable for the implementation of delegated authority. This objective is especially important given the huge expansion of executive influence in the modern era ... Clearly, given the role and scope of the federal establishment, the importance of Congress’s review function looms large in checking and monitoring the delegated authority that it grants to federal departments and agencies.”¹¹⁶

In the event that it is not possible to abolish the concept of security votes entirely (since it is unconstitutional), the National and State Houses of Assembly must be prepared to take their oversight function seriously. They must be prepared to investigate how monies are expended under this heading and insist on accountability on the part of the executive arm of government. Accepting that there are some security expenditures that cannot withstand public scrutiny without endangering their general objective of maintaining adequate security, this cannot justify the present situation in Nigeria where public officers allocate to themselves vast sums of money, spent with no accountability on issues that have nothing to do with the security or welfare of the people.

In this context, the authors recommend that the National Assembly (and state Houses of Assembly, where appropriate) establish a special procedure for the appropriation and oversight of security vote. This procedure, in the form of an act (or law as the case may be), would require legislative approval for security votes under suitable headings that may include: provision of vehicles and equipment for the police and other security agencies; training of security agencies; intelligence and counter terrorism; special allowances for security operations; and special provisions to deal with emergency security challenges. The legislature should then use the various legislative committees to monitor and supervise how monies allocated under these various headings are expended by the executive officers.

The legislation should also insist that general information on the particular amounts appropriated for each heading and how they are eventually expended is readily made available to members of the public, especially bearing in mind the existence of the FoI Act. This would be in line with what obtains in other jurisdictions (for example the US) where it is usual practice for intelligence committees to vote to release information on security

116 P Towell “Defense: FY2011 authorization and appropriations” (23 November 2010) *Congressional Research Service*, available at: <<https://fas.org/sgp/crs/natsec/R41254.pdf>> (last accessed 4 April 2018).

spending periodically, and such votes should not elicit any objection from the executive branch of government.¹¹⁷

Generally, there is no reason why the Nigerian legislature should not borrow a leaf from Congress and effectively supervise and monitor the appropriation and expenditure of security funds, from the time of budget drafting and legislative appropriation, even to after the disbursement of the funds. The Nigerian legislature should also use such a mechanism as the “reporting requirement” (to be embedded within the proposed new legislation) to insist that public officials within the executive arm of government appear in chambers to give a detailed account of how they expended monies allocated to them under the various headings of security votes created by the act. There is also no reason why the Nigerian legislature should not enact legislation similar to Gramm-Rudman and the Budget Enforcement Act (both highlighted above) to help check executive excesses in budget appropriation and expenditure.

Furthermore, as a means of preventing the abuse of security votes in Nigeria, the provisions of the fifth schedule to the Constitution (the Code of Conduct for Public Officers) are considered apposite. A chief executive who collects security vote and undertakes personally and or individually to administer security in their domain puts themselves in a position where their personal interest may conflict with their duties and responsibilities.¹¹⁸ By the time they claim a right to rebuild their country home or hire and pay classified private security personnel as part of security vote expenses, their interest will conflict with their duty, which will amount to a breach of the Code of Conduct.¹¹⁹

Again, a chief executive who misspends or embezzles security vote abuses their power under paragraph 9 of the fifth schedule to the Constitution. By such misspending or embezzlement, they do or direct to be done, in abuse of office, an arbitrary act prejudicial to the right of other persons, knowing that such act is unlawful or contrary to government policy. As a result, any president or governor who collects security votes and fails to prevent insecurity, crime or insurgency within the federation or a state as the case may be (and there is a consequential death, injury or loss of the property of citizens), has performed an arbitrary act prejudicial to the people’s fundamental rights to life and property.

Therefore, they can, and should be, prosecuted at the Code of Conduct Tribunal for breach of the code, according to paragraph 18 of the fifth schedule. In *Bukola Saraki v Federal Republic of Nigeria (FRN)*,¹²⁰ the Court of Appeal

117 The Select Committee on Intelligence United States Senate 103rd Congress (second session) *Legislative Oversight of Intelligence Activities: The US Experience Report* (1994, US Government Printing Office) at 8.

118 The Constitution, fifth sched, para 1.

119 *Ibid.*

120 [2016] 2 NWLR (pt 1495) 1 at 59, paras A–C. See also *Attorney-General of the Federation v Abubakar* [2007] 8 NWLR (pt 1035) 117.

held that the Code of Conduct Tribunal is a special court established to adjudicate cases or disputes relating to breaches of the code by public officers. However, it is also true that the chief executives enjoy immunity from such proceedings during the pendency of their tenure and can only be prosecuted after the expiry of their tenure.¹²¹ The agencies responsible for prosecution should ensure that such defaulting chief executives are duly prosecuted and the proceeds of such illegal activities confiscated.

This section of the article cannot be complete without mentioning two salient acts in operation contemporary Nigeria: the Economic and Financial Crimes Commission (EFCC) Act¹²² and the Corrupt Practices and other Related Offences Act.¹²³ Section 40 of the EFCC Act defines economic crime to include, among other things: “the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, ... money laundering, embezzlement, bribery, looting and any form of corrupt practices”. The misspending and embezzlement of security votes fits into this definition of crime. Those public officials who mispend and embezzle security votes do so with the objectives of earning wealth illegally. When the administration of security votes implicates fraud, money laundering, embezzlement, looting and any form of corrupt malpractice, the EFCC should investigate and prosecute the offender. This will ensure adequate punishment for the offender and act as a deterrent.

Similarly, section 3 of the Corrupt Practices and Other Related Offences Act establishes the Independent Corrupt Practices and other related Offences Commission (ICPC). The ICPC has powers to investigate and prosecute offences of accepting gratification or making corrupt offers to public officers,¹²⁴ fraudulent acquisition and receipt of property,¹²⁵ making false statements or returns¹²⁶ and using an office or position for gratification.¹²⁷ When any of these offences are implicated in the administration of security votes, the ICPC should investigate and prosecute the offender.¹²⁸

121 The Constitution, sec 308.

122 Cap E1 LFN, 2004.

123 Cap C31 LFN, 2004.

124 The Corrupt Practices and other Related Offences Act, secs 5–6 and 8–9.

125 *Id.*, secs 12–13.

126 *Id.*, sec 16.

127 *Id.*, sec 19.

128 Apparently, the anti-corruption agencies are unable to act in this context because they are establishments of the executive arm, which are also the major perpetrators of security vote corruption. It is, therefore, virtually impossible for an appointee of a particular government to prosecute those who appointed him. Again, the functions of these agencies are usually politicized. This emasculates their ability to function effectively.

CONCLUSION

This article has explored the rise to dominance of the “security vote” paradigm in the socio-political economy of Nigeria. It has examined its justification, abuses, constitutionality and close links to the cankerworm of corruption. It has argued that the security vote concept is unconstitutional and that the best measure to prevent its abuse is to abolish it entirely. However, because of the peculiar nature of public governance in contemporary Nigeria, this appears to be impossible and public officials have continued to “use and abuse” the concept, despite its unconstitutional nature. In view of this, the article has suggested legal mechanisms to prevent the misspending and embezzlement of public funds by government officials in the name of “security votes”.

It has been suggested that the Nigerian legislature should use the various constitutional mechanisms suggested above to prevent the abuse of security votes in Nigeria. This would include establishing new legislation to supervise and monitor effectively security funding in the country and provide for the proper supervision and control of executive officers through legislative oversight (as is done in the US). The Code of Conduct should also be enforced to prosecute erring officers who abuse security votes.

It is clear that the issue of security vote abuse has persisted in Nigeria because government officials neither have regard for the rule of law (constitutionality) nor for transparency and accountability in government. These officials are propelled by their inordinate quest for personal gain, to the detriment of the welfare of the generality of Nigerians. One salient point is that Nigeria is regarded as one of the giants of Africa. As a result, other African (particularly western African) countries naturally look to her for guidance in issues of governance. In the event that the “big brother” is enmeshed in this type of abuse, what positive lessons will other countries draw from the Nigerian experience? The answer is none. Rather, they may as well toe the same line (if they are not doing so already) and abuse public funds in the name of security votes. In this context, it is important for Nigeria to implement the various mechanisms that will prevent security vote abuse. In this way, the country will become the purveyor of a transparent and accountable governance regime, capable of emulation by other African countries.

In the end, the predominant rationalization appears to be that the years of (suppressive) military regimes have apparently prejudiced Nigeria’s socio-political culture. As a result, Nigeria is smeared, not merely by ineffectual political institutions but also, in conjunction with the latter, by a deficiency in democratic leadership, particularly at the level of government officials and the local political elite.¹²⁹ This is obvious in the prevalent propensity of elites to utilize public offices and political power to chase private gains. Even though

129 DK Ologbenla “Leadership, governance and corruption in Nigeria” (2007) 9/3 *Journal of Sustainable Development in Africa* 97 at 108.

it is reasonable to think that some military and intelligence expenditure should continue to be classified even in a democracy, the widespread custom of manipulating security votes by federal, state and even local government executives to their private advantage is repugnant to norms of constitutionality, transparency, equity and accountability.