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The Rule of Law and its Practice in Nigeria: An Assessment

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Abstract
The rule of law is one of the basic concepts that may not be ruled out in a democratic institution. It is a concept that goes hand in hand with other concepts such as good governance and democracy. Ever since the era of A.V. Dicey, several other scholars have nourished and contributed to the growth of the principle of the rule of law. It is the opinion of this study that the principle of the rule of law is intrinsically not fool-proof. It contains some anomalies but these are not so obvious when implementation of the spirit of the principle sets in. Taking Nigeria as a case study, the study argues that the rule of law is at best at its vegetative state. Thus attempts to institute good governance in Nigeria have always proven problematic. It is agreeable that colonial rule imposed a type of governance in the country that was anti-people in nature. By the time the colonialists left, the local political elites have imbibed the culture of this type of governance that puts premium on gaining political power without considerations for accountability, rule of law and constitutionalism. This paper argues that there is a deficit of rule of law and good governance in the country today. This deficit can be corrected through a viable and virile civil society, but much is dependent on the role of a qualitative leadership. The analytic method of research is employed to probe the meaning of rule of law and its viability in Nigeria.

Keywords: Constitution, Good Governance, Nigeria, Political Philosophy, Rule of Law.

Introduction

A perusal of the major concerns of the rule of law reveals its affinity with other aspects of governance. In the governance of any polity as a defined structure, the role of the constitution as the legal framework within which policies and laws are fashioned is colossal. It is the document that is often said to be

the reference point especially in a constitutional democracy that is being practiced in Nigeria taking cue from the United States of America. The parameters for ensuring good governance through the rule of law are well spelt out in the constitution. It is therefore logical to conclude that the relationship between constitutionalism, rule of law and good governance is inseparable.[1]

However, this paper concerns with the rule of law, paying attention to democracy and good governance as well. It is therefore not surprising when Charlie Nwekeaku avers that "these three concepts; namely, the rule of law, democracy and good governance are so interrelated that one is tempted to liken their relationship to that of Siamese twins. Their relationship is so intricately linked that, sometimes, one wonders where one stops and the other begins."[2] The rule of law is one of the cardinal ideas latent in governance in contemporary times. There is no doubt that the idea expressed by this phrase is meant to spell out, without vagueness or ambiguity regarding the role of the governing and the governed. It is therefore pertinent to ask, what exactly is the rule of law? More so, it is necessary to expose the main claims present in the rule of law. Another important aspect is to reveal the connection(s) between the phrase and what obtains in the Nigerian society.

Through the employment of the method of analysis, this research intends to examine all the issues highlighted above. That is why the content of this paper has four parts including this introduction. The second divide of the study is concerned with the main claims and the modus operandi of the rule of law. The third section makes a critical assessment of the phrase with the Nigerian state in mind, as the final section summarises and concludes the entirety of the study. Let us proceed with the main contents of the rule of law and how it relates with democracy and good governance.

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1 T.A. Ifedayo & O.B. Akomolede. "Good Governance, Rule of Law and Constitutionalism in Nigeria", in *European Journal of Business and Social Sciences,*. Vol. 1, No. 6. (2012), pg. 69.

2 Charlie Nkeaku. "The Rule of Law, Democracy and Good Governance in Nigeria", in *Global Journal of Political Science and Administration,* Vol, 1, No, 2. (2014), pg. 26.

The Rule of Law in Governance

The meanings or contents of the concept of the rule of law vary from place to place, from earliest times to this day. To Aristotle (1916), the rule of law is preferable to that of any individual. During the Medieval Ages, the world was governed by laws, human or divine, and that the king himself ought not to be subject to man, but subject to God and to the law, because the law makes him king. Anthony Mathew summarises the doctrine of the rule of law as follows:

(a). that the law touching on the basic rights of citizens shall be narrowly and precisely drafted so as to constitute a clear guide to official actions and citizens' conduct; and

(b). that the application and interpretation of such laws shall be under the control of impartial courts operating according to fair procedures.[3]

The rule of law simply means that law rules or reigns.[4] This presupposes a situation where everything is done in accordance with law thereby excluding any form of arbitrariness.[5] The concept as we understand it, and as it is adopted in the developed societies, where democracy has long been a way of life of the people and where despotism or dictatorship is no longer the order of the day, connotes that the citizens in relationship amongst themselves and in relationship with the government bodies and their agencies shall be obligated unto the law which shall not be ignored by anyone except at his peril, and if by the government, this will promote anarchy and executive indiscipline capable of wrecking the organic framework of the society.[6] It is a way of preventing the abuse of discretionary power. It accords with the dictates of reason

3 Anthony Mathews. *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society,* (London: Sweet & Maxwell 1988), pg. 219.

4 B. Nwabueze. *Nigeria's Presidential Constitution: 1979-1983*, (Ibadan: Longman Nigeria Ltd 1985), pg. 3-8.

5 Nwabueze. *Nigeria's Presidential Constitution: 1979-1983*, pg. 3-8.

6 J.C.A Pat-Acholonu.. "Threats to the Jurisdiction of the Court and the Rule of Law in Nigeria." *All Nigeria Judges Conference Papers*. (Abuja: Federal Ministry of Justice 1995), pg. 43-47.

that the court should use its awesome power to make the government of the day rule by principles recognized in civilized societies and bound by the pronouncements of the courts.[7] The main ideas in the rule of law may be reduced to three.

However, the very first attempt to reduce the idea of the rule of law to precise legal form was by Professor A. V. Dicey in his lecture on English Law at the University of Oxford in 1885. His definition has since become widely accepted and authoritative of the concept.[8] According to him, the concept of the Rule of Law connotes three things. Firstly, it connotes the "absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Dicey explains further that "Englishmen are ruled by the law, and by the law alone, a man may be punished for a breach of the law, but he can be punished for nothing else."[9] What this means is that governmental powers must be exercised in accordance with the ordinary prescribed laws of the land. The courts in Nigeria have also adhered to this principle.[10]

Secondly, it means equality before the law, or the equal subjection of all classes to the ordinary laws of the land administered by the ordinary law courts. In this sense, the concept of the Rule of law excludes the idea of exemption of any officials or others from the duty of obeying law which governs other citizens or from the jurisdiction of the ordinary tribunals or courts.[11] Thus, every person, no matter his/her status in life is subject to the ordinary law of the land. However, Dicey himself admitted that this idea of equality before the law

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7 J.C.A Pat-Acholonu.. "Threats to the Jurisdiction of the Court and the Rule of Law in Nigeria," pg. 43-7.

8 H. Phillips. *The Constitutional Law of Great Britain and the Commonwealth*, (London: Routledge & Kegan Paul 1957), pg. 31.

9 A.V. Dicey. *The Law of the Constitution*, (New York: Routledge 1990), pg. 202-3

10 M.A. Mohammed & T.S. Ajepe. "Rule of Law in Nigeria", *Journal of Law, Policy and Globalization.*" Vol., 3 (2012), pg. 69.

11 A.V. Dicey. *The Law of the Constitution,* pg. 202-3.

ought to be subjected to some modifications in view of the fact that some Acts of Parliament had given judicial or quasi-judicial powers to executive authorities. There are also some exemptions from liability based on public policy granted to judicial officers such as the president, vice president, state governors and deputy governors, legislators, members of diplomatic corps, public officers, etc. A further limitation to this second definition of the concept of the Rule of Law by Dicey is the fact that there are numerous tribunals established in Nigeria which in the real sense of the word, are no courts as envisaged by Dicey.

Thirdly, according to Dicey, the rule of law may be used as a formula for expressing the fact that with us, the laws of the constitution, the rules which in foreign countries naturally form part of a constitutional case are not the source but the consequence of the right of individuals as defined and enforced by the court. In other words, in Dicey's view, the doctrine of the Rule of Law may be said to mean the existence and enforcement of certain minimum rights usually preserved by the Constitution. These rights are found in most national constitutions as in Chapter Four of the 1999 Constitution of the Federal Republic of Nigeria (as amended), African Charter on Human and Peoples' Rights and other regional and international bills of rights.

From Dicey's three meanings, it could be inferred that in any given society, before the Rule of Law could be said to exist, the following must be in place:

(a) supremacy of written regular law made by the lawmakers;
(b) certainty and regularity of law;
(c) absence of arbitrary or wide discretionary powers of governments or its agencies;
(d) equality before the law;
(e) administration of the law by the ordinary law courts; and
(f) enforcement of some minimum rights.

The rule of law is not the exclusive preserve of any single government, it transverses all actions and jurisdiction. It is a universal concept. This is because the International Commission of Jurists has on at least three occasions, attempted to throw light on the doctrine. In 1955, in Athens, the Commission declared that the rule of law means that law must bind the state like the governed; all governments must respect individual's rights and provide effective means of enforcing such rights; that judges must adhere to the rule of law and adjudicate without fear or favour. They must resist attempts from any quarters to jeopardize their independence in the performance of their duties. Lawyers all over the world must guide the independence of their profession and uphold the rule of law in the practice of their profession.[12]

The doctrine of the Rule of Law is one of the pillars upon which true democracy and good governance is established. Historically, the concept is rooted upon the theories of early philosophers, who in their own ways proffered various definitions to the doctrine. Aristotle expressed the view that the Rule of Law was preferable to that of any individual.[13] The rule of law, according to Agu, is a dynamic concept and principle which is employed not only to safeguard and advance the civil and political rights of the individual in a free society, but it is also used to establish social, economic and cultural conditions under which his legitimate aspirations and dignity may be realized.[14] In another breadth, John Locke commented on the concept of the Rule of Law thus: "Freedom of men under government is to have a standing rule to live by, common to everyone of that society and made by the legislative power created in it, and not to be subject to the inconstant, unknown, arbitrary will of another man."[15] What John Locke means in essence was that the Rule of Law meant that all governmental

12 M.A. Mohammed & T.S. Ajepe. "Rule of Law in Nigeria", pg. 2

13 Aristotle. *Politics III*, (Translation Jowett, ed. Davis). (New York: Routledge 1916), pg. 139.

14 G.A. Agu. *Democracy, Human Rights and Rule of Law in Nigeria: Myths and Realities*, (Makurdi: Destiny Ventures 2009).

15 John Locke. *An Study Concerning the True Original Extent and End of Civil Government,* (London: Awnsham Churchill 1690).

powers were to be exercised and determined by reasonably laid down laws and not by the whims and caprices of anybody or authority.[16]

So far, this study has been able to take a look at the concept of the rule of law from different perspectives. It is therefore not a surprise especially when we come to realise that the prime aim of the discourse is to make a critical evaluation of the concept. The next section does justice to this as we proceed therein shortly.

The Applicability of the Rule of Law in Contemporary Nigeria: A Historical Review and Assessment

In this section, our focus is to take a critical look at the notion of the rule of law from the dimension of the Nigerian experience. An assessment of the rule of law is incomplete without giving it a concrete assessment to see if these ideas may actually be practiced in reality. So, let us take a rough sketch of the Nigerian situation.

What has been the lot of the concept of the rule of law in Nigeria? Has it been upheld as supreme or has it suffered bashing from the various governments irrespective of their political toga, be it military or civilian? In order to appreciate how well or how bad the rule of law has feared in Nigeria, the concept would be treated under two periods; namely, military and civil rules. Military administration is necessarily a regime of force. Its manner of coming to power is usually a forceful entry into governance, usurpation of the existing political and constitutional order in a manner not contemplated by the constitution. The Constitutions in Nigeria, starting from 1960 to the present 1999 constitution (amended) have always provided for democratically elected governments.[17]

Nigeria has so far experienced a long period of military rule from 1966 to 1998, with only intermittent civil governance. However, what is striking is the fact that on attaining power

16 D.O. Aihe. *Selected Studys on Nigerian Constitutional Law*. (Idodo: Umeh Publishers Ltd 2005), pg. 19.

17 M.A. Mohammed & T.S. Ajepe. "Rule of Law in Nigeria", pg. 4.

through the barrel of the gun as against the ballot box, the military junta usually proclaimed the rule of law as the cornerstone of their administration.[18] For example, the late Major General Idiagbon of the Buhari/Idiabgon Military era (1984 –1985) alluded to the rule of law when he stated that, "…stable government is absolutely impossible anywhere in the world if the governed are denied their rights and they have nowhere else to seek redress."[19] Events have, however, shown that military leaders only paid lip service to the rule of law.[20]

In Nigeria, starting from the First Republic, all democratic processes were brought to a complete halt following the military *coup d'état* of January 1, 1966. Although Decree No. 1 of 1966 left large part of the 1963 Constitution intact, including Chapter 3 which dealt with Fundamental Human Rights, thus safeguarding (at least in theory), the rule of law. However, Section 6 of Decree No. 1 of 1966 provides inter alia: "No court of law shall question the validity of any decree or edict."[21] This, in effect, means that no action of the executive can be challenged in court under a military dictatorship.

Subsequently, the Nigerian military ruled by decrees which are patently unconstitutional and are often flagrant violation of the principles of the rule of law guaranteed to the people under the constitution. So, it is clear that gross violation of the principles of the rule of law came into sharper focus under military regimes in Nigeria. Unfortunately, however, it recurs under democratic rules in the country. Under the 1979 Constitution of the Federal Republic of Nigeria, the situation in which arbitrary use of power by those in government was most evident was in application of the doctrine of *Nolle Prosequi*. The common law doctrine of *nolle prosequi* simply means unwilling to prosecute. It is a motion by the plaintiff in a civil suit or by the prosecution in a criminal action, by which he

18 F. Agbaje. "The Rule of Law and the Third Republic." *Fundamental Legal Issues in Nigeria,* N.L.R.ED. P Series 1995, No. 1, 45., pg. 21.

19 M.A. Mohammed & T.S. Ajepe, "Rule of Law in Nigeria", pg. 4.

20 M.A. Mohammed & T.S. Ajepe, "Rule of Law in Nigeria", pg. 5.

21 See The Nigerian Decree No. 1 of 1966.

declares that he will no further prosecute the case, either as to some of the defendants or altogether.[22]

By this doctrine, in a criminal case, the prosecution may stay or discontinue the proceeding at any stage before the delivery of judgement, in respect of the accused person or persons, or in respect of only one or some of them. This is what obtains under the Constitutional Convention of Great Britain, along which the Nigerian Legal System was fashioned. Under the convention, the Director of Public Prosecution (DPP) exercises *nolle prosequi*. The reason for this is based on the fact that the DPP is supposed to be an independent umpire, whose duty is that of protecting the state and the public, by ensuring that only people who actually commit crimes are prosecuted

Thus, the DPP has unencumbered discretion to determine cases which shall be prosecuted, and those that should not, and in respect of cases where criminal prosecution has commenced, either by himself or any other persons or bodies, whether they shall be discontinued.[23] There are several justifications for the delegation of power to the DPP. However, the prominent reason has been adduced to the rational that the then Attorney-General being a member of a political party is less likely to be faithful in protecting and preserving public interests.[24]

Under the Independence Constitution of 1960, this practice was incorporated in Section 97(5), which provided that the DPP of the federation shall have power in any case to discontinue at any stage before judgement is delivered in any such criminal proceedings instituted or undertaken by himself or any other person or authority (S.97 (5), 1960 Constitution of the Federal Republic of Nigeria).

In the Republican Constitution of 1963, by Section 104, the office of the DPP was retained, but the office of the Attorney-General was superimposed over it. Thus, the power to

22 O. Adekoya. "The Doctrine of *Nolle Prosequi*: The Nigerian Experience." *The Jurist* (Journal of the Law Students' Association of Ogun State University), Vol. 3, (1990) pg. 41.

23 O. Adekoya. "The Doctrine of *Nolle Prosequi*: The Nigerian Experience", pg. 42.

24 See *The Guardian,* October 18, 1988.

discontinue criminal prosecutions hitherto exercised solely by the office of the DPP was now exercised by the Attorney-General. In the same vein, under the 1979 Constitution, the position of the 1963 Constitution was expressly provided for unambiguously in Sections 160 and 191 respectively (of the 1979 Constitution as amended). This power is also provided for in the Criminal Procedure Act, 1958.

Under the 1979 Constitution, the Attorney-General still exercised *Nolle Prosequi*. However, the continued vesting of this enormous power in the Attorney-General, who plays a dual role of a politician and a Chief Law Officer, has raised serious questions, criticisms and fear. The fear emanates from the partisan exercise of the power and its abuse. There was a report about an Attorney-General in one of the states in 1982 who filed a *nolle* on behalf a client whom he had been representing in the Magistrate Court before he was appointed into office.[25]

Also, during the Second Republic in Ondo State, *nolle* was entered in respect of some accused persons because they belonged to the party in power. Another instance was in the then Bendel State in 1982. The then Commissioner of Police for that state, irked by the rate at which the state Attorney-General entered *nolle* on filmsy excuses, called a Press Conference to disclose this to the public.[26] The only defence to that allegation in a counter Press Conference called by the Attorney General was that the test to be adopted under Section 191 of the 1979 Constitution is according to his (A-G's) own judgement.

In the Fourth Republic, under the 1999 Constitution, a *nolle* was also entered by the then Oyo State Attorney-General in the murder case of the former Minister of Justice and Attorney-General of the Federation, Chief Bola Ige in a controversial circumstance. Lead prosecution counsel in the trial of suspects charge for the murder, Chief Debo Akande (SAN) had to withdraw from the case citing his displeasure with the decision of the Attorney-General to enter a *nolle* in favour of the accused

25 see *The New Nigerian,* June 5, 1982.
26 See *The National Concord*, July 15, 1982, pg. 1.

persons without consulting him. The A-G, however, said he needed not seek the opinion of anybody before entering a *nolle prosequi*. There are other numerous analogous examples.

As could be seen from the above experiences, therefore, the claim that the supremacy of the law is an important element of the rule of law is a falsity in the Nigerian democratic practices. The Nigerian leaders behave as if they are naked emperors and have nothing binding on them. The consequences are that we have leaders who deliberately and perversely undermine the democratic system. If they are elected (or selected), they seek to control the legislature and the judiciary. They assume a "larger than life" role in imposing their limited world-view on the nation in outright disregard of the laws governing the people.[27] That is why the immunity clause in section 308 of the 1999 Constitution is an official license for the presidents, vice-presidents, governors and their deputies to breach the law at will.

Experiences have shown that the exclusion of these categories of public office holders from civil or criminal proceedings while in office is a way of encouraging mass corruption and embezzlement of public funds by politicians. Unfortunately, Nigerian courts have extended this privilege to these public office holders after leaving office, thereby making it impossible to bring actions against their unlawful activities while in office. In a situation where the political class considers being in government a privilege, and not a responsibility, giving the public office holders this type of privilege is not in the best interest of the society.

Another element of the rule of law which has been greatly bashed under the Nigerian democratic experience since 1999 is the idea of equality before the law. Are Nigerians really equal before the law? Can the poor cohabit with the rich? Are the poor not trampled upon before the law? It has been provided in section 14 sub-section (1) of the Nigerian Constitution (1999), that the Federal Republic of Nigeria shall be a state based on

27 B. Kwaghga. "Rule of Law in Nigeria and Challenges to Good Governance", *Journal of Management and Corporate Governance*, Vol. 3 (2011), pg. 4.

the principle of democracy and social justice. However, does this principle reflect in the Nigerian society? For instance, can the families of those six innocent young Nigerians who were slaughtered by the police in Apo village in Abuja in August 2005 claim justice in Nigeria? After several years of the struggle for justice, has the Nigerian government heard the cry of anguish of their families? Can the poor claim justice in Nigeria? For instance, can the former and serving governors be subjected to justice and same treatment as ordinary Nigerians? Can there be a rule of law without adequate security for Nigerian people? In the face of growing insecurity (kidnappings, armed banditry, extra-judicial killings by the police, etc.), is it true to say there are law and order in Nigeria? It is inconceivable how she could be subjected to severe physical molestation on account of her not giving way for a navy admiral's convoy. This was not only callous, barbaric but an unnecessary display of high headedness, under a democratic setting like ours.[28]

Going by numerous such instances, one can say that what we have in Nigeria today is the rule of anarchy, rule of the jungle or rule of the guile.[29] An order in which the majority of the people have no stake and see no justice is ultimately unenviable. For as long as there is no just order standing on negotiated consensus, our democracy cannot be a precursor of the rule of law, and our continuous claim to it would be mere pretensions. The application of the rule of law in Nigerian democracy is clearly bound up with class relations. Law in Nigeria is part of the superstructure adapting itself to the necessities of an infrastructure of productive forces and productive relations. As such, it is clearly an instrument of ruling class. It defines and defends the ruling class' claim upon power and authority, resources and property relations. It determines who controls what, when and how, and mediates class relations and the struggle for power with a set of appropriate rules and sanctions, all of which ultimately confirm and consolidate

28 B. Kwaghga. "Rule of Law in Nigeria and Challenges to Good Governance", pg. 5.

29 M. H. Kukah. "Democracy and Good Governance." In Ayodele E. (ed.) *Africa: National Unity, Stability and Development* (Ibadan: Sibon 1998).

existing class hegemony.

Hence, the rule of law in Nigeria is a mask for the rule of a class - its stronghold in the control of power under any given regime (democracy or authoritarian rule). The application of the rule of law in Nigeria has established an unwholesome social and political order in which the rich prey on the poor, the politicians on the electorate, the governments on the citizens, the capitalists on the workers, the police on the hapless and defenceless citizenry, etc. The whole country has thus become a huge carcass for bite whose flesh tigers and lions, dogs and leopards, crocodiles and maggots engage in a deadly and ceaseless scramble for.[30]

Conclusion

This study has been concerned with the concept of the rule of law. We commenced by showing the origin, meaning and scope of the rule of law as propounded by A.V. Dicey and several other scholars. The aim of this exercise has been to make a critical evaluation of the concept. This is why we narrowed down our examination to the concrete scenarios of the Nigerian state which belittles the possibility of the faithful practice and implementation of the principle.

It is the submission of this study that basically, to ensure good governance anchored on the rule of law, the rulers and the ruled must submit to the ethos of civil society. Civil society refers to the people's own organizations outside government that interacts and relate on the basis of social values and culture of the society. These are organizations that operate outside the purview of the state and they include the media, voluntary associations, student unions, community development associations and other associational groups and Non-Governmental Organisation (NGOs), in general. According to Kukha, "the civil society is an arena where manifold social monuments and civic organizations from all classes attempt to constitute themselves in an ensemble of arrangements so that

30 B. Kwaghga. "Rule of Law in Nigeria and Challenges to Good Governance", pg. 6.

they can express themselves and advance their interests."[31] Agu has added to the discourse on civil society when she stated that "it is that segment of the society that interacts, yet it is distinct from the state."[32]

The importance of civil society in electoral politics, rule of law and democracy in Nigeria can be gleaned from the experience of Western Europe. There, the French Revolution is said to have taken place as a result of intellectual and literary exchange of ideas for social and political change in salons and coffee houses in France. The reality of the experience of Western Europe in general shows that civil society emerged as a counter weight to monarchical and semi-feudal institutions that continued to treat the political arena as the private domain of kings.[33] As important as civil society is to the consolidation of a viable democratic system in Nigeria, its activity could either be integrative or disintegrative of society. The activities are integrative when they are seen as acting as a critical check on authoritarian rule. So, the nurturing of civil society within the Nigerian polity could be the most effective means a controlling repeated abuses of the state power, holding rulers accountable to their citizens and thus, establishing the foundation for a sustainable democratic system of government in Nigeria.

31 M. H. Kukah. "Democracy and Good Governance", Pg. 79.
32 G.A. Agu. *Democracy, Human Rights and Rule of Law in Nigeria: Myths and Realities*, pg. 281.
33 M. H. Kukah. "Democracy and Good Governance", pg. 79.

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