

UNJUST LAW AS A JUSTIFICATION FOR CIVIL DISOBEDIENCE

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Introduction

Laws are bodies of rules for human conduct. They are meant to guide human actions, indicating those that are permitted or accepted and those that are prohibited, which performance attracts one form of punishment or the other. Laws are supposed to guide the behavior of citizens of a nation. A nation without laws is like a vehicle without wheels. Without laws people cannot live peacefully together as there will be the problem of reconciling conflicting human rights. As Thomas Hobbes pointed out in his theory of the state, when man was alone, there was no need for laws. The need for laws was necessitated by the increase in human population, to help reconcile naturally conflicting rights of different individuals. It is therefore expected that citizens should obey laws, to avoid an anarchical state where jungle justice (the principle of survival of the fittest) operates. According to Hobbes, the commonwealth was formed because men had a foresight of their own preservation, and thus had to find a way of averting that miserable condition of war and strife which are natural consequences of ever conflicting human rights. For John Locke, the main aim of forming the commonwealth (government) is the preservation of the 'Property' of Citizens.

Since the commonwealth and laws were created for the noble sake of the preservation of life and property, through the avoidance of war and uncertainties; it behooves on all citizens to obey the laws of the state or nation.

This brings us to the issue of legal responsibility. The social contract presupposes that government is an artificial construct of free men in a voluntary agreement. However, contract is not a one-side affair. It usually involves more than one party. In the case of social contract as held by political philosophers like Locke and Hobbes, there are two principle parties - the commonwealth and the citizens. As the citizens are expected to act in accordance with certain legal stipulations, the commonwealth or leaders are also expected to keep to their duties. It involves a sort of *quid pro quo*. In other words, there are rights and duties for both the led and the leader. It is expected that, using the mandate of the people or citizens (i.e. in a *de jure* government), the leaders should protect the lives and properties of citizens. On the other hand, it is expected also that the citizens support the government with a good followership. If citizens disobey, they are punished in one way or the other. But what happens when the leaders go wrong, as they often do. In a *de jure* government, there are provisions in the Constitutions on how the citizens can try to change government's wrong policies or law or commission or omission of any kind. But the problem comes: What happens when such processes or channels have been tried in vain by citizens to effect such changes or in a

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situation where the government in question has thwarted such processes to suit itself, such that such legal processes do not exist any longer? What of in a *de facto* government which is a government by the fact of its existence.

This brings us to the question of civil disobedience. When citizens omit their responsibility or commit a crime, they are punished by ready set government machinery. On the other hand, when government fails in its duty of protecting the lives and properties of citizens, either by making unjust laws or by omitting their legal duties, citizens should try to change such laws or the entire government (if it becomes necessary), through the set legal processes. But when the government in question is so corrupt that it has destroyed such legal processes or channels of changing government policies or government itself, as the case may be, the citizens cannot be blamed if they decide to take to civil disobedience. Civil disobedience is not disobedience per se, since it is a public and non-violent kind of action aimed at making a change of government policy or part of it perceived to be wrong or misdirected.

Actually, some legal positivists (like Thomas Hobbes) held that the command of the sovereign should not be disobeyed for whatever reason since the mantle of leadership was given to the sovereign by the citizens in a sort of social contract. According to Hobbes, in that contract, the citizens invested all their rights to the sovereign. In short, for Hobbes, an unjust law is a contradiction; every law is a command of the sovereign or commonwealth which is supreme and absolute in authority.

However, this extreme view of Hobbes is not shared by other legal positivists. For instance, John Locke argues that the essence of the commonwealth is the preservation and protection of the citizens' lives, liberties and wealth. And that being the case, it is only logical that the commonwealth loses its mandate as soon as it fails to keep to the dictates of the contract. Therefore, the citizens can take to the normal legal processes of changing either such bad policies or part of them or the government itself. If such legal means fail, civil disobedience becomes inevitable and justifiable.

Definition of terms

What is Law?

Law is one of those concepts that do not have just one or two definitions. Several scholars and philosophers of law have, throughout human history, given their various definitions for law. This question 'What is law?' has attracted a myriad of answers throughout the history of man, ranging from the Old Testament's assertion of law as the will of God to the contemporary times. However, the philosophy of law proper emerged in ancient Greece (The Macmillan family Encyclopedia 1992: 242). The question of the nature of law was first tackled in the 5th century B.C. by the Sophists and Socrates (Ibid). The debate as to whether law exists by nature or by human-made convention started as far back as then (Ibid). While the Sophists opined that the essence of law is nature and reason, Socrates as well as Plato and Aristotle favoured the view that the essence of law is convention and will (Ibid). Thinkers who belong to the former group are loosely said to be of the tradition of 'Natural Law', whereas those of the latter group belong to the tradition of 'Legal positivism'.

All of the early political philosophers were much more concerned with the nature of justice and good government (Ibid). Though some ideas of natural law can be found in Plato's concept of the just state, the first full-blown theory of natural law was propounded by a Roman statesman and politician, Marcus Tullius Cicero. In his Commonwealth, he wrote that 'true law is right reason in accord with nature, it is of universal application, unchanging and everlasting ...' (Ibid). Later, Saint Thomas Aquinas gave a four-fold classification of types of law, viz: (1) eternal law (2) natural law, (3) divine law and (4) human law. Both

Cicero and Aquinas argued that an unjust law is not a genuine law but an act of violence (Ibid).

Unlike the natural-law jurists, legal positivists argued that the essence of law is the command or will of the sovereign. Thomas Hobbes argued that an “unjust law” is a contradiction in terms (Ibid). As is characteristic of Jeremy Bentham, he was concerned with law’s utility in providing the greatest happiness for the greatest number. In short, as summed up by H.L.A. Hart, in his book, *The Concept of law*, natural law jurists hold that:

There are certain principles of human conduct awaiting discovery by human reason, with which man-made law must conform if it is to be valid, whereas legal positivists contend that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality though in fact they have often done so” (Ibid).

The historical school of jurisprudence has a different conception of law from both the natural law jurists and the legal positivists. As held by the most notable of them Friedrich Karl Von Savigny, there must be ‘an organic connection between law and the nature and the character of a people’ (Ibid).

Some other definitions of, or comments on, law include that of Malinowski who wrote in his book – *Crime and Custom in Savage Society*:

The rules of law stand out from the rest, in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force, based ... upon mutual dependence, and realized in the equivalent arrangement of reciprocal services...(Schur 1968:73).

According to Max Weber: “An order will be called “Law” if it is externally guaranteed by the probability for that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a “staff” of people holding themselves specially ready for the purpose” (Ibid: 75).

Selznick rejected coercion as the hallmark of the distinctively legal, as held by Weber. For Selznick, “Legality presumes the emergence of authoritative norms, norms that are themselves “guaranteed” not, as Weber put it, by the probability of sanction by a specialized staff, but rather by evidence of other consensually validated rules that confirm the legality of the immediately relevant norm” (Ibid: 76).

For Karl Marx, law is nothing but an instrument used by the bourgeoisie to further their exploitation of the workers.

As already noted above, there are many definitions of law. But for the purpose of this paper, we shall use as a working definition, the one given in the Macmillan family Encyclopedia, “Law can be broadly defined as a system of standards: Standards of human conduct that impose obligations and grant corresponding rights, and institutional rules regarding the ascertainment, creation, modification, and enforcement of the standards” (The Macmillan family Encyclopedia 1992: 242).

What is an unjust law?

Many legal positivists argue that the essence of law is the command or will of the sovereign. Some of them, such as Thomas Hobbes, even argue that an ‘unjust law’ is self-contradictory because the existing law is itself the standard of justice (Ibid). The implication of this position is that leaders cannot go astray. Whatever they do is right. Whatever laws they make are correct and indubitably so. Hobbes tries to justify his position by arguing that when we become members of a political society we surrender to the sovereign or leader the right we have by nature to govern ourselves (Hobbies 1946:17).

However, many of the legal positivists after Hobbes, did not join him in his extreme claims. For instance, although John Austin and Jeremy Bentham agree with Hobbes that law is the command of the sovereign, they disagree that it is necessarily the standard of justice or morality (The Macmillan family Encyclopedia 1992:242). For Jeremy Bentham, if a law does not provide the greatest happiness for the greatest number, it would be an ‘unjust law’. The natural law jurists would naturally insist that a law conforms to certain principles of human conduct; if not, such a law is an ‘unjust law’.

In any case, an ‘unjust law’ is that law which either goes against the fundamental rights of citizens or does not protect the general will of citizens of the state or nation in question. An ‘unjust law’ is that law which violates the rights of the citizens or which goes against the initial promise of the ruler or leader, by social contract, to defend the lives and properties of the citizens. In short, when positive law is seen to be out of line with the natural laws or some basic human principles, it is considered an ‘unjust law’.

What is legal responsibility?

Legal responsibility is the obligation imposed on citizens of a state, by social contract, to obey the laws of the state. The question has often been discussed by jurists, scholars and philosophers of law- Why do we obey laws? Anarchists have advocated that law be abolished. For example, “Orthodox Marxist theory, which viewed cultural values and social institutions as fundamental reflections of the underlying economic arrangements in a society, also inclined to the view that law is not a social necessity” (Schur 1968: 70).

Despite the anarchist position, we still obey laws. Why? Some thinkers insist that people obey laws because they are forced to do so. Some others cite such factors as internalization of norms, habit, a sense of the need for reciprocity and fair play. But beyond all these, there is this reason that man sees in law the reflection of a natural order which morally compels obedience. This natural order is supported by the feeling to live up to the demands of the social contract (societal expectations). By and large, laws are instruments of social organization and peace maintenance and, therefore, require obedience.

What is Civil Disobedience?

The word, *disobedience* signifies a refusal to act in accordance with a certain rule or expectation. The word ‘civil’ could be seen as antonym to ‘military’, ‘uncivil’, ‘uncivilized’ and ‘private’. Hence, an act of disobedience is considered ‘civil’ if it involves civility as an antonym to any of the aforementioned.

‘Civil disobedience’ can be passive or active; it could involve an omission or commission respectively. Civil disobedience is usually public and non-violent. According to John Rawls, in his book, *A theory of Justice*, civil disobedience is:

...a public, non violent, conscientious, yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way, one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principle of social cooperation among free and equal men are not being respected (Rawls 1972:364).

It is a non-violent, yet conscientious act. It is usually public so as to arouse public sentiment through which it achieves its aim –change. As noted by Edwin Schur in his book: *Law and Society*, an act of civil disobedience:

...may be directed against general abuses in the legal system (for example, police brutality against Negroes), or against specific legislation believed to be unjust (such as the selective service or racial segregation laws), or against an aspect of administering a particular law (such as the use of tax funds to finance warfare), or against the absence of a specific law (such as fair-housing legislation (Schur 1968:60).

It should be noted that civil disobedience is different from conscientious refusal. John Rawls enumerated so many differences between them, but for the sake of conciseness, we shall take only one of them: “There are several contrasts between conscientious refusal and civil disobedience. First of all, conscientious refusal is not a form of address appealing to the sense of justice of the majority” (Rawls 1972:369).

However, conscientious refusal and civil disobedience are related in some aspects. For example, they are both non-violent and aimed towards effecting a change.

Civil disobedience can be direct or indirect. It is said to be direct when government policies are violated directly, and indirect when it is incident laws to such policies that are violated, the violation of which attracts the attention of the government in question to the violation, by the extension of such major polices thought to be unjust.

Unjust law as a justifiable excuse for civil disobedience

The question of the possibility of justifying civil disobedience has been of interest to many philosophers of law and other scholars alike. While some argue that civil disobedience can be justified on the grounds of breach of contract on the part of the leaders; some others (especially Thomas Hobbes) opine that there are no justifiable grounds for civil disobedience. The contention of the former group is that according to a supposed social contract, leaders are to protect the lives and properties of their subjects and to make laws and policies in the same direction. They command the obedience of citizens in so far as they carry out this onerous responsibility. But as soon as they digress from it, they lose the followership of their subjects, as room is therefore created for the citizens to opt for change for such wrong laws or the entire leadership. On the other hand, the latter group is of the opinion that leaders are sovereign and absolute in whatever they do, since they have the mandate of citizens. The implication is that they can do no wrong, no laws made by them are wrong.

Laws are bodies of rules used to guide the actions of members of a civil society. Laws indicate actions that are permitted or accepted and also those that are prohibited, the performance of which attracts one form of punishment or the other. So, laws are necessary

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for peaceful co-existence of members of a civil society since they are instruments used for the reconciliation of naturally conflicting individual rights. In other words, laws are essential in any civil society. Laws demand obedience or compliance. It behooves on citizens legal responsibility, and it is expected that citizens should obey the laws of the state. Be it granted and accepted that obedience and grounding in legitimate authority are key features of the legal system. Let us go back to the main issue and ask: Is there any justifiable room for civil disobedience?

Justification of civil disobedience

In a civil society, the constitution dictates and stipulates duties and rights of both the government and its officials as well as those of the citizens. The Law guides both the governor and the governed in a legal system. It spells out how the leaders have to use their authority to protect the lives, rights and properties of the citizens. The citizens are also required to comply with the leaders in the organization and maintenance of the society, by obeying laws. Citizens are punished for going contrary to the law in any way – either by commission or by omission. Thus, the followership of citizens is necessarily expected in the hope that the government will guarantee the protection of the civil liberties, rights and properties of citizens.

By the way, there are two major kinds of government – a *de facto* government, usually regarded as a government by the fact of its existence as such. This kind of government constitutes political legitimacy as soon as it has the slightest sign of the consent of the citizens in question. Even lack of opposition is considered an implicit consent; after all, silence is said to be affirmation. The second kind of government is a *de jure* government which is a legal government. This is a democratic kind of government. Its legitimacy is not by adoption but by origin. It is rooted in the law of the land. Thomas Hobbes also distinguishes between these two main forms of government: *de facto* he identifies as *sovereigns by acquisition* while *de jure*, he identifies as *sovereigns by institution*. He states that both of them have their foundation in the fear of the citizens. He however points out that the only difference between them is that while *sovereigns by institution* are rooted in the fear of citizens for one another, *sovereigns by acquisition* are rooted in the fear of citizens for the sovereigns.

A Commonwealth by acquisition is that where the sovereign power is acquired by force; And this kind of dominion, or sovereignty, different from sovereignty by institution only in this, that men who choose their sovereign do it for fear of one another, and not of him whom they institute; but in this case they subject themselves to him they are afraid of (Hobbes 1992 :109).

In any case, government, according to the assumed social contract, has got rights and duties bestowed on it. It has the right of leadership and to enjoy the followership or the political allegiance of the citizens. Its officials have also got some immunity to enjoy. The government has also got the duty of protecting the lives, properties and rights of its citizens. It also has to make laws in this direction. If the government goes contrary to this onerous duty of its, either by omission or commission; it breaches the terms of the social contract. The immediately proper thing for citizens to do at this stage is to engage the democratic channels for change of the law or policies or parts of either that is involved. It is only when this democratic channel of checking abuse of the authority of the constitution fails that civil disobedience is necessitated. Civil disobedience is a necessary and desirable instrument of change. This is in line with the view of Hannah Arendt who, Basil Nnamdi, in his study of her works, quotes to have expressed thus:

Civil disobedience can be turned to necessary and desirable change or to necessary and desirable preservation or restoration of the *status quo* –the preservation of rights guaranteed under the first Amendment, to the restoration of the proper balance of power in the government, which is jeopardized by the executive breach as well as by the enormous growth of Federal power at the expense of the state's rights. In neither case can civil disobedience be equated with criminal disobedience (Nnamdi 1994:71).

In his work, *Concerning Civil Government*, John Locke tells us the essence of the political society and government:

If man in the state of nature be so free as has been said, if he be absolute lord of his own person and possession, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; ... to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name-property (Locke 1992:53).

John Locke also declares that whatever law that leaders are making must be: "...conformable to the Law of Nature – i.e., to the will of God, of which that is a declaration and the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it" (Ibid).

Therefore if a government makes unjust laws, it loses the right of being obeyed by citizens. And when the citizens have tried in vain to change such bad laws through democratic channels, they are justified to take to civil disobedience. In fact, they will be unjustified to continue to obey. In the words of Martin Luther King, in his "Letter from Birmingham City jail",

One has not only a legal but moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with Saint Augustine that 'An unjust law is no law at all.... An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saints Thomas Aquinas, "an unjust law is a human law that is not rooted in eternal and natural law" (Schur 1986:61).

Therefore it behooves on the citizens of any nation to take to civil disobedience, after having exhausted all the provisions en-route democratic channels or when such political procedures of ensuring change in government laws and policies are closed. Civil disobedience is not disobedience per se. It is only disobedience to the extent that it bears the name 'disobedience'. It is quite distinct from criminal disobedience which is usually done secretly and with the hope of not being found out. But on the contrary, civil disobedience is usually a public, non-violent action meant to attract the attention of all, aimed at compelling government to change some perceived wrong or unjust laws. In short, according to John Rawls, Civil disobedience is:

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A public, non violent, conscientious, yet political act, contrary to law, usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion, the principle of social cooperation among free and equal men is not being respected (Schur 1986:61).

Also according to Hannah Arendt, as quoted by Basil Nnamdi:

Civil disobedience arises when a significant number of citizens have become convinced – either that the normal channels of change no longer function, and grievances will not be heard or acted upon; or that, on the contrary, the government is about to change and has embarked upon, and persists in, modes of action which legality and constitutionality are open to grave doubt (Nnamdi 1994:68).

Opposition to civil disobedience

One of the strongest oppositions to civil disobedience is posed by Thomas Hobbes. For Hobbes, civil disobedience can hardly be justified. In fact, he tells us that there is nothing like an 'unjust law', that it is a contradiction in terms because the existing law is itself the standard of justice (The Macmillan Encyclopedia 1992: 242). Hobbes argues then that civil disobedience is a violation of a constituted authority, for the citizens have no right whatsoever to question the decisions of the 'Commonwealth' or leader. According to Hobbes' presentation of the fictitious social contract, men discovered that the only way to avoid the insecurity of the state of nature was to form a commonwealth and to

...confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and everyone to own and acknowledge himself to be author of whatever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements to his judgement (Hobbes 1992:100).

Hobbes goes on to say that the contract in question is more than an ordinary consent or concord.

...It is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man "I authorize and give up my right of governing myself to this man, or to this assembly of men on this condition; that thou give up thy right to him, and authorize all his actions in like manner" This done, the multitude so united in one

person is called COMMONWEALTH; in Latin CIVITAS
(Ibid).

Thus, Hobbes concludes that there can be no breach of the covenant by the Commonwealth or the Sovereign since he was not part of the covenant:

...because the right of bearing the person of them all is given to him they make sovereign, by covenant only of one to another, and not of him to any of them, there can happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretence of forfeiture, can be freed from his subjection. That he which is made sovereign maketh no covenant with his subjects beforehand is manifest;... (Ibid).

It is on this basis that Hobbes condemns any form of disobedience including civil disobedience. For him, the sovereign or leader is above the law. The subjects had submitted to him all their rights, including their right to life. The only right they did not submit was their right to self preservation because, as he distinguishes, 'It is one thing to say, kill me or my fellow, if you please; but another thing to say, I will kill myself on my fellow' (Hobbes 1946: 21). The point is that for Thomas Hobbes, it is the sovereign who decides what is right or what is wrong, and from simple logic, it follows that whatever the sovereign decides, is right.

But the premise on which that logic is based is fallacious. After all, as Hobbes himself mentioned, the chief aim of forming the social contract was to 'secure them (citizens) in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contented' (Locke 1992:61). One then wonders how this aim can be realized without respect for the fundamental human rights of citizens. Moreover, according to John Locke, the chief aim of the social contract was 'the mutual preservation of their (citizens') lives, liberties and estates, which I call by the general name – property' (Ibid).

We can conclude here by saying that it might be true, as Hobbes says, that citizens gave their consent during the social contract; but then, if they did so, it is more plausible that they did so for the preservation of their lives, rights and properties (as held by Locke) and not otherwise. In other words, it does not seem reasonable or feasible that citizens could have willingly given their consent to the forfeiture of their fundamental human rights, especially their rights to life, without favourable conditions being guaranteed.

Conclusion

As already noted by Martin Luther, and as cited above, we are obliged to disobey unjust laws as much as we are obliged to obey just laws. It is not only unjust to obey unjust laws, it is also risky. A ready instance is the experience of the trial of Nazi soldiers for war offences in 1945, in Nuremberg, Germany. The soldiers had obeyed unjust laws before and during the Second World War and had wanted to exterminate the Jews (what would now be termed 'genocide'). They had obeyed what was considered law because their superiors had had it so. But after the war, in 1945, 'the principal Allies in World War II executed an agreement, later accepted by nineteen other nations, creating an international military tribunal for the purpose of trying Axis war criminals' (Rawls 1972:63). Consequently, twenty-two

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Nazi leaders were tried, nineteen of whom were convicted-eleven being sentenced to death and others to imprisonment for terms ranging from ten years to life (Ibid).

Therefore, obedience must be done with the consequences in view. We should obey when we should obey and disobey, in the appropriate manner, when need be. Those who embark on civil disobedience are not and should not be seen as committing criminal disobedience. No; they are rather well-meaning citizens who want to insist that the stipulations of the constitution be properly adhered to, and that the laws of the nation are rational and within the bounds of natural law.

References

- Hobbes, T. 1946. *Leviathan*. London: Oxford University Press.
- 1992. "Of Commonwealth" *Encyclopedia Britannica*, Inc., Chicago: The University of Chicago.
- Jordan, W. 1992. *Ancient Concept of Philosophy*, London: Routledge.
- Locke, J. 1992. "Concerning Civil Government" *Encyclopedia Britannica*, Inc., Macmillan Press Ltd.
- Nnamdi B. 1994. *Political Obligation and civil disobedience in Hannah Arendt: A politico-philosophical perspective*. Rome: Pontificia Universitas Urbaniana.
- Omeregbe, J. 1990. *Knowing Philosophy*, Lagos, Nigeria: Joja Educational Research and publishers Limited.
- 1991. *A simplified History of Western Philosophy*, vol. 1, Lagos: Joja Educational Research and Publishers Ltd.
- Osa 2007. "Unpresidential hypocrisy" *Insider Magazine*, No. 6, 19th February.
- Ostheimer, J. 1973. *Nigerian Politics*, New York: Harper and Row.
- Senghor, L.S.1975. "What is Negritude?" G.C. Mustoso ed., *Readings in African Political Thought*, London: Heinemann.
- Rawls, J. A. 1972. *Theory of Justice*, London: Oxford University Press.
- Schur, E. M. 1968. *Law and Society*, New York: Random House, Inc.
- The Macmillan Family Encyclopedia*. 1992. Grolier Incorporated ed., Britain: Macmillan Press Ltd.

Ukwuoma, D. 2007. *Nigerian Political Leadership*, Onitsha: Royal Priesthood International Ltd.