

THE RULE OF LAW IN GOVERNANCE IN NIGERIA*

Abstract

*The rule of law is a liberty centred constitutional concept which stipulates that everything must be done in accordance with the law. It encapsulates such ideals as government according to the law, equality before the law and the independence, and autonomy of the judiciary among others. The rule of law is fundamental and prerequisite in a democratic system of government. It is the pillar of constitutional democracy. It serves as a blueprint for designing an ideal legal system. There is almost the absence of the rule of law in military rule. Military rule is marked with autocracy and rule by force. The people are denied civil liberties which conflict with the dictator's will. The decree is the supreme law of the land in military dispensation. However, in democratic dispensation constitutionalism and rule of law is supposed to be *umero uno*. This article will examine the ideal place of rule of law in governance vis-à-vis the Nigerian experience both under democratic and military governance.*

Introduction

The concept of the rule of law is one of the prominent and important constitutional concepts. It is fundamental principle accepted as a standard not only for judging the performance of government, but also for determining which is beneficial or destructive to humanity. This concept is the bedrock of our system of justice. Being the bedrock of our system of justice, it is of great importance, so as to justify the legal order and legitimize the system of a given society.

The rule of law collectively symbolizes the most important features of democratic governance such as government of the people, by the people and for the people; separation of power and checks and balances; representative democracy and substantive limits of governmental actions against the individuals (the protection of human freedom and dignity); limited government; and the review by an independent judiciary as a central mechanism for constitutional enforcement.¹ Hence, the rule of law is a hydra-headed concept that encapsulates very many issues in law, the polity and society. To Ojo, it is “a nebulous concept whose meaning and content vary from place to place.”²

Meaning of the Rule of Law

The rule of law being a constitutional concept remains the cornerstone of governance in any given polity. It means that everything must be done according to the law. This implies that both the government and the governed must always justify their actions in law. And that government should be conducted within the framework of recognized rules and principles which restrict discretionary power, which Coke colourfully spoke of as “golden and straight netwand of law as opposed to the uncertain and crooked cord of discretion.”³ Government business should be done to avoid dictatorial tendencies, because if discretionary powers are allowed, those in government would use such to the detriment of the less privileged members of the society.

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¹ S.O. Ogerie, **Fashioning the Constitution of Federal Democratic System**, Pitman Publishing Co., Nigeria, 2002, p. 45.

² A. Ojo, **Constitutional Law and Military Rule in Nigeria**, Evans Bros., Ibadan, 1987, p. 239.

³ Quoted in **Miscellaneous Offences Tribunals v. Okoroafor** (2001) 10 NWLR (Pt. 745), p. 310; **All Nigerian Peoples Party v. Benue State Independent Electoral Commission** (2006) 11 NWLR (Pt. 992), p. 597.

According to the Black's Law Dictionary, the rule of law is the supremacy of regular law as opposed to arbitrary power. Every person is subject to the ordinary law within the jurisdiction.⁴ In Dicey's⁵ exposition;

It is the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, prerogative or even of rule of wide discretionary authority on the part of government ... a man may be punished for a breach of law but he can be punished for nothing else.

This definition begs the question, for a look at it will bring out certain presumptions which are no longer fashionable because of the expansion of government functions and of course of frontiers of knowledge. First is the presumption that a man can only be punished for a breach of "the regular law" before the ordinary law courts. The regular law to him meant the common law of England and statutes. This presumption has been restrictive of the laws applicable now in modern States which include a bulk of delegated legislation from Ministers and Government Departments.

The second presumption is that a breach of the laws must be adjudicated by the ordinary law courts. This view has also been faulted for disregard for the role of arbitral tribunals, administrative tribunals and disciplinary bodies of professional associations. These bodies are recognized as necessary in the administration of justice provided they observe the rules of natural justice and their decisions subject to judicial review ...

Malemi⁶ also sees the rule of law, as the observance, application and supremacy of civil or regular laws as opposed to arbitrary laws and arbitrariness, martial law, emergency law or military rule. It is the law which is reasonably justiciable in a democratic society. Hence, all persons in Nigeria are under Nigerian law or within the Nigerian rule of law. As John Locke⁷ aptly states,

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.⁸

In **Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee**⁹, *Herring C.J* has this to say:

It is not the English view of the law that whatever is officially done is law ... On the contrary, the principle of English law is that what is done officially must be done in accordance with the law.¹⁰

Furthermore, the rule of law connotes equality of all citizens before the law. This means that both the governor and the governed are equal before the law, that no person should be given

⁴ B. A. Garner, **The Black's Law Dictionary**, 7th Edition, West Group Publishing Co., St. Paul Minn, 1999, p. 1332.

⁵ A. V. Dicey. **Introduction to the Study of the Law of the Constitution**, 10th Edition, 1885, p. 199.

⁶ E. Malemi, **Administrative Law, Cases and Materials**, Grace Publishers Inc., Lagos, 2004, p. 47.

⁷ J. Locke, **Essays on True Extent and Exit of Civil Government**, Cambridge University Press, New York, 1860, p. 51.

⁸ *Ibid.*, p. 51.

⁹ (1945) 7 CLR, p. 168.

¹⁰ *Ibid.*, p. 168

more advantage than the other. This is in line with another proposition of Dicey¹¹ where he posits the concept to mean;

Equality before the law or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizen from jurisdiction of ordinary tribunals¹².

Expounding on this point Igwenyi¹³ opined that the rule of law also means equality of all citizens before the law so that each citizen has equal right to be protected by the law and at the same time has equal right to resist any infraction into his person and/or interests in property. In my considered view, this right to protect one's interest can be achieved through an independent judiciary which ought to be free from executive or legislative control.

Elucidating further on the rule of law as equality of all before the law, Malemi¹⁴ opines that the rule of law means equality of citizens before the law, and not favouritism. That all the persons in the society should be equal and subject to the law of the land. Law should apply equally to all except for the privilege permitted by the Constitution or other law for certain public officers during their term of office.¹⁵ In **Courier v. Union of Post Office Workers**¹⁶, Lord Denning MR stating the position of the law on equality says:

To every subject in this land no matter how powerful, I would use Thomas Fuller's words over 300 years ago; "be you never so high, the law is above you."

In **Shugaba v. Minister of Internal Affairs**¹⁷, the Court held that rule of law ensures equality of all persons without any distinction, that it also guarantees transparency and incorruptibility and must be preferred.

Stretching further on the position of the law on equality and supremacy of the law, Yohanna A Madaki¹⁸ posits that the rule of law means supremacy of the law, equality of both government and governed before the law, absence of arbitrariness in government. It also means governance according to known due process established by laws that are certain and respected for the right of the individual. It then follows that a despotic government, particularly one not elected or one fraudulently elected cannot observe the rule of law.¹⁹

However, it is worthy of note that for the rule of law to be supreme, the people whose conduct and affairs are regulated by such law must have participated in the making of that law either directly or through their freely and democratically chosen representative where people have input in the making of the laws with which they are governed; like in the constitutional democracy of Nigeria, where the preamble of the 1999 Constitution reads thus: "We, the people

¹¹. A. V. Dicey, *op. cit.*, p. 201.

¹². *Ibid.*, p. 201

¹³. B. O. Igwenyi, **Modern Constitutional Law**, Nwamazi Printing and Publishing Co. Ltd., Abakaliki, 2006, p. 37.

¹⁴. *Ibid.*, p. 37.

¹⁵. E. Malemi, **Administrative Law: Cases and Materials**, Grace Publishers, Lagos, 2004, p. 48.

¹⁶. (1977) 1 QB, pp. 761 – 762.

¹⁷. (1981) 1 NCLR, p. 125.

¹⁸. E. Amucheazi and O. Olatawura, "The Nigerian Legal System/Tribunals: An Analysis", **The Judiciary and Democracy in Nigeria**, National Orientation Agency (NOA), Abuja, 1998, p. 100.

¹⁹. *Ibid.*, p. 100.

of the Federal Republic of Nigeria ... do hereby make, enact and give to ourselves the following Constitution.” Otherwise such law will not be regarded and respected as supreme.

In furtherance of this discourse, Dicey posits the rule of law to also mean;

A formula for expressing, the fact that the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.²⁰

In my humble opinion, one can easily discern the idea of human rights observance and enforcement by law courts in Dicey’s propositions which has now encapsulated more ideas, even by jurists. This is evident in the words of International Commission of Jurists at its Congress in New Delhi, India,²¹ wherein it examined and restated that the rule of law is a dynamic concept, which should be employed not only to safeguard and advance civil and political rights of individuals in a free society, but also to establish economic, social, cultural and educational conditions under which its legitimate aspirations and dignity may be realized.

To Dicey, from his proposition hereinabove stated - human right existed before the Constitution. Human rights are not creations of the Constitution but are antecedent and precede the political society. They are what make us human and are precondition to a civilized existence. The Constitution merely protects and save these existing rights. The writer agrees entirely with Dicey’s view because human rights are natural rights and accrue to us by virtue of the fact that we are human beings.

Hence, the rule of law means respect for human rights. These rights could broadly be divided into political, economic and social rights. It involves respect for and protection of human rights by government, its servants and agents and by everyone in the country. Without human rights there can be no justice, and life is meaningless.

In addition, rule of law also means respect for the decision of the Court. It then means that there should be respect for the orders, decisions and processes of the Courts.²² A dissatisfied party may appeal against a decision up to the Supreme Court. This is so, for civilization cannot flourish in a society in which the rule of law is not respected. To underscore the importance of the judiciary and obedience to its decisions or orders Dr. Nnamdi Azikiwe had this to say “the judiciary is the bulwark of the liberty of citizens.”²³ In the formal sense the rule of law means any ordered structure of norms in a given society. Importantly, for there to be rule of law there must be a constitutional democracy where the Constitution is rigid, supreme and above all other laws of the Land.

Rule of Law in a Democratic System of Government

The rule of law is a distinguishable concept that refers to such ideals as government under the law, equality before the law and the independence and autonomy of the judiciary. To Ben Nwabueze the rule of law is not just a doctrine about legality; it is not just a requirement that all executive actions of government affecting the individual must be backed by, and strictly in accordance with the law. It is a doctrine that requires that within the limits of the law making

²⁰ A. V. Dicey, *op. cit.*, p. 202.

²¹ **Journal of International Commission of Jurist**, 2, 1959, pp. 7 – 43.

²² **Governor of Lagos State v. Ojukwu** (1986) 1 NWLR (Pt. 18), p. 621.

²³ Dr. Nnamdi Azikiwe, “Essentials of Nigerian Survival”, **Foreign Affairs**, Vol. 43, No. 3, 1965, p. 451.

power allowed by the higher law of the Constitution, the law must circumscribe the discretion it grants to government in matters affecting the interest of the individual, so as to curtail as much as possible the scope of governmental arbitrariness.²⁴

The rule of law is the pillar of constitutional democracy of great importance.²⁵ President Abraham Lincoln (1809 – 1865), a Republican and the 16th President of the United States of America, in his address at the dedication of the military cemetery at Gettysburg, Pennsylvania on 19th November, 1863 defines democracy as: “The government of the people, by the people and for the people.” In the words of Hon. Justice S. O. Uwaifo, democracy is the popular control of the government by the will of the majority.²⁶

Thus, democracy is a government where the people write the Constitution, set out the structure of government, delegate powers to it, vote in their representatives to form the government, assess the government and at periodic elections renew or withdraw its mandate to continue to govern. Therefore, for there to be a true democracy, the government must be a government of the people, formed by the people and exists for the welfare of the people. In my considered view, in practice, no one can vouch for the true attainment of this idealism.

To provide a suitable environment for the supremacy and observance of the rule of law and respect for human rights, the government must be:

- (a) Constitutional, that is based on a Constitution which ideally should be written and contain a fundamental rights chapter or bill of rights, and
- (b) The Constitution or government must be democratic.²⁷

It then follows that where there is no constitutional and a democratic government in place in a country, it is almost futile to expect much respect for the rule of law or human rights because democracy provides the environment for civil rights to take root and thrive. There is no gainsaying that the rule of law is the most important feature of democratic governance. It serves as a theoretical blueprint for designing an ideal legal system. It represents a synthesis of normative values and processes that is grounded in the precepts of natural justice that promotes and legitimizes the mechanisms of formal justice. Hence, it is a network of interrelated, interdependent elements, rather than a monolith.

In a constitutional democracy like ours, it is of utmost importance that the judiciary should fully play its role in upholding the rule of law. For the judiciary to achieve this, independence, impartiality and easy accessibility to court, must be guaranteed. The jurisdiction of the Courts should also be protected and guarded jealously for the protection of rights of citizens. This proposition was expounded by **Aniagolu JSC** in **Safekun v. Akinyemi & Ors.**²⁸ thus;

It is essential in constitutional democracy such as we have in this country, that for the protection of rights of citizens, for the guarantee of the rule of law, which include according to fair trial to the citizen under procedural irregularity, and for checking arbitrary use of power by the executive or its agencies, the power and jurisdiction of courts under the Constitution must not only be kept intact

²⁴ B. O. Nwabueze, **Constitutional Democracy in Africa**, C. Hurst & Co. London, Vol. 3, p. 20.

²⁵ *Ibid.*, p. 19.

²⁶ S.O. Uwaifo, “Rule of Law As A Reliable Catalyst for Sustainable Democracy”, **Triumph of the Rule of Law in Nigeria Historic Judgements: Anambra State**, U. E. Communications, Lagos, 2007, p. 564.

²⁷ E. Malemi, *op. cit.*, p. 50.

²⁸ (1980) 5 – 7 SC, p. 25.

and unfettered but also must not be nibbled at ... Indeed, so important is that preservation of and non interference with, the jurisdiction of the Courts that our present Constitution has specifically provided in S. 4(8) that neither the National Assembly or House of Assembly shall enact any law that ousts or purports to oust the jurisdiction of a Court of law or a judicial tribunal established by law.²⁹

The Constitution of Nigeria³⁰ preserves the jurisdiction of the Courts precluding ouster of court's jurisdiction in legislations; this is very commendable of a constitutional democracy. Hence, there are checks and balances and arbitrariness is reduced.

In **Governor of Lagos State v. Ojukwu**³¹, the Supreme Court dealt passionately and extensively on the need to obey court orders and thus held *inter alia*, that "it is a very serious matter for anyone to flout a positive order of a court and proceed to insult the court further by seeking a remedy in a higher court while still in contempt."³²

In **Nigerian Army v. Mowarin**³³, Ubaezeonu, JCA reading the lead judgement of the Court of Appeal says,

An order of Court must be obeyed even if such an order is perverse, until such a time that the order is set aside by a competent court ... a flagrant flouting of an order of the court by the executive is an invitation to anarchy³⁴

Furthermore, respect for civil liberty is the fundamental requirement of the rule of law and democracy. In other words, the rule of law serves to protect the shared liberty interests of all members of the society. It does this by establishing a dynamic equilibrium between power and law. Pure power is arbitrary might; law is a system by which institutions channel power so that it conforms with a peoples values and established patterns of expectations. Neither power nor law alone will lead to a stable society.³⁵

Advocating the need for respect of civil liberties and rule of law, Justice Louis D. Brandeis of the United States Supreme Court in **Whitney v. California**³⁶ opines thus:

In government, the deliberative forces should prevail over the arbitrary; the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of the political truth, that without free speech and assembly, discussion would be futile ... That the greatest menace to freedom is an inert people ... that it is hazardous to discourage thought, hope and indignation ... that the part of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.³⁷

²⁹ *Ibid.*, p. 25.

³⁰ S. 4(8), The Constitution of the Federal Republic of Nigeria, 1999.

³¹ (1986) 1 NWLR (Pt. 18), p. 622.

³² *Ibid.*, p. 622.

³³ (1992) 4 NWLR (Pt. 235), p. 345.

³⁴ *Ibid.*, p. 345.

³⁵ W.Y. Daniel, "The Rule of Law", **Nigerian Law and Practice Journal**, Nigerian Council of Legal Education, Nigerian Law School, 1997, p. 115.

³⁶ (1957) 274 US, p. 357 at p. 367.

³⁷ *Ibid.*, p. 367.

In **A. G. Bendel State v. Aideyan**³⁸ the appellant State Government purportedly acquired the plaintiff respondent's building. Not being satisfied the respondent sued the State Government. On appeal, the Supreme Court of Nigeria held that the respondent was entitled to his building. Nnaemeka-Agu J.S.C. has this to say:

The right to property in Nigeria is entrenched under Section 40 of the 1979 Constitution. That right is inviolable and such property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Further, such law must provide for the payment of adequate compensation to the owner ... It follows therefore that any purported acquisition which is not according to a law containing the above provisions is no acquisition at all in the eyes of the Constitution.³⁹

In **Okogie v. A. G. Lagos State**⁴⁰, the defendant in this case, that is, the Lagos State Government abolished private ownership of primary schools by issuing Government circular dated 26th March, 1980, by which no private primary school will be allowed to operate in the State with effect from 1st September, 1980. The plaintiff contended that the Government's action was in breach of the right to freedom of expression and press under the Constitution.⁴¹ The Court per Agoro J. held that the Lagos State Government had no power under the relevant laws to abolish private ownership of primary schools in Lagos. That the right of the plaintiff to own and operate schools under the Constitution must be protected.⁴²

In **Director of SSS v. Agbakoba**⁴³, the plaintiff/appellant brought an action for a declaration that the forceful seizure of his passport by agents of the State Security Services (SSS) was a violation of his right to personal liberty, freedom of thought, freedom of expression and freedom of movement as guaranteed by the Constitution, as amended and for an order of mandatory injunction directing the defendants/respondents to release the passport forthwith. On appeal to the Supreme Court, it held, *inter alia*, that the respondents were liable and were ordered to release the applicant's passport forthwith.⁴⁴

Also, the 1999 Constitution preserves the jurisdiction of the Courts; this is very commendable of a constitutional democracy. Hence, there are checks and balances and arbitrariness is reduced. Therefore, disputes as to the legality of acts of government must be decided by Courts and by judges who are wholly independent of the executive. This is illustrated in **All Nigerian Peoples Party & Ors. v. Benue State Independent Electoral Commission & Ors.**⁴⁵ Here, the appellants sponsored candidates for election into the Office of the Chairman and Vice Chairman of the Kwande Local Government Council of Benue State. After the elections, the results were collated and the officials of the respondents on 28/04/2004 declared the results of the poll and gave the copies of the certificate of return to agents of the appellants, the police and other agents present at the collation centre. To the appellants' greatest surprise instead of the 1st respondent publishing the result and declaring same in the Gazette as required by law,

³⁸. (1989) 4 NWLR (Pt. 118), p. 646; **Bello & Diocesan Synod of Lagos v. LEDR** (1973) ALL NLR 1966 and **Adewole v. Jakande** (1981) 1 NCLR, p. 262.

³⁹. *Ibid.*, p. 667; **Governor of Lagos State v. Ojukwu**, *op. cit.*, p. 621.

⁴⁰. **Okogie v. A. G. Lagos State** (1981) 1 NCLR, p. 218.

⁴¹. S. 36, Constitution of the Federal Republic of Nigeria (C.F.R.N) 1979.

⁴². **Okogie v. A. G. Lagos State** (1981) 1 NCLR, p. 218.

⁴³. (1999) 3 NWLR (Pt. 595), p. 314 SC; **Ubani v. Director of SSS** (1999) 11 NWLR (Pt. 625), p. 129; **Ikem v. Nwogwugwu** (1999) 13 NWLR (Pt. 633), p. 140.

⁴⁴. *Ibid.*

⁴⁵. (2006) 11 NWLR (Pt. 992), p. 587.

they announced the following day over the State radio that the election had been postponed indefinitely.

Aggrieved by this action, the appellants filed a suit in the State High Court. The State High Court said it has no jurisdiction. Dissatisfied, the appellants appealed to the Court of Appeal. The Court of Appeal, Jos Division unanimously allowing the appeal stated that the Nigeria Constitution is founded on the rule of law, the primary meaning of which is that everything should be done according to law. Disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive. According to him, judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law, for this is both in the interest of the government and all persons in Nigeria.⁴⁶

It is worthy of note that the rule of law and the rule of force are mutually exclusive. Law rules by reason and morality, force rules by violence and immorality. Thus, where the rule of law operates, the rule of self-help by force is abandoned. Therefore, once the Court is seized of a matter no party has a right to take the matter into his own hands. This is the ratio in **Nwadiajuebowe v. Nwawo & Ors.**⁴⁷ where the Court of Appeal Benin Division per Augie, J.C.A. observed that there is no dispute to the fact that the Delta State Government published the said Delta State Legal Notice No. 6 of 1996. This was done on August 16, 1996, during the pendency of the suit, which had been filed by the plaintiff/respondents on the 7th day of December, 1995, wherein they claimed that the rulership of Onicha-Olona was rotational. For the Delta State Government to go ahead and promulgate a legal notice, which favours one of the parties, is clearly to undermine the proceedings before the Court, and amounts to treating the Court with levity and contempt.

The Court went further to state that the law is trite that once the court is seized of a matter, no party has the right to take the matter unto his own hands. There is no gainsaying that the application of the rule of law principle is predominant in democratic system of government as can be seen in a plethora of cases discussed above. Moreover, it has gained tremendous credence with the new democratic dispensation in Nigeria because Presidentt upholds the rule of law. This is evident in a number of recently decided cases and issues in the polity.

In **Peter Obi v. INEC**⁴⁸, the appellant aggrieved with the declaration of Dr. Chris Ngige, as the Governor of Anambra State by INEC, filed a petition at the Governorship and Legislative Houses Election Tribunal, challenging the declaration and return of Dr. Chris Ngige, as the candidate who won. The tribunal upheld the appellant's petition stating that he was the candidate who was validly and duly elected. Dr. Ngige dissatisfied appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the decision of the tribunal. Consequently, Peter Obi took the oath of office as the Governor of Anambra State on the 17th day of March, 2006. In 2007, INEC announced that the election to the Office of the Governor of Anambra State would be conducted on the 14th day of April, 2007.

The appellant, that is, Peter Obi aggrieved, commenced an action at the Federal High Court against INEC asking the Court to declare that his tenure of office as Governor of Anambra State began to run from the date he took the oath of allegiance and office on the 17th day of March, 2006. That he, the incumbent Governor has not served his four-year tenure of office. The trial court held that it lacks jurisdiction, since the suit is related to election matters. On

⁴⁶. *Ibid.*, **Governor of Lagos State v. Ojukwu** (1986) 1 NWLR (Pt. 18), p. 621.

⁴⁷. (2004) 6 NWLR (Pt. 869), p. 439.

⁴⁸. (2007) 11 NWLR (Pt. 1046), p. 436 at p. 616.

appeal, the Court of Appeal upheld the decision of the trial court that it indeed lacked jurisdiction and dismissed the appeal.

The appellant then appealed to the Supreme Court and the Supreme Court unanimously allowed the appeal, stating that jurisdiction should be examined not when it is invoked, but when the cause of action arose. It is the claim of the plaintiff that determines the jurisdiction of a court entertaining same. For this, the four-year term of the office of Peter Obi, as Governor of Anambra State starts to run from the day he took his oath of allegiance and office, from the 17th day of March, 2006 to 16th day of March 2010, as is provided by Section 180(2)(a).⁴⁹ The Federal High Court has unfettered jurisdiction to entertain and determine the suit.

The most striking issue was that this decision was welcomed by the President, who even ordered, the immediate reinstatement of Peter Obi as Governor of Anambra State, as directed by the Court. This decision by the Supreme Court is actually rule of law in-action.

In **Ladoja v. INEC**⁵⁰, the appellant was elected as the Governor of Oyo State and took his oath of allegiance and office, later on he was impeached. The impeachment was declared unconstitutional, null and void by the Supreme Court, resulting in his reinstatement into office. The appellant having been unlawfully removed from office for eleven months asked the court to declare that he is entitled to a period of four uninterrupted years. That his tenure should be extended by eleven months.

The Supreme Court held that neither itself nor any other Court has power to extend the period of four years prescribed for the Governor of a State beyond the terminal date calculated from the date he took the oath of office. To accede to this request will occasion much violence to the Constitution.

The Constitution⁵¹ entrusts the Attorney General of the Federation with enormous powers, which are to institute or undertake criminal proceedings against any person before any court of law in Nigeria, to take-over and continue any such criminal proceedings that may have been instituted by any other authority or person; to discontinue at any stage before judgement is delivered any criminal proceedings instituted.

These powers conferred on the Attorney General under the Constitution are important powers that ought to be exercised with utmost passion and the greatest sense of responsibility, and always in the interest of the public, justice and the need to prevent the abuse of legal process. Such powers should not be exercised whimsically, so as not to detract from the rule of law.

This is manifest in **Kalu v. EFCC**.⁵² In this case, there was a Court Order on 31st day of May, 2007, restraining EFCC from arresting, detaining and prosecuting Orji Uzo Kalu, the then Governor of Abia State. But the EFCC went ahead and prosecuted him flouting the Court Order. Therefore, the Counsel to Kalu petitioned the President of the Federal Republic Nigeria and the Attorney General of the Federation that the charge against his client was in breach of the rule of law. The Attorney General of the Federation wrote to EFCC directing it to comply with the Court Order. Having not complied with the court order, the Attorney General of the

⁴⁹ Constitution of the Federal Republic of Nigeria, 1999.

⁵⁰ (2007) 12 NWLR (Pt. 1047), p. 136.

⁵¹ S. 174, Constitution of the Federal Republic of Nigeria, 1999.

⁵² Adesina Debo, "The Attorney General takes over Kalu's case." **Guardian Newspaper**, Guardian Newspapers Ltd., Lagos, 6th September, 2007, p. 2; Adefaye Gbenga – "Attorney General takes over Kalu's cases", **Vanguard Newspaper**, Vanguard Media Ltd., Lagos, 8th September, 2007.

Federation came to Court on the adjourned date to take-over the matter and rightly too. This is actually in compliance with the rule of law.

The judiciary has in a long line of recently decided cases⁵³, carried out judicial review into the procedural irregularities of the legislature and giving wise and correct decisions following laid down rules and principles. Positively too, various election petition tribunals in the country have overturned the unlawful declarations of winners of elections made by INEC in the 2007 elections; where there were no elections but candidates were declared winners or elections were rigged. The tribunals in arriving at these decisions followed laid down principles and rules, hence upholding the rule of law.

Rule of Law in Military Dispensation

The word military or armed forces covers not only the army but also the Navy and Air Force of a country,⁵⁴ Nigeria inclusive. Ordinarily, the military is principally concerned with the defence of the country from external aggression, maintaining its territorial integrity and security its borders from violation, suppressing insurrection and acting in aid of civil authorities to restore order when coded upon to do so by the civil authority.⁵⁵ Hence, the military has no place in the politics of a democratic or civilized State.

Whenever the military comes into power they suspend parts of the Constitution and modify it and whatever is left of the Constitution operates subject to the decrees of the Federal Military Government. Hence, the aptness of Chief Obafemi Awolowo's statement that "under military rule, the rule of law is not totally suppressed, but largely in abeyance."⁵⁶

In the strict sense of it, military rule means absence of democracy and the rule of law. Above all, there is supremacy of decrees over the Constitution. It also connotes prevalence of martial law, emergency rule and autocracy as opposed to civil law. There is great practice of unitary system of government and less observance of the doctrine of separation of powers.

Moreover, in military government, the institutions of the State are defective, stifled and lack full capacities. They discharge their functions in an indifferent, arbitrary and superficial manner, because they are ultimately controlled by one person, the dictator who appoints people who do his will; right or wrong. He rules by decrees and without a regular parliament, and manages the affairs of the people according to his desires.

The people are denied civil liberties which conflict with the dictator's will. He remains in office by ensuring that the people are subject to his will, inarticulate and powerless. The decree becomes the supreme law of the land. The Constitution exists only to the extent that it is not suspended and modified and subject to existing decrees and sometimes even subject to edicts. The Constitution generally loses its binding force and substance, it almost becomes a mere paper. The Ruling Military Council exercises the powers of the government; especially the legislative and executive. The judicial powers though still left with courts are subject to the direction and control of the military. Hence, the military makes the laws, executes them, and controls its interpretation. And these laws are made to suit the interest of the military, at the same time ousting the jurisdiction of the Courts to question their activities.

⁵³ **Inakaju & Ors. v. Adeleke & Ors.** (2007) 4 NWLR (Pt. 1025), p. 423 at p. 668; **Dapialong & Ors. v. Dariye & Ors.** (2007) 8 NWLR (Pt. 1036), p. 239; **Alamiyeseigha v. Igoniwari** (No. 2), 2007, 7 NWLR (Pt. 1034), p. 443; **Maikyo v. Itodo** (2007) 7 NWLR (Pt. 1034), p. 412.

⁵⁴ S. 217 CFRN, 1999.

⁵⁵ 2 s. 217 (2)(a), (b) & (c), CFRN, 1999.

⁵⁶ O. Awolowo, "The Press in the Service of the State", **Voice of Wisdom**, pp. 93 – 101.

In **Lakanmi & Anor. v. Attorney General, Western State & Ors.**⁵⁷, the Tribunal of Inquiry into the Assets of Public Officers set up under Edicts No. 5 of 1967⁵⁸ made an order vesting the properties and accounts of the plaintiffs/appellants in the State Government until the Governor shall otherwise direct.

The plaintiffs challenged the validity of the Edict in the High Court and sought an order of *certiorari* to quash the order of the Tribunal. The High Court held that the order is not *ultra vires* and that the Edict was validly made. By Decree No. 45 of 1968, the Federal Government validated the subject matter of the action and ousted the jurisdiction of the Courts.

On further appeal, the Supreme Court held that this *ad-hominem* decree was unconstitutional, that is contrary to 1963 Constitution and as such null and void. That *ad-hominem* rule against specific individuals amounted to a judicial rather than legislative function or act and that only courts are entitled to make judgements on individual cases. In a very swift reaction the military administration passed another decree called Decree No. 28 of 1970 by which they made it clear beyond doubt that Decree No. 1 of 1966 (their First Decree) had established a new legal order, under which their decrees were superior to whatever part of the 1963 Constitution they permitted to continue to exist and that the validity of Edicts cannot also be challenged in Court except to the extent it is inconsistent with a decree. They went further to state that any decision made either before or after the commencement of the decree by any power under the Constitution which declares any decree or edict invalid, is null and void.

The decision of the Supreme Court in Lakanmi's case in the opinion of this writer was a bold step towards judicial activism and the rule of law by the Court. But the military government continued to nullify the good job done by the judiciary to the polity. Similar issue was raised in **Guardian v. Federal Republic of Nigeria**⁵⁹, but the matter was not handled with the same courage and boldness as the Supreme Court did in Lakanmi's case.

The Land Use Act⁶⁰ promulgated by the military government also ousts the jurisdiction of the Courts, stating that the Decree shall have effect notwithstanding anything contrary to any law or rule of law, and that the Court should not question why all the land should be vested in the Military Governor, the Military Governor should grant Statutory Right of Occupancy and the Local Government should grant Customary Right of Occupancy.

In **Wang Ching Yao & 4 Ors. v. Chief of Staff Supreme Headquarters, Dodan Barracks & 2 Ors.**⁶¹ Here, the detainees were citizens of Taiwan on business trip to Nigeria. They were detained for alleged acts prejudicial to the security of the State and the economic advancement of Nigeria. The appellants dissatisfied with the decision of the Federal High Court lodged an appeal. The Court of Appeal held that its jurisdiction is ousted because there is no right of appeal in such matter, therefore, cannot say anything in the matter. With greatest respect, I do not agree with this decision because, the ouster clause cannot oust the inherent jurisdiction of the Courts to find out whether the authority exercising the power is doing so in accordance with the procedure laid down by the enabling statute or not.

⁵⁷. (1971) 1 ULR, p. 201.

⁵⁸. Public Officers & Other Persons (Investigation of Assets) Edict No. 5, 1967.

⁵⁹. (1994) 5 NWLR (Pt. 364), p. 50.

⁶⁰. S. 47, The Land Use Act, 1978.

⁶¹. CA/L/25/85 Unreported, delivered April 1, 1985.

In **Attorney General of Lagos State v. Dosunmu**⁶² the Government of Lagos State had revoked the plaintiff's interest on a piece of land in Victoria Island pursuant to the policy of one man, one plot, as a result of which the State Government enacted the Determination of Interest Edict No. 3 of 1976 and Determination of Interest in State Lands Order 1976, whereby the plaintiff's interest in the second plot was determined. Both the Edict and the Tribunal of Inquiries 1977, oust the jurisdiction of the Court to inquire into the validity of the Edict and any act done under it.

The plaintiff instituted an action challenging the Constitutionality of the Edict and the Order of 1976, the Trial Court held the Edict and the Order unconstitutional and invalid. On appeal, the Court of Appeal said the trial court lacks jurisdiction and as such should not pronounce on the matter, but went further to state that the policy of the State Government of one man, one plot infringe on the Constitution.⁶³ On further appeal to the Supreme Court, the question was whether the Court of Appeal was right to have gone into the merit of the case in the face of ouster clause.

The Supreme Court unanimously held that the courts below lacked jurisdiction in declaring the Edict and Order unconstitutional for alleged contravention of Section 31 of 1963 Constitution, when their jurisdiction so to declare had been ousted.

However, from the plethora of cases examined above, it is clear that some Courts are of the view that once an ouster clause is seen, the Court should immediately give effect to it and hands off the matter, that is, not entertain the matter at all. While others are of the view that the matter should be looked into, to find out whether the procedure or conditions laid down by the legislation ousting such jurisdiction is followed.

Notwithstanding, the numerous Decrees and their associated ouster clauses promulgated by the military government, the Courts have often times tried to guard their jurisdictions jealously and apply the principles of the rule of law in their decisions. This is illustrated in a plethora of cases, as exemplified in the following: In **Oba Lamidi Adeyemi (Alafin of Oyo) & Ors. v. Attorney General of Oyo State & Ors.**⁶⁴, the Supreme Court per Anigolu J.S.C. observed thus:

It cannot be too often repeated ... that the jurisdiction of the Courts must be jealously guarded if only for the reason that the beginning of dictatorships in many parts of the world had often commences with usurpations of authority of Courts and many dictators were often known to become restive under the procedural and structural safeguards employed by the Courts for the purpose of enhancing the rule of law and preserving the personal and propriety rights of individuals. It is in this vein that the Courts must insist wherever possible, on a rigid adherence to the Constitution of the Land and curb the tendency of those who would like to establish what virtually Kangaroo Courts are under different guises and smoke screens of judicial regularity⁶⁵.

⁶². (1989) 6 SCNJ, p. 134.

⁶³. Section 31 (2)(b), The Constitution of the Federal Republic of Nigeria, 1963.

⁶⁴. (1984) 1 SCNLR, p. 525 at p. 602.

⁶⁵. *Ibid.*, p. 602

In **Commissioner of Customs & Excise v. Cure & Deeley Ltd.**⁶⁶, the Court observed that it is a well-known rule that a statute should not be construed as taking away the jurisdiction of Courts in the absence of clear and unambiguous language to that effect. Disputes as to the legality of the acts of government are to be decided by judges who are wholly independent of the executive. This is illustrated in **Governor of Lagos State v. Ojukwu**⁶⁷, where the Court of Appeal had earlier granted an *ex parte* application of an interim injunction to stop ejection of Chief Ojukwu pending the determination of the motion on notice. While the case was still pending in Court the Lagos State Government without an order of court forcibly ejected Chief Ojukwu from the property in dispute. On application to the Court of Appeal, the Court gave an order of mandatory injunction restoring Chief Ojukwu to his residence at No. 29 Queens Drive, Ikoyi, Lagos.

The Lagos State Government and the Commissioner of Police, Lagos Command without carrying out the order of the Court of Appeal to restore Chief Ojukwu into his house, sought an order staying the execution of the decision of the Court of Appeal pending the determination of the appeal in the Supreme Court.

The Supreme Court held per Oputa J.S.C. (dismissing the application) thus:

- (i) It is a very serious matter for anyone to flout a positive order of a Court and proceed to insult the Court further by seeking a remedy in a higher Court while still in contempt of the lower Court.
- (ii) It is more serious contempt when the act of flouting the order of the Court is by the executive.
- (iii) Once the Court is seized of a matter, no party has a right to take the matter into his own hands.
- (iv) To use force to effect an act and while under the Marshall of that force, seek the Courts equity is an attempt to infuse timidity into Court and operate a sabotage of the cherished rule of law.
- (v) The government should be conducted within the framework of recognized rules and principles which restrict discretionary power.
- (vi) That disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive.
- (vii) The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. It is both in the interest of the government and all in Nigeria.⁶⁸

This decision by the Supreme Court is a *locus classicus*. Also in **Miscellaneous Offences Tribunal v. Okoroafor**⁶⁹, the Supreme Court articulated that the rule of law demands that government should be conducted within the framework of recognized rules and principles which restrict discretionary power. And that disputes as to the legality of the acts of government are to be decided by judges who are wholly independent of the executive.

However, it is of paramount importance, as in the cases afore mentioned, that Courts should always and at all circumstances guard their jurisdiction, check the legality of acts of government, so as to protect the rights of citizens, for the guarantee of the rule of law.

⁶⁶. (1962) 1 QB 340 at p. 356.

⁶⁷. (1986) 1 NWLR (Pt. 18), p. 622.

⁶⁸. **Governor of Lagos State v. Ojukwu** (1986) 1 NWLR (Pt. 18), p. 622.

⁶⁹. (2001) 18 NWLR (Pt. 745), p. 295.

It is pertinent to note that some of these statutes or laws that oust the jurisdiction of the Courts set out conditions or procedures that must be followed in their enforcement. Where these conditions are not observed and the matter is brought before the Court, the Court has a duty to entertain the matter, otherwise, the judiciary will be failing in its main duty of ensuring that the rule of law prevails in our society.

In **Miscellaneous Offences Tribunal v. Nwammiri Ekpe Okoroafor**⁷⁰, the respondents were pharmacists. On the 29th of June, 1989, they were arrested and detained upon an allegation that they were involved in the manufacture of fake and adulterated drugs. They were later brought before the miscellaneous offense tribunal where they were charged with possession of adulterated drugs. The respondents' trial did not commence one year and five months after their arraignment. The respondents then went to court asking the Court to stop the appellant tribunal from trying them and then quashing the proceedings of the tribunal. At the High Court the issue of the application of the ouster clause contained in the Tribunals (Miscellaneous Provisions) Decree No. 9 of 1991 was referred to in the Court of Appeal.

The Court of Appeal held that the ouster clause would apply to take away the supervisory jurisdiction of the High Court only when an inferior tribunal abides strictly in its entirety with the enabling statute. As the appellant was in disobedience of the relevant statute, the ouster clause contained therein would not avail them. The appellant dissatisfied, appealed to the Supreme Court. The Supreme Court unanimously dismissing the appeal held, per Ejewunmi JSC, that whereas the Court would ordinarily abide with the provision ousting its jurisdiction, it nonetheless reserves the right to consider whether the provisions of the ouster clause are applicable in a given circumstance. In other words, while the Court will not challenge the right or legal capacity or power of a military regime to make a Decree or Edict, it reserves the power to inquire into whether or not such Decree or Edict is consistent with the provisions of the Constitution. The provisions of a Decree ousting the jurisdiction of the Court cannot be relied upon or invoked to cover up irregularities, carelessness or outright misapplication of the provisions of the Decree.⁷¹

The Supreme Court⁷² held further that a Court is obliged to uphold the ousting of its jurisdiction. However, ousting of the jurisdiction of the Court does not preclude the Court from exercising jurisdiction to interpret the ouster clause itself or to determine whether or not an action in question comes within the scope of power or authority conferred by the enabling statute. Where legislation ousts jurisdiction of the Court, the Court reserves the right to consider or examine whether the provisions of the ouster clause apply to a particular case in hand.

Suffice it to state that the Court frowns at any legislation that purports to oust its jurisdiction, it guards and preserves its jurisdiction jealously. As Lord Simonds once put it, "... anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court ..."⁷³ The Court often guards its jurisdiction and insists wherever possible on a rigid adherence to the Constitution of the land, because the beginning of dictatorship in many parts of the world had often commenced with usurpation of authority of Courts and many dictators were often known to become restive under the procedural and

⁷⁰ *Op. cit.*, pp. 295 – 299.

⁷¹ *Ibid.*, **Barclays Bank of Nigeria Ltd. v. CBN** (1976) 6 SC, p. 175; **University of Ibadan v. Ademolekun** (1967) 1 ALL NLR (Pt.1), p. 213; **FCDA v. Sule** (1994) 3 NWLR (Pt. 332), p. 257.

⁷² *Ibid.*, **ANPP v. Benue State Independent Electoral Commission** (2006) 11 NWLR (Pt. 992), p. 585; **A. G. Federation v. Guardian Newspaper** (1999) 9 NWLR (Pt.618), p. 187.

⁷³ **Smith v. Elloc RDC** (1956) AC, p. 736 at p. 750.

structural safeguards employed by the Courts for the purpose of enhancing the rule of law and preserving the personal and proprietary rights of individuals.

Conclusion

The rule of law is the most important feature of good governance in the polity. It preserves the jurisdiction of the Courts and promotes checks and balances of governmental powers. Adherence to the rule of law is seen more in democratic system of government than in the military dispensation. Although in practice, there is no ideal promotion of the rule of law.