THE ROLE OF RULE OF LAW IN A DEMOCRACY

INTRODUCTION

Nigeria, fourth attempt of democratic rule came on stream on the 29 of May 1999 with Chief Olusegun Obasanjo as the President and Commander-in-Chief of Armed forces of Federal Republic of NIGERIA. He was in power for 6 years when another election was conducted and Alhaji Umaru Musa Yar'adua was sworn in as the President and Commander in Chief of the Armed Forces of the Federal Republic of Nigeria on May 29, 2007.

However, Nigeria hitherto, had been under the autocratic military rule since 31st of December 1983.[1]

in this paper I intend to examine the role of the rule of law is democratic dispensation.

WHAT IS RULE OF LAW?

In our contemporary world, the Rule of Law has virtually become the most popular phraseology constantly coming out from the rulers and the ruled, whether within a democratic set up or dispensation, monarchical enclave, military or dictatorial junta. In the modern world. this phrase is as popular as democracy, Fundamental human rights or the natural rights of man. The phrase itself is anchored on the word **law**, meaning that man should be ruled or any country should be governed not by the rule of man or the rule of the mighty or that of whims and caprices of leaders, but by the rule of law. Despite His omnipotence, omnipresence and omniscience. God chose to give to the Israelites through His servant, Moses the Ten Commandments. To Dr. Tunji Braithwaite, these ten commandments[2] constitute the Living Oracles and quoting Bodin with approval, the learned author said[3]:

"All the princes of the earth are subject to them, and cannot contravene them without reason and rebellion against God. His yoke is upon them, and they must bow their heads in fear and reverence before God. The absolute power of princes and sovereign Lords does not extend to the laws of God and nature. He, who best understood the meaning of absolute power, and make Kings and Emperors submit to His will, defined his sovereignty as a power to override positive law''.

❖ Oluwarotimi Odunayo Akeredolu SAN

[1] The military overthrew the civilian Government of President Sheu Shagari on the eve of December 31st, 1983 in a military putch which was headed by major General Mohammed Buhari. The country had being at one time and the other under Military Rule since january 15th, 1966.

Despite the unfathomableness of God's wisdom and awesomeness of His powers, He still chose to govern man through the rule of law embodied in the ten commandments and all other laws made for man and promulgated by successive governments in different parts of the world have been tailored in line with the ten commandments. The whole essence of this is that the rule of law itself was an expression first created by God, directing man not to be governed by might, but by laid down laws. More than 25 centuries ago, Aristotle espoused the beauty and importance of this ancient and all-time important rule in his writings, emphasizing that the rule of law was preferable to the rule of man[4]. This postulation which will ever remain germane and unalterable was further developed by Pollock and Henri de Bracton in their notions of "the free and lawful men, and of the King being'' ''under God and the law[5]''. On these two notions was the common law founded and, put in another way, both constitute its fulcrum.

The greatest exponent of the rule of law was Professor A. V. Dicey, to whom the doctrine simply means that no man is punishable or can be made to suffer in body or goods, except for a breach of law established in the ordinary legal manner and before the ordinary courts of the land. In effect, it means the supremacy or pre-eminence of regular law in contradistinction to the influence of raw or arbitrary. Power or the absence of arbitrariness, or prerogative and wise discretionary powers on the part of the government[6].

In spite of the theory of 'uncommanded commander associated with the positivist school of the 19th century in which John Austin Bentham and others were the precursors[7], the importance of the rule of law in modern society has always elicited positive comments from prominent jurists, even during there time and to date. Positivism itself, if analytically dissected, is associated with orderliness, despite its differentiation between what the law is and what the law ought to be. As rightly posited by a learned author[8];

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[2] Exodus 20 vs 3,4,5,6,12.13.14.15,16 and 17.

[3] See The Fuchsprudence of the Ling Oracle Page 196

"Precision may be an elusive goal but the striving towards it, whether possible, is commendable and profitable''.

In fairness to Austin and Bentham, we should all remind ourselves that they were reformers, hence there insistence that prior to any reform, there has to be a thorough classification of the law as it is.

According to the first indigenous Chief Justice of Nigeria, Sir Adetokunbo Ademola, while addressing the African Conference on the Rule of Law in Lagos in January, 1961, the term, Rule of Law, is not mainly an Anglo-American institution but a rule that applies to every one who believes that man is governed by law and not by the whims of men. In the words of the learned Chief Justice:[9]

"It has been said that the rule of law is mainly an Anglo American institution, that the concept of government under law and such phrases as the supremacy of law and the rule of law, are all purely Western inventions. The communist analysis maintained that everything is legal which is good for the state and the problems of adjusting the legitimate claims of the individual and his society has no place. The African, it was suggested, might find a third legal system which is neither the rule of law nor the socialist legality propounded by the Communists. But the rule of law is not a Western idea, nor is it linked up with any economic or social system. As soon as you accept that Man is governed by law and not by whims of men, it is the rule of law it may be under different forms from country to country but it is based on principles, it is not an abstraction notion.

One cannot but agree with Sir Adetokunbo Ademola that the term "Rule of Law' is not an abstract notion but a very fundamental one applicable to any set of people who are human beings, notwithstanding their type of government or mode of governance. Although everyone naturally subscribes to the idea of rule of law, it would appear as if the definition varies from one place to the other or from one continent to another. Nevertheless, in our world of today which has now become a global village, the term is used as a litmus test to ascribe recognition to humane and egalitarian government based on the principles and ideals of democracy. There are three basic conceptions of the rule of law as postulated by J. M. Elegidol[10]. The first conception is founded on the idea that organs of government must be subject to legal rules. To the promoters of this view, such as King John, the rule of law means no more than that. Thus, in Article 13 of the Great Magria Carta of 1215, King John had promised that:

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[4] Politics 111. 10 cited in J. M. Elegido (ed.) "JURISPRUDENCE", Spectrum Books Limited, Ibadan, 2002, page 182 see also the paper delivered by Chief Wole Olanipekun, San on Monday 27 February, 2006 at the Faculty of Law Obafemi Awolowe University Ile-Ifs. Titled "Assault on the Rule of law: A. Veritable Threat to Democracy

[5] Ibid

[6] Ses A. V Dory: The Law of the Constitution, 19 edition

[7] See Disa Jurisprudence, 1 edition

[8] Ibid, page 382.

"No free man shall be taken or imprisoned except by lawful judgment of his peers or by law of the land.[11]

This conception, which could be located early in the common law insists that all actions of government officials must be justified in law and that no government official, no matter how highly placed, is entitled to disregard the law on grounds of state security or political expediency. In one of his writing, Dicey lent great support to this conception when he said:-

''Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals..[12]

This postulation is often justified on the need to protect the freedom of ordinary citizens by not allowing government officials to encroach on it save on the basis of clear legal authority.[13]

In spite of the apparent virtue of this conception, it is not flawless in the sense that it can be manipulated by a tyrant to cause hardship to the citizens. Prominent jurists and indeed political philosophers are always quick to point out that there is more to the ideal of the Rule of Law than the crusade for public officials to respect the law in their actions. They argue that the mere fact that the government officials promise to keep to the law does not mean that the people will be better off. This shortcoming has led to the second conception of the meaning of the ideal of the Rule of Law This conception is predicated on the idea that not only should government respect the law in all its actions but that the law should minimizes arbitrariness on the part of government and makes it possible for the citizens to take the law into account in planning what to do. In the words of ElegidO[14], a tyrant can always pass a law giving himself unlimited and unreviewable powers and thus ensure that he will not break the law"

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[9]Africa Conference on the Rule of Law, 1961

This conception contrasts sharply with the positivist school of law, as championed by jurists like Dworkin[15], Austin[16] and Kelsen[17]. These jurists believe in law posited, that is, they believe in the positive law. To them, as long as law has passed through the mechanisms of law making. it becomes law which must be respected and obeyed irrespective of whether it is a good or bad law, moral or immoral. Juxtaposing the positivist school with the first conception of the Rule of Law as earlier discussed, the fears of Dicey[18] and others about the possibility of a despotic leader manipulating the ideal of Rule of Law to his own advantage are easily appreciable. It must be pointed out here, and as noted by Elegid0[19], that the objective of minimizing arbitrary power was foremost in the minds of those who fought for freedom in the Constitutional conflicts which took place in England during the 17th century for example, in 1642. Sir Edward Coke warned the parliament 'to leave all causes to be measured by the golden and straight mate-wand of the law and not to the uncertain and crooked cord of discretion[20] John Locke, on his Part, stated that:-

"Freedom of men under government is to have a standing rule to live by, common to every member of that society and made by the legislative power erected in it and not to be subjected to the inconstant, uncertain arbitrary will of another man.[21]

The third conception of the Rule of Law is more demanding than the two discussed above. An excerpt from the Declaration of Delhi published by the International Commission of Jurists in January, 1959[22], sums it up. It states thus:-

"The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the personality.

What this formulation is saying in essence is that for a law to meet the requirements of the Rule of Law, it must be good in the sense that it must be in furtherance of the protection and enjoyment of the citizens basic rights.

I have always aligned myself with the proposition that law itself is meaningless if it does not foster the greatest happiness of the greatest number of any group of people in practical terms in the areas of education. health care delivery, transportation, old age care, employment opportunities, security of lives and social, economic, educational and cultural conditions which are essential to the full development of his limbs, etc., etc. In other words, for our law in Nigeria to be meaningful, all the fascinating propositions or enactments in Chapter II of the Constitution relating to Fundamental Objectives and Directive Principles of State Policy should be made justiciable[23]. As was the situation in India in the case of MINERVA MILLS LTD VS. UNION OF INDIA AIR (1980) SC where the Indian Supreme Court affirmed the justifiability of their own equivalent provisions of our Directive Principles of State Policy. Wherein Justice Bhagwatti summarized the position thus:-

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[10] See chief Algbaje vs commissioner of Police, Unreported Suit No CAW/1969 of 27th August 1969. See also jideonwo Vs Governor of Bendel State(1981) 1 NCLR 4.

[11] Op.Cit page 184.

''The large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation though representing some of the most cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and the well to do, and the only solution for making these rights meaningful to them was to re-make the materials conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.''

THE RULE OF LAW AND THE 1999 CONSTITUTION.

Black's Law Dictionary 6th edition, define a Constitution as "the organic and fundamental law of a nation or a state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principle to which its internal life is to be conformed organizing the distributing and limiting the functions of its different departments and prescribing the extent and manner of the excise of sovereign powers governed." A charter of government deriving its whole authority from the governed.''

To O Hood Phillips[24]:

"The constitution of a state in the abstract sense is the system of laws. customs and conventions which define the composition and powers of organs of the state and regulate the relationship of the various state organs to one another and to the private citizen. A constitution in the concrete sense is the document in which the most important law of the constitution is authoritatively ordained A country such as our [United Kingdom) which has no constitution in the concrete sense of the word it should be clear from the context which meaning is being employed."

From whichever angle one looks at it, the constitution of the nation is its organic and principal law. It is the **font et origo** of every other law. In Nigeria, the 1999 constitution, as imperfect as it is, is the **grundnorm**. The Supreme Court said, **"It is the fountain of all our laws; it is the composite document setting out how the country is to be held together...it is the very foundation of nation's existence.[25]**

Although unlike the 1989 Constitution which provides that "the state shall... enforce the rule of law" in section 16(6), there is no provision in the 1999 Constitution Howbeit, section 17(1) thereof state that "the state social order is founded on ideals of freedom, equality and justice." To my mind. The entire these ideals sum up or are encapsulated in the rule of law. The entire

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[12] R.Dworkin: ''Taking Rights Seriously'' London, 1997; pages 18

[13] John Austin, London 1982

[14] See H. Kelsen: :The Pure Theory of Law'' Bakery, 1967

[15]Ibid

constitution itself, again notwithstanding its glaring imperfection, aims at Nigeria being governed by the rule of law, against the rule of man or those who temporarily or transiently hold own to the rein of power. That is why the constitution in part II thereof and section 4, 5 and 6 respectively divided the legislative, executive and judicial powers between the three realms of state.

Judicial pronouncements from our Court support the view that Nigeria is governed by the rule of law and not by the whims and arbitrariness of man. In Governor of Lagos State Vs Ojukwu[26] where the then Lagos State Military Government decided to use the rule of force to acquire the property of a citizen, the Supreme Court, per Obaseki JSC Condemned the action in an unequivocal manner thus;

"In the area where rule of law operates, the rule of self-help, by force is abandoned Nigeria being one of the countries in the world even in the third world which proclaims loudly to follow the rule of law, there is no room for in the rule of self-help by force to operate The Nigerian constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law It means also that government should be conducted within the framework of recognized rules which restrict discretionary power which Coke colourfully spoke of as golden and straight meet wand of law as opposed to the uncertainty and crooked cord of independents of the executive by the Constitution of the Federal Republic of Nigeria 1979. 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 persons in Nigeria. The law should be even handed between the Government and citizens."

To Oputa JSC. In the same case, "Nigeria even under a military government, the law is no respecter of persons, principalities governments or power."

Similarly the rule of law was proclaimed in the following cases of **GARUBA VS UNIVERSITY OF MAIDUGURI[27], DENLOYE VS MDP DISCIPLINARY COMMITTEE[28], DR. SHOFEKUN VS AKINYEMI[29], GARBA VSFED.CIVIL SERVICE COMMISSIONJO, OBEYA VS AGF31 and ELEGO VS GOVT. OF OGUN STATE[32].**

THE LINK BETWEEN RULE OF LAW AND DEMOCRACY

The word "**democracy**" is derived from a combination of two Greek word "**demos**" meaning people and "**Kratia**" meaning "rule" or "government". Democracy is a government either directly.. or through representatives. Democracy is a representative government. **President Abraham Lincoln** of the United State of America rightly defined democracy as a government of The people for the people[33]. Any true democracy must posses the three ingredients present in this definition. To be a true democracy, the government must be:

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[16] (1986) 1 NWLR (Pt. 18) 550

[17] (1968) 1 All NLR 306

[18] (1980) 5-7 SCI

1. A government made up of the generality or representatives of the people
2. A government formed and installed by the people; and
3. A government that exists for the welfare of the people.

The welfare of the people is a critical factor. This is so, for the whole purpose or object of government is the welfare of the people, for instance, as provided in section 14(2) (b) of the 1999 Constitution Democracy started in the ancient Greek city-states. Democracy is a government where all qualified adults in the country participate in the government either directly, or through their representatives. Democracy is a government that allows representation of all people and interests in a country. Democracy is an open government because government is a public affair or an everybody affair, and not the privilege of a few. As an open government, democracy permits and protects human rights.

Democracy is a government that allows the people to choose their leaders by way of election, or to reject such leaders and their programmes, when they are no longer serving the interests of the people Though democracy originated in Greece, it is the best form of government for any country. However, those who do not want to practice democracy will either argue that democracy is for western societies, or advocate for a home grown democracy, so that they can dominate, control, and manipulate democracy to become something else, which will not benefit the people.[34]

Rule of Law and Democracy are like Siamese twins too difficult to separate and the practice of one leads to the practice of the other, or put differently, adherence to one lead to the other. No wonder then that hydra-headed despots and unmitigated tyrants nowadays claim to owe allegiance to the rule of law and subscribe to democratic norms, simply to gain universal acceptability and acclamation. Today, democracy is undoubtedly becoming the only acceptable system of government is taken as unacceptable. Even the Eastern block which used to operate a close (communist) system has been opened opened up to due to **Mikhail Gorbachev's** twin policy of **Glasmost** and **Perestolka** of the 1980s. The democracy train has also moved to the otherwise impenetrable Arab world as dictatorship is giving way in places like **Afghanistan** and **Iraq**. The rule of man of Austin's **'uncommanded commander'** is becoming increasingly archaic. In any event and to my mind, the "**uncommanded commander**" is God who rules supremely in the affairs of man and that same God decided to govern us by laid down laws. Even in the first judgment passed at the **Garden of Eden**, He laid down for us the principle of fair hearing, particularly that aspect of it encapsulated in the Latin maxim, Audi Alteram Partem. No wonder, **Fortescue J**. alluded to this in the case of **R. VS. CHANCELOR OF THE UNIVERSITY OF CAMBRIDGE**[35] when his Lordship said, **"Even God did not pass sentence upon Adam before he was called upon to make his defence. 'Adam, says God,**

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[16] (1916)-4 STR-557

where art thou? Hast thou eaten of the tree whereof I commanded thee thou shouldst not eat?' And the same question was put to Eve also."

Section 1 (2) of the 1999 constitution provides thus:-

> **"The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this constitution."**

In other words, the constitution has spelt out the way and manner we are to be governed, including the tenures of elected officers at the Local Government. State and Federal levels. The point being made is that section 1 (2) is not restricted to taking over of the government of the Federal Republic of Nigeria by the Armed Forces through condemnable and uncivilized coup d'etats alone, but also extends to any attempt, orchestrated or real. manipulated or prompted by, on behalf or at the behest of any person to change what the constitution has enacted as tenure of any elected officer or official by elongation.

The same constitution has also delineated responsibilities between all functionaries who are donees of its powers or largesse, including the President, the Governors, member of the National and State Assemblies, the independent National Electoral Commission and its counterparts at the state levels. Policy, National Judicial Council, Federal Judicial Service Commissions, etc.. Each of these donees is also expected to respect the Constitution and not to desecrate its sacredness because by doing so, they would be assaulting the rule of law and threatening our democracy.

However, the impeachment of governors and their deputies on flimsy excuses ranging from the absurd to the sublime and particularly in instances which are very much connected with political victimization also constitutes an assault on the rule of law and a threat to our nascent democracy. Between 1999 and now, the **Governors of Balyesa and Oyo** have been impeachment with utter impunity and without any consideration for the due process eloquently stipulated in our Constitution vide of **Abua**, **Akwa Ibiom** and **Ekiti States** were also impeachment blatantly and without caring for the rule of law, the sacredness of the constitution and the high office of Deputy Governor. The purported impeachment of **Senator Rasheed Ladoja**, **Governor of Oyo State** culminated in the anti climax of the determination of the political big wings in this country to stand the constitution on its head. It was one impeachment too many and too ugly. Though the impeachment was upturned by Court of Appeal and upheld by the Supreme Court in the case of **INAKOJU VS ADELEKE**[36].

Similarly, the Supreme Court in the celebrated case of A/G. LAGOS VS. A/G. FEDERATION? where the Court, since 10th December, 2004 declared as illegal, unconstitutional, null and void, the withholding by the Federal Government of statutory funds meant for local government in Lagos State. Initially, the attitude of the Federal Government to the judgment was that it would not obey it. After several pleas and entreaties, the Federal Government said it would start paying in tranches and after paying two installments, the Federal Government stopped releasing the remaining batches on the ground that the Lagos State Government should go and conduct local government elections before they are released. Yet the Supreme Court ordered that the funds be released forthwith. The order of Supreme Court was not obeyed throughout the tenure of

President Olusegun Obasanjo not until recently when President Musa Yar'adua ordered immediate payment of the withheld Lagos State federal allocation.

In conclusion I have examined the definition of the rule of law as propounded by several writers and also the 1999 Constitutional provisions particularly section 14 (2) and the links between the rule of law and democracy.