INVESTIGATING THE REALITY OF RULE OF LAW IN NIGERIA: THE EXECUTIVE'S EXTRAORDINARY POWER OVER THE JUDICIARY IN VIEW

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CERTIFICATION

I, **Oghenefejiro Jaeden AGHA** with Matriculation Number **LAW1504255** do hereby certify that, apart from the references made to other persons works, which have been duly acknowledged, this entire project work is a product of my personal research and that this project has neither in whole nor in part been presented elsewhere for any other degree.

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APPROVAL

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DEDICATION

This work is dedicated to God Almighty, the source of true knowledge, and to Mr and Mrs Agha-Daniels, my wonderful parents.

ACKNOWLEDGEMENT

My heartfelt gratitude goes to my wonderful parents, Dr and Mrs Agha-Daniels, and my beautiful sisters Oke, Efe, Elo and Kome for their unconditional love, prayers and being my backbone ad support system when I needed it

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To my favourite people in the world that I call my best friends, Pearl, Peace, Ejiro, Mercy, Kelechi and Tosin. Thank you for being part of an essential stage of my life, the laughter, the tears, the prayers and the fun we had, would forever be cherished. I would also like to thank my friends Adesuwa, Noyo, Sylvester, KC, Ojonugwa, Lyon, Daisy, Vincent and so many others whose names are not written here, I owe my immense gratitude to each of you, though not mentioned, remain forever valuable to me. Thank you for being my support system when I needed you.

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LIST OF ABBREVIATIONS

ACHP	African Charter on Human and People's Rights
CEDAW	Convention to Eliminate All Forms of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
JUSUN	Judiciary Staff Union of Nigeria

ABSTRACT

The concept of the 'Rule of Law' simply means accountability to the provisions of the law - a state of affairs in governance, in which the law holds sway to the letter, no matter whose ox is gored. In a state where the Rule of Law prevails, the application of the law and its principles in the administration of that state, is effected without recourse to creed, tribe, gender, religion, personal desires or status amongst other things. What matters without more, is the law and Justice.

Kingdoms. and states have risen and fallen partly or totally due to the concept of the rule of law. If one looks at history through the eyes of circumspection, one can almost see mankind's endless battle with chaos and anarchy. A frenzied scramble to infuse order starting from the family to communities and then to larger aggregates of people. Where man's toil in this direction has failed, anarchy has sprung forth, wars have happened, taking lives and breaking once vibrant states into smaller units or something else entirely.

Time has taught us that in the administration of a State, the most useful tool in maintaining the Rule of Law, does not reside exactly in the letters of the Law but in the application of the law. Laws may be vibrant and beautifully couched; properly delimiting roles and actions in a society but if these laws are not applied or properly applied, the letters on paper begin tending towards worthlessness. As Nigeria is the focus of this essay, the pertinent question is whether the administration of government in this country is compliant with the rule of law? Is it?

The application of this concept in Nigeria can be likened to a cruise through a pothole-filled street. Again and again, more abrasions on the Rule of Law happen, some, leaving people utterly shocked and wondering desperately how worse the next one is going to be. Certain acts most times by the executive, leave much to be desired and leave Nigerians with the feeling that we are in an authoritarian State.

The aim of this essay is to examine the application of the Rule of Law in Nigeria and prescribe cures where needed. To successfully achieve this, a foray will first be undertaken into the meaning and origin of the Rule of Law, thereafter, this writer will examine the perceptions of scholars and pundits on the concept, from here, the Rule of Law will be examined in line with auxiliary concepts after which the firmness of the Rule of Law from a

legal standpoint will be examined in Nigeria. While doing this, reference will be made to other states and events within and outside Nigeria to not only help achieve a clean grasp of the issues surrounding the rule of law in Nigeria but also provide time tested solutions to them.

CHAPTER ONE

THE CONCEPT OF THE RULE OF LAW

1.0 Introduction

> "The clearest way to show what the Rule of Law means to us in everyday life is to recall what has happened when there is no rule of law."[1] President Dwight Eisenhower

History has taught us, that the civilized man has always viewed anarchy with a sense of fear hence the need to infuse order into any community of people by creating a political authority to oversee the management of the community and ensure stability. However, what men have always feared more, civilized or not is the loss of their fundamental rights to other men. This has reinforced the need to not only establish a political authority but to make everyone even the authorities, subject to the law.

In this chapter, the Rule of Law will be conceptualized by making an inquest into its meaning, historical formation and the core perceptions that paved way for its birth. The end of this chapter is to make an attempt at infusing a working meaning to the concept upon which background, the scope of the Rule of Law will be discussed in the next chapter.

1.1 The Concept of the Rule of Law – A Break Down

The concept – the 'Rule of Law', is clearly built on two words, 'Rule' and 'Law'. This may create some confusion as it shares prima facie similarities to the words 'rule(s) of law' itmust be noted, that 'rule(s) of law' denotes a legal rule or rules which state a position in an area of law, like the rule against perpetuities for instance. That said, as regards the concept of the Rule of Law, while the meaning of 'Rule' is straight forward, the meaning of 'Law' is quite ambiguous. 'Rule' in the sense it is used means "the exercise of authority or

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[1] Bass, Hilarie 'Champions of the Rule of Law', 1 February, 2018) https://www.abajournal.com/magaazine/article/champions_of_the_rule_of_law. Accessed 30 September 2020

control – Dominion". Law on the other hand, is multifaceted; inundating scholars with a multiplicity of definitions. Over the years, scholars have defined it with respect to their areas of practice and experience and this has done nothing to simplify and give a universal meaning to the word 'law'. Like a scholar, Okunniga put it, "Nobody, including the law, has offered; nobody, including the lawyer, is offering; nobody, including the lawyer, will ever be able to offer a definition of law to end all definitions…"[2]

Law has been defined to mean, "A rule, usually made by a government, which is used to order the way in which a society behaves". It is also "the system of rules of a particular country, group, or area of activity". Law can also refer to a discipline – the study of law. The problem here, is finding a perfect definition of law. This is however, not possible as the word is mildly polysemous – presenting meaning, based on need. The above definitions however, are to lay down some perspective for the purpose of this paper, as to what Law means.

As hinted above, 'Law' as used in the 'Rule of Law' can be better understood, if one defines it in the sense of a body of rules governing human conduct. In line with this thinking, the Rule of Law can be perceived in a very simplistic sense, as the dominion or exercise of authority of a body of rules governing human conduct. But what kind of law? The whole body of laws or the basic law – the constitution? As will be discussed latter, the law referred to in this sense is almost always the constitution because every other law flows from it and if it rules, the law rules.

The question to be checked next is, what is The Rule of Law? Efforts to conceptualize the Rule of Law have divided into two main classes namely the Formalist and the Substantive conception of the Rule of Law. Formalist definitions (also known as definitions of 'Rule by Law'), places extra stress on the constituents of the procedural part of the Legal structure

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[2] Okunniga, A.O. Transplants and Mongrels and the Law: The Nigerian Experiment: Inaugural Lecture Series 62; (Ile-Ife: University of Ife Press 1983), p.g 2

which a State must possess in order to be in compliance with the Rule of Law and it places no emphasis on whether or not the law is just. Definitions of the concept which dwell simply on compliance with due process and transparency without any statement on the result of such transparent processes; that is, whether or not it will work justice, belong to this definition class. Substantive conceptions of the Rule of Law on the other hand go over and above this and state requirements a legal/political framework must possess to work justice. Former Secretary General of the United Nations (UN), Kofi Annan in his reports in 2004, reiterated the UN's position on the Rule of Law by defining it as: 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency…'[3] The foregoing, is a perfect example of a substantive definition of the Rule of Law. According to this definition class, the Rule of Law must have three qualifications; first, the government must be under the law – the law must be supreme, everyone including the rulers must be equal under the law and lastly, the procedure and letters of the law must work together to actualize justice or else, it is a travesty of the Rule of Law.

The stress however, while discussing this concept in this essay will be more on defining the Rule of Law in line with Substantive conceptions - the effect or purpose of the dominion of law than on the mere dominion of the letters of the law. Some argue that there is no Rule of

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[3] Report of the Secretary General, The Rule of Law and Transactional Justice in Conflict and Post Conflict Societies, UN Doc S/2004/616 (2004) at para. 6. https://www.cambridge.org/core/journals/leiden-journal-international-law/article/abs/international-rule-of-law. Accessed 30 September 2020

Law if the laws are arbitrary, in favour of a select few and/or an antithesis to ideal democracy. While this writer has is reluctant to agree with the assertion that the Rule of Law must align with ideal democracy, this writer agrees that arbitrary or oppressive laws which do not judge the government on the same scale with which the rest of the populace is judged, is not in dominion but is merely a tool. Naomi Choi, puts this in perspective when she defines the Rule of Law as "the mechanism, process, institution, practice or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government and more generally prevents the arbitrary use of power…"[4]

Although it is not entirely clear on the face of it, the celebration of the Rule of Law has always been the celebration of the rule of just laws as opposed to law in its ordinary sense. In climes where draconian laws have been enthroned, what is obtained is a rule of the tyrants who made those laws as opposed to the Rule of Law. Because it is not enough for laws to govern humans and infuse order in their conduct, such laws must be fair and hold their makers accountable too – such laws must be just. This was what Cicero meant in the classical age when he said "True law is right reason in agreement with nature…"[5] This sums it up, if law must rule a community of people, it has to be a brand that is right reason in agreement with nature. It has to be law that supports the equality of all citizens before the law, secures a non-arbitrary form of government and prevents the arbitrary use of power. This is what the rule of Law should mean today. This position, did not spring from emptiness but from an iridescent history of legal practice, the failings and successes in the practice, the play of global politics and most of all, the thought and perception of legal scholars over the years. To gain a broad understanding of the Rule of Law, this writer will take a deep dip into the history leading to its advent.

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4 Choi, Naomi, 'Rule of Law' Encyclopedia Britannica. (2019)

5 Cicero, 'De Republica' III 52 B.C. pg 22

1.2 Historical Development of the Rule of Law

The Concept of the Rule of Law may be as old as mankind. Although it is uncertain when the rule of law was conceptualized, there is no gainsaying the assertion that it has been in existence since the advent of the earliest civilizations, if not in practice, at least in the collective thoughts and imagination of the populace of several civilizations. This is clear from the many faces of the concept that have existed through history culminating in what is now known as the Rule of Law. It has evolved over time and paved way for the emergence of ideal democracy and its accompanying modes of governance as we know it today.

1.2.1 Classical Period

Earliest writings on the concept can be traced to ancient Greece – the cradle of democracy and found in the discourse of the most distinguished Greek Philosophers. At the risk of exaggeration, the greatest examples of the contribution of Greek Philosophy to the Rule of Law are the writings of Plato and Aristotle. Plato conceived the initiative that the rulers should be subject to the law. This concept introduced by Plato was later further advanced by his student Aristotle. His argument on the Rule of Law is centered on the position that Rulers should be under the law to prevent arbitrary rule. He captures this masterfully in the following words:

> "And the rule of law, it is argued, is preferable to that of any individual… therefore he who bids the law rule may be deemed to bid God and Reason alone rule but he who bids man rule adds an element of the beast; for desire is a beast and passion perverts rulers, even though they be the best of man. Therefore, the law is reason free from desire."[6]

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[6] Hall, Jerome, 'Plato's Legal Philosophy', Indiana Law Journal: Vol 31: issue2, Article 1. https://www.repository.law.indiana.edu/ilj/vol31/iss2/1 Accessed 7 October 2020

He went further to stress the importance of just laws as opposed to unfair or immoral laws. He equated the former to such laws promulgated under the Rule of Law and the latter class to such promulgated under arbitrary rule of men.

Much of Roman culture has roots in Greek philosophy and by extension, the Rule of law, found its way into Roman political culture. Among Roman philosophers, Cicero is one of the most notable. In his work, he spoke with emphasis about what quality the law must be. One would easily agree that amongst political pundits of his time, he better understood that being under the law is not enough. First, the quality of the law must be examined. Rulers could make obnoxious laws and pretend to be subservient to them; laws could oppress the people and profess a twisted sense of justice. Cicero observed such laws as a travesty of what the law should be. According to him, true law must be right reason in agreement with nature, nature being, what is naturally right, just and common sensical. For Cicero[7], if the law does not deliver unequivocal and impartial justice, it is bad law. The Roman Republic at its peak did not have a sole individual as a sovereign. They instead let legislative power reside in the Senate while executive power was decentralized. The Senate was in a way a representation of the people and tried to uphold the ideals of the Rule of law but when the Republic fell, the Rule of law fell with it and the Roman empire was established, the emperors were above the law; they were the law. Laws were promulgated which crushed any system that attempted to delimit the powers of the emperor. Somehow, this part of the classical period pushed the concept of the Rule of Law and political thought associated with it, into a sort of coma. This continued until later in the medieval era.

1.2.2 The Medieval Era

The early part of the Medieval period was fraught with the Church establishing its hegemony over much of the civilized world. At this time, the thought that the king had a divine right to

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[7] ibid

rule was in vogue. For a king to have legitimacy, his reign must be sanctioned by the church. The problem with this was that once a king's reign was sanctioned by the church, his right to rule was seen to be directly from above and although he was under the church, he was not under the law and thus was not judged by the same scale his people were judged. With the formation of protestant movements, kings were seen and now treated as what they were – mere men. Before the dominance of the church, customary law prevailed in Europe and rulers were seen as under the law and guardians of same. When the thought of Divine right of kings began to wane, customary law prevailed once more. The people sought to delimit the powers of kings and this was one of the things that led to the writing of the Magna Carta in 1215. One important provision in the Magna Carta that sought to uphold equality and thus by extension, the Rule of Law was that which provided that no one should be deprived of his property except by a 'lawful judgment of his equals and by the laws of the land…'[8] This formed the foundation of the establishment of the right to own property, right of compensation in cases of compulsory acquisition of property and in a way, the right to fair trial and justice in not only England but it also affected the development of these rights in constitutions in some other parts of the world. The latter part of the Medieval period saw a reawakening in the people and this showed in the thought of political analysts and philosophers at the time. This reawakening was occasioned by a fall back to the thought of philosophers of the classical eraas political thoughts in this latter era, were more or less an affirmation of thoughts in the classical era. One of the foremost political/legal commentators of the medieval era, is Thomas Aquinas, who in his work affirmed the thought of Aristotle. While in the spirit of the time, he stated that the king was above the law, he however also opined that it will be in good faith and indeed proper for the kings to be subject to the laws they make. The waning of the idea of

[8] Stenton, Doris Mary. 'Magna Carta' . Encyclopedia Britannica, 11 Feb.2021, https://www. Britannica.com/topic/Magna Carta. Accessed 4 June 2021

'divine right to rule 'gave impetus to the flight of the Rule of Law and several other jurists wrote about it and elaborated its frontiers. On the wings of this, in England, the Parliament now attained a position capable of checking the king in power. Kings were now held accountable for their actions in contravention with the Rule of the Law. Another political thinker of this era was the 13th Century English Philosopher, Bracton who also reaffirmed the thinking that the 'king himself ought not be subject to man but subject to God and to the Law because the law makes him King.' This thinking continued to grow in strength into the Renaissance Period.

1.2.3 Renaissance Period

This era was filled with a renewal of consciousness on many levels including politics and the law. One of the themes of the Renaissance period was 'Liberalism' and at the core of this thought was the reverence for the Rule of Law. People had now begun to understand, respect and internalize the concept of rights. John Locke a notable thinker in this era and viewed as the father of Liberalism, expanded on this concept of fundamental rights and the Rule of Law, while he stated that 'freedom of men under government is to have a standing rule which is common to everyone of their society and which is made by the legislative power… and which is subject to no arbitrary will of another man…' In his Two Treaties of Government (1690), John Locke propounded the theory of social contract as he asserted that the government was there to protect and not exploit the governed. In line with this, government is in power by virtue of social consent and their actions while making laws, executing same or adjudicating, must be in agreement with the common good. According to him, social contract was entered into by the society and the government, the former, giving the latter the right to govern them in exchange for protection. He went further to make statements on the theory of Separation of Powers an important concept which engenders the

Rule of law. This theory will be introduced shortly in this chapter. Baron de Montesquieu expanded more on the theory of Separation of powers and the Rule of Law in his book where he stated:

> "When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty: because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the Legislative and executive…"[9]

From Montesquieu's position, the theory of Separation powers is a means of curbing abuse of political power and thus instituting the Rule of Law.

1.2.4 The Rule of Law Today

The present political consciousness on the Rule of Law, liberty and the coinage of the phrase "Rule of Law" are spawns of the explanation on the concept given by the British Constitutionalist, Albert V. Dicey in his book Law of the Constitution in 1885. In his work, he defined the concept of the Rule of Law as having three important principles:

1. **Absolute Supremacy of the Law:** He propounded the delimiting of political power as opposed to arbitrary powers wielded by the government with wide discretionary authority. He opined that the law of the land must be supreme and above any political authority.

2. **Equality before the Law:** On this constituent, Dicey opined equality of people and classes in the society before the law. It must be noted that this does not in any way entail an embrace or the proposition of a classless society but that irrespective of the class a person belongs to, the law and its systems of application will treat them the same way everyone else is treated.

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[9] Montesquieu, Baron 'The Spirit of Laws',1748. https://www.britannica.com/topic/The-Spirit-of-laws. Accessed 4 June 2021

3. **The Concept of Rights:** This third principle is considered quite ambiguous. As regards this principle, Dicey said that the unwritten constitution of the United Kingdom, could be said to be suffused by the rule of law because certain fundamental rights like rights to personal liberty, or public meeting (Freedom of Association) resulted from judicial decisions, but under some other foreign constitutions such fundamental rights were products of written constitutions. Dicey here viewed the unwritten constitution of the United Kingdom as being more superior and being more disposed to the enforcement of Fundamental Rights just because it was unwritten and thus, easily amended to better protect rights. While this may not exactly be true, this third principle has now been expanded and understood to be the harbinger of fundamental rights as a major constituent of the Rule of Law.

Like Dicey, Hans Kelsen, who was one of the drafters of the Austrian Constitution of 1920, propounded the theory of the Hierarchy of Norms. He argued that in every State, the laws follow a particular sequence. The constitution is at the apex of this sequence, towering over and above everyone and every law in that state, with other laws following and drawing their authority from the constitution which he called 'The Grundnorm'. The perception of Hans Kelson, is viewed as having greatly influenced the Rule of Law in civil law States like Austria, Sweden and France.

The global consciousness occasioned by all these political thoughts has culminated in the Universal Declaration of Human Rights, 1948 signed by many countries in the world. A paragraph in the preamble to the convention, states the rational behind its creation thus: "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law…" This goes to show that the journey to institute the rule of Law penned down by countless philosophers and

Jurists and no doubt re-echoed by the voices of thousands of oppressed throughout history has gained global notoriety and this is good. It is a just step in the right direction.

1.3 The Rule of Law and Related Concepts

The Rule of Law does not work in a vacuum. While conceptualizing the Rule of Law and laying its historical background, some mention was made of certain related concepts. Those concepts will be briefly introduced hereunder.

For a State to be ruled by Law there is need for some sort of framework made up of other concepts which aid the overall presence of the Rule of Law. These other concepts share interconnectedness with the Rule of law – in some cases, the Rule of Law cannot work without their presence and vice versa.

1.3.1 Rule of Law and Democracy

Democracy is born from two Greek words – *demos* and *kratos* meaning 'People' and 'Rule' respectively. This concept was established in classical Greece through the practice of direct Democracy, wherein, all adult male Greeks not only directly made laws and policies but also participated in governance. This concept has found its way into present day political practice with a few amendments. Democracy simply denotes a system of governance in which the people elect the political leaders who form the government of the day. Thus, the government is a product of the will and desire of the people. Democracy and the concept of the Rule of Law are quite theoretically independent. They do not depend on each other for meaning but are both welcome concepts in the practice of good and amicable governance. Both systems work together to infuse rationality, fairness and justice in governance.

There exists in democracy an intrinsic tool that serves the protection of Fundamental Rights. Even if we refuse to look deeply into the array of Rights it affords, the obvious natural Right of a people, to make choices – to choose who governs them is clearly given by Democracy. This Right of choice can even very broadly be referred to as Liberalism. The protection these Rights offer for the people, hint at the presence of the Rule of Law. The relationship between both concepts is however, not so closely knit. As a writer put it, there can be Rule of Law without democracy but it will be quite impossible for Democracy to exist without the Rule of Law and this writer agrees. The ideals of Democracy revolve around voting persons into political offices; these persons while governing the general populace would have to conform to certain guidelines or laws instituted by the people or their representatives. Failure to comply would mean the political leaders will at least not get reelected or at worst, face sanctions. This means that such political leaders are under the Rule of Law. The Rule of Law on the other hand, does not need Democracy to exist. Other forms of government, even Monarchy can also incorporate the ideals of the Rule of Law. Earlier on, while expounding on the history of the Rule of Law, this writer, made reference to the Magna Carta and the effect it had on the British Monarchy at the time. Several other laws promulgated in the United Kingdom over the years, have served to keep the Monarchy in check. Even to this present day, the Queen of England, is not above the law as there are several checks instituted to delimit her powers and place in government. An example of how the Rule of Law can exist without Democracy can be drawn from this.

1.3.2 Rule of Law, Separation of Powers and Checks and Balance

The principle of 'Separation of Powers' is the division of governmental powers in a State into several components. In democratic countries like the United States of America and Nigeria, this division is effected into three main branches or arms namely the Executive whose duty is to implement laws and policies, the Legislature whose duty is to make laws and the Judiciary whose duty is to adjudicate and interpret laws. One reason for this separation is to avoid powers of governance residing in one institution so as to prevent abuse. Another reason is the principle of checks and balance. This involves the law infusing each of these branches of government with powers to check other branches. Some of such tools involve giving an arm some powers of another arm to avoid situations where one arm exercises dominance with respect to their competencies over other arms. This practice limits the arbitrary exercise of power and ensures fairness. The drafters of the Constitution of the Commonwealth of Massachusetts were absolutely on the right track when they emphasized the closeness of the theory of Separation of powers and the Rule of Law thus:

> "…the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judiciary shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men"[10]

This to a very large extent, sums up the theory of Separation of powers and its relationship with the Rule of Law.

1.3.3 Rule of Law and Constitutionalism

Constitutionalism is the willingness of the government and governed of a state to abide by the spirit of the, the grund norm of that State. By so doing, every act done by the government or

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[10] Stewart,Iain "Men Of Class: Aristotle, Montesquieu and Dicey on Separation of Powers and the Rule of Law".4 Macquarie L.J. pg.187(2004) https://www.law.mq.edu.au/HTML/staff/stewart

by the people in the institution of a government must be done in line with the fundamental law - the Constitution. Thus, any government or act of the government that does not flow from a proper exercise of the dictates of the constitution lacks legitimacy. In short, Constitutionalism speaks of the social and political disposition of the people and government to be bound by the letters of the Constitution. This writer dares say that Constitutionalism and the Rule of Law can be taken to be similar concepts if not the same. The reason for this, is that most constitutions, especially that of Nigeria on which this paper is ultimately based, brandish the tenets of the Rule of Law. Thus, total subservience to the Constitution is subservience to the Rule of Law. Constitutionalism and Rule of Law are like two names of the same person or thing. Both concepts aim at reaching the same goal through more or less the same means. A word that can be used in describing constitutionalism is 'lawfulness'. This lawfulness must be viewed in light of respect for the provisions of the Constitution and being lawful – observing the dictates of the law is also being under the Rule of Law.

1.4 Conclusion

Today, the Rule of law has become a legal and political norm stating unequivocally that in a state, no one is above the law but it was not always like this. The rule of law has gone through countless stages to evolve to the state it is in today. One great milestone in its journey is that several cultures across the world have internalized the concept and have given it their own meaning in line with what the form of government they practice. Although there are fears that the extension of the Rule of Law to other forms of government aside Democracy and Western political ideology, may soil the pure ideals that the concept teaches. Authors who entertain this fear actually have a good ground to do so. One example of the reason for this assertion is a statement credited to Former Zimbabwean autocratic

President, Robert Mugabe, who once asserted that, ‘only a government that subjects itself to the Rule of Law has any moral Right to demand of its citizens obedience to the rule of law” Statements like these from persons who no doubt, had no respect for the Rule of Law cause the apprehension that the concept can be misunderstood and its ideals, grossly misplaced and even misapplied to work injustice. Even nations that do not allow the law rule, can claim they do simply because they feel they do. In spite of this, authors generally, welcome the widespread internalization of the concept and frown at moves to pin the Rule of law as having one origin and a meaning that cannot be improved on. The Rule of Law has gotten this far, because it has been open to the contribution of several perspectives irrespective of the time or clime its coming from. Cultures today must be allowed to contribute their quota to the concept and this can only be possible if they can relate with it on a grass-root level. This is what makes the Rule of Law truly universal.

CHAPTER TWO

THE SCOPE OF THE RULE OF LAW IN STATE GOVERNANCE - AN INTERNATIONAL VIEWPOINT

2.0 Introduction

It is no gainsaying, that the major station for the Rule of Law is in governance. Governance has been defined simply as "The action or manner of governing".[11] It includes the manner or technique through which the government of a state governs. It has also been described as the process of decision-making and the process by which decisions are implemented or not implemented.[12] To govern effectively, a government has to properly sustain 'co-ordination and coherence among a wide variety of actors with different aims and objectives including political actors, institutions, corporate interests, and transnational organizations.'[13]A country's compliance with the Rule of Law can best be analyzed on two levels: (1) The type of Laws that exist in that country and (2) The way its government follows the Law. In the introductory chapter to this paper, the Rule of Law was conceptualized. In this chapter, its scope will be analyzed in line with international practices. In doing so, the practice of the rule of law in some select governments will be x-rayed to reveal the shortcomings or progress of the Rule of Law experienced globally. Lastly, the moves made by international bodies to instill the Rule of Law in Nations of the world will be mildly examined. The essence of this chapter, is to set a background; a control test of some sorts for the later examination of the Rule of Law in Nigeria.

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11 Lexico, 'Governance' (Lexico, Powered by Oxford) https://www.lexico.com/en/definition/governance> accessed 2 August 2020.

12 Alam Zeb, *Good Governance: Main Streaming in Pakistan,* 1st Edition, Sarhad Rural Support Program Peshawar, Pakistan, (2009)

13 Jon Pierre, Introduction: Understanding Governance, (Oxford University Press 2000) 6.

2.1 The Rule of Law and Classifications of Governments

There are many classifications of governments. Treating all of them with respect to the Rule of Law may yield some confusion. So for the purpose of this paper, Governments will be classified based on two main parameters – the structure on the on hand and the source of political power wielded by the characters in government on the other. As regards the former, Governments can be classified into Federal, Unitary, and Confederal types. The latter classification includes, Democracy, Monarchical, Communist and Authoritarian forms of government. Other classifications include the ideology of the Government, the character in government that is saddled with wielding political power and lastly its socio-economic and socio-political stance. One important point to note is that a State may fall into one or more of the above mentioned classifications. While this writer agrees that the other parameters of classification may have roles to play in how effectively the Rule of Law is followed by a particular State, classification as regards the source of political power and the structure of the government, seem to have more influence on how the Rule of Law is followed. Classifications in these categories are broader and have more bearing on the Rule of Law. Following in that line of thought, this essay will first engage an analysis of the types of governments with respect to the two main classifications, after which it will examine compliance with the rule of law in countries that practice – Democracy, Monarchy, Communism and Authoritarian forms of government. This will be done whie examining the select countries in line with how the structure of their governments aid or militate against the rule of law. In the preceding chapter, this writer touched in passing, on concerns that the concept of the Rule of Law should not be viewed as the preserve of Democracy. Although this writer agrees with this assertion, it is necessary to examine the Rule of Law with regards to the practical happenings among governments of the world today, especially in non-democratic governments.

2.1.1 Democracy

The term democracy comes from Greek and means "rule of the people." Perhaps the most popular definition of Democracy in the world today, is the one given by Abraham Lincoln in his Gettysburg Address where he posited Democracy as "government of the people, by the people, for the people."[14] It is a political system in which citizens of a State govern themselves either directly or indirectly. This is the type of government with which we are most familiar because it is practiced in several forms by about half of the countries in the world.[15] In direct Democracies - most often viewed as Democracy in its pure form - people make their own decisions about the policies and distribution of resources that affect them directly.[16] In this sense, Government is constituted and run by everyone. This was the exact brand of Democracy practiced in ancient Greece. Needless to say, this type of Democracy will be very impractical in modern times hence the resort to indirect Democracy in which the populace, elect those who govern them, make policies, laws and implement those laws and policies on their behalf.

Modern Democracy did not arise from nothingness. It came into being through a new consciousness on the part of the people to oust traces of Totalitarianism and Absolutism in the governments which ruled them. This consciousness came in different guises – Nationalism, Socialism and even on the wings of the First and Second World Wars. The depth of such absolutism is glaring from the infamous words of King Louis XIV of France

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[14] Abraham Lincoln Online, 'The Gettyburg Address' http://www.abrahamlincolnonline.org/Lincoln/speeches/gettyburg.htm Accessed 21 August, 2020.

[15] Drew Desilver, 'Despite global concerns about democracy, more than half of countries are democratic' https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/ Accessed 21 August, 2020.

[16] Open Library, 'Types of Political systems' (Open Library) https://open.lib.umn.edu/sociology/chapter/14-2-types-of-political-systems/ Accessed 10 August 2020.

(1638–1715) wherein he said - "*L'etat, c'estmoi"* which translates "I am the State."[17] Quite early forceful examples of historical moves of the people, ousting such totalitarian governments are the American revolution in 1776 and the French revolution which followed a little over a decade after, ousting the rule of the British Empire and Louis the XVI respectively, and enthroned Republics.[18]

In terms of governmental structure and sub systems, Democracy embraces several forms. Some democratic countries like the United States of America, practice Separation of Powers and a sharing of powers through a Federal system of government in which governmental power is shared between a Federal government on the one hand and Federating units on the other. The United Kingdom which is also a democratic country, practices a parliamentary system of government wherein there is fusion of powers between the legislature and the executive this contrasts sharply with the Presidential system of government in the United States. The structure of the Government is Unitary as power resides only at the center.

Democracy is currently viewed as the best vehicle for shipping the Rule of Law in the world today as it best embraces ideals such as Separation of Powers, respect for Fundamental Rights and Constitutionalism. This is reaffirmed in the Declaration adopted on 24 September 2012 by the United Nations General Assembly on the Rule of Law at the National and International Levels. Paragraph 5 (five) of that Declaration, reads that "Human Rights, the Rule of Law and Democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[19] Aside the concept of Constitutionalism with comes side by side with Democracy, the fact that the

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17 History.com, 'Louis XIV' https://history.com/topics/france/Louis-xiv .Accessed 21 August 2020.

18 History.com, 'How did the American Revolution influence the French Revolution' https://www.history.com/news/how-did-the-america-revolution-the-french-revolution.Accessed 21 August 2020.

19 United Nations, General Assembly 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels A/67/L.1, (2012), para. 5. https://daccess-ods.un.org/TMP/6150929.33177948.html .Accessed 16 August 2020.

government is elected by the people, especially through such elections as are conducted periodically, means the people have a say in the long run as regards how they are governed. The key point to note is that if the Government is elected and abuses the Rule of Law, the Constitution and engages in acts that are inimical to the people, the Government in question will be voted out of office. To that end, the degree of responsiveness of the government to the interests and needs of the greatest number of citizens, will tell to a large extent, depending on the constitutional framework, if they will be returned to office which in turn tells how well that government respects dimensions of Rights, equality and accountability.[20] The downturn to the narrative is that this is not always the case. In many cases, aside regular structural abuse of the Rule of law, what exists is not Democracy but a travesty of it. Most times, the leaders of such governments become presidents through elections and the will of the people but later on, like Laurent Gbagbo of Ivory Coast, refuse to vacate office and move on to become complicit in the abuse of the Constitution of the State, the law in general and even international crimes. Paraphrasing the words of a writer, they trade the mantle of liberator for the amour of a tyrant.[21]Sometimes, these Governments under the pretense of being democratically compliant have conducted elections with just one political candidate on the ballot paper.[22] In these cases, the elected may say democracy is being practiced but is it? An even more pertinent question is, is the Rule of Law being upheld?

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[20] Massimo Tommasoli, 'Rule of Law and Democracy: Addressing the Gap Between Policies and Practices:UN Chronicle, https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices Accessed 13 August 2020.

[21] Alan Cowell, 'Robert Mugabe, Strongman Who Cried, 'Zimbabwe Is Mine,' Dies at 95' :The New York Times, 9 September (2019) https://www.nytimes.com/2019/09/06/obituaries/robert-mugabe-dead.html Accessed 10 August 2020.

[22] Economist, An Election with only one candidate https://www.economist.com/middle-east-and-africa/2008/06/26/an-election-with-only-one-candidate Accessed 16 August 2020.

2.1.2 Monarchy

Monarchy is perhaps the oldest form of government. The earliest records of a monarchy go back as far as the 4th Millennium BCE in Mesopotamia.[23] For a long while from that time, Monarchy was the toast of politics. It was seen as the best system of government with only minor amendments proposed, like Plato's proposal of a philosopher king[24] which he described as a ruler who loved wisdom, was reliable and willing to live a simple life. Through the time that followed, aside Greek states, the Roman Republic (which later became an Empire) and few other exceptions, monarchy reigned supreme.

Monarchy is a system of government in which political power resides in a monarch - a king or queen. The general practice is that the ruler comes from a particular family or group of families in which members of that family are classified hierarchically in a line of succession. The power of a monarch may come in several ways some monarchs have gained political power through conquest and some others through some sort of contract with the people. Often times, the monarchs who gain power through force are arbitrary in their rule and do not uphold the rule of law. In time past, the mantra was "the king can do no wrong".[25] Today however, that is not the case. The desirability of Monarchy kept declining through the ages and accelerated from the 18th century because amongst other reasons, people's consciousness continued going through an awakening to the undesirability of their Rights being abused, the fact that a divine Right to rule was a farce and the truth that legitimacy resided in the people's hands. The main drive for this is the concept of Liberty. This concept taught such ideals as Freedom; Fundamental Rights– Right to self expression and self government, the concept

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23 'History of Ancient Mesopotamia:MIP https://mesopotamia-history.weebly.com/government-laws.html Accessed 20 August 2020.

24 Plato's Republic Circa 380 BCE

25 Jiahua Che, Kim-Sau Chung, Xue Qiao, 'The King Can do no wrong on the criminal immunity of leaders', (2019) 170 Journal of Public Economics https://doi.org/10.1016/j.jpubeco.2018.11.008 Accessed 10 August, 2020.

that the rulers like the ruled should also be under the law. The concept of Liberalism gradually arose in defiance to absolute monarchies and the abuse of Rights they engendered. In Great Britain, it started slowly with the Magna Carta of 1215[26] until major reforms happened which relieved the monarch of all executive powers.

In recent times, monarchies still exist in different guises. Absolute monarchies today, are few and far between. Aside these ones, the common kind today is Constitutional Monarchy. In this kind of monarchy, the Monarch's power is under the law, delimited by the constitution and largely ceremonial. Most of these Constitutional Monarchies are paired with parliamentary democracies. A perfect example is the Queen of England who exercises ceremonial powers while the Prime Minister who is the Head of Government and Head of the Parliament, exercises executive powers. Others examples of constitutional monarchies are found in countries such as Denmark, Norway and Belgium amongst others. As at the time of writing this long essay, forty-four countries in the world are monarchies. Out of that number, sixteen countries including the United Kingdom recognize the Queen of England – Queen Elizabeth II as their monarch. The rest monarchies are constitutional monarchies except the kingdoms of Oman, Eswatini, Brunei, Saudi Arabia and the Vatican. [27]

A lot of countries came into being in the 20th century by either gaining their independence from another country such as Nigeria and Ghana which gained independence from the Great Britain or breaking out of an already existent country as was the case for Czech Republic which broke off from Czechoslovakia in 1993.[28] Most of the newly independent countries moved on to become Republics but some such as Iraq and Saudi Arabia became monarchies.

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26 Anthony Valcke, 'The Rule of Law: Its Origins and Meanings: A Short Guide for Practitioner (2012), http://ssrn.com/abstract=2042336 Accessed 15th July 2020.

27 Erika Harlitz-Kern, 'Monarchies are gradually disappearing' :The week,(2020) https://theweek.com/articles/889866/monarchies-are-gradually-disappearing Accessed 17 August 2020.

28 Milan Hauner, 'Czech Republic' (2020) https://www.britannica.com/place/Czech-Republic Accessed 12 August 2020.

However, by the 21st century, owing to the march of the concept of Liberty, monarchy had lost its appeal as newly independent countries easily became Republics.

Monarchies which are still in existence are such that are nimble and quickly adapt to the changing times. From major reforms such as the Monarchy of great Britain submitting to reforms and allowing its powers be delimited to a ceremonial status by the parliament to recent minor reforms in the Kingdom of Saudi Arabia allowing women drive and apply for passports unaccompanied by a male guardian, monarchies of the world are learning that the only way they can exist in these times, is to surrender their absolutism and come under the law.[29]

2.1.3 Authoritarianism and Totalitarianism

Authoritarianism and Totalitarianism are types of governments wherein the sovereign constitutes the government and rules absolutely without recourse to the will of the people. The structure of these two types of government, is mostly unitary. All State power is exercised from a central structure, leaving grass-root execution of policies to non-decision-making agents of the authoritarian or totalitarian government. For the purpose of this section of the paper, both systems of Government will be treated as the same and may be used interchangeably. However, in practice, they are not the same. Totalitarianism extends beyond the borders of authoritarianism in the sense that totalitarian governments go to the extent of citizen surveillance and seeking to control every aspect of the lives of their citizens. The term, Totalitarianism was created by the Italian dictator Benito Mussolini in the 1920s. He defined it as being “all within the State, none outside the State, none against the State.” At the time

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[29] Ibid (n. 17)

the Second World War had commenced, the word, 'totalitarianism' had become synonymous to an oppressive State where freedom was a dream.[30]

Authoritarian Governments are not freely elected by the citizens they govern. Such governments are clearly undemocratic and are often times, deteriorations from an ideal State. Monarchies in time past were totalitarian in nature. Today, some Governments in Asia like North Korea and even some democracies especially in Africa have quite descended in totalitarianism. Authoritarian governments are largely non-democratic even if some like Zimbabwe in the time of Robert Mugabe pretended to be. The highlights of Totalitarian States are the repression of dissent, repression of citizens' participation in government and the absence of the Rule of Law. Because such governments do not have legitimacy, it is almost always politically unstable and could be toppled by a rebellion. To avoid this, it uses the tools of fear and oppression to coerce the people to confirm to its will. Sometimes, an authoritarian government could have a military background. The several Military Regimes Nigeria had in the past before ushering in its fourth republic in 1999 are clear instances. Examples of States which practiced such governments in the past are Germany under Adolf Hitler, the Soviet Union under Stalin, Italy under Benito Mussolini amongst others. Present day major totalitarian and authoritarian governments include North Korea, Iran and to an extent, China.

2.2 Practice of the Rule of Law in foreign governments

The practice of the Rule of Law differs from one jurisdiction to another. Some states either reject some parts the tripartite concept as proposed by A. V. Dicey or do not have an existing constitutional structure capable of following the Rule of Law to the latter. The political practice in some democratic such as the United States of America, The United Kingdom and

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[30] The Editors of Encyclopaedia Britannica, 'Totalitarianism' https://www.britannica.com/topic/totalitarianism Accessed 13 August 2020.

some other non-democratic States will be discussed subsequently to x-ray the compliance with the Rule of Law in those States. The discourse of the practice in these States will serve as microcosms or contact points to create a picture of the practice of the Rule of Law outside Nigeria.

2.2.1 United States of America

To x-ray the mood of the Rule of Law in the United States of America (USA), its Federal Constitution will be a good starting point. For the American people, a Constitutional Government must be limited. The Framers of the American constitution knew balance was necessary - too much power at the center would breed autocracy and too little power at the center would mean more power for the states within the union and this in it self could nourish rebellion, as powerful States could easily leave the union or establish dominance over other States. Thus, right from the inception of the political structure of the American union, power was shared in the constitution in a way that supports liberty, yet instills order. But before all these, after the American Revolution there was a short tussle between the Courts and the American parliament. The Courts' efforts to amend seemingly unjust laws were largely unsuccessful. The reason for this was the then existent consciousness that the legislature is supreme. This perception no doubt came from the political Practice of their erstwhile colonizers – the British. The Federal Constitution of 1787 changed this and began the trend that set the pace for the supremacy of the Rule of Law in America. This Constitution gained its supremacy by drawing its power from the will of the people - the preamble of the Constitution proclaims without vacillation that the Constitution is established by "We the People"[31] - the American people. This served to legitimize the provisions of the constitution and by extension, legitimized any subsequent American Government which was instituted

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[31] James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government (3rd Edition, Indianapolis: Liberty Fund, 2000) 283 - 286 https://oll.libertyfund.org/pages/rule-of-law-us-constitutionalism Accessed 16 August 2020.

through the constitution. The Constitution thus became the highest law and the executive, legislature and judiciary became subject to its whims. Thus any law or policy that goes against or undermines the constitution is no law and will not be enforced.[32] The Federal Supreme Court of the United States under the Federal Constitution now had the duty of a watchdog of the Constitution; holding public officers accountable.

To properly execute the dictates of the Rule of Law and achieve order, Justice and liberty, the concepts of Separation of Powers, Checks and Balances, Political Responsibility, the Bill of Rights and the Principle of Federalism were all enshrined in the American Constitution. Checks and Balances were not only instituted between power wielding federal characters such as the Federal Executive, Legislature and Judiciary, but also between the Federal government as a whole and the state governments.[33]

Some of these aforementioned concepts instituted in furtherance of the Rule of Law were not instituted with the first constitution but came in and were bettered through later amendments. The concept of Human Rights is an example. The Bill of Rights was not incorporated in the original constitution but only came in through later amendments. The Philadelphia delegates who drafted the initial Constitution felt that the fact that government's powers were already delimited, there was no need to enshrine Human Rights in the Constitution. However, by September 25, 1789 the first ten amendments of the constitution were undertaken and the Bill of Rights was introduced[34] thus completing the tripartite presence of the Rule of Law in the Constitution of the United States.

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32 Marbury v. Madison 5 U.S. 137

33 Ibid (n 21)

34 National Constitution Center, 'First Amendment: Freedom of Religion, Speech, Press, Assembly, and Petition', https://constitutioncenter.org/interactive-constitution/amendment/amendment-i accessed 12 August 2020.

According to a writer, after World War II, the United States has stood against some authoritarian and totalitarian regimes. This was showcased heavily by the Cold War which set the Democratic/Capitalist world against communism which on the other hand was spearheaded by the Soviet Union and had countries such as Cuba, China and North Korea sharing the same ideology. These communist countries shared and still share a disregard for the Rule of Law – especially the Rule of Law as proposed by the Democratic world involving the entrenchment of Fundamental Rights and the delimitation of governmental powers. However, the United States in spite of its stance was also in alliance with some other very repressive Governments such as South Vietnam and Chile.[35] In fact, the United States despite the beauty of its Bill of Rights is not perfect. At some point, the government imprisoned citizens who criticized the First World War after Federal and State characters had ratified it.[36] In the 1960s and 1970s, Federal internal and external criminal investigative agencies spied and intruded on the privacy of Americans who dissented against government policies. This was done even though their Right to dissent and free speech was protected by the first amendment of September 25th 1789 to the Constitution.[37] In recent times, the American government has been complicit in several breaches of the Rule of Law. From cases like the Water Gate Scandal[38] which led to the resignation of President Richard Nixon to very recent

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35 M. Sullivan, *American adventurism abroad: Invasions, interventions, and regime changes since World War II* (Revised and expanded edition, MA: Blackwell, 2008)https://open.lib.umn.edu/sociology/chapter/14-2-types-of-political-systems/ accessed 17 August 2020.

36 R. J. Goldstein, *Political repression in modern America from 1870 to 1976* (Urbana: University of Illinois Press, 2001) 152, 154, 601

37 D. Cunningham, *There's something happening here: The new left, the Klan, and FBI counterintelligence*(Berkeley: University of California Press, 2004) 142.

38 James M. Perry, 'Watergate Case Study' http://www.columbia.edu/itc/journalism/j6075/edit/readings/watergate.html accessed 20 August 2020

events surrounding the impeachment of President Donald Trump,[39] to the many cases of police brutality which has occasioned current mass protests by the Black Lives Matter Movement worldwide, the American system it seems, despite its well couched constitutional provisions is not perfect but by and large, America is to a large extent, enjoying the rule of law - cases where it has upheld the Rule of Law far outweigh the cases where it has let the law fall through. The Constitution of the USA has never been suspended on a complete scale, no President of the United States has ever tried to pronounce himself a dictator and no political party has ever seized control of the Federal government or any of the state governments through force.

2.2.2 The United Kingdom

The prime catalyst in the journey of the United Kingdom (UK) in entrenching the Rule of Law in her political system was the signing of the Magna Carta in 1215. The Magna Carts aside delimiting the powers of the hitherto sovereign – the king, it first touched on the concept of Rights by stating thus: "To no one will we sell, to no one deny or delay right or justice."[40] Serious reforms started happening when the parliament especially the House of Commons came into being in the 13th century. Thus by the 17th century, the Bill of Rights 1689 was enacted. It governed how power was shared amongst key political structures in the UK. It did not stop there. It went further to set out the Fundamental Rights of citizens and laid the first blocks of Parliamentary Supremacy in the UK. It must be noted however, that most reforms with respect to the Rule of Law were undertaken even while slave trade was in full swing. It was not until slave trade was abolished by the Slave Trade Act of 1807 and Slavery Abolition Act 1833 that the concepts of Equality before the law began to make more sense in

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39 BBC, 'Trump impeachment: A very simple guide'<https://www.bbc.com/news/world-us-canada-39945744> accessed 16 August 2020.

40 Magna Carta, 1215, https://www.bl.uk/learning/timeline/item95692.html accessed 17 August 2020.

the UK. Today, the UK practices Parliamentary Supremacy, as opposed to Constitutional Supremacy. The reason for this, is more or less because its constitution is unwritten in one single document but comprises several documents promulgated as needful by the parliament.

In the enforcement of the Rule of Law, the Courts have stepped up countless times. In key cases such as *Entick v Carrington*[41] and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*[42] the British courts have stepped in to right wrongs or speak actively against cases where in execution of policies, the government had overreached their powers. The United Kingdom despite its followership of the Rule of Law has not been so benevolent outside the country as authors have written of its many abuses of Rights of the natives of places it colonized.[43]

2.2.3 Other States

a. Saudi Arabia: Saudi Arabia practices a monarchical system of government with a king who is the head of State and Government. The king functions in Executive, Legislative and Judicial capacities. The legal system of the kingdom is based on Sharia Law and the teachings of the Prophet Mohammed. The kingdom has no written constitution although in1992 the king promulgated a document which is known as *Al-Niẓām al-Asāsī li al-Ḥukm* (the Basic Law of government) which provides rules on how the government is to be run and sets forth the Rights and responsibilities of Saudi citizens.[44] The citizens of Saudi Arabia lack many basic Rights. Women are largely discriminated against with minor reforms such as women being allowed to drive unaccompanied by a male guardian met with great rejoicing.

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41 (1765) EWHC KB J98

42 (2008) UKHL 61

43 George Monbiot, 'Deny the British empire's crimes? No, we ignore them' <https://www.theguardian.com/commentisfree/2012/apr/23/british-empire-crimes-ignore-atrocities> accessed 21 August 2020.

44 Encyclopedia Britannica, 'Government and society' https://www.britannica.com/place/Saudi-Arabia/Government-and-society accessed 17 August 2020.

This goes to show the extent of freedom women are afforded be in Saudi Arabia. According to Human Rights Watch, in the year 2015, the kingdom carried out 158 executions with 63 of those executions for non violent crimes.[45]

b. China: China Practices an autocratic system of government and its economic policy is based on communism. Over fifty (50) percent of the economy including means of production and distribution is owned by the government. The concept of Fundamental Rights in particular and the Rule of Law in general is grossly limited in practice.[46] The government engages in mass surveillance of its citizens with the over two hundred million (200,000,000) close circuit television cameras all over China.[47] Chinese activists who have spoken out against the government have disappeared mysteriously and when they reappear if they do appear, they retire into ominous silence.[48]

c. North Korea: Amongst 21st century nondemocratic Nations for which the practice of the Rule of Law is almost non existent, North Korea is king. The government is authoritarian in nature and currently run by the supreme leader Kim-Jung Un. The country is quite closed to the world and engages in public mass executions without trial. Countless abuses of Fundamental Rights have happened in North Korea, engineered by the government.[49] Laws are pronounced by the government hierarchy and enforced by the police and military.

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45 Human Rights Watch, 'Saudi Arabia: Mass Execution Largest Since 1980' https://www.hrw.org/news/2016/01/04/saudi-arabia-mass-execution-largest-1980 accessed 20 August 2020.

46 Jared Genser, 'A Major Setback to the Rule of Law in China' https://thediplomat.com/2014/09/a-major-setback-to-the-rule-of-law-in-china/accessed 19 August 2020.

47 Louis Casiano, 'How China uses its massive surveillance apparatus to track its citizens, keep them in line' https://www.foxnews.com/world/china-massive-surveillance-apparatus-track-citizens accessed 18 August 2020.

48 Mayan Derhy, 'Top five non-democratic Countries'<**https://borgenproject.org/top-five-non-democratic-countries/> accessed 19** August 2020

49 Human Rights Watch, ' North Korea: Events of 2016' https://www.hrw.org/world-report/2016/country-chapters/north-korea> accessed 20 August 2020.

2.3 General setbacks to the practice of the Rule of Law

From the discussion above, several setbacks to the Rule of Law are very clear. They include; certain government practices which do not support the presence of Rights, double standards in governance and inimical ideologies. The United Nations in its bid to constantly set the bar for what constitutes good governance, issued a report in 1992 through the United Nations Committee for Development Planning in which it identified the following as constituents of Good Governance:[50]

1. Territorial and ethno-cultural representation, mechanisms for conflict resolutions and for peaceful regime change and institutional renewal.
2. Checks on Executive power, effective and informed legislatures, clear lines of accountability from political leaders down through the bureaucracy;
3. An open political systems of law which encourages an active and vigilant civil society whose interests are represented within accountable government structure and which ensures that public offices are based on law and consent;
4. An impartial system of law, criminal justice and public order which upholds Fundamental Civil and Political Rights, protects personal security and provides a context of consistent, transparent rules for transactions that are necessary to modern economic and social development;
5. Professionally competent, capable and honest public service which operates within an accountable, rule governed framework and in which the principles of merit and the public interest are permanent;

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[50] United Nations Committee for Development Planning, 'Poverty Alleviation and Sustainable Development: Goals in Conflict?' (1992) cited in Alam Zeb, *Good Governance: Main Streaming in Pakistan,* 11-12

6. The capacity to undertake sound fiscal planning, expenditure and economic management and system of financial accountability and evaluation of public-sector activities.

7. Attention not only to central government institutions and processes but also to the attributes and capacities of sub-national and local government authorities and to the issues of political devolution and administrative decentralization. It encompasses a broad agenda that includes effective government policies and administration, respect for the rule of law, protection of human rights and an effective civil society. However, it is imperative to point out that it is not confined only to political and social issues but also includes proper management of the economy as well as transparency and fair competition in business.

Some of these ingredients are lacking in some countries analyzed above. One thread seems to run through the latter set of countries treated under the heading "other States". The radical abuse of Human Rights and disdain for the Rule of Law seems to be more prevalent in States that practice an authoritarian form of government as is the case of Saudi Arabia, China and North Korea or States that practice ideologies which do not support liberty and the delimiting of powers. The reason for this can be summed with the words of John Emerich Edward Dalberg Acton, "power tends to corrupt and absolute power corrupts absolutely"[51] The basic setbacks to the Rule of Law, are primarily the absence of mechanisms to lay down its tenets and where the tenets of the Rule of Law are laid down, in the absence of proper enforcement mechanisms or failure of those mechanisms to keep the government in check, issues arise and the delivery of good governance is impossible. This writer asserts that in the absence of the Rule of Law, good governance is not only grossly incomplete but impossible. This subtopic

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[51] Phrases.org, 'Power tends to corrupt and absolute power corrupts absolutely' https://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html accessed 19 August 2020.

will be treated again later on within the body of this long essay, specifically with respect to Nigeria.

2.4 International Articles and Conventions on the Rule of Law

The failure of many countries of the world to establish the Rule of Law, and even the struggle of countries that have seemingly established it even in written form, have caused international concern. This has been a subject of resolutions of Heads of States and governments, of States which are members of international organizations. There are currently many Articles, Resolutions and International Statutes which touch on the Rule of Law even though most times they are limited in enforcement by the concept of Sovereignty amongst other things. It is needful at this point, to highlight some of them. Among the three arms of the Rule of Law as proposed by A. V. Dicey, the most stressed is the concept of Human Rights. This forms the bulk of most International Statutes on the subject of the Rule of Law. In no order of importance, some of them will be highlighted hereunder.

2.4.1 Convention to Eliminate All Forms of Discrimination Against Women (CEDAW)

This Convention which comprehensively defines Discrimination Against Women was adopted by the United Nations General Assembly in 1979. The treaty covers such issues as education, health care, employment, property ownership, and human trafficking. It is the first treaty on Women's Rights of a comprehensive nature. The primary aim of CEDAW is to eliminate discrimination against women and to promote the Rule of Law and respect for Women’s Rights around the world. It obligates state parties especially those that are signatories to it, to condemn discrimination of every form and to set legal frameworks in

place which will provide protection against discrimination and incorporate the principles of Equality and Justice.[52]

2.4.2 Rome Statute for the International Criminal Court

The Rome Statute for the International Criminal Court came into force on the 1st of July 2002. It has been ratified by about 123 countries. The treaty is very important because it does not only act as an international Criminal Code but also as a check on politicians worldwide from acting arbitrarily especially in ways that result in breaching the main three crimes prohibited by the treaty namely genocide, war crimes and crimes against humanity. The Treaty also establishes the first permanent, International Criminal Court saddled with the responsibility to try individuals accused of any of the aforementioned crimes for which they would not be tried for in their home countries and would thus escape punishment. Since its inception many violators who committed international crimes have been brought before the court and convicted.

2.4.3 European Convention on Human Rights

This Convention is a comprehensive body of Human Rights which covers States that are part of the Council of Europe. It was enacted to protect Human Rights and political freedom in Europe. It came into force on the 3rd of September 1953 and currently has 47 signatories of Council of Europe member States.

2.4.4 Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) in 1990, was adopted by the UN General Assembly. It is the first International Treaty to provide and promote a wide set of standards to

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[52] American Bar Association, 'International Treaties' https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/international_treaties/ accessed 17 August 2020.

the end of furthering the promotion of the Rights and protection of children. As at 2016, 196 countries are parties to the Treaty and of all the member countries of the United Nations, only the United States is yet to ratify it.

2.4.5 African Charter on Human and People's Rights

Like the European Convention on Human Rights caters for European countries, the ACHP which has been ratified by forty-four member States of the African Union, covers countries on the African continent who ratify it. It enjoins member States of the African Union to uphold and respect the Rights and freedom of their citizens. The Charter came into force on 21st October 1986. In 1998, a protocol to the Charter was adopted on the basis of which an African Court on Human and Peoples' Rights was to be created. The protocol came into force on the 25th day of January 2004.[53]

2.5 Conclusion

The importance of the Rule of Law in governance cannot be over emphasized. Cases of abuse of Rights and bad governance in the world today are occasioned by the absence of the Rule of Law. The aim of this chapter was to gain a panoramic view of the practice of the Rule of Law outside Nigeria so as to better balance the discourse -when it begins- of Nigeria's observance of the concept, against *outside* examples.

In the next chapter, the structure of the Rule of Law in Nigeria will be assessed especially the structure as laid down by the Nigerian Constitution.

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[53] African Commission on Human and People's Rights,'State Parties to the African Charter'<https://www.achpr.org/statepartiestotheafricancharter> accessed 21 August 2020.

CHAPTER THREE

THE STRUCTURE OF THE RULE OF LAW IN NIGERIA

3.0 Introduction

In the previous chapter, the practice of the Rule of Law in select jurisdictions of the world was subtly analyzed vis-à-vis the systems of government practiced in those jurisdictions. The essence is to gauge the effectiveness of the rule of law with respect to systems of government aside democracy; to further understand if there are other systems better suited to the practice of the rule of law - this could come in aid when this writer proffers cogent solutions at the end of this paper.

In the previous chapter, it was concluded that countries which operate democratic systems have the most respect for and observance of the Rule of Law and its attendant concepts. Nigeria also operates this system of government so in this chapter, the structure–the legal framework- establishing the Rule of Law in Nigeria will be analyzed to pave way for the analysis of practical happenings in Nigeria with respect to the Rule of law in Chapter four.

3.1 The Rule of Law - A Foundation of Nigerian Political System

If one needs to discover the sort of government practiced by a State, and its compliance with the Rule of Law, the best way to commence such inquest and be imbued with such knowledge is through the Constitution of that State, in whatever form it may be. After independence in 1960, the Great Britain began cutting ties with Nigeria as its colonial master. Nigeria being a protégé of the United Kingdom at the time, inherited its democratic system.

The Great Britain which had mostly employed an autocratic system in governing its colonial territories first caved to pressure by nationalists and other external bodies and allowed Nigerians for the first time on September 20, 1923 to elect representatives from NNDP, the

first political party in Nigeria, to advance their interests in the Legislative Council.[54] This continued through several colonial constitutions until 1959 when Britain was preparing to hand over the reins of governance to Nigerians, the general elections to elect Nigeria's first leaders happened and thus continued the culture of democracy. This culture which goes hand in hand with the Rule of Law has found expression in Nigeria's constitutional framework. It must be stressed that it is not practical for the doctrine of the Rule of law to effectively work under a political environment or constitution which does not support the existence and protection of the Rights of citizens in a State, by that State, from the State and from other citizens. As gleaned from previous chapters and from happenings internationally, aside the pressure from the International community and the actual and figurative screams of its citizens, there is nothing tugging on the conscience of a tyrannical government to uphold the Rule of Law except the draconian laws that State creates and as has been posited in the forgoing chapters, draconian laws are no laws as far as the concept of the Rule of Law is concerned. In the Nigerian situation, the Rule of Law is mainly expressed in its written Constitution and the same spirit is spread through other legislations. In the following substrata, Nigeria's constitutional development from 1960 till date will be traced to track the constitutional history of the Rule of Law in Nigeria. This will be done in line with the three arms of the Rule of law as propounded by Professor Dicey.

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54 Adeleke Olumide Ogunnoiki, 'Political Parties, Ideology and The Nigerian State', (2018) 4(12) International Journal of Advanced Academic Research | Social & Management Sciences, 124 https://www.researchgate.net/publication/335127795 Accessed 28 August 2020.

3.1.1 1960 Independence Constitution

On the 1st of October 1960, Nigeria was granted independence from her colonial masters and on the strength of a Federal Constitution, which supported a ceremonial head and a prime minister who had executive powers, it began its new *life*.[55]

The 1960 constitution did not exactly mention that the constitution was supreme. Instead, subject to legislative amendment, it declared that every other law inconsistent with its provisions shall be void to the extent of that inconsistency:

> "This Constitution shall have the force of law throughout Nigeria and, subject to the provisions of section 4 of this Constitution, if any other law (including the constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."[56]

It does not also expressly state that there is equality before the law but the fact that this may have been intended can be gleaned from its provisions in sections 17 – 31; that the rights provided therein were meant to be enjoyed equally by everyone in Nigeria especially citizens - which are defined in sections 7 – 14 of the 1960 constitution.

The introduction of Fundamental Rights into the 1960 Constitution came as a result of the fear of minorities in Nigeria. It was because of this, the Minorities Commission was set up and in 1958 the commission presented its report in which it prescribed the introduction of constitutional guarantees of the rights of citizens[57] as a panacea to allay the fear of the minorities. This bill of rights was in many ways, was labeled after the European Convention

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55 Britannica, 'Independent Nigeria', https://www.britannica.com/place/Nigeria/Independent-Nigeria accessed 28 August 2020.

56 Constitution of the Federal Republic of Nigeria, 1960, s 1.

57 Great Britain, Report of the Commission Appointed to inquire into the fears of Minorities and the means of allaying them(Cmd 505, London, HMSO, July 1958).

for the Protection of Human Rights and Fundamental Freedoms, 1953.[58] It is worthy of note that as regards fundamental rights during independence and before the coming of the 1960 constitution, the convention was the governing legislation with respect to human rights in the territories administered by Britain and thus, it followed as the best and most available foundation for the establishment of fundamental rights in the new Nigerian Constitution.[59] The Bill of Rights in the 1960 Constitution was quite comprehensive as it covers all the rights as we know them today, covering rights like: rights against deprivation of life, inhuman treatment, slavery and forced labour, the protection of personal liberty, fair hearing, private and family life, freedom of conscience, freedom of expression, freedom of peaceful assembly and association, freedom of movement, freedom from discrimination.

Drawbacks: One downturn amongst others to this constitution is that its Bill of Rights states in a blanket fashion, when the right against deprivation of life, right to personal liberty, fair hearing and freedom from discrimination can be derogated from.[60] It is submitted that this gives a somewhat blanket leeway for the derogation from very sensitive rights such as fair hearing and the right of freedom from discrimination.

3.1.2 1963 Republic Constitution

Although the 1960 constitution was the independence constitution, it still had traces of the influence of Nigeria's erstwhile colonial masters. This was one of the things the 1963 Constitution sought to remedy amongst other things. The first Nigerian Republican Constitution came into force on the 1st of October1963.The need for this constitution arose not exactly because of the Rule of law or the need to further keep the powers of government

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58 A. H. Robertson, Human Rights in Europe: A Study of the European Convention on Human Rights (Manchester, 1963) 179 - 195

59 Paul O. Proehl, 'Fundamental Rights Under the Nigerian Constitution, 1960-1965' 1970African Studies Center 90024 https://escholarship.org/uc/item/6231f7zv accessed 7 September 2020.

60 Constitution of the Federal Republic of Nigeria, 1960, s. 28

subject to checks. It arose primarily because of the need to create a shift in power and give the Nigerian executive, especially the prime minister, powers over more organs of government.[61] The changes occasioned by the new constitution which have links to the Rule of Law are as follows:

1. The replacement of the Judicial Committee of the British Privy Council with the supreme court of Nigeria as the final Court of Appeal.[62]
2. The Nigerian legislature and its powers were no longer defined by an Act of the British Parliament. Thus removing the external influence that hitherto defined a major governmental arm.
3. The Queen – who is not elected – was removed as the constitutional head of state. This meant that Nigeria experienced a change from Monarchy to Republican system of Government.[63]
4. More representation in parliament was given to the people through the increment in the number of legislative seats.
5. The constitution itself was passed by the Nigerian Legislature as opposed to the British parliament.
6. The office of the President was established and according to the constitution, he was to be elected by a joint session of the two houses of the Federal Legislature. His powers could be checked through impeachment by the House of Representatives. The office of the president served to replace the Queen of England as the Head of State

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61 Constitution of the Republic of Nigeria, 1963 s. 50(3), 42(1)(c), 39(3)

62 Constitution of the Republic of Nigeria, 1963 s. 111(1) compare with Constitution of Nigeria, 1960 s. 114

63 Constitution of the Nigeria, 1960 s. 33(1) compare with Constitution of the Republic of Nigeria, 1963 s. 34

and also the Commander-in-Chief of the Armed forces of the Federal Republic of Nigeria.[64]

It may be argued however, with merit of course, that movements towards establishing this constitutional dispensation into effect were more concerned with cutting off Nigeria's final ties with its former colonial masters than with sharpening the shape of the rule of law on paper at least.

As regards the three arms of the Rule of Law as propounded by Professor A. V. Dicey, the constitution does not render anything different from its predecessor, the 1960 independence constitution. The provision concerning the supremacy of the constitution is exactly the same, there is no express provision about equality before the law but same can be deduced from the bill of rights in the constitution. The bill of rights is also quite the same with the same concerns as was identified in the 1960 constitution.

Drawbacks: Owing to the fact that the primary tenets of the rule of law as present in the prior constitution were adopted in this constitution hook, line and sinker, the drawbacks present in the former constitution which were identified earlier are also present in this constitution. In addition, some new changes infringed on the tenet of the Rule of Law somewhat. Chief amongst these is that the Judicial Advisory Committee was now the power to appoint, promote and transfer judges in the President on the advice of the Prime Minister. This is a potential drawback as it threw some fetters on the feet of the judiciary and tied them to the apron strings of the executive. If for example the Prime Minister was a stooge of the President, they could manipulate the judiciary to their advantage and by extension, make an entire arm of government subject to the whims and caprices of another.

By and large, this constitution made several steps in the right direction and houses some of the big steps Nigeria made towards institutionalizing the Rule of Law. One of the core

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64 Ibid

changes it made from the former constitution was ensuring that the Nigerian people had more influence over the people who governed them. The last sentence of the preamble to this constitution says a lot about this point: "*We the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following Constitution*".

3.1.3 1979 Constitution

The 1979 Constitution symbolized a turning point of some sorts on three levels. The first was that it symbolized a change from one constitutional dispensation into another; the second was that it came as a respite from the travails of military rule and the third was that it served to open a new chapter for a country healing from the wounds of a terrible Civil war. The military had taken over governance and set aside the 1963 constitution in 1966 and with the setting aside of the 1963 constitution, the Rule of Law had become the Rule by Law with the Military Government seen as being above the law and the highest law making body in the country. Human Rights abuses were highly prevalent during this time starting with those carried out during the Nigerian Civil War. To be fair, the military regime at the time had taken steps to bring in a new constitutional order with one of such steps being the Aburi Accord of 1967. That failed though and was also one of the events that led to the Nigerian Civil War later that year. In 1975, it was the Murtala/Obasanjo led Military Government that finally set out the constitution drafting committee made up of forty-nine members that went about the business of drafting the Constitution. Upon the final review of the constitution, it was promulgated by the Supreme Military Council as the Constitution of the Federal Republic of Nigeria, 1979.

Thus after about 14 (Fourteen) years of Military rule, on the 1st of October, 1979, a democratic constitution was ushered in. This Constitution made a strong departure from the British parliamentary system of government also known as the "Westminster model" where

the office of the Prime Minister exists, to the American presidential system of government; the Washington Model.[65] With respect to the Rule of Law and democracy, the constitution made a lot of important changes. This constitution was supreme and made provisions to that effect. It stated unambiguously *"this constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria"*[66] It further stated that no person or group of persons shall govern or take control of the Federal Republic of Nigeria or any part of it outside the provisions of the Constitution.[67] As regards equality before the law, the constitution provides under its non-justiciable *"Fundamental Objectives and Directive Principles of State Policy"* explicitly thus: *"In furtherance of the social order- (a) every citizen shall have equality of rights, obligations and opportunities before the law"*[68]

It also provided a very exhaustive Bill of Rights which does not fall into the drawback of the 1963 constitution which provided a general derogation from very important rights such as freedom from discrimination, right to life amongst others. Under the 1979 constitution, the derogation from rights such as Right to Life, Personal Liberty and Freedom from Discrimination that are very sacrosanct were explained within the section which defines and provides the rights itself as opposed to a blanket avenue for derogation which leaves the door open for any inimical exception to the concerned rights to come in.

Other important amendments in the 1979 Constitution which hint at the Rule of Law and

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65 James S. Read, 'The New Constitution of Nigeria, 1979: "The Washington Model"?' (2009) 23 , 2 Cambridge Press pp. 131-174 https://doi.org/10.1017/S0021855300010810 accessed 21 September 2020

66 The Nigerian Constitution 1979, s. 1(1)

67 Ibid, Section 1(2)

68 Ibid, Section 17(2)(a)

Democracy are itemized hereunder:

1. The Constitution now established a Code of Conduct Bureau, a code of Conduct Tribunal, the Public Complaints Commission and a Code of Conduct for Public Officers.
2. The three organs of government namely the Executive, Legislature and the Judiciary were now clearly separated.
3. Under the new constitution, there was now present, a healthy environment for checks and balances to operate.
4. The Judiciary was now saddled with the responsibility of conducting judicial reviews and interpreting the constitution
5. The creation of the office of the Executive President and Commander in Chief of the Armed forces of the Federal Republic of Nigeria in which the office of the Head of State and Head of Government would be fused. The President and his Vice must be elected in a general election.
6. The creation of the offices of State Governors and deputy state governors to be elected with quite the same criteria as that of the Office of the President.
7. The tenure of office of the members of the two houses of the Legislature, the tenure of Governors and their deputies and that of the president and his vice were delimited to four years only per term with a limit of two terms only per person.
8. The President and his vice and the Governors and their deputies could be removed through impeachment by the Federal Legislatures and State Houses of Assemblies respectively.
9. Nominations into key offices in the Executive like ministerial appointments for instance were to be approved by the Federal Legislature. This was also the case for

the appointment of Commissioners for the States' executives where the Houses of Assembly made similar approvals.

10. This constitution made a change from the 1963 constitution with respect to the appointment of Justices of Federal Courts. The Chief Justice of the Federation was now appointed by the President but only with the approval of the Senate. Justices of the Federal High Court, the Federal Court of Appeal and the Supreme Court were now appointed by the Federal Judicial Service Commission with the approval of the Senate.

Drawbacks: One of the serious drawbacks of this new constitutional dispensation was that the system was novel especially since all that had been the handbook of governance hitherto had been tailored towards the British system of governance thus; this new system seemed too complicated for governing characters to implement. This was exemplified by the many squabbles that ensued within the period this constitution operated.

3.1.4 1999 Constitution (As Amended)

With the end of the second Republic, also came the end of the 1979 Constitution. The military took over political power in 1983 and suspended the constitution – as usual. Years of military rule followed, broken only by the botched third Republic from 1992-1993. After the failure of the third Republic, Military Rule continued until the 1999 Constitution ushered in the fourth and present Republic on the 29th of May, 1999. The 1999 constitution on many levels is a recreation of the 1979 Constitution as it retains many of its provisions. The provisions of the 1999 Constitution and its four alteration Acts are what are currently in force throughout the Federal Republic of Nigeria. All the tenets of the Rule of Law will now be treated hereunder to examine the present constitutional position of the Rule of Law in Nigeria.

3.1.5 Current Constitutional Entrenchment of the concept of the Rule of Law

A. Supremacy of the Law

In the current constitution, the doctrine of the Rule of Law has a very firm foundation which permeates through the entire Nigerian Legal System. Firstly, the constitution like the 1979 Nigerian Constitution declares itself to be supreme over every person, authority and law throughout the Federal Republic of Nigeria,[69] thus satisfying the first ambit of the definition of the Rule of Law by A. V. Dicey which posits that the law must first be supreme for the Rule of Law to hold sway. As an aside, it must be pointed out that every law in Nigeria does not have to state it is supreme to satisfy that tenet of the Rule of Law. The Nigerian Legal system follows the structure of a pyramid with the Constitution at the apex and every other law gains validity from its supremacy.[70] The Supreme Court has given judicial support to this in the case of *Attorney General of Abia State and Others v. Attorney General of the Federation and Others* where it stated thus:

> "The Constitution of a nation is the *fons et origo* not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and omega. It is the barometer in which all statutes are measured. In line with this kingly position of the constitution, all the three arms of government are slaves of the constitution, not in the sense of undergoing servitude or bondage, but in the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the Constitution over and above every statute, be it an Act of the National Assembly or a law of the House of Assembly of a State."[71]

Under the 1979 Constitution amended by Decree No. 1 of 1984, which amendment was made during Military Rule, the Supreme Court of Nigeria in *Military Governor, Lagos State & Ors v. Chief Emeka Odumegwu Ojukwu* made a further pronouncement when it held that:

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69 Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 1.

70 Onyekachi Wisdom Caesar, 'Justifying the Assertion that in Nigeria, the Function of the Rule f Law is Performed by a Supreme Constitution' http://ssrn.com/abstract=2147375 accessed 16 July 2020.

71 (2006) 2 All N.L.R. 24; (SC99/2005, SC 121/2005, SC216/2005 CONSOLIDATED) (2006) NGSC 36 (7 JULY 2006)

> "The Nigerian Constitution is founded on the Rule of Law the primary meaning of which is that everything must be done according to law…"[72]

B. Equality under the Law

In furtherance of the ideal of Equality before the law and sister tenets under the rule of law, Chapter II of the Constitution, titled 'Fundamental Objectives and Directive Principles of State Policy', although non-justiciable[73] sets the tone for the consciousness of the Nation with respect to foundational ideals of the Rule of Law. The constitution under this chapter provides that the social order of the state (Nigeria) is founded on ideals of freedom, equality and justice and goes on to provide that every citizen shall have equality of rights, obligation and opportunities before the law.[74] Before this statement on equality, the Constitution provides that it is the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of Chapter II of the Constitution.[75] It further states that "the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice"[76] Not unlike the 1979 constitution, this 1999 constitution also anticipates the possibility of abuse of power and states that the State will make it its duty to abolish all corrupt practices and abuse of power.[77] The only drawback to these provisions under Chapter II is that they are not enforceable in court especially as they are not rights per se but merely directions as to how the government should shape its policies.

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72 (1986) All N.L.R. 233; (SC. 241/850) (1981) 8 (14 February 1986)

73 Non-Justiciability in this sense means that the provisions of Chapter II of the Constitution cannot be a subject of litigation.

74 Constitution of the Federal Republic of Nigeria, 1999 (as amended)**, s.** 17(1), 17(2)(a)

75 Ibid, s. 13

76 Ibid**, s.** 14(1)

77 Ibid, **s.** 15(5)

C. The Concept of Rights

The Bill of Rights in the 1999 constitution (as amended) is more or less a copy of the same Rights in the 1979 constitution with just the numbering of the sections changing. This also places the current Bill of Rights in Chapter IV of the Constitution, above that present in the 1960 and 1963 constitutions. The Rights protected by the current constitution are: Right to life, Right to dignity of human person, Right to personal liberty, Right to fair hearing, Right to private and family life, Right to freedom of thought, conscience and religion, Right to freedom of expression and the press, Right to peaceful assembly and association, Right to freedom of movement, Right to freedom from discrimination, Right to acquire and own immovable property anywhere in Nigeria, Right to compensation in cases of compulsory acquisition of property. Chapter II of the Constitution further states the Special Jurisdiction of the High Court as the court of recourse where one's rights have been infringed on. One thing that is of note here is that the 1999 constitution, like the 1979 constitution, makes a turnaround from labeling the rights therein with *archaic*[78] terms and labels such as "slavery and forced labour and deprivation of life". Another notable character retained from the 1979 constitution is that the derogations from very sensitive rights such as the Right to life[79], Right to dignity of human person[80] and Right to personal liberty[81] amongst others are specifically mentioned and made within the section which provides for the rights as opposed to the blanket derogation available in the 1960 and 1963 Nigerian Constitutions.

The courts have not been slow in making pronouncements as it concerns the various rights in Chapter II of the present Constitution. On the Right to fair hearing, the Appeal court in *The*

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78 The word 'archaic' is used in a very loose sense.

79 Constitution of the Federal Republic of Nigeria, 1999 (as amended)**, s.** 33

80 Ibid, **s.** 34(1)

81 Ibid, **s.** 35(1)

Asst. Insp. Gen. of Police (Zone 3 Command, Yola) and Anor v. Alhaji Ibrahim Isa Gombe said thus:

> "The Right to fair hearing is a Fundamental one. It is indeed both constitutional and sacrosanct and therefore cannot in any circumstances be lightly disregarded or discountenanced by every authority or persons, including the courts or tribunal, empowered to determine any issue involving the civil rights and obligations of a citizen of this country. It is indeed one of the major pillars or foundation on which justice is built…"[82]

The Nigerian Legal Jurisprudence is saturated with similar cases as the one above where the courts have continued to make pronouncements on the various rights as provided in the 1999 constitution.

D. Entrenchment of Safeguards

The practice of the Rule of Law is hardly possible without structural safeguards inhibiting abuse of political power by the government or even individuals. Thus, safeguards such as Separation of Powers, Independence of the Judiciary, Checks and Balances and Judicial Review are important for law to reign supreme. The presence of each of these safeguards in the current constitution are treated hereunder.

i. Tripartite Separation of Powers

According to the French Jurist, Montesquieu "…if the legislative and executive authorities are one institution, there will be no freedom, there won't be freedom anyway if the judiciary body is not separated from the legislative authorities."[83] In the 1999 Nigerian Constitution, powers of governance and the corresponding duties follow the idea behind Montesquieu's proposition and are clearly divided into three parts, Law making power is vested in the

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82 (CA/YL/67/2015) (2016) NGCA 13 (28 June 2016)

83 Baron De Montesquieu, 'L'Espirit des Louis 1748

Legislature,[84] powers of execution of policies and laws are vested in the Executive[85] and lastly but not the least, powers of adjudication and judicial review are vested in the Judiciary.[86] The establishment, composition of the offices and agencies of the Legislature[87], Executive[88] and Judiciary[89] and the qualifications needed to attain such offices are further provided in the constitution.

The court in *Attorney General of Abia State & Ors v. Attorney General of the Federation*[90] properly summed up the principle of separation of Powers in the constitution when it held that the principle of Separation of Powers entrenched in the Constitution entails that none of the three arms of government should encroach unto the powers of the other. Each arm is a separate, equal and co-ordinate department and none can constitutionally encroach upon or erode the functions vested in the other.

ii. Checks and Balances

It is not enough that powers of governance are separated between various bodies in a state. If each arm is not checked while wielding the powers they are vested with, they could become tyrants in their own sphere and impede the proper functioning of government. This is why checks and balances are important to ensure that each arm acts as a check and conscience on the excesses of the other. A plethora of checks and balances are present in the 1999 constitution.

a. Independence of the Judiciary

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84 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 4

85 Ibid s. 5

86 Ibid, s. 6

87 Ibid, Chapter V (Part 1 - 2)

88 Ibid, Chapter VI (Part 1 - 3)

89 Ibid, Chapter VII (Part 1-4)

90 (2002) 6 NWLR (Pt 763) 254

Needless to say, in the proper functioning of a state such as Nigeria, there needs to be in existence a mechanism that effectively determines interprets the constitution, disputes and maintains balance.[91] In the absence of this mechanism, the political structure of a state may fall out of place. In extreme cases, such deficiency gives way to anarchy. This mechanism in Nigeria as in several other democratic jurisdictions in the world is the judiciary. The constitution contains several provisions which are to the end of ensuring the independence of the judiciary. This independence will be highlighted from two major points namely the appointment and Remuneration of Judicial Officers.

Appointment

The appointment of Judicial Officers into the Supreme Court, Court of Appeal and High Court is not left solely in the hands of any of the other organs of government. The appointment of the Chief Justice of Nigeria is made by the President, only on the recommendation of the National Judicial council subject to the confirmation of such appointment by the Senate.[92] For other Justices of the Supreme Court, such appointment is made by the President on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate.[93] The Judicial Officers of the Supreme Court also have a fixed tenure subject to few exceptions.[94] In the appointment of a judicial officer into the office of the Chief Justice of Nigeria, where the seat is vacant, the president appoints the most senior Justice of the court but such appointment can last for only three months wherein, he will appoint another justice of the Supreme Court in the interim for

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91 Ekpenkhio & Ors v. Egbedon (1993) 7 NWLR (Pt 308) 717, 714 "…the judiciary has the added responsibility as a guardian and protector of the Constitution. Therefore, whenever the executive or the legislative arm of government exceeds its constitutional powers, the judiciary on a proper application to it will curb the exercise of such excessive powers and declare it a nullity."

92 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 231(1)

93 Ibid, s. 231(2)

94 Ibid, s. 231(4)

another three months if the National Judicial Council has not recommended any person for appointment.[95]

As regards the Court of appeal, an appointment to the office of the President of the Court of Appeal shall be made by the president on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate.[96] Furthermore, the appointment of a person to the office of a Justice of the Court of Appeal shall be made by the President on the recommendation of the National Judicial Council.[97]

Appointment into other Federal Courts like the National Industrial Court, the Federal High Court and the High Court of the Federal Capital Territory follow a similar fashion of keeping the intrusion of the other arms of government to the barest minimum and where these other arms actually have any duty with respect to appointments of judicial officers in these courts, they act more or less like rubber stamps to the recommendation of the National Judicial Council; a neutral body. Something similar occurs in State courts.

Removal of Judges:

Section 292[98] clearly stipulates that:

" A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances-

a) in the case of

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal of High Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja and President, Customary Court of Appeal of the Federal

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95 Ibid, s. 231(5)

96 Ibid, s. 238(1)

97 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 238(2)

98 Constitution of the Federal Republic of Nigeria 1999 (as amended)

Capital Territory, Abuja, by the President acting on an address supported by two-thirds majority of the Senate.

Then *subsection b* provides that

b) In any case, other than those to which paragraph (a) of this subsection applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to discharge the functions of his office or appointment or contravention of the Code of Conduct.

The foregoing power f the removal of judges by the President or Governor of a state with support by members of the Senate or House of Assembly raises the same questions asked above with respect to their appointment. These powers granted to the politicians to appoint and remove judges, all go to rob the judiciary of its independence.

Budgeting and Funding:

The Federal Government of Nigeria and State Governments are usually involved in the budget process and allocation of funds to the Courts in Nigeria. This again raises the issue of the extent of judicial independence in Nigeria. This is because unrestrained domination of one arm of government over the other can produce impaired budgetary allocation process. This is usually a challenge in Nigeria where the government ignores and flouts express constitutional provisions in this regard, especially the State Governors. The Constitution states that "…any amount standing to the credit of the Judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the Courts concerned".[99] This

[99] Section 121(3) Constitution of the Federal Republic of Nigeria 1999 (as amended)

provision is often at times overlooked an ignored especially where the head of a Court with in a state is not on good terms with the Governor. Such inadequate budgetary allocation gives rise to disastrous situation for the Judiciary. Lack of adequate funds can cause lack of maintenance of structures like court halls, chambers, registries and offices of supporting staff, etc. all these affects the efficiency of the Courts and the quality of Justice dispensed. A recent scenario that reflects this problem of funding. For instance, from the 6th of April 2021, up until the writing of this work, the Judiciary Staff Union of Nigeria (JUSUN) ordered its members across the federation to shut all courts in the country to press home their demand for implementation of financial autonomy for the judiciary. Since then, access to all courtrooms, to protests the continued refusal of many state governors to observe the Rule of Law and obey court judgements on the issue of financial allocations for the judiciary. It is an appalling situation where the judiciary has to go to the executive, cap in hand, begging for funds for its operations.

b. Payment of Judicial Officer is not made directly by any of the arms of government. It is charged upon and paid out of the Consolidated Revenue Fund.[100]

c. Judicial Review: Judicial Review in Nigeria is the power of the court in proceedings before it, to declare whether acts of the Legislature or executive are in line with or contrary to the constitution.[101] The Supreme Court has painted the position of judicial review in the Nigerian legal system in three basic ways:

    i. The courts particularly the Supreme Court, ensuring that every arm of government plays its role in the true spirit of the principles of Separation of Powers as provided for in the Constitution.

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100 Federal High Court Act, 1973 S. 3(5), Court of Appeal Act, 1976 s. 2(4)

101 B. O. Nwabueze, *The Presidential Constitution of Nigeria (London: C. Hurst & Company Ltd, 1982)309.*

ii. That every public functionary performs his functions according to law, including the Constitution.

iii. For the Supreme Court, that it reviews court decisions including its own, when the need arises in order to ensure that the country does not suffer under the same regime of obsolete or wrong decisions.[102]

This basically means that the courts in their duties of deciding cases conduct judicial review on the acts of the legislature and the executive and thus curb the excesses of these other organs by checking the existence of inimical Laws and Acts.

d. Presidential Assent, Veto or veto override: In making laws by the National Assembly, such power is exercised by bills passed by the two houses of the National Assembly. Where the bill goes through the process of law making, it does not become law automatically except the president gives his assent to it. In the absence of this assent, where he vetoes it, it can still be passed into law by both houses with each passing it by a two-thirds majority.[103] By so doing, the executive acts as a check on the law making power of the legislature and in turn, the legislature also checks the assent of the President to ensure it is not used arbitrarily. The rationale for the veto override and especially the need for two-third majority is the fact that if two-third majority of each of the houses actually vote to override the President's veto, then it is actually the will of the people in play as the members of those houses are their elected representatives.

e. Power of the Legislature to conduct Investigations (Oversight functions):

Each house of the National Assembly has the power to conduct investigations into any matter or thing with respect to which it has power to make laws, conduct

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102 Abdulkarim v. Incar Nig. Ltd (1992) 7 NWLR (Pt. 251) 1; Imo J. Udofa, 'The Power of Judicial Review in the Promotion of Constitutionalism in Nigeria: Challenges and Prospects' 40 Journal of Law, Policy and Globalization, 193 www.iiste.org accessed 23 September 2020

103 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 58

investigations into the affairs of any person, authority, ministry or government department charged, or intended to be charged, with the duty of or responsibility for executing or administering laws enacted by the Nation al Assembly and Disbursing or administering moneys appropriated or to be appropriated by the National Assembly. This power was vested in the legislature for two primary reasons, to make laws and to expose corruption, inefficiency or waste in the execution of laws within its legislative competence.[104]

f. Budget: The Executive cannot freely spend from the Consolidated Revenue Fund. Whatever expenditure it will make in the year must planned for and collated into a budget which will in turn be passed into law as an Appropriation Act. Any expenditure outside this Appropriation Act must also be sanctioned by the Legislature.[105]

g. Ministerial Appointment

Appointment of persons recommended for ministerial appointments by the president must be confirmed by the Senate. In this case, the senate does not just act like a rubber stamp but scrutinizes the candidate to see if the person satisfies the qualities expected of minister of the Federal Republic of Nigeria. In this sense, the Legislature checks the Executive.[106]

h. The Press

It is the position of several authors that the Press is the fourth arm of government in the sense that they also act as a check on the excesses of the three arms through

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104 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s.88

105 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 80, 81

106 Constitution of the Federal Republic of Nigeria, 1999 (as amended) s. 147

reporting and intimating the general public on their activities. This notion is however theoretical does not stem from the fact that they are a full blown institution of government. It has its roots in Section 39 of the constitution which provides for freedom of information and the press.

3.2 Entrenchment of the Rule of Law in other Nigerian legislations Nigerian

The rule of law is also further entrenched in the many laws that exist at the Federal and State level on items within the Legislative and current lists. It also is present in bye-laws made on residual matters in the constitution. From the Penal code Laws and Criminal Code Laws in the Northern and Southern states respectively, to laws on tax, freedom of Information and Data Protection, each Act or law of the Federal and State Legislatures reverberate on the letters, with a frequency that not only extols but also embodies the tenets of the rule of law.

The several laws in the Nigerian Jurisprudence draw their primacy from the constitution and hint at the need for an equal enforcement over the persons they apply to. On the issue of Fundamental Rights, perhaps a great milestone with respect to safeguarding the fundamental rights of the Nigerian People is the Fundamental Rights Enforcement Procedure Rules, 2009, which provides for the procedure for the enforcement of Fundamental Rights under the constitution. Amongst other bright and laudable provisions in the rules, one provision of importance is the fact that fundamental rights are deemed as so sacrosanct that the doctrine of locus standi does not inhibit it. A person's fundamental Rights can be enforced by another person no matter the relationship or lack of relationship between the person suffering from the infringement and the person enforcing it.

3.3 Conclusion

From the forgoing, it is clear that the Rule of Law is firmly rooted in the Constitutional History of Nigeria. From its tottering days when the Nigerian constitution still battled with

the presence of our former colonialist – England, through the many mutilations meted out on it by military decrees, to its current position now with four alteration acts, the Constitution has grown with respect to digging a deep foundation for the Rule of law and keeps growing to plug still present loopholes. The Judiciary has been doing its bit to ensure that the lapses in the wordings of the Constitution are not employed to occasion abuse of power and by extension, abuse of the constitution. In spite of the many successes of the Rule of Law through its entrenchment in the basic law of Nigeria, the journey has not been rosy. In this chapter, the rule of law was basically viewed in black and white – by the letters – on paper. The essence of this is to create a foundation for the next chapter, where the past and present practical travails of the Rule of Law in Nigeria will be deeply x-rayed.

CHAPTER FOUR

PRACTICE OF THE RULE OF LAW IN NIGERIA

4.0 Introduction

The Rule of Law in Nigeria has a checkered history. Happenings since independence have shown that Nigeria has consistently suffered consistent abrasions on the Rule of Law. No doubt, its structure currently on paper seems solid but as time has proved, words on paper without actual practice resides in emptiness.

In this chapter, the practice of the Rule of Law in Nigeria will be analyzed through various occurrences in the Nigerian political and social space and through decided cases. The timeline in view will be from Independence in 1960 till the present year 2020. Events captured in this chapter, do not totally cover the practice of the Rule of Law in Nigeria, but attempts to exhaustively do so; to give the reader a bird's-eye view of the practice in Nigeria.

The analysis in this chapter will be broken into three parts for ease of analysis and perusal. The first part will be based on the state of the Rule of Law in all the Civilian dispensations before 1999, namely the 1st - 3rd Republics. The second part will be based on the analysis of the Rule of Law under the several Military Regimes in Nigeria before the Fourth Republic and the last part will be based on the state of the Rule of Law in the civilian dispensations in Nigeria, post 1999.

4.1 The Advent

4.1.1 Independence and the 1st Republic

Nigeria's first democratically elected government upon Independence in1960 was led by Sir Abubakar Tarawa Belewa as the Prime Minister, the Queen as the ceremonial Head of State, Jaja Nwachukwu as the first Speaker of the House of Representatives and Nnamdi Azikiwe as the Senate President. It was not until 1963, Nigeria was made a Republic, that Tafawa

Balewa was elected the Prime Minister of the Federal Republic of Nigeria with Dr. Nnamdi Azikiwe as the President but of ceremonial status and this government, spanned from 1963 to 1966.[107]

Nigeria being highly ethnically and culturally heterogeneous, faced a lot of issues in its political sphere especially during the First Republic. These issues cast spite on any attempt to instill the Rule of Law. Perhaps the first point in any discussion on the state of the Rule of Law at Nigeria's inception should be the constitution and its attendant effects. No doubt, the constitutional disposition at the time was like a writer[108] described, "a shaky foundation". There were several incongruities in the constitution which made it hardly practical. One of such errors was in the abnormal Federal establishment; based on highly disproportionate regions in terms of population. It seemed like – and which was the fear of other regions at the time - that the system was set up so only one region – the Northern Region – would remain in power. This created spinoffs of errors which largely stunted the growth of the Rule of law and occasioned a breakdown of law and order. One of such spin-offs which was a result of the system instituted by the 1960 constitution and extended by the 1963 constitution, was the National Census of 1962 - 1963. Population figures at the time, was needful for not only the allocation of revenue amongst the regions and allocation of seats at the parliament but also employment quotas in the civil service. Thus the regions namely the North, East and West represented by the three dominant political parties at the time - Nigerian Peoples' Congress (NPC), National Council of Nigeria and the Cameroons (NCNC) and the Action Group (AG) respectively, sought tirelessly to influence the census by inflating the census results of 1962

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107 Britannica, 'Independent Nigeria' https://www.britannica.com/place/Nigeria/Independent-Nigeria accessed 12 October 2020.

108 Murtala Muhammad 'Nigeria's Tortuous Transition after Independence: The Collapse of the First Republic' – On Nigerian Peoples and Culture (Ahmadu Bello University Press Limited, Zaria, Kaduna State, 2014) 6, 7 https://www.researchgate.net/publication/319463969 accessed 18 October 2020

and 1963.[109] The result of this was a general breakdown of order caused by census results that were terribly outrageous at the time.[110]

It is the argument of this writer that the motivation in the moves of the regions in attempting to outdo one another in terms of numbers, can be traced back to the 1960 Constitution which was parliamentary in nature and which system was largely adopted by the 1963 Republican Constitution. This writer argues firstly, that the parliamentary system of government was not created of the will of the Nigerian people. It was clearly enacted by a British Order in Council and thus made with the aim of retaining the British system and control over Nigeria to an extent. Clear pointers to this is the fact that it retained the parliamentary system of government practiced in Britain and the Queen as the Head of State. The forgoing were preconditions placed by Britain for Nigeria's independence. It was not until the 1963 Republic Constitution, that the Queen was removed as the Nigerian Head of State, yet, the queer parliamentary system remained. The point of this is that Parliamentary/Federal system of government did not take into cognizance the interest of the Nigerian people as a whole but enthroned a somewhat divisive system which fixed the number of representatives of each region in parliament based on the population figures of the regions. This in turn, led to a deterioration of the Rule of Law. Thus, the 1960 and 1963 Constitutions could not be said to be supreme or to have engendered equality before the law, as it was set up on the basis of inequality of the regions and thus, the laws made under that kind of system would no doubt largely favour one region over others. This amongst other things, occasioned several riots like the Tiv Riot and Western Region Crisis in which lives and property were destroyed.[111] There

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109 Ibid, n. 2

110 Feyi Fawehinmi, 'The story of how Nigerian Census figures became weaponized' (Quartz Africa) https://qz.com/africa/1221472/the-story-of-how-nigerias-census-figures-became-weaponized/ accessed 18 October 2020.

111 J. H. Price, *Comparative Government* (London: Hutchinson and Company Publishers Limited, 1975)

were fears of Northern Dominance on the part of the other regions, owing to their size. This occasioned rancor and animosity, and the fact that several of the government development schemes and Military stations were situated in the North did not help matters.[112]

Things worsened by the 1964 General Elections as it was fraught with violence and there was nationwide rigging and rejection of results by the political parties in places where they did not win or better still, where they could not rig effectively. Following were several spates of violence in which lives and property were lost. The number of people killed at the time was settled at 700 while the number of those injured numbered over 900.[113] Alliances were forged between political parties but this did even more to destabilize the Rule of Law. This soon degenerated into animosity between the Hausas and Igbos being the main supporters and members of NPC and NCNC respectively. The ethnic differences amongst the regions was highly weaponized and politicized especially by the ruling class leading to spates of violence and disregard for the Fundamental Rights of Nigerians.[114]

Aside the above events which were first fruits of the constitutional dispensation at the time, lack of purposeful leadership and corruption also affected the policies adopted by the government at the time and the embezzlements of public funds soon led the country into economic crises with inflation rising in leaps and bounds.[115] This and many more ugly occurrences, first led to two military coups in 1966[116] and the Nigerian Civil war which took place from 1967 – 1970.

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112 Ibid, n 2

113 BBC News, 1964 cited in Ibid, n 2

114 O. Nnoli, *Ethnic Politics in Nigeria,* (Enugu: Fourth Dimension, 1980) "ethnicity serves the interest of the ruling class that replaced the departed colonialists, even though it is a colonial creation".

115 Daily Telegraph, January 1966; New Nigeria, January 1966 cited in Ibid, n 2

116 A. Ademoyega *Why We Struck, Nigeria* (Ibadan: Evans Brothers 1981) 8-32

4.1.2 The 2nd Republic

By 1976, plans by the Olusegun Obasanjo Military Administration to hand over power to a civilian government and the drafting of the 1979 had commenced. By 1979, the 1979 Constitution came into force and elections were conducted which ushered in Alhaji Shehu Shagari as the Executive President of Nigeria. The military administration then promptly and successfully handed over power to the new civilian administration. The collective expectation of the Nigerian people at the time was that the Rule of Law would better exist in a democratically elected government than under the military which had hitherto, seized power. While this was true to a very large extent, especially with respect to Fundamental Rights, it was not so as regards other ambits of the Rule of law. Nigerians were to learn the bitter truth they should have learnt before, that it was possible for a constitution to exist without constitutionalism. The constitution in itself is not magical. There needs to be devotion to the constitution and actual practice of its provisions to the letter, for constitutionalism to come into being. And this is where the Rule of Law manifests.

Shagari's administration from 1979 – 1983 was marred with corruption and abuse of the Rule of Law. The first major breaches of the hallowed concept occurred just within four months into the Shagari administration. It happened that on the 24th of January 1980, the news filtered into the Nigerian space that the majority leader of the Borno State House of Assembly, Alhaji Shugaba Abdulrahman Darman had been deported. The majority leader had been deemed a prohibited immigrant by the Federal Minister of Internal Affairs, Alhaji Maitama Yussuf and on the strength of this, the minister purportedly acting under the Immigration Act, 1963 deported him to the Republic of Chad. The truth about his deportation was that it was politically motivated, as his political party, the Great Nigerian Peoples' Party which was the dominant political party in Bornu State and had won the governorship election in the state was at loggerheads with the dominant political party on the national level; the

National Party of Nigeria. He was thus fingered for political oppression. Despite Shugaba's assertions that he was a Nigerian, the Ministry of Internal Affairs failed or better put, refused to investigate his claims and deported him on the grounds that: "… by the Nigeria Security sources, which showed conclusively that the applicant (Shugaba) was, and still is a serious danger to public safety, public order as well as danger to the Rights and freedom of others in Nigeria"[117] The allegations were serious and would normally elicit an investigation before any action would be taken but this was not done. He was promptly deported and his Nigerian passport seized.

The Federal Court of Appeal did not waste time in affirming the decision of the Borno State High Court which had earlier quashed the deportation order. The court further chided the Minister of Internal Affairs for his conduct and stated that seizing Shugaba's passport was an infringement on his Fundamental Rights of Privacy, Personal Liberty and Freedom of Movement as a citizen of Nigeria.[118] Throughout the rest of the Shagari administration, cases of not just corruption and misappropriation but also situations where government officials exercised political power without recourse to the constitution were rife and cast spite on the essence of a civilian government.[119] The blatant spate of electoral fraud in the 1983 election seemed to be the last straw which broke the camel's back and gave the military the impetus to come back in power through a military coup spearheaded by General Muhamadu Buhari on the 31st of December 1983.[120]

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117 Nwabueze B. *Nigeria's Presidential Constitution, 1979-1983*, (Ibadan: Longman Nigeria Ltd 1985) 205 (Emphasis mine)

118 Federal Minister of Internal Affairs & Ors. v. Shugaba Abdulraman Darman (1982) 2 NCLR 915; Shugaba Darman v. Federal Minister of Internal Affairs & Ors (1981) 516.

119 Ibid, Nwabueze B. Nigeria's Presidential Constitution, 1979-1983, 205

120 BBC, 'Military Coup of 1983' https://www.bbc.com/news/av/world-africa-11405111 accessed 20 October 2020.

4.1.3 The 3rd Republic

Nigeria's third Republic was a botched affair. General Ibrahim Badamosi's Military regime, was set to transfer power back to a civilian regime by 1991. However, inspite of the fact that Local Government Chairmen and State Governors had already been elected into office in the year 1992, the military postponed conducting presidential elections and handing over power until 1993 citing political unrest. However, when the election was conducted in 1993 with M.K.O Abiola emerging as the clear winner, the military government led by General Babangida, went back on its word and annulled the election cutting off the glimmer of hope Nigerians had with respect to the coming civilian dispensation. The military however, later stepped down, leaving the interim government of Chief Earnest Shonekan to conduct fresh elections. This period was one of chaos and a complete abandonment of the Rule of Law. The military led by General Abacha so soon after, stepped in and took control of government again, plunging the government into years of bitter military rule fraught with several cases of human Rights abuse and affronts on the Rule of Law.[121]

4.2 Military dispensation

Nigerian Military Juntas cover the period between 1966 – 1979 and 1983-1999. The later period is broken only by the interim government of Chief Earnest Shonekan which happened between 2 January 1993 – 26 August 1993 before another military coup led by General Sani Abacha took place.

As earlier stated in this paper, the First Republic ended in two bloody military coups happening one after the other. The first was orchestrated and executed by Major General Johnson Thomas Umunnakwe Aguiyi-Ironsi on the 15th of January, 1966 wherein some

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121 The Associated Press, 'Nigerian Military leader ousts interim president' (The New York Times, 1993) https://www.nytimes.com/1993/11/18/world/nigerian-military-leader-ousts-interim-president.html accessed 1 November 2020.

members of the Nigerian ruling class including the Prime Minister Abubakar Tafawa Balewa and the Saduana of Sokoto - Sir Ahmadu Bello were assassinated. A countercoup led by Murtala Mohammed occurred on 28th July 1966 in which General Aguyi Ironsi was killed and ushered in the military government of Lieutenant Colonel (later General) Gowon.

The Rule of Law which had hitherto, been consigned to the bins of forgetfulness by the government and civilians alike, sank deeper in mire as the military replaced the 'Rule of Law' with 'rule by law'. The military regime occasioned wanton deprivation and disregard of the right to life of Nigerians. It began with the mindless killings in the North of people from Eastern Nigeria which the Nigerian Military Government, did not do much about. Soon after, the Nigerian Civil War broke out when all attempts to broker peace with the Aburi Accord between the Ojukwu led Eastern region and the Gowon administration failed.[122] During the Nigerian Civil War, the Rule of Law which was in a sick state hitherto, failed completely. There were inhumane abrasions of Human Rights on both sides of the war, mostly from the end of the Gowon administration which through starvation, championed the death of thousands of people mostly children.[123] The war lasted from 1967 to 1970 and millions of lives were lost by the time it ended. There were times when the Nigerian Army dropped bombs on Igbo civilians in open market places in disregard of their natural Right to life and the Laws of War.

Life under the military juntas were fraught with terror and anguish. The first moves to toppling the Rule of Law by a new Junta included an announcement that the prior government whether it was constitutionally elected or not, had been toppled and replaced, a

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122 US Library of Congress, 'Civil Law' < http://countrystudies.us/nigeria/23.htm> accessed 1 November 2020.

123 Chinua Achebe 'There was a Country' (The Penguin Press: New York, 2012) 267 – "A statement credited to Chief Obafemi Awolowo and echoed by his cohorts is the most callous and unfortunate: All is fair in war, and starvation is one of the weapons of war. I don't see why we should feed our enemies fat in order for them to fight

suspension of the constitution in whole or in part through a Constitution Suspension and Modification Decree[124] and a proscription of all democratic institutions including political parties. The forgoing were done to cloth the government with a forced legitimacy as they were clearly illegitimate and illegal under the constitution. Another reason for the above was to enable the military Government do their will without restraint, whether it meant well for the citizens or not and most times, it did not. Law making institutions like the legislature, were abrogated and laws were made through proclamations which are known as Decrees on the Federal level and Edicts on the state level. The deletion of the legislature, saddled the Military Government with law making powers and freedom to make laws which did not bind the rulers. However, it was impossible to get rid of the judiciary that easily as their duty of adjudication was weighty and helped sustain law and order. To keep the judiciary reined in, the military government introduced 'ouster clauses' to bar the courts from entertaining matters brought to challenge unpopular provisions in the decrees. This was an issue in the case of *Lakanmi & Anor. v. Attorney General, Western State & Ors*[125] The Plaintiffs had challenged in court, the validity of the Edict No. 5 of 1967 wherein the Tribunal of Inquiry into the Assets of Public Officers was created under. The Plaintiffs were seeking an Order of Certiorari to quash the order of the Tribunal. The tribunal had issued an order vesting the properties and the bank accounts of the Plaintiffs/Appellants in the State Government until the Governor shall otherwise direct.

The High Court held in favour of the tribunal while stating that the order is not ultravires, the Edict having been validly made. Through Decree No. 45 of 1968, the Federal Government

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124 Nigeria, 'Decree No. 59, the Constitution (suspension and Modification) (no. 9) Decree 1966' (Ministry of Information, Print Division, 1966) https://books.google.com.ng/books/about/Decree_No_59_the_Constitution_suspension.html?id=-msNAQAAIAAJ&redir_esc=y accessed 1 November 2020; Constitution (Suspension and Modification) Decree 1984 (Decree No. 1)

125 (1974) 4 ECSLR, 713

validated the action of the tribunal and ousted the jurisdiction of the Courts. The Plaintiffs appealed and the Supreme Court held that the decree was ad-hominem - targeting a specific individual, unconstitutional and null and void as it was contrary to the 1963 constitution. The Military Government promptly passed Decree No. 28 of 1970 by which they made it clear that by virtue of Decree No. 1 of 1966, decrees were superior to whatever part of the 1963 Constitution that still existed and that the validity of Decrees and Edicts cannot be challenged in court. The trend continued as the juntas kept brewing Edicts and decrees to oust and frustrate the jurisdiction of the courts.[126] In *Agbaje v. Commissioner of Police*[127] the complainant had sued the Commissioner of Police for unlawful detention. The Commissioner of Police had drawn his power to detain the complainant from the Armed Forces and Police (Special Powers) Decree No 24 of 1967. The decree empowers the Inspector General of Police and the Army Chief of Staff to order the detention of a particular category of persons with an ouster clause inserted thereafter. The High Court of the Western State held that the ouster clause could not stop the court from inquiring into the validity of the order and that whatever order made, had to comply strictly with the Decree and the onus was on the Commissioner of Police to show this. In many cases, the courts succumbed to this pressure and obeyed the ouster clauses as in *Nwosu v Imo State Environmental Sanitation Authority and Others* where Belgore JSC (as he then was) stated that "…military regimes, decrees of the Federal Military Government clearly ousts courts jurisdiction, there is no dancing around the issue to found jurisdiction that has been taken away…"[128]

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126 Attorney General of Lagos State v. Dosunmu, (1989) 6 SCNJ, p. 134; Governor of Lagos State v. Ojukwu, 1986) 1 NWLR (Pt. 18), p. 622; Guardian v. Federal Republic of Nigeria, (1994) 5 NWLR (Pt. 364), p. 50.

127 (1969) 1 NMLR, 137

128 (1990) 2 NWLR (PT 135) 688 SC,

The Supreme Court per Aniagolu J.S.C puts the situation and what should be the position of the courts clearly in *Oba Lamidi Adeyemi (Alafin of Oyo) & Ors. v. Attorney General of Oyo State & Ors* when it held 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 commenced 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 regularity."[129]

Another means through which the Military wished to usurp the powers of the Judiciary was by establishing Military Tribunals. The military tribunals were seemingly established to reduce the strain on the courts and deal with very serious cases such as fraudulent practices, armed robbery, drug trafficking amongst others in a summary manner. The military however, started using these tribunals to effect wickedness and oppression as most of those brought before the tribunals were perceived opposition to the military government of the day brought on trumped up charges and of course, the courts were barred from inquiring into the orders made by the tribunals. Furthermore, an appeal to a regular court was seen as inquiring into the decision of the tribunal and thus, impossible. The case of *Ken Saro Wiwa and 8 others* stands out as having been tried by the Ogoni Civil disturbances tribunal, they were sentenced to death and promptly hanged without allowing them any right of appeal.[130] This writer submits that this is a clear breach of the Rule of Law.

Under the Obasanjo Military Regime which had succeeded the assassinated Murtala Mohammed who had in turn, sacked the government of Gowon, the home of the Late Afro

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129 (1984) 1 SCNLR, p. 525 at p. 602.

130 Amnesty International, 'The Ogoni Trials and Detentions' <https://www.google.com/url?q=https://www.amnesty.org/download/Documents> accessed 2 November 2020.

beat musician, Fela Kuti was raided by military personnel and Fela's mother, Fumilayo Ransome-Kuti was thrown from a second story window and she sustained injuries from which she died.[131] The military government denied any involvement in the raid and the soldiers were labelled "unknown soldiers". Another trait of the military juntas, was retroactive decrees. A decree would be enacted but would be deemed to have taken effect before that time, rendering all acts criminalized in the decree, illegal at the time they were committed even though it was not so. A perfect example of this is decree No. 20 of 1984 which introduced serious punishments to acts such as dealing in cocaine. The decree was deemed to have come into effect on the 31st of December, 1983. It was however, in truth promulgated on the 6th of July, 1984.

These and many more were the abrasions on the rule of law, orchestrated by the Military government. Each one was quite worse and even more brutal than the last, placing Nigeria in an era this writer begs to refer to as Nigeria's dark ages. The military governments generally ruled with iron fists and effected gross abuse of the Fundamental Rights of Nigerians. In fact, what remains in the wake of the antics of military dispensations was aptly called, "sorrow, tears and blood".[132]

4.3 **Civilian dispensation - Post 1999 – The Present State**

Nigeria took its first worthwhile sigh of relief from the Military government on the 29th of May, 1999 when a new constitution came into force and Chief Olusegun Obasanjo who was elected on the 27th of February as the first constitutional President of the Fourth Republic came into power. This government spanned from 1999 – 2007 and being built on a

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131 Tayo Agunbaide, 'Remembering Funmilayo Ransome-Kuti: Nigeria's 'lioness of Lisabi' (Aljazeera, 2020) https://www.aljazeera.com/features/2020/10/1/the-lioness-of-lisabi-who-ended-unfair-taxes-for-nigerian-women accessed 1 November 2020.

132 Binda Ngazolo, 'Fela's Stories: Sorrow, Tears and Blood' (Pan African Music, 2019) https://pan-african-music.com/en/felas-stories-sorrow-tears-and-blood/ accessed 22 October 2020.

constitutional foundation, seemed better than past military governments in terms of economic prosperity, freedom of speech; other rights and the tenets of the Rule of Law were strongly upheld. There were moments however, when there were terrible abrasions on the Rule of Law so much so that it made the country feel it was still under a military regime. One of such is the Odi Massacre which took place on the 20th of November 1999. At the time, there was tension in the area and reports had it that twelve (12) police officers had been murdered by armed bandits not far from the Odi Community. The President, Olusegun Obasanjo, on the wings of this, sent soldiers into the Odi community to 'arrest' the said bandits. The operation was code named "HAKURI II"[133] and at the time it reached its end, about 2,500 bodies mainly women and children were strewn all over Odi with homes razed to the ground.[134] This brazen act of razing homes and destroying property on a whim because of perceived opposition, under the Obasanjo Administration did not start and stop with the president. Elias Courson writes that the past Bayelsa State governor, Chief Alamieyeseigha at one time also sent the army to Odioma settlement in Bayelsa State and by the time they were done with their operation, about 78 houses had been burned to the ground with many people dead.[135]

There are many other instances of failure of the Obasanjo administration to follow the Rule of Law. From gross violations of the constitution to his sneaky manipulation of the state houses of assembly to through unconstitutional means, remove sitting governors who

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133 Elias Courson, 'Odi Revisited?: Oil and State Violence in Odioma, Brass LGA, Bayelsa State' (2006) Niger Delta Economies of Violence Working Papers 7-r, 1-2 <https://www.google.com/url?q=http://geog.berkeley.edu/ProjectsResources/ND%2520Website/Niger Delta/WP/7-Courson.pdf> accessed 30 October 2020

134 Tari Bolou, 'Odi massacre: Anyone with tribal marks on their chest was slaughtered, corpses littered everywhere –Bolou, former Bayelsa commissioner (Punch Newspapers, 2017) https://punchng-com.cdn.ampproject.org/v/s/punchng.com/odi-massacre-anyone-with-tribal-marks-on-their-chest-was-slaughtered-corpses-littered-everywhere-bolou-former-bayelsa-commissioner/?amp_js_v=a6&amp_gsa=1&amp=1&usqp=mq331AQFKAGwASA%3D accessed 29 October 2020

135 Ibid, n 27

opposed him[136], it was clear that the government at the time was only ready to succumb to the will of the constitution when it suited it.[137] One of such governors removed through the prompts and backing of the President was the Plateau State governor in 2007. A group of 10 members which was shorter than the constitutional two-thirds majority of the State House of Assembly which would normally have been 16 members and without the earlier preconditions in the constitution being properly met[138], met early in the morning, and "removed" the governor, Joshua Dariye of Plateau State on trumped up charges This was an affront on the Rule of Law and constitutionalism. This culminated in the case of *Michael Dapialong & 5 others v. Chief (Dr.) Chibi Joshua Dariye & another*[139]. Both the court of Appeal and the Supreme Court refused to honour the impeachment and voided all actions taken prior to the impeachment as it was unconstitutional. Another case in question, is the case of *Obi v. Independent National Electoral Commission (INEC)*[140]. The State House of Assembly was divided into two with 15 legislators on one side and 13 on the other, due to unsettled rifts. The majority group met in a hotel outside the state, and issued a notice of allegations against the governor of Anambra State, through newspaper publications. This was pursuant to commencing removal proceedings against the Governor. Based on this notice, they directed the Chief Judge to set up a panel of investigation. While this was going on, the legislators refused to obey all court orders to the contrary. This group of 15 members, sat at 5am in the morning and in that proceeding which was conducted within the premises of the

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136 Samuel Ogundipe, 'Presidency accuses Obasanjo of masterminding removal of five governors from office' https://www.premiumtimesng.com/news/headlines/270008-presidency-accuses-obasanjo-of-masterminding-removal-of-five-governors-from-office.html accessed 29 October 2020

137 Ben Nwabueze, *How President Obasanjo Subverted the Rule of Law and Democracy* (Gold Press Ltd, 2007) 3-8.

138 Constitution of the Federal Republic of Nigeria, 1999 (as amended) S. 188

139 (2007) 8 NWLR (Pt 1038) 332 pp. 303 & 424

140 (2007) 11 NWLR (Pt. 1046) 565

house, voted to remove the Governor. The 'removed' governor brought the matter before the court on the grounds that the removal was unconstitutional having failed to meet many of the requirements in section 188 of the 1999 Constitution and pursued the matter up to the court of Appeal. The court aptly order the re-instatement of the governor and chided the legislators' actions. Similar events led to the case of *Inakoju v. Adeleke.*[141] In these three cases and others, one important point of deliberation by the courts was Section 188(10) of the 1999 Constitution (as amended) which was an ouster clause. The provision of this subsection may have been intended as a check on the powers of the judiciary or may just be a relic of the military dispensation showing itself on civilian terrain. The attitude of the courts in the cases above and especially in the case of *Dapialong v. Dariye* is indeed laudable. The dictum of Onnoghen JSC, in *Dapianlong v Dariye* sums the courts' position thus:

> "It is true that section 188 (10) of the 1999 Constitution oust the jurisdiction of the courts in respect of the impeachment of a Governor or Deputy Governor but that must be subject to the rule that the legislature or the House of Assembly complied with all the constitutional requirements in section 188 needed for the impeachment as the court have jurisdiction to determine whether the said constitutional requirements have been strictly complied with or not."[142]

The position of the courts brilliantly espoused by Onnoghen JSC above, served to make the Rule of Law stronger, plug the loophole in subsection 10 and cement the place of the Judiciary as Guardians of the Constitution. They simply said: If you do not do your jobs properly, we must step in to do ours.

The first administration of the Fourth Republic was indeed a roller coaster. Aside clear violations, there were other subtle actions which seemed constitutional, but which aim was to truncate democracy. The presidency's refusal to send revenue allocation to Lagos State for years is one of such. Although this was not an exact violation of the constitution, the bill to

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141 (2007) 4 NWLR (pt 1025) 423

142 Ibid n 33

amend the 1999 constitution to include a third term provision for the President, which was championed by the Obasanjo Administration, showed a deeply seated thirst to twist the constitution if he could to suit himself and remain in power for as long as possible.. This move was of course, shut down by both houses of the federal legislature as such a provision if passed would have severely injured democracy.[143]

Some blame this attitude of coercion and attempts to bend the will of others exhibited by the President Olusegun at the time, on his military background. He was clearly used to ordering people about and getting his way. This writer argues that nothing gives any leader the right to negate the Rule of law in a democratic dispensation in the name of having a military background. Such attitude in the face of the constitution should be promptly kept under lock and key or at best, consigned to the dustbins of history; and left there.

The States Executive Governors are also complicit in this career of impunity. They are still taking bites off the cake of impunity and disregard for the constitution with the craze of setting up Local Government Caretaker Committees. Section 7 of the Constitution of the Federal Republic 1999 (as amended) states that:

> "The system of local government by democratically elected government council is under this constitution guaranteed; and accordingly, the government of every state shall subject to section 8 of this constitution ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils."

What is obtainable however in practice, is that state governors, especially such as are just newly elected, dissolve constitutionally elected Local Government Councils and replace them with Caretaker Committees. The silent rationale for doing so is to purge the system of Local Government Councilmen still loyal to the past government or clearly in opposition to the

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143 Bisi Abidoye, 'How Obasanjo's Failed Third Term Agenda was funded' (Premium Times, 2018) https://www.premiumtimesng.com/news/headlines/283530-how-obasanjos-failed-third-term-agenda-was-funded-new-book.html accessed 23 October 2020

present one. This is unconstitutional. To show the dire state of things, five years prior to 2014, 27 states had not conducted Local Government elections.[144] Appalling!

Other arms of the government and subsequent governments after the Obasanjo administration, have been complicit in several acts of abrasion on the Rule of law. Although the Yaradua Administration was short-lived, President Goodluck Jonathan, did well to continue his legacy of utmost respect for the Rule of Law until he was elected as president on his own platform. His government has the least amounts of disregard for the Rule of Law but was highly corrupt having elements such as Dasuki Sambo who presently, has a case on corruption in court.

The Buhari Administration has been second only to the Obasanjo administration in terms of violations of the Rights of Nigerians and the Rule of Law in general. The case against *Sambo Dasuki* is one of such example of this government's impunity. Dasuki was arrested and arraigned in 2015 on allegations that he diverted $2.1 billion dollar funds meant to be used to purchase arms for the Nigerian troops in the fight against terrorism under the Goodluck Jonathan Administration. Despite being granted bail by not less than seven courts of law, the SSS refused to release him. The Economic Community of West African States (ECOWAS) court has even held on the issue, that the continued refusal of the State Security Service (SSS) to release Dasuki despite several court orders to that effect, was a violation of this Fundamental Rights. It took until 2019, for Dasuki to be released on bail. No doubt, the SSS carried out their continued detention of the suspect on the order of the president, Muhammadu Buhari inspite of pleas and criticisms from the international community and

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144 P. O. Oviasuyi, Lawrence Isiraojie, 'Appointment of Local Government Caretaker Committees: An Aberration in Local Government Administration in Nigeria' https://www.google.com/url?q=https://www.researchgate.net/publication/340082710 accessed 31 October 2020

Nigerians.[145] A similar incident is that of *Omoyele Sowore* who was arrested and arraigned on charges of treason, money laundering and cyberstalking the President. A Federal High Court ordered his release from detention. A day after he was released in compliance with the court order, he was rearrested again on the 6th of December 2019 by officers of the SSS. It seemed to everyone, that the government was making a mockery of the system. Why release him if you were going to arrest him the next day on the same grounds? He has however since been rereleased on bail after the Attorney General of the Federation issued a statement saying his office was going to finally comply with the court order.[146]

A case clearly captured in a series of events which go to further show the level to which the government of Nigeria is ready to bend the rules to suit their actions, is the case of *Ayo Salami,* former President of the Court Of Appeal and *Walter Onnoghen,* previous Chief Justice of Nigeria. The case of *Salami* opened a new dimension in the judiciary, thus necessitating controversies as to its rightness and constitutionality. Ayo Salami was suspended by the National Judicial Council (NJC) over his refusal to apologize to the NJC and the then Chief Justice of Nigeria, Justice Aloysius Kastina Alu. He was then compulsorily retired by the then President Goodluck Jonathan, who acted under his constitutional authority. Subsequently, he was then recalled by the NJC but the President refused to approve the acts of the NJC, and that scenario raised serious questions concerning partisan nature and level of independence in the judiciary.

One day Nigerians woke up to the news that the Chief Justice of Nigeria has been suspended by President Muhammadu Buhari upon the direction of the Code of Conduct Tribunal (CCT)

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145 Halimah Yahaya, 'Review: Sambo Dasuki's long Road to Freedom' https://www.premiumtimesng.com/news/headlines/369962-review-sambo-dasukis-long-road-to-freedom.html accessed 23 October 2020.

146 Aisha Salaudeen and Stephanie Busari, ' Nigeria orders release of detained activist, Omoyele Sowore' (CNN, 2019) < https://www.cnn.com/2019/12/24/africa/sowore-release-order/index.html> accessed 1 November 2020.

upon Onnoghen's misconduct and false asset declaration before assuming office. Onnoghen in his defence had stated that he forgot to declare the accounts he was accused of hiding. Constitutionally, the National Judicial Council (NJC) is the only body vested with the powers of appointment, promotion and discipline of judicial officers. This has been cemented in law by virtue of the recent case of *Nganjiwa v. Federal Republic of Nigeria*[147] wherein the court of Appeal held that before any criminal action can be taken on a judicial officers or before he can be brought before any court on the basis of allegations of crime, he must first be brought before the National Judicial Council his employer, being constitutionally vested with the power to discipline him. The directive to take any action as regards the embattled Onnoghen should have come from the NJC but the President bypassed the body and went straight to the CCT.

Sections 153(1), 271 (1), 292(1)(a)(ii) and Paragraph 21 of Part 1 of the Third Schedule to the Constitution of Republic of Nigeria 1999 (as amended) provide that any judicial officer accused of an offence must first be subject to investigation and disciplinary action by the National Judicial Council before any trial is conducted. Furthermore, the Constitution[148], provides that the CJN as a Federal judicial officer can only be removed from office by the President acting on an address supported by two thirds majority of the Senate for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or body) or for misconduct or contravention of the Code of Conduct. Thus the actions of the President of Nigeria was clearly illegal and unconstitutional.

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147 2017) LPELR – 43391 (CA).

148 Constitution of the Republic of Nigeria (as amended) S. 212(1)(a)(I)

Onnoghen was not given fair hearing in the CCT which had ruled it had Jurisdiction to try Onnoghen without recourse to the NJC and has found him guilty; barred from returning to any judicial office in the next ten years[149] and he has since appealed to the Court of Appeal.

Since then, there have been issues of abuse of the Freedom of Movement of Walter Onnoghen as his International passport has been seized without any reason given for such seizure or why the government has barred him from traveling out of the country.[150] The point is, there is no order of incarceration against him as the guilty verdict only effect on him was with respect to his professional life and does not have prison time attached to it. So its curious why his freedom of movement is being restricted. This is clearly another abrasion on the Rule of Law by the government of Nigeria.

The military and security services have also been complicit in many abuses of the rights of Nigerians. Once of such, is the murder of over 300 Shia moslems were killed in a clash with the military in Kaduna State. *El Zazaky* their spiritual leader was arrested and charged to court. His home was also demolished by security agents. Having charged him to court, the SSS also disobeyed a court order, ordering his release on bail.[151]

A most recent case of the Buhari led administration trampling on the Rule of Law, occurred in October, 2020. Protests erupted throughout Nigeria with thousands of people wielding placards demanding an end to Police Brutality which has in no small way has been institutionalized in Nigeria especially in the police unit known as the Special Anti-Robbery

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149 Evelyn Okakwu, 'CCT convicts Onnoghen of false assets declaration' (Premium Times, 2019) https://www.premiumtimesng.com/news/headlines/325953-breaking-cct-convicts-onnoghen-of-false-assets-declaration.html accessed 1 November 2020.

150 Eno-Abasi Sunday and Yetunde Ayobami Ojo (Lagos) and Bridget Chiedu Onochie (Abuja), 'Passport seizure FG pursuing vendetta against Onnoghen – Lawyers' https://m.guardian.ng/news/passport-seizure-fg-pursuing-vendetta-against-onnoghen-lawyers/ accessed 1 November 2020.

151 Punch, 'Six times Buhari has disobeyed court orders' https://punchng-com.cdn.ampproject.org/v/s/punchng.com/six-times-buhari-has-disobeyed-court-orders/?amp_js_v=a6&amp_gsa=1&amp=1&usqp=mq331AQFKAGwASA%3D accessed 2 November 2020

Squad (SARS). This unit has been complicit in multiple cases of extortion, fraud, brutality, extra judicial killings and plain murder even in broad day light. The protests kept growing in intensity until the government proscribed the Unit. The problem however, was that the government had on several occasions in the past, dismantled the same unit, yet they were still on the streets wreaking havoc on Nigerians.[152] During the protest, the Nigerian Police which was being accused of brutality, responded with even more brutality by killing more protesters and injuring others. The pinnacle of these killings happened at the Lekki Toll Gate on the 20th of October, 2020 which has now been known as the Lekki Tollgate Massacre. At least, 12 people were killed according to Amnesty International[153], when men of the Nigerian Army blockaded the toll gate, cut off the lighting and in the absence of the security camera which had been removed earlier in the day by men of the Lekki Concession Company Limited, began shooting live rounds at peaceful protesters. The aftermath of the incident has been accusations and counter accusations which has implicated the Governor of Lagos State, Babajide Sanwo-Olu, APC chieftain, Asiwaju Bola Tinubu, the Presidency and the Nigerian Army. Judicial panels of Inquiry have since been set up in the respective states to inquire into the protests and the violence that ensued and in Lagos, the same panel has been set up to look into the Lekki Toll gate massacre.[154] The sad icing on the cake is that when the Commander In Chief, Muhammadu Buhari addressed the nation subsequently after the toll gate Massacre,

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152 Oluwole Oyewale, 'Youths protest for reforms in Nigeria: what lies ahead for #endsars' https://www.brookings.edu/blog/africa-in-focus/2020/10/29/youth-protests-for-police-reform-in-nigeria-what-lies-ahead-for-endsars/ accessed 1 November 2020.

153 Amnesty.org, 'Nigeria: Authorities must stop attempts to cover up Lekki Toll Gate massacre – new investigative timeline' < https://www.amnesty.org/en/latest/news/2020/10/nigeria-authorities-must-stop-attempts-to-cover-up-lekki-toll-gate-massacre-new-investigative-timeline/> accessed 29th October 2020.

154 Alfred Olufumi, 'Lekki Shooting: Nigerians express outrage, demand justice after PREMIUM TIMES' investigation' https://www.premiumtimesng.com/news/more-news/423980-lekki-shooting-nigerians-express-outrage-demand-justice-after-premium-times-investigation.html accessed 1 November 2020.

his speech made no mention or reference to the victims of the tollgate massacre, not even a word of acknowledgement that such event even occurred.[155] Tragic.

Stepping up its campaign to enthroned the absence of the Rule of law, the Nigerian government has now commenced withholding the passport of Nigerians who were at the forefront of the #EndSARS protests. Some of such persons have been denied leave to exit the country as their passports have been confiscated by the government without probable cause. This no doubt, rings the same bell the case of Shugaba Darman rang in the second republic. To worsen things, there are rumours that the government has already compiled a list of such persons who are on travel ban out of the country.[156] Will these brazen acts ever end?!

4.4 **Conclusion**

The major question upon a reflection on the above is, is all hope lost? Are we lost as a nation? There is no gainsaying the truth that the several governments Nigeria has had and their institutions have at several points, done things right with respect to the Rule of Law. However, the position of this essay is critical as the ills and breaches of the Rule of Law on the part of the governments, far outweigh the bright points and seem to be getting more devilish and brazen as the years go by.

In the next chapter, a summary of this paper will be attempted and suggestions given as to how Nigeria can transcend beyond this present culture of blatant disregard of the Rule of Law.

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155 Abiola Odutola, '#EndSARS: Full text of President Muhammadu Buhari's National address' (Nairametrics 2020) https://nairametrics.com/2020/10/22/endsars-full-text-of-president-muhammadu-buharis-address/ accessed 22 October 2020.

156 Nimi Princewill, 'EXCLUSIVE: Federal government begins compilation of #EndSARS protesters on no-fly list' (Peoples' Gazette, 2020) https://peoplesgazette.com/exclusive-federal-government-begins-compilation-of-endsars-protesters-on-no-fly-list/?utm_source=ReviveOldPost&utm_medium=social&utm_campaign=ReviveOldPost accessed 3 November 2020.

CHAPTER FIVE

SUMMARY, RECOMMENDATION AND CONCLUSION: A DISCOURSE AT AN END

5.0 Summary

This discourse on the Nigerian practice of the Rule of Law, began with an introduction of the concept of the Rule of law, to give a background to not only the meaning of the concept but also its historical foundation and formation. Flowing from that, it is gathered that the Rule of Law does not just mean strict adherence of the governors and governed to the rule of law, but that the laws being adhered to must be humane and practicable being given life by a constitutional law making body sanctioned by the people. Blind enforcement of unjust laws is clearly a "rule by law" as opposed to "rule of law". It was further gathered that for the rule of law to reign supreme, mechanisms must be in place to check the rulers through checks and balances and at best, a tripartite separation of powers.

In chapter two, the practice of the Rule of Law in other Jurisdictions and the system of government practiced therein was observed and it was discovered that countries which operate an absolute monarchy, a dictatorship, socialism, communism or some other rigid form of government were more prone to disregarding the concept of the Rule of law. In many of these cases, the rulers are deemed above the law. Other countries which practice constitutional forms of government fare better with respect to the practice of the rule of law, especially with respect to the protection and guarantee of the rights of the ruled.

Nigeria being a constitutional government is supposed to be at optimum performance as regards the Rule of law, in line with the dictates of the constitution. However, that is not the case. Although we are far better than most countries of the world with respect to the practice of the Rule of law, our practice since independence, leaves much to be desired.

Chapter three was a foray into the constitutional development of Nigeria from 1960 to the 1999 constitution. Nigeria began from a shaky constitutional foundation which caused a lot of

conflict but we have since transcended to the quite stable constitution we have today. Although the constitution at present, still has some loopholes and relics of the past constitutions and the military governments, it has taken many steps in the right direction. The military dispensations of Nigeria hampered the Constitutional growth of the country but it is laudable that since the fourth republic began twenty years ago, no military intrusion has been experienced.

Chapter four dealt with the actual problem which is the subject matter of this paper as it revealed several structural and administrative disregard of the rule of law by the arms of Government, especially the executive. The period and events treated by this chapter spanning from 1960 till date, are not comprehensive on the problem but as promised, show a very clear picture of the ills Nigeria is currently facing. Research on the spite on the rule of law dished out in this country showed that the major aim for disregarding the rule of law by the government, is mostly to fuel selfish desires. From the leaders of the first and second republic who caused chaos and whipped up ethnic and religious sentiments among the masses to gain political positions so they can conveniently steal from the Nigerian coffers, to the military juntas which came into power in the guise of saving the people from corrupt politicians but whose main aim was to steal power and enjoy corruption – One concept resonates – Selfishness. An example of the above is Sani Abacha who hijacked the interim government of Chief Earnest Shonekan. He is complicit in the highest form of corruption of all time in Nigeria. His loot are still being returned today from all the banks he stashed them in the world.[157]

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157 Chike Olisah, 'FG recovers $311 million Abacha loot from US, Jersey' (Nairametrics 2020) https://nairametrics.com/2020/05/05/fg-recovers-311-million-abacha-loot-from-us-jersey/ accessed 1 November 2020; Kindle Danni, 'Nigeria to recover €5.5 million Abacha loot from Ireland' (Premium Times 2020) https://www.premiumtimesng.com/news/top-news/408848-nigeria-to-recover-e5-5-million-abacha-loot-from-ireland.html accessed 1 November 2020.

The bid to avoid such abandonment of the Rule of law is the reason why the mechanisms of checks and balances and Separation of powers exist. The problem with this however, as seen in practice, is that these mechanisms of checks are laws provided no doubt in the constitution. What happens where the provision of checks even though present in the constitution is disregarded with impunity? What happens where a particular breach of the constitution is seen as a norm and overlooked? This is seen in cases where governors willy-nilly dissolve constitutionally elected Local government councils and appoint caretaker committees in an their stead. Clearly this means that the rule of law is being trampled upon but how can this be stopped in its tracks?

5.1 Recommendations on upholding the constitutional order and the rule of law

It will be almost impossible for the rule of law to reign supreme without a vibrant constitutional order. To make Nigeria's vibrant and ensure compliance with the rule of law, the answer to the questions in the forgoing paragraph and the subject of this essay, are given in the following recommendations:

- **Prompt amendment of the constitution and laws to cure loopholes:**

  There are several loopholes in the constitution which politicians time and time again, exploit for selfish political reasons. No doubt, the courts have always stepped up where they can to cure those lapses like they did in the cases of Inakoju v. Adeleke, Dapialong v. Dariye amongst others treated in the preceding chapter.. It is indeed laudable the courts are doing their bit to cure the lapses in the constitution but there is a limit as to how far they can go. No matter how much activism the courts brew up, they are certainly still not the legislature and are not involved in law making. Too much judicial activism in fact, will equate usurping the powers of the legislature and such will be injurious to the proper functioning of a constitutional Government. Thus,

the Legislature has to step up to amend the constitution whenever any lapse is detected**.** Understandably, constitutional amendment is not an easy or quick process but the right thing has to be done when proper, by the proper institution.

- **Provision of Quality education to improve the literacy level of the citizenry:**

  The assertion that knowledge is power can hardly be faulted. The biggest instruments of chaos in a society, are such class of the citizenry which do not have access to qualitative education. This has proved consistently true. Such set of persons are impressionable and easily controlled by ill meaning politicians. This has manifested in the several riots and breakdown of law and order in all the republics where ethnicity and religion have been used and are still being used as tools to orchestrate chaos. It has also manifested in the various violent elections which have taken place in the country and even in the recent #EndSARS protests which was hijacked by hoodlums comprising mainly the uneducated in the society. Education will not teach a person everything but it serves to open the mind and grooms it to be what it truly should be – a tool constantly in search of knowledge – a tool that constantly asks questions and views the world with the eyes of questions and circumspection. Thus, an educated populace is awake and willing to secure change through the right channels. This even extends to the area of leadership. What we have in politics today, especially at the grassroots are professional louts aspiring to political positions. Such persons will no doubt, continue to support the system that made them. It is the recommendation of this writer that the government should step up in the area of education and ensure its properly funded to improve existing infrastructure so more Nigerians can get access to education. This however, is just a recommendation based on what should be. It is doubtful that the same government which benefits from the lack of qualitative

education, will release more funding towards education to keep citizens informed and less disposed to vices. It is further recommended that well meaning individuals and Non Governmental organizations dedicated to this regard, should be set up, step up and help.

Understandably, there will always be persons willing and ready to be used as agents of discord and chaos but if there is a way to cut down the frontline of such groups with education and social restructuring, we should take it.

- **The promotion of regular, free, fair and credible elections which will help electing credible and patriotic persons into government:**

This is the most important recommendation, because laws can be madd but you can not force the government to obey them. Even worse is the fact that the citizenry are in a quandary where the mechanisms of checks which are suppose to kick in to hold these leaders accountable fail altogether. Thus the option left is to stop the current culture of voting based on sentiments and along religious and ethnic lines. Candidates should be chosen based on their prior records, with all facts considered and most importantly, Nigerians should come out to vote and protect the votes cast at all costs.

- **The aspiration of youths to elective positions should be encouraged:**

A careful look at the government as constituted at the state and Federal levels, will show that youth representation is sparse. This writer submits that it is needful for youths to show more presence in politics so as to infuse fresh thoughts and perspective into governance. Thankfully, the Not too Young to Run Act[158] has brought participation in governance closer to the youth. At this point, all that is

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158 Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration, No. 27) ACT, 2017 [Reduction of Age Qualification for the Office of President, Governor, and Member of the House of Representative or House of Assembly of a State]

needed is for the youth in the society to show interest and vie for elective positions. This can be better actualized by mass sensitization of the youths and the provision of financial and structural platforms by civil society organizations and well meaning individuals so as to aid those who have the proper disposition to politics, actualize this recommendation.

- **Introduction of a Constitutional Court:**

  It is recommended that a constitutional court be established to help interpret constitutional matters especially such as would be deemed academic by regular courts. If such an institution exists, lapses in the constitution can be can be brought before the court to give its interpretation to it and such interpretation will have the force of law. The legislature can follow on later with an amendment of the *faulty* section of the constitution to make its meaning clearer. Through this, loopholes can be cured before they are utilized by politicians to achieve breaches of the Constitution and by extension, breaches of the rule of law.

- **Programmes on electoral and bureaucratic reforms for improved service delivery:**

  There are lapses in the Nigerian bureaucratic structure that give leeway to electoral riggers to perform their mischief. The electoral act for one, being the embodiment of guidelines for conducting elections, suffer from several lapses and leaves much to be desired.. Some of these lapses are rooted in the failure of the electoral process to keep to the times. There are now safer, faster and more error free ways of casting votes and one of such is through electronic voting. The current electoral act does not take such new trends into cognizance. Furthermore, the lazy and frustrating bureaucracy in Nigeria has deprived many people from casting their votes because they have still not

been given their voters card to enable them vote in the polls. This is beyond sad. These errors and lapses need to be fixed as soon as possible to help pave way for Nigerians to vote into government, the right hands for elective jobs, without any hassle.

- **Orientation and ethical rebirth of the citizenry**

  No matter what step Nigeria as a country chooses to take, the first step is sensitization and reorientation. Most Nigerians, deep down, want to do the right thing with respect to moving Nigeria forward. What they lack, is proper sensitization as to what is needful to actualize the Nigeria of our dreams. What is suggested here is a nationwide programme sensitizing Nigerians on the steps to take with respect to their civic and social duties. This can be actualized through the media, in-person sensitization programmes, radio jingles amongst others. The sole aim is to awaken the consciousness in Nigerians to fight for a better Nigeria.

5.2 Conclusion

It is easier to destroy than to repair. This is why repairing Nigeria will take conscious and concerted effort on the part of Nigerians individually and collectively. It is no lie that positive changes in this respect can never happen overnight. The ills that beleaguer the country did not begin overnight either, it took time to sleep into the fabrics of our democracy through festering years of misrule and terrible governments. This writer opines that if the recommendations above are followed through with proper modifications, we will be taking many steps in the right direction towards the dream of a Nigeria that brightened up the hearts and faces of Nigerians on the 1st of October 1960.

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