

Evaluation of the Practice of Constitutionalism and the Rule of Law in a Democracy: A Case of Nigeria, 1999-2009

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Abstract

The term rule of law and constitutionalism echoed into the subconscious of ordinary Nigerians under the eight years of President Obasanjo and two years of Yar'Adua government simply because of assaults of the paradigm of law and contempt for the laws, just as the term dictatorship assumed wider popularity when military heads of state held sway, more especially under late General Sani Abacha. What exactly are the rule of law and constitutionalism and what do they guarantee for the society that upholds these concepts in a thematic form by identifying their major features. The author goes on to use the major indices of the rule of law and constitutionalism to evaluate their practice in Nigeria using specific instances to add currency to this position. Patron-client politics of elite theory swerves as its theoretical perspective. The article concludes by positing that the rule of law and constitutionalism are ideals in Nigeria which are difficult to attain in their totality.

Key Words: Rule of Law, Constitutionalism, Civil Liberties, Human Rights, Due Process, Constitution, Governance.

Introduction

Constitutionalism and the rule of law have a variety of meanings. In a popular parlance, the former refers to a complex of ideas, attitudes and patterns of behaviour elaborating the people that the authority of government derives from and is limited by a body of fundamental laws (the constitution). The latter takes over from where constitutionalism stops. It is a legal term, which

includes a number of interrelated principles (predominance of regular laws as apposed to arbitrary law, equality before the law and protection of human rights and individual liberties).

These two interrelated concepts have gained currency since Nigerian returned to civil rule in 1999. Most of the debates are centered on how to enforced and reinforce them so that due process mechanism became part and parcel of governance in the polity.

Since 1999, the rule of law and constitutionalism and due process was always mentioned as key aspects of governance, but the practice of governance itself shows very little linkage to the general demands of constitutionalism and the rule of law. A foremost example is the civilian regimes penchant for disregarding and outright disobeying of court orders and judgments. In Nigeria, for instance, the police and other security agencies and power holders are the arrow heads of the forces bent on humiliating and abusing human rights especially of suspected offenders.

In Nigeria, for instance, law enforcement agencies like the police and the governing elites are the arrowheads of the forces bent on humiliating and abusing human rights and civil liberties especially of suspended offenders. There is no equality before the law in Nigeria. It appears that those who are accused of stealing billions of naira as governors or public office holders are more equal than all other category of defendants. Bail is granted to them even when they are not supposed to be granted bail as a matter of course and upon the most liberal terms.

In Nigeria, especially during the administration of Chief Olusegun Obasanjo from 1999-2007, the rule of law and constitutionalism was always mentioned as a key aspects of governance, but the practice of governance itself showed very little linkage to the general demands of the rule of law. A foremost instance was the regime's penchant for disregarding and outright disobeying of court orders and judgments. This was done impunity setting very poor examples for governance. This article's overall conclusion is that good governance can not exist without the rule of law and constitutionalism. The rule of law ensures that the political system does not operate arbitrarily but runs smoothly allowing the rulers and the ruled to relate in a mutually beneficial manner to ensure the continued existence of the polity. The regime of Alhaji Umaru Musa Yar'Adua inherited this rule of law and constitutionalism challenge.

The first part of the paper is introductory, it tries to explain the concepts of the "rule of law" and "constitutionalism", the second part attempts an operational definitions of "the rule of law" and

“constitutionalism” and the third section evaluates the practice of “rule of law” and “constitutionalism” in Nigeria, using specific instances and the lessons Nigeria can learn from their practice. The final section offer recommendations and concludes the paper.

Thematic clarification of concepts

Constitutionalism

There are two major contending perspectives to the understanding of the concept of constitutionalism. These are the descriptive and prescriptive usages. Used descriptively, the concept refers primarily to the historical struggle for constitutional recognition of the people’s right to “consent” and certain other rights and civil liberties and privileges. Used prescriptively, its usage incorporates those features of government seen as the essential elements of the constitution (Fellrenbacher, 1989:1)

One example of constitutionalist’s descriptive use is offered by Schwartz (1980) complication of sources seeking to trace the origin of the Federal bill of rights. Beginning with English antecedents dating back to the Magna Carta (1215), Bernard Schwartz explores the presence and development of ideas of individuals’ freedoms and privileges through colonial charters and legal understandings. Then in carrying the story forward, he identifies revolutionary declarations and constitutions, documents and judicial decisions of the confederation epoch and the formation of the Federal Constitution. Finally, he turns the debates over the federal constitution’s ratification that ultimately provided mounting pressure for a federal bill of rights. While hardly presenting a “straight line, the account illustrates the historical struggle to recognize and ensure constitutional rights and principles in a constitutional order (Wikipedia, the free encyclopedia).

Used descriptively, the concept of constitutionalism can refer chiefly to the “historical struggle for constitutional recognition of the people’s right to “consent” and certain other rights, freedom and privileges: (Casper, 1986:473).

As described by political scientist and constitutional scholar Fellman (1974:485)

Constitutionalism is descriptive of a complicated concept, deeply imbed in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to the rule by the arbitrary judgment or mere fiat of

public officials.... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow (2007:4) Constitutionalism embodies:

The idea that government can and should be legally limited in its powers, and that it's authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to any one keen to explore the legal and philosophical foundations of the state.

Whether reflecting a descriptive or prescriptive focus, treatments of the concepts of constitutionalism all deal with the legitimacy of government. One recent assessment of American constitutionalism, by Fritz (2008:1), for example; notes that the ideas of constitutionalism serves to define what it is that grants and guides the legitimate exercise of government authority.

One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power (Wikipedia free encyclopedia). William Hamilton has captured this dual aspect by noting that constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order" (Hamilton, 1934:255).

From the above theses, constitutionalism deals with the rule of law. What this means is that a government which a constitution sets up should conduct itself in accordance with the rules of law - that is according to agreed procedures. Any government set up by a constitution has limits to its powers. Constitutionalism says that not only should these limits be recognized and accepted by government, the fundamental human rights and civil liberties of

the citizens should also be recognized and guaranteed. Dictatorship and constitutionalism do not go hand in hand.

Nigerian constitutionalism would be more correctly defined as the doctrine that states that government must act within the confines of a known constitution, whether this is written or in part of an unwritten constitution or convention.

The Rule of Law

The rule of law does not have a precise definition and its meaning varies from country to country perhaps, the most significant application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written publicly disclosed laws adopted and enforced in accordance with established procedural steps referred to as due process. This principle is intended to be a safeguard against arbitrary governance, whether by a utilitarian leader, or mobocracy. Thus the rule of law is hostile both to dictatorship and to anarchy.

According to Appadorai (1974), the term was a direct consequence of the postulation of J.J. Rousseau on the theories of the separation of powers and checks and balances. The fear of the abuse of power was so great that the locus of power had to be separated among the executive, legislature and the judiciary with detailed mandates to check the excesses of each other. This is seen to reduce overall power and ultimately check abuse. It is also in this vein that Dicey (1980:2002) defines the rule of law to mean:

The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, or prerogative or even wide discretionary authority on the part of government.

In support of Dicey's thesis, Sagay (1996) and Enemou (1999) posit that the rule of law as a principle seeks to curb the excesses of the political authority who are custodians of power ensuring that they exercise this power within the ambit of the laws of the land and not to their whims and caprices.

In his treatise, Dicey (1980) identified three principles, which together establish the rule of law. These are principles:

1. The principle of impartiality
2. The principle of equality before the law
3. The right to individual liberty.

The Principle of Impartiality: This principle states that no person should be subjected to arbitrary laws. It argues that anybody accused of wrong doing in

the society should first be brought to fair trial in a court of law, before being punished if he is found guilty. The accused person is also entitled to the services of a lawyer to defend him during his trial. If he cannot afford the cost of hiring a lawyer, the state should provide one for him free of charge. The principle of impartiality argues strongly against detection without trial. It holds that a person should be regarded as innocent before the law until he is proven guilty.

The principle of equality before the law: this principle implies that any person in the society regardless of his social position should be accorded equal treatment under a given law. This means that if there is a law preventing people from wandering about after ten o'clock at night, a permanent secretary caught wandering after that time should be given the same punishment as a labourer caught violating the same law. This principle simply means that all men should be considered equal before the law.

The right to individual liberty: This refers to constitutional provisions that attempt to protect the speech, freedom of movement, and of association. In order for the individual to feel safe and be happy, his own liberty has to be protected. The government and other members of the society should, therefore not deprive him of his fundamental rights as a human being. That is government should operate accuracy to fixed published and predictable rules (constitutionals). This notion is against the Jacobian notion of democracy or Confucian ideas of discreet paternalism by morally superior state officials. The thesis required for public decision making to operate on a known time scale for decisions to be communicated to affected parties to be based on veritable statements of reasons and for affected to be told of the remedies available to them and the era within which such remedies can be exercised (Hood, 2001:703).

In "The Rule of Law and its virtue" The constitutional theorist Joseph Raz identified the constituent principles of his conception of the rule of law. Raz's conception encompasses the additional requirements of guiding the individual's behaviour and minimizing the danger that results from the exercise of discretionary power in an arbitrary fashion, and in this last

respect, he shares common ground with the great constitutional theorists A. V. Dicey, Friedrich Hayek and E. P. Thompson. From this general conception he stated that some of the most important principles were:

- ❖ The laws should be prospective rather than retroactive
- ❖ Laws should be stable and not changed too frequently as lack of awareness of the law prevents one from being guided by it
- ❖ There should be clear rules and procedure for making laws
- ❖ The independence of the judiciary has to be guaranteed
- ❖ The principles of natural justice should be observed particularly those concerning the right to fair hearing
- ❖ The courts should have the power to review the way in which the other principles are implemented
- ❖ The courts should be accessible; no man may be denied justice
- ❖ The discretion of law enforcement and crime prevention agencies should not be allowed to prevent the law (Wikipedia the free Encyclopedia)

Standing alone, these eight elements may seem clear and understandable. But they are actually difficult to implement in the real world because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choices. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Inflexibility could cause the courts of a country (judiciary) to neglect the human element of each particular case. Additionally, instead of only applying prospectively some laws are meant to apply retroactively or to past conduct, because they were passed with the specific intent of correcting the conduct in question. These conflicts are recognized and it is suggested that societies should prepare to balance the different objectives listed above.

The above listed criteria of the rule of law is helpful in understanding the rule of law because it outlines the types of rules, or formal constraints, that societies should develop in order to approach legal problems in a way that minimizes the abuse of legal process and political power. The rule of law extends beyond mere regulations and is also shaped by the so called institutional constraints" on government implied in one of the elements of rule of law. One such institutional constraints is the existence of independent judiciary, another is developing ways of promoting "transparent governance". Informal constraints such as local culture or traditions that may encourage

citizens to organize their behaviour around the law also help constrain the government, promote liberty and therefore define the rule of law.

Although, still seemingly vague, the rule of law may be most correctly defined as a theory of governance relying upon a series of legal and social constraints designed to encourage order and to prevent arbitrary and unreasonable exercise of government power.

Theoretical Perspective

The theoretical foundation of this article will rest on elite theory. Parry (1977) defined elites as the small minorities who appear to play an exceptionally influential part in socio-political affairs. They exercise preponderant influence within that collectivity by virtue of their actual or supposed talents.

In political science, the theory is basically a “class” analysis approach to the understanding of political phenomena. The term has history that dates back to the writings of Vilfredo Pareto, Gaetano Mosca, and Robert Michels and observations made by them with regard to (1) the elite as distinguished from the non-elite groups within a social order and (2) the divisions within the elite as between a governing and a non-governing elite.

Furthermore, Mosca Gaetano (1939) noted that the distinguishing characteristic of the elite is the “aptitude to command and to exercise political control”. The conceptual schemes postulated by elite theorists comprise the following generalization:

In every society, there is, and must always be, a minority which rules over the rest of society. This notion is quite compatible with Robert Michel’s observation in his “political party” who posits that organization says oligarchy”. Mosca Pareto also says that in all human societies, be it capitalist or socialist, simple or complex, there is a ruling elite which rules all others member of society.

The classical elite theorists posit that elites derive almost invariably the original power from coercive sources through the monopoly of military factor. The minority, either “political class” or governing elite compose of all those that occupy political power or those that influence governmental decisions. This minority undergo changes in its membership and composition. These changes may ordinarily be by recruitment of new members of society. Sometimes the change is by incorporation of new social groups and accordingly a complete replacement of ousted elite by counter elite through revolution. The last form of change comes about when elite refuses to respond to the first two changes.

Elite theorists also talked about what they called the “circulation of elites”. This can be explained as a situation where by one set of elites (political executives) is replaced by another possessing similar traits. This is what Mosca Pareto was describing when he generalized that “history is a graveyard of aristocracies”. This statement shows the inevitability of change when the elite facet. This change can take different forms: (1) between different categories of the governing elites itself (e.g. from the non-governing elite) or between the elite and the rest of the population and while such changes go on, they affect merely the form but not the structure of rule which remains at all times minority dominated (Oligarchy).

The application of this theory to this article posits that elites consist of those successful persons who rise to the top in every occupation and stratum of society. For example; we can talk of elite of lawyers or Senior Advocates (SAN), elite teachers (Professors), politicians (god fathers, elected and appointed officials) among others.

The elite own political structures which return the god sons to office, bribes the judiciary or electoral umpires to decide cases in their favour. They equally provide financial resources to the non-governing elites to oil their political machine. They control the decision making of their parties and their communities respectively. The role of the elites in Nigeria is captured by the role the once powerful kitchen cabinet of late President Umaru Yar'Adua. The last days of the President's rule was characterized by conscious attempts by the unofficial cabinet to hold on to power, hiding under the delusion that the former president was active enough to pass instructions on even critical state matters that sometimes required physical strength, which events have now demonstrated he surely lacked.

Led by the former first lady, Hajia Turai, the kitchen cabinet was so powerful that at a time top government officials were also at its knees. The kitchen cabinet wanted to hold on to power so as to control the machinery of governance from the dark recesses of Aso Rock. Even when the president was ill and flown to Saudi Arabia, the nation was made to believe that all was well. Attempts by state government and members of the National Assembly to see the ailing president at the King Faisal Hospital were rebuffed by the kitchen cabinet. The late leader was kept in communicado. Not one of his ministers or party official was able to see him, including the National Chairman of the People's Democratic Party, Chief Vincent Ogbulafor.

The cabal held sway. The misty situation, orchestrated by the kitchen cabinet fuelled speculations about the status of the current president whose hold on power was threatened by the cabal.

Evaluation of the Practice of Constitutionalism and the Rule of Law in Nigeria

In the subsequent pages an attempt will be made to evaluate Constitutionalism and the Rule of Law in Nigeria using Dicey's Concept's of the rule of law and Fritz (2008) concept of constitutionalism. Are the Nigerian Presidents above the law? This is the question that has agitated the minds of the Nigerian Bar Association, the Civil Liberties Organization, Femi Falana, human rights activists and other prominent Nigerians in recent times. The analysis below will help in addressing answers to the puzzle stated above.

For someone who had a lot of political goodwill at the onset of the 4th Republic in 1999, Chief Olusegun Obasanjo indeed performed below average. This is the unanimous verdict from scholars and public affairs analysts. At a national seminar on Democracy, Good Governance and National Development in Nigeria on May 28th 1999, Chief Obasanjo as President-elect declares thus:

The one thing I have always thought about when we say PDP "Power to the People" is what power to the people means. Power to the people means that we, the elected representatives of the people are accountable to the people. We the elected representatives of the people have the democratic dividends they are entitled to. Therefore, we have been elected by the people to deliver those promises we made during the campaigns. No matter the period, whether in months or even years, Nigerians will be asking what they will get. What will they get from electing you as their Senator, a member of the House of Representatives, Governor and what they will get from electing me as their president and Turaki Abubakar as their Vice-President? Power to the people means that we have faith in our future, Obasanjo (2000:53).

Ten years later, the euphoria had long disappeared replaced by delusion, resentment and regret from the populace. The Obasanjo administration had turned Nigeria into a lawless state arming groups to perpetrate violence at elections, kill political opponents and circumvent due

process. The provisions of the law which he had indirectly referred to were honored in the blatant breach of them. The 2007 general elections have been consistently described as the worst the country has ever had, Ali (2007:1).

The first salvo of the undemocratic style of the administration was fired at Chief Evans Enwerem, former Senate President, who was spuriously removed with monetary inducements simply because he disagreed with the executive on the principles of governance. The lower house was also not spared as Obasanjo maintained constant hostility to the speaker, Alhaji Ghali Umar Na'Abba. Attempts to remove the speaker failed on many occasions but led to the near impeachment of Obasanjo on charges of constitutional violations, Ali (2007:21).

Ayodele (2007:22) observes that the Obasanjo administration consistently interfered with the independence of the Independent National Electoral Commission (INEC). This clearly shows why INEC was not a neutral organizer of elections. Recent Supreme Court and Election Tribunal reversals of so-called electoral victories were nullified due to the failure of INEC to find the ANPP candidate and former governor, Prince Abubakar Audu on the ballot paper. This was brazenly done despite constitutional provisions that only the law courts can avoid an aspirant's candidacy.

The government was also highly autocratic in terms of party administration. Due process never influenced decisions of party governance. Ayodele (2007:22) opines that former PDP National Chairman and presidential candidate, Chief Barnabas Gemade, was constantly at loggerheads with President Obasanjo over party administration and discipline. The President had reinstated Chief Tony Anenih, erstwhile Minister of Works and former PDP Board of Trustee (BOT) Chairman after being suspended by Chief Gemade for indiscipline and insubordination. Chief Gemade was soon shoved aside and replaced by Chief Audu Ogbeh. President Obasanjo's intolerance of criticism and advice soon led to the forcing out of Chief Ogbeh as PDP Chairman at gun-point! There was no democratic consensus in these decisions. The President simply carried on like a garrison commander. He ultimately found his alter ego in Colonel Ahmadu Ali rtd. Who replaced Chief Ogbeh. Lack of internal democracy did not exist in the PDP alone but all facets of governance. The President constantly used his office as Commander in Chief to prosecute real and perceived political opponents. Opposition consolidated when Chief Obasanjo wanted to succeed himself in power through proposals for a highly controversial constitutional amendment that would permit him to contest in 2007 for a third term agenda were mercilessly persecuted.

Dr. Chimaroke Nnamani, former Governor of Enugu State, Dr. Orji Uzor Kalu, former Governor of Abia State, Mr. Boni Haruna, former Governor of Adamawa State, Senator Bola Ahmaed Tinubu, former Governor of Lagos State and Dr. George Akume, former Governor of Benue State are some of the governors that were consistently harassed by the Economic and Financial Crimes Commission (EFCC).

Oladeji (2006:1) also supports Ehirim's observation noting that not only governors were harassed but other prominent citizens as well. Former Chief of Army Staff, General Victor Malu, former Senate President, Ken Nnamani and the Late Chief Sunday Awoniyi, former PDP Chieftain are glaring examples. The peak of intolerance for due process and the rule of law was the eventual expulsion of the Vice-President, Alhaji Atiku Abubakar from the PDP and the declaration of the vacancy of the office of the Vice-President. This was however reversed when the Supreme Court ruled that the President had no constitutional powers to remove the Vice-President, (Akhare, 2007:35).

So personalized was the apparatus of governance that the former Governor of Anambra State, Dr. Chris Ngige had his security details withdrawn for simply being a political ally of the Vice-President. The office of Governor was not too sacred for the President to permit such a breach of the rule of law. The abeyance of the rule and due process also manifested when Governors Rasidi Ladoja, Oyo State, Joshua C. Dariye, Plateau State and Ayo Fayose of Ekiti State were removed illegally through impeachment procedures and process that had more of political coercion than due process. Two of these former Governors, Ladoja and Dariye were later reinstated by the courts, (Odaudu, 2007:25).

On the economic front, the Obasanjo government constantly withdrew billions of naira and spent same from the consolidated revenue account without the written or verbal expressed consent of the National Assembly. The government also consistently disobeyed judgments of the Supreme Court especially the order of the court to release over 38 billion naira of local government funds owed Lagos State government. Petroleum pump prices were increased 6 times during the tenure of the administration without due process. This arbitrariness also showed in the sudden hike of the Value Added tax (VAT) from 5 to 10 percent. All over the place it was one form of breach or another. The aftermath of these was a situation of insecurity, insensitivity, lack of transparency in public affairs, all, strong indicators of poor governance.

The same question agitated the minds of Alex Ekwueme, former Vice President and other prominent Nigerians in 2005. Ekwueme who is not given to commenting frequently on national issues opened up on the issue in June 2005. In a five-page document, he criticized former President Obasanjo for acting lawlessly. With specific reference to the continued withholding of the funds meant for local governments in Lagos State, despite the Supreme Court judgment, Ekwueme said the President was acting as if he was above the law. He noted that in spite of the clear, unambiguous, and unequivocal unanimous decision of the Supreme Court, the federal government continued to hold the statutory allocation due to Lagos State.

The former Vice President is surprised that with the battery of lawyers available to advise the federal government, the president nevertheless persists in perpetuating illegality. However, Ekwueme believes that there are limits of presidential outlawing and constitutional provisions for curbing the excesses the president in this matter.

The May 14, 2005, launching of the Obasanjo Presidential library was also described as an abuse of power. The late Gani Fawehinmi said that the launching of the library as illegal and unconstitutional. About N6 billion was realized from individuals and corporate bodies at the event. The radical lawyer thereafter filed an action against the president at the Federal High Court, Abuja over the project; joined in the suit as defendants are the Economic and Financial Crimes Commission, EFCC, and Independent Corrupt Practices Commission, ICPC, and Code of Conduct Bureau.

In the suit, Fawehinmi wants the court to determine whether it was abuses of power for Obasanjo a serving President to launch an Obasanjo Presidential library at Abeokuta, Ogun State on May 14 2005 and receive gifts of money for that purpose from federal government contractors and beneficiaries. He claims that this amounts to corrupt practices and abuse of power contrary to section 15(5) of the 1999 constitution. This section provides that: "The state shall abolish all corrupt practices and abuse of power".

According to him, it is also a flagrant disregard of the code of conduct for public officers contained in item I fifth schedule, Part I of the 1999 Constitution. It provides that: "A public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities".

Fawehinmi is also seeking for a declaration that the composition of the board of trustees of the library being a private project of a serving President is both a violation of sections 15 (5) and 23 of the 1999

constitution. He claimed that Christopher Kolade, then Nigeria's High Commission in Britain, Governor Gbenga Danuel of Ogun State and Iyabo Obasanjo-Bello, then Ogun State Commissioner for health, who were all public officers are incompetent to serve Obasanjo's private business. He claims that Karl Masters, Vernon Jordan both from the United States and Richard Branson, from the United Kingdom were incompetent to serve as board members because they are foreigners.

The human right activist is equally asking for a declaration that the license which Obasanjo as Chairman of the Federal Executive Council approved for himself in 2003 the establishment of the Bells University of Technology to which the presidential library is affiliated is an abuse of power.

It is against this background that Fawehinmi is asking for the mandatory order directing the EFCC and ICPC to investigate all the contracts awarded by the federal government to all the donors at the launching since the inception of the Obasanjo's Presidency.

He wants these agencies to be mandated to take appropriate actions against the president and the donors within the provisions of the EFCC Act No 1 of 2004 and the ICPC Act of 2000.

This he said includes for forfeiture of the entire project and the Olusegun Obasanjo Presidential Library Fund.

The civil rights groups noted that there was a fundamental flaw in the president's anti corruption crusade because it hypocritically defines corruption so narrowly, selectively and whimsical as to exclude what ever the president found it convenient to exclude.

Since November 23, 2009, the President has been bedridden and could not perform his functions. Yet, he has refused to follow constitutional due process by writing a letter that would excuse him from duty and allow the Vice President to function as an acting president. Where, then, is the due process?

Specifically, the *Guardian* witnessed an informal colloquium on the state of the nation, late last year, where most participants concluded that the Yar'Adua administration will be further weakened by a series of constitutional breaches when he faces the electorate soon.

The participants including lawyers, civil society activists and academics actually listed six critical areas where alleged breaches have been most visible, while the Attorney General of the Federation has reportedly looked the other way. The key issues raised are:

- The service chiefs remanded unconfirmed according to Army Act 2004
- No Clerk in National assembly that conveyed appropriation Bill to Saudi Arabia.
- Oath Act elevated above the constitution on Chief Justice of the Federation swearing in 50 days absence without Acting President.
- Director General of NAFDAC appointed without membership of PCN and
- Director General SEC appointed without required qualification in capital market.

One discussant noted a case exclusively reported by *The Guardian*, on Monday June 2, 2008, titled “General in Court, Queries Service Chiefs Appointments”. The discussant who spoke in a passionate tone noted that, ‘as we speak now, the Yar’Adua administration has refused to comply with section 18 of the Army Act (2004), which provides that Service Chiefs must be confirmed by the National Assembly before they can assume office.

The issue came to light in 2008 through a retired General’s quest for justice against the military authorities that never confirmed the appointments of service chiefs that allegedly retired him.

Section 18 of the Armed Forces Act CAP A20 Laws of the federation, 2004 Provides in Sub-section:

1. The President may after consultation with the Chief of Defence staff and subject to confirmation by the National assembly, appoint such officers in this Act referred to as the service Chiefs as he thinks fit, in whom the command of the Army, Navy, and Air Force, as the case may be, and their Researches shall be vested.

Subsection 2 states: The Service Chiefs shall be known:

- (a) In the case of the Nigerian Army, as the Chief of army Staff
- (b) In the case of the Nigerian Navy, as the Chief of Navy Staff, and
- (c) In the case of Air Force, as Chief of Air Staff.

It would be recalled that this paper noted that, the National Assembly had confirmed no service chief since 1999, when this democratic dispensation began, not even since 2004. And the ones that the President Yar’Adua appointed shortly after the revelation of the lacuna in court in 2008 have not been confirmed till date. No names were submitted to the National Assembly.

Inquiries too to the President of the Senate and the Speaker of the House on why they have not asked the President to send his nominees to the

National Assembly for confirmation has not received any response since 2008.

Another critical breach is the non-compliance with Section 51 of the Constitution, which specifically provides for the appointment of the clerk of the National Assembly. This is the provision: there shall be a Clerk of the National Assembly and such other staff as may be prescribed by an Act of the National Assembly, and the method of appointment of the clerk and other staff of the National assembly shall be as prescribed by that Act.

The colloquium pointed out that there is an indication that the new Supplementary Appropriation Act may be voided by a court very soon, not because of the controversy generated by the reported assent of the President in Saudi Arabia, but because according to the legal process of transmitting Bills to the President, it is only the Clerk to the National Assembly that can do that, not the presiding officers of the National Assembly. But at the time of transmitting the Supplementary Appropriation Bill to the reportedly recuperating President in Saudi Arabia last week, there was no Clerk of the National Assembly. Reason: The discussants quoted a recent revelation in the Guardian to the effect that, the Acting Clerk of the National assembly that signed the document as Clerk of the National Assembly has not been appointed, even as Acting Clerk by the National assembly Commission. Mr. Yemi Ogunyomi who signed the Bill to the President is still Deputy Clerk of the National Assembly.

The Clerk of the National Assembly, Alhaji Nasir Arab began his terminal leave since October 12, 2009 when Mr. Ogunyomi was announced as Acting Clerk without any letter, even till date and his (Arab's) terminal leave will end on 12 January 2010. There is no indication that by January 12, 2010, there will be a Clerk of the National Assembly.

But mysteriously, by a curious twist of politics in the National Assembly inner recesses, there is no Clerk of the National Assembly, no Deputy Clerk of the National Assembly, no Clerk of the Senate, No Clerk of the House of Representatives and no Deputy Clerk in the House since the Deputy Clerk in the House Mr. Oyeniyi Stephen Ajiboye began pre-retirement leave in October last year.

Despite the provision in Section 51 of the 1999 Constitution, there has been no Clerk in the Senate since June 10, 2008, when Alhaji Umaru Sani retired as Clerk of the Senate. Similarly, the last Clerk of the House of Representatives Chief Collins Walter Nwosa retired since 12 January 2005.

But the discussants feared that some opposition leaders might go to court soon, to challenge the validity of the Appropriation Bill transmitted by

an Illegal clerk of the National Assembly to the President in Saudi Arabia. The Attorney General of the Federation announced gleefully last week that the President had signed the 2009. Supplementary Appropriation Bill into law in his hospital bed in Saudi Arabia.

It is the same way lawyers, including a Senior Advocate of Nigeria, SAN Chief Adegboyega Awomolo were last week worried by the manner the new Chief Justice of Nigeria was sworn in without a letter of appointment by the President.

The former Attorney General of Osun State, Awomolo said there had been no appointment of a new CJN, as the Senate had only conveyed a confirmation to the office of the President.

As a participant at the colloquium put it, “what if the President returns next week to nominate another CJN since he has not reacted formally to the confirmation of the new CJN with a letter appointing Justice Katshina Alu, who was controversially sworn in last week by outgoing CJN, Justice Idris Legbo Kutigi, who was made to rely on an Oath Act, instead of the 1999 Constitution’s provision that the president should do so.

There were reports of eight Justices of the Supreme Court, who were absent at the swearing in ceremony last week, although all of them are resident in Abuja.

Apart from the absence of the President for the past 41 days without authorizing the Vice President to act as President, the colloquium also noted that it was on record that when the Director General of NAFDAC was appointed early last year to replace the current Information Minister, the nominee was not a registered member of the Pharmacists Council of Nigeria (PCN), as provided by the NAFDAC enabling Act. It was recalled that the nominee from Benue is actually a physician, who was staying in the United States at the time.

In 62 years of the coming into force of the Universal Declaration of Human Rights in 1948, which Nigeria has since adopted, it is sad that gross cases of human rights abuse abound in Nigeria.

More prevalent in the polity last year has been prolong pre-trial detention that has affirmed the equitable maxim that “delay defeats equity”. This has affected the rights and civil liberties of suspects and slowed down the pace of justice dispensation by the court. Suspects in the nation sometimes spent over a decade in person as Awaiting Trial Inmates. This is in consistent with the constitutional provision for arraignment with a reasonable time (48 hours). Equally rampant in Nigeria has been the degrading treatment meted out to prisoners, detainees, suspects and the

prevailing harsh and life threatening prison conditions. Also employed by the Nigeria Police and other security agencies have been torture as a tactic of interrogation and as a tool of extortion (Eme, 2008).

The most illustration is the recent court judgment between the EFCC and James Ibori. James O. Ibori, former government of Delta State, has a reputation for winning cases. There is hardly anything wrong with that. The courts, as arbiters in disputes, are free to pronounce him guilty and order appropriate penalty. In doing so, however, the courts must clearly establish the basis for the decision, which must be in accordance with the laws of the land. This is to say presiding judges must be fair, and their conclusions should be convincing.

These are the areas the two major litigations that have seen Ibori in and out of court since 2003, failed to meet public expectation. In the case of theft against James Ibori, the court established that one James O. Ibori was convicted for theft of building materials in 1995 but could not say whether the convict was James O Ibori, the then governor of Delta State. It was such a controversial and unconvincing judgment. Expectedly, it generated a lot of credibility problems for the judiciary.

The case of 170-count charges of corruption against Ibori during his eight-year tenure as governor has left a huge amount of controversy in its trail. First, Ibori objected to being tried by the Federal High Court in Kaduna. Rather he wanted the case transferred closer home in Benin. But the authorities did more than the asked for. They created a Federal High Court at his doorstep in Asaba Delta State.

At the end, Ibori got the judgment he wants. He was acquitted on the 170-count charges. Many have criticized the judgment as the exact opposite of what the public thinks and knows about Ibori's material possession. Some have petitioned the appropriate authorities that the trial judge had compromised himself. He has subsequently been given a query.

Lessons for Nigeria

From the discussions above Nigeria has a lot to gain and learn from practice of constitutionalism and the rule of law. The legitimacy of governance, that is the positive support and competence of government to formulate and deliver services, and respect for human rights and civil liberties should be properly defined. With the above-cited gains the rule of law and constitutionalism may be most correctly defined as a theory of governance, relying on a series of legal and social constraints designed to encourage order and to prevent arbitrary and unreasonable exercise of governmental powers.

From what is currently on ground in Nigeria, it would appear that the rule of law and constitutionalism wear more of Marxist colouration in its practice. In Marxist conceptualization, these two interrelated concepts are instruments of oppression of the voiceless and the disempowered at the hands of the power holders, which set the laws to suit themselves.

To move away from the above conceptualization of the terms, the underlisted are recommended: There is a need for the Nigeria police and other security agencies to undergo mandatory training in human rights law. The training is to equip the law enforcement agents with the basic knowledge of how human rights laws operate to make the officers more effective in their duties.

- There is a need for a constitutional court to be established to help resolve constitution related matters and election and human rights related disputes.
- The legislation providing for a code of conduct should be strengthened. The code of conduct should require a full disclosure of assets before taking office and upon leaving office. Such disclosure should be made to a prescribed authority and within a prescribed period of time.
- Where parliamentary or executive immunity is provided, such immunity should be limited to acts carried out during the course of duties as a public official, not extended to all act (especial criminal acts)
- There is need to include clearly defined criteria in the constitution under which the president can be removed through no-confidence motions or through impeachment proceedings.
- Breaches to the rule of law and constitutionalism should not be tolerated as experienced in the past but be sanctioned severely to serve as a deterrent to others. The judiciary should be properly independent and funded and strengthened to be able to discharge their functions.
- The media should b proactive in educating the citizens and creating consciousness, of good governance, respect for constitutionalism and the rule of law both by the leaders and the led. To achieve this, all laws inhibiting their operations should be repealed.
- It is suggested that only persons of high moral standing and integrity should be elected or appointed to positions of trust in government. It

is only such persons who can actually obey and respect the rule of law and constitutionalism.

Conclusion

The past years of the Obasanjo and Yar'Adua administrations breed corruption and insincerity in governance. It is indeed ironic that these situations came from governments that kept propounding the rule of law, constitutionalism, and good governance. A gap therefore existed between the ideology of governance they advocated and the actual acts of governance they took. Perhaps the most damning verdict is the very flawed conduct of the 2007 general election where a lot of mandates were stolen or denied. The verdict of the courts in these matters underscore the declarations of international election monitors especially that of the European Union (EU) who have constantly maintained that the elections were marred with numerous incidents of rigging, ballot snatching, intimidation and violent thuggery and unpardonable bias by the official election managers, the "Independent" National Electoral Commission (INEC) which was anything but independent.

The refusal of the United States (US), United Kingdom (UK), France and Germany to accept the former Chairman of the PDP, Ahmadu Ali as Ambassador because of his role in the flawed elections also supports allegations of the circumvention of due process and a huge breach of the rule of law, tenets of democracy and good governance. It is instructive to note that President Yar'Adua also attained power through this same flawed process, hence his greatest challenge of illegitimacy.

From the above theses, it is clear that the rule of law and constitutionalism are ideals which are difficult to attain in their totality. Very few societies have come close to achieving the rule of law and constitutionalism in their totality.

However, to ensure sustainable human development, actions must be taken to work towards these ideals with the aim of making them reality. In observing these ideals, the rule of law and constitutionalism will shift from being aspirations to a glaring reality for future leader and the led to follow.

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