

The Rule of Law in a Military Government — An Appraisal

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I would like to preface this lecture with a quotation from the present Chief Justice of Nigeria, Hon. Justice M. L. Uwais, CON on the importance of the observance of the principles of the Rule of Law by all governments and the effects of its disregard; I quote:

“If Governments treat court orders/judgements with levity and contempt, the confidence of the citizens in the courts will be seriously eroded and the effect of that will be the beginning of anarchy in replacement of the Rule of Law.”

There is no doubt that there has always been some traces of unreasonableness or arbitrariness in the action of man or governments. Even in the home or in small communities those who find themselves in position of leadership/authority do exhibit traits of abuse of power and often take unkindly to any attempt to limit their authority or power, especially if they are invested with absolute authority like the military in modern government. But the principles of the Rule of Law however emphasise the fact that both the ruler and the ruled are subject to law even in a military dictatorship, hence the reason for this discourse.

Permit me to quote from one of our renowned Constitutional Lawyers where he remarked as follows, that: “Constitutional Law purists might wonder at the possibility or even utility of discussing the observance of the Rule of Law and law in a military administration. They are very quick to point out that the two are irreconcilable odd bed-fellows in the sense that while one deals with legality and regularity, the other derives and maintains its authority and existence by force. It is maintained that one is exclusive of the other. The attempt to even discuss them together is like looking for a piece of needle in the Atlantic Ocean.”¹

This notwithstanding, I have decided to embark on the academic exercise because of the times through which we have lived, our experience in the recent past and to serve as a guide to our future. Let me first attempt

the definition of the Rule of Law. According to Jean-Flavien Lalive, “The Rule of Law is based upon one permanent and fundamental factor, as well as others which may be considered more flexible and relative. This permanent factor is the belief that every individual has the right to enjoy the dignity of man. There is another factor which is more flexible and complex, namely that a country which takes the Rule of Law as its authority is not obliged to adopt only one particular form of legal procedure and institution...”²

What is crucial to the operation of the Rule of Law however is the fact that man is governed by the law and regulations and not by the whims and caprices of the ruler. The features of the Rule of Law was graphically set out in 1885 by Professor A. V. Dicey, the details of which I do not intend to belabour you with for now. Suffice it to say that the concept of the Rule of Law is an ancient one, dating from the Aristotelian period and developing right through the middle ages to modern times. Many centuries ago, it was recognised that government possesses enormous powers which if misused may be employed to oppress individuals, and this has been a matter of concern to both political and legal philosophers. Hence the search for a suitable and somewhat permanent means of subjecting governmental power to control. The answer was found through the instrumentality of law. Thus Aristotle remarked that: “The Rule of Law is to be preferred to the rule of man. We do not permit a man to rule but the law...”³

By this, that great philosopher meant that where the Rule of Law prevails, government will be better organised by law rather than by the dictates of the leaders, which invariably results in chaos. Later on, Grotius and other philosophers within the Western Civilization used natural law as the basis of a new international law, worked out in the hope of setting limits to the conduct of States.⁴ The medieval period saw the close of the Dark Ages and marked the emergence of some semblance of law and order from a long period of chaos. The prevailing theory during this period was that law, of some sort, the law, whether of God or man, should rule the world.⁵ The rise of parliament and the idea of its sovereignty in the 14th and 15th centuries helped to emphasise and modify the principle of the Supremacy of Law. The proposition was that although law was supreme, parliament, which is sovereign could change or modify it. These developments helped in no small measure to mellow down the so-called divine power and rights of the King. In this way, the Kings of England e.g. Henry VIII, in all constitutional questions observed the letter of the law. Worthy of mention too is the struggle between King James I of England and Sir Edward Coke. King James thought that it was a divine prescription that he ruled his subjects and that he was not answerable to the common law and the courts, manned by his subjects! Coke, in reply, remarked that: “The King ought not be under any man, but under God and the law.”⁶ The

need for the control of the absolute power of the State over citizens also led to the establishment of constitutional governments whose authority was limited by the contents of the Constitution. The nature and extent of the limitations on governmental power do vary in pattern from country to country. The experience in the United States of America, France, Canada, United Kingdom and some third world countries with constitutions differ from one another. From this, it can be seen that the concept of the Rule of Law is not only of great antiquity, but it is also of universal validity. It is not a peculiarity of the English constitutional law or indeed the constitutional law of any particular country.

Meaning of the Rule of Law

Today, the concept of the Rule of Law is said to be devoid of any universal meaning. This means that it holds various meanings to different nations/individuals. For instance, in a purely formalistic sense, it may mean no more than “public order maintained by the force of politically organised society.”⁷ In another sense, it may be seen as “any ordered structure of norms, set and enforced by an authority in a given community.”⁸ In this sense, it is free from any particular ideological context and encompasses tyrannous as well as liberal humanitarian orders.

This concept may yet be defined as “a tradition that embodies at least three indispensable elements — first that every person whose interest is likely to be affected by a judicial or administrative decision has the right to a meaningful day in court, secondly that the deciding officers shall be independent in the real sense from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and thirdly, that day-to-day decisions shall be reasoned, rationally justified in terms that take full account of the demands of the particular situation.”⁹

But perhaps, the most notable definition of the concept is that of Albert Venn Dicey, the great Constitutional Jurist referred to earlier, who saw the Rule of Law as having three distinct meanings, namely: First that the Rule of Law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. This entails that no man is punished or be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.¹⁰

In his second meaning, Dicey states that the Rule of Law means the equality of all persons before the law or equal subjection of all classes to the ordinary law of the land, administered by the ordinary courts. In this sense, the Rule of Law means that no man is above the law and that every man, whatever his rank or condition is subject to the law of the realm and

amenable to the jurisdiction of the ordinary tribunals. The third meaning ascribed to the Rule of Law by Dicey is that the general principles of the English constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. Here, Dicey contrasts the situation in England with that in foreign lands where the security given to the rights of individuals results from the general principles of the constitutions. The Rule of Law in this sense may be used as a formula for expressing the fact that with us the laws of the constitutions, the rules which in foreign countries form part of a constitutional code, are not the source, but the consequence of the rights of individuals as enforced by the courts.

In 1959, the International Commission of Jurists (ICJ) described two ideas underlying the concept of the Rule of Law i.e.:

- (i) that all power in the State should be derived from and exercised in accordance with the law; and
- (ii) that the law itself must be based upon respect for the supreme value of human personality.¹¹

And more recently, Hon. Justice Chukwudifu Oputa JSC (Rtd.) also opined that: “The Rule of Law is a shield and a fortress against tyranny and oppression. It is the defender and custodian of individual rights and liberties, an asylum and a comfort to the oppressed, a guarantee of hope for the innocent, a chilling terror to the malignant and the vile, an encouragement to good behaviour by both government and the governed.”

From the above definitions, one can see that the often-talked about concept of the Rule of Law means different things to different societies or groups, depending on the angle from which the user of the expression wants his audience to look at it. For the purpose of this paper, however, I will adopt and summarise the meaning of the concept along the tripartite expressions or the three imperatives of A. V. Dicey; namely:

- (1) The Supremacy of Law over arbitrary power;
- (2) The Independence of the Judiciary; and
- (3) Equality of all before the Law.

With the above background of the concept of the Rule of Law, one can now proceed to examine its application in our own setting i.e. in Nigeria in the past years of military rule — which ended recently.

The Application of the Doctrine in Nigeria

Any attempt to discuss the operation of the doctrine of the Rule of Law in Nigeria must of necessity entail a look at the application of the doctrine under both civilian and military regimes. However, much of our discussion here will centre on the application of the doctrine under the military vis-a-

vis its ordinary concept and our expectations — which is the focus of this paper. Out of the 39 years of Nigeria's independence, the military ruled the country for 29 years; therefore any appraisal of the principles of the Rule of Law in Nigeria must of necessity discuss the Military in Governance.

What has been the role of the military in governance generally? Military rule to all intents and purposes, is the direct antithesis of a popular democratic rule i.e. while the former usually comes by power through the barrel of gun, the latter comes by the same power by the authority, power or choice of the people; whereas the former is a government of force, the latter is the government arising by the popular choice or will of the people. Ordinarily, the Nigerian Armed Forces has a Creed to which its members subscribe on Oath which runs thus:

“My honour is my faith
I vow my faith in Nigeria
The Supremacy of the Constitution
Our heritage of liberty.

My duty is my service
To defend Nigeria everywhere
Our territory, wealth and people
The cradle of our freedom.

Whenever the clarion calls
Whatever price or odds
My faith is one and ever
The Federal Republic of Nigeria.”

As was rightly observed by a Political Scientist, the creed conveys a lot of emotions and radiates patriotic zeal. However, it becomes hollow on the balance of societal judgement, given the political and historical experience of all Nigerians with the Military. And therefore we should ask ourselves some questions as follows: Where is Nigerian soldier's belief in the Supremacy of the Constitution when with each coup, the Constitution is suspended and the Rule of Law put in the cooler for all times? Where is the defence of Nigeria's wealth, with the dimension of the looting of the national and state treasuries which has been and is being revealed to us today? Where have our soldiers defended the nation when the principles of Federalism were buried with the emergence of successive military regimes which automatically turned the country into a one military command structure? And where is the Republic-Status of Nigeria when soldiers grab and inherit the power to rule for themselves without elections? ¹² There is no doubting the fact that the operation of the doctrine of the Rule of Law in whatever form has not been possible under military regimes because no matter how benevolent, the military by its very nature is unconstitutional,

an aberration, and autocratic by its inherent central command structure. Although, the Rule of Law is a dynamic concept, not really limited to a specific legal system, form of government or economic order, yet it has been recognised that it can be more fully realised under a system of government established by the will of the people, for example, a constitutional democracy.”¹³

Surprisingly enough, from the advent of the military in 1966 to its termination recently, all the military leaders from General Gowon (Rtd.) to the last, General A. Abubakar (Rtd.) have professed their commitment to the tenets of the Rule of Law and the recognition of individual rights and freedoms. Whether they actually observed this is for all and posterity to judge. Even though, the late Major-General Idiagbon of the Buhari-Idiagbon military era (1984–85), was once reported to have said that:

“A stable government is absolutely impossible anywhere in the world if the governed are denied their rights and they have nowhere else to seek redress.”

The draconian laws passed and the near absolute regimentation of society during that era belies the statement. Ironically too, some jurists and legal luminaries in Nigeria have made assertions to the effect that the Rule of Law was observed even under military regimes in Nigeria!

For example, Dr. Lateef Adegbite in his writings had said that:

“military regimes in Nigeria have striven to observe the fundamental features of the Rule of Law with only occasional transgressions here and there, necessitated by the exigencies of their task.”

The word ‘occasional’ there seems to me questionable, judging by the numerous times that the principles of the Rule of Law, were either jettisoned completely or abrogated. Furthermore, Chief F. R. A. Williams, GCFR, SAN while commenting on the Rule of Law under the military regime in Nigeria opined that:

“Military Government in Nigeria as we have come to know it since the coup of January 1966, is not a system of government, in which a despot or a military oligarchy operating above the law exercises absolute power. It is rather a system of government which after coming into existence by overthrowing the existing legal order, replaces it by a new legal order.”¹⁴

This seems to be a more objective, albeit not totally acceptable appraisal, taking into account the way some military regimes in Nigeria and indeed in Africa exercised power in government. It is important however to reiterate the fact that military regimes in Nigeria most of the time paid no more than lip service to the doctrine of the Rule of Law as will be evident in a moment.

To buttress this assertion, it is necessary to recall some of the incidents where the military engaged in the abuse of the cardinal principles of the Rule of Law or acted in excess of the minimum norms of governance acceptable in a civilised society. The most grotesque abuse of the Rule of Law under the military was through the reckless abandon with which and sometimes mindless way they used force and the instruments of state power on the innocent and helpless civilian populace.

The incidents of the harassment of ordinary citizens by military personnel abound and all this show that the military in power usually saw itself as above the law. For example, during the General Olusegun Obasanjo military regime (Feb. 14, 1976–Sept. 30, 1979), the house of the late Fela Anikulapo-Kuti was invaded by a lorry-load of armed men. When he complained, the explanation was that the act was perpetrated by the ubiquitous “unknown soldier”, and of course the victim went without any redress whatsoever. Also in 1985, the Supreme Court of Nigeria had cause to describe the forceful ejection of Colonel Odumegwu Ojukwu (Rtd.) from his residence in Lagos by a multitude of armed men as “executive lawlessness.” The Supreme Court as the last hope of the common man stood firm and dismissed the appeal of the Lagos State Government against the order of the lower court for repossession from Odumegwu Ojukwu. The Supreme Court, *inter alia*, reiterated that: “the essence of the Rule of Law is that it should never operate under the rule of force or fear.”¹⁵ Yet again, we may recall a minor traffic offence committed by the late Chief M. K. O. Abiola's son against an Airforce driver which prompted the invasion of his residence, molestation and detention of the late Chief M. O. Abiola himself and members of his family, an act which was condemned by the public as outrageous, brutish and barbaric, and yet he went without a remedy — a free citizen of this country where the Constitution has specific provisions for the protection of life and property! Chief Afe Babalola, SAN in condemning the attack said it was: “not only an assault on the dignity of Chief Abiola but that it was also an assault on the Rule of Law and freedom of the people of Nigeria.”¹⁶

It is instructive at this point to note that the Preamble to the Universal Declaration of Human Rights (1948) states that:

“It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.”¹⁷

All governments are enjoined to observe this principle. One notes with satisfaction however that the democratic government under the Presidency of the same Chief (General) Olusegun Obasanjo, now a civilian Head of State has, within a few weeks of coming into office set up a Panel/Commission under the Hon. Justice Chukwudifu A. Oputa JSC (Rtd.) to investigate human rights abuses in the country since 1975 to the end of the military regime. This decision is in the right direction and appears to be the single most important decision that affects the welfare of the people that has ever been taken by any government in this country in its recent history. It is important because of the numerous human rights abuses in Nigeria in recent years. As observed recently, by a commentator on public affairs, such a Commission is necessary: “if Nigerians are to be psychologically released from the trauma of the past terror unleashed on them in the last one and a half decades by agents employing the free use of the apparatus of state power.” He further opined that: “In circumstances such as we have experienced, only a thorough investigation of past abuses can restore the confidence of Nigerians in their nation and renew their courage to freely express their view in a democratic system.” It is our hope that by the time the Panel reports and government takes a decision on its recommendations, the wounds inflicted on the psyche of Nigerians and our system of administration of justice and fairness would have been substantially healed.

It is important that we briefly go through some of the characteristic features of military rule in Nigeria with a view to assessing the degree of terror unleashed on the psyche of the Nigerian nation in the last 29 years:

1. The Use of Draconian Legislations and the Ouster of the Courts Jurisdiction

The most common form of abuse of the Rule of Law is the use of ouster clauses in decrees to remove the court's jurisdiction, thus rendering them powerless in patent cases of the denial and deprivation of the people's fundamental human rights. It has been a peculiarly military phenomenon. Even though there were just a few cases of such provisions during the Gowon regime, from the Babangida era, right through to the Abacha regime, the country witnessed a great upsurge in this practice. All the detention laws passed under the military regimes like the State Security (Detention of Persons) Decree No. 2, 1984 ousted the jurisdiction of the Courts. Usually, the military begins its life by promulgating decrees for the suspension and modification of the Constitution, which empowers it to make any laws however heinous, unjust and immoral, without being subject to challenge in any court in Nigeria.¹⁸

These decrees are most often used to oppress and intimidate the citizenry and silence or control the voices of dissent in society.¹⁹ The

choice of any of these obnoxious laws is determined by the political climate at any given point in time. It is more so when the government feels threatened by an interest group or individuals.²⁰ Virtually all the decrees, all the provisions purporting to oust the court's jurisdiction also exclude any inquiry as to whether the provisions of the fundamental human rights of the citizen have been violated. For example, section 1(2)(b)(i) of the Federal Military Government (Supremacy and Enforcement of Power) Decree No. 13 of 1984 provides that:

“the question whether any provision of Chapter IV of the Constitution has been, is being or would be contravened by anything done or proposed to be done in pursuance of any Decree or an Edict shall not be inquired into in any Court of Law and, accordingly, no provision of the constitution shall apply in respect of any such question.”²¹

One wonders then whether a military regime can thrive without the exclusion of the provisions of the constitution entrenching the fundamental rights of its citizens. Indeed, it can be argued that the denial of human rights is the cardinal point of military dictatorship. No military regime in Nigeria, no matter how benevolent, has been able to flourish without denying the citizens some of these fundamental rights.²²

Hence, where there is conflict between a decree and an unsuspended provision of the constitution, the decree would prevail. In *Lakanmi & Anor. v. A. G. of Western State & Ors.*,²³ the Western State Court of Appeal stated that:

“Once a decree is made, as provided in Decree No. 1 of 1966, nothing, not even the provisions of the constitution can derogate therefrom.”

Also, in *Ogunlesi & Ors. v. A. G.*,²⁴ the High Court of Lagos State held that decrees can override the provisions of the old constitution.

The first onslaught by law on human rights in Nigeria was the promulgation of the Constitution (Suspension and Modification) Decree No. 1 of 1966 amending Section 1 of the 1963 Constitution, thereby removing the supremacy of the constitution as the fundamental law of the land. A similar provision was re-enacted in the more recent Constitution (Suspension and Modification) Decree No. 107 of 1993. Section 5 of the Decree provides:

“No question as to the validity of this Decree or any other Decree made during the period 31st December, 1983 to 26th August, 1993 or made

after the commencement of this Decree or of an Edict shall be entertained by any Court of Law in Nigeria.”²⁵

With this, the courts were made incompetent to entertain any question as to the validity of a Decree or an Edict which violated human rights provisions in the 1963 Constitution. Subsequently, many other decrees followed suit, directly or indirectly suspending or modifying the 1963 Constitution and abrogating the powers of the courts.²⁵

In the light of these laws, one may therefore ask what happened to the authority of the courts in the promotion and protection of human rights? It is to the credit of our courts that the judiciary has neither allowed the system to collapse, even though it has also not in many cases stoutly stood against such arbitrary and uncivilised provisions, in the interpretation of the various decrees and edicts affecting human rights. One of the principal duties of a Judge is to use law to suppress force and fraud²⁶ and Lord Denning M. R. in *Wallesteiner v. Moir*²⁷ observed that:

“It is the duty of a Judge to denounce wrong doing when it is established before him. The courts speak for all law abiding citizens upholding the opinion of the good, and shakes the confidence of the wicked.”

Our Judges do not have to fight shy of Ouster Clauses, they should examine such decrees to see if they are in consonance with the unsuspended provisions of the constitution or have, as a matter of fact, actually rendered them powerless in determining a case. The Supreme Court in *Barclays Bank Nigeria Ltd. v. Central Bank of Nigeria*²⁸ categorically asserted that:

“In considering whether or not a court has jurisdiction to entertain any claim, it is our view that while a person's right of access to the courts may be taken away or restricted by statute, the language of any such statute will be watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. That is why it is now well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that where such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the courts.”

It is my submission that this is the right approach and that our judges should endeavour to make it a cardinal principle of approach in interpreting such laws whenever faced with them.

2. Retroactive Legislations

One other form of assault on the Rule of Law is in the promulgation by the Military of retroactive legislations. The Special Military Tribunal (Miscellaneous Offences) Decree No. 20 of 1984 introduced drastic penalties for various acts of economic sabotage including bunkering, stealing NEPA cables, tampering with pipelines, forging and uttering negotiable instruments, cheating at examinations, and dealing in cocaine, etc. For an ordered society, no one will quarrel with the provisions of this Decree, except for the death penalty imposed for cocaine dealing, as they keep in check the deviant in society, and the retroactive effect given to it. The Decree was deemed to have come into effect on 31st December, 1983, although it was actually promulgated on the 6th of July, 1984. Out of the four cocaine dealers and executed under the Decree, one committed the offence before the Decree was promulgated! Thus a sacred human life was taken under a penalty that did not exist when the alleged offence was committed. This is obviously a gross and reckless abuse of power and the sacred duty of those in authority to protect and preserve the citizenry. Another form of these offensive and objectionable laws is the Lands (Title Vesting, etc.) Decree No. 52 of 1993! Section 1(1) of which provides that:

“For the avoidance of doubt and notwithstanding anything to the contrary contained in the Constitution of the Federal Republic of Nigeria, 1979, as amended, the title to all the lands within 100 metres unit of the 1961 shoreline of Nigeria or ocean bordering the Federal Republic of Nigeria shall to the exclusion of any right accruing to any body corporate or unincorporate or industry, vest in the Federal Government of Nigeria without any further assurance than this Decree.”

Section 7 of the Decree characteristically backdated the commencement date to January, 1975. The import of this section is to circumvent the Land Use Act of 1978 which vests ownership of land in the State Governments.²⁹ One has often wondered whether such decrees as these were made for public good, to protect the interest of society or to advance the interest of some highly-placed individuals in our society, vide the list of those said to have acquired the Osborne Street reclaimed lands overlooking the Lagoon in Ikoyi, in Lagos State!

3. Military Tribunals

Under military regimes, military tribunals are usually set up to become part of the justice system on the pretext that they help to decongest the courts, that they make for a speedy adjudication process, and that they are aimed at reducing the problems of corruption, drug abuse, etc. In practice however, the proliferation of tribunals has considerably undermined our judicial system and thus denied the citizen of his rights to justice and fairness under our criminal justice system, as evident in the numerous cases of the deprivation of the liberty of the citizen and the very long periods for which victims were kept in detention under one pretext or the other. Not only that, these tribunals derogated from the judicial powers constitutionally vested in the courts. For example, the Failed Banks (Recovery of Debts, and Financial Malpractices) Decree No. 18 of 1994 has been seen to be rather vindictive and sectional in its application. In many cases, it overturned the age old principle of making the prosecution prove its case beyond reasonable doubt. Rather than speeding up the process, it left many suspects in detention for a period of about 2 to 3 years without trial. Invariably too, the composition and procedure of some of these tribunals were found to violate the provisions of the African Charter of Human and People's Rights.³⁰ The system was also found to be most undesirable especially where appeals were not allowed to the regular courts against the decisions of these tribunals.

4. Denial of Right of Appeal and Shifting the Onus of Proof

An important mechanism for self-correction in our judicial system is the process of appeal or judicial review. It is sad to note that in all the tribunals set up by military decrees, many of the provisions of these decrees were couched in varying languages, excluding appeals or judicial review. For example, Section 11 of the Exchange Control (Anti Sabotage) Decree provides that:

“No right of appeal to any court in Nigeria granted by any enactment or law shall apply in respect of the conviction of an offender or in respect of any sentence imposed by a tribunal constituted under this Decree.”³¹

It is equally unfortunate that these extra-judicial institutions such as special tribunals often ruled out the possibility of appeal. If an appeal was possible at all, then it was most of the time, to another Special (Appeal) Tribunal or to the Executive. The nine Ogoni tribesmen of Rivers State

who were sentenced to death in November, 1995, for example, could only appeal to the then Provisional Ruling Council (PRC).³²

Another aspect of the evil of military dictatorship and injustice contrary to the age old cardinal principles of law and justice are some provisions of military decrees on the evidential burden of onus of proof. A fundamental principle of our law is that he who alleges must prove. The general principle of law was overturned by several decrees i.e. the burden of proving guilt was shifted to the accused even where death was the penalty. For example, under the Public Officers (Protection Against False Accusation) Decree No. 4 of 1984, “the burden of proving, in any prosecution, that a message, rumour, report or statement which is the subject matter of a charge is true in every material particular shall be on the person charged, notwithstanding any contrary provision in any other law.”³³

5. Detention without Trial

Generally, in times of national emergency, governments make laws limiting the civil liberties of the citizens for the safety of the State, but after the crisis is abated, such laws are usually repealed. In Nigeria, however, provisions in military decrees empower the executive to detain people without trial, and this even in peace time! Usually no reasons are given by the detaining authority as to how a detainee constituted a menace or threat to the State. Attempts by the courts to order the release of such detainees on application by way of habeas corpus or any other procedure was treated with contempt and disobeyed with impunity.

In recent proceedings involving Dr. Beko Ransome Kuti, a civil rights activist, who was ordered to be produced by the detaining authority, the order of the court was flouted. In anger, the trial Judge in his ruling on an objection raised by the prosecution in relation to the release order, noted that it was “very disturbing that the executive was in the habit of flouting court orders.” He then declared that the failure of the State Security Service and the Inspector-General of Police to produce Dr. Kuti amounted to contempt and that they should be sanctioned.³⁴ Detention without trial definitely runs contrary to the rules of natural justice, personal liberty and fair hearing — and thus negates the principles of the Rule of Law.

The above incidents of abuse of the doctrine of the Rule of Law are some of the many that took place quite too often under past military governments in Nigeria. The various infractions and assaults on the Rule of Law while understandable because of the nature of the authority, was unwarranted. A military government even though ipso facto, un-democratic and unused to the strict adherence to the true concept of the Rule of Law owing to its obedience to the structure of a central authority with a central command culture, once it takes over, on its own, voluntarily a different

responsibility to its normal role, ought to strive to conform to the norms of government in a civilised world.

Conclusion

I have within the confines of my understanding, and the time and resources available to me tried to examine the features of the Rule of Law within the context of military government, which is not totally peculiar to only military regimes in Nigeria but also in most countries where the military have seized power, abandoning its traditional role of defending the nation. After a thorough examination, one may be tempted to conclude like some authorities that, to expect the observance of the Rule of Law, as understood by legal minds and by ordinary law abiding citizens, by a military government because of its very nature is like embarking on an arduous and interminable voyage or expedition looking for a point where two parallel lines will meet; yet one must submit that it is incumbent on any institution or body that voluntarily assumes the reins of power to govern, to endeavour to operate within the norms and cardinal principles laid down by the law and the constitution for governance, no matter how difficult or unpalatable for such institutions, in whatever circumstances because such norms are the minimum standards acceptable in modern societies for governance through the Rule of Law. In the alternative, the simple solution would be that any body or institution assuming the reins of power which knows that it cannot abide by the tenets of good governance through the Rule of Law should not venture into governance. It is my view that the judiciary, which is the last hope of the common man has a great role to play in this respect to ensure the sanctity and preservation of the provisions of the constitution and the observance of the Rule of Law by whatever government, be it military or civilian. The observance and enforcement of the principles of the Rule of Law is a ‘sine qua non’ for, and so cardinal to the existence and maintenance of a free and peaceful world. It is with this in mind that the Act of Athens, even in centuries past, described the Rule of Law as:

“Springing from the rights of the individual, developed through history in the age-old structure of mankind for freedom, which rights include freedom of speech, press, worship, assembly and association, and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.” ³⁵

It is my earnest hope that with the new dispensation in Nigeria, i.e. the fourth Republic, our fourth experiment in democratic governance, the Rule

of Law will thrive once again, with the judiciary living up to its traditional constitutional role. The repeal of most of the obnoxious decrees promulgated during the military era that nearly turned Nigeria into a police state in these past years, a pariah state that sent its citizens into exile for fear of their lives and a country shunned by the international world until the end of military rule recently, seem to augur well for the future.

In conclusion, let me emphasise the fact that the Rule of Law presupposes, in state governance and judicial administration, the exclusion of arbitrary power in its totality. The independence of the judiciary is a bulwark against tyranny and violation of the doctrine of the Rule of Law and an assurance that the sacred principles of the separation of powers under the Rule of Law is sacrosanct. Military regimes are essentially dictatorial, monolithic, unconstitutional and above all, antithetical to democracy. The doctrine of the Rule of Law needs an enabling environment like a democratic system of government within which to thrive. It suffered a serious assault to the point of emasculation under military regimes in Nigeria in the form of injustice and arrogant display of power brought about by various laws unknown to the civilised world. Our past attempts at and experience in democratic governance, namely from 1960–65, 1979–83 and the ill-fated third Republic from June 1993 to 17th November, 1993 ended in a fiasco and were overthrown or terminated by the military, accusing the elites and powerful as always inviting them to take over government! General A. Abubakar's regime, the last military government handed over power to a democratically elected government now under Chief Olusegun Obasanjo and has thus written his name in letters of gold as the second military leader in the country that voluntarily handed over the reins of government to a civilian democratic government. Since the doctrine of the Rule of Law is an indispensable apparatus of democratic government, it is hoped that now that the fourth Republic is in place, the citizens of Nigeria will be ruled only by the prescriptions of laws constitutionally enacted for the good of all as a government of the people by the people and for the people and that the legislators will be responsible enough not to give room for any future incursion of the military into governance. The air of relief and freedom is already blowing across the land and many of the obnoxious decrees like State Security (Detention of Persons) Decree No. 2 of 1989 and its like have been repealed, albeit in the last days of the military regime. It is hoped that the new democratic order will further improve on this to ensure that the bad (military) laws in our statute books inhibiting or encroaching on our fundamental human rights and freedom are removed. All the people of Nigeria can then breathe the true air of freedom and say, like that great American freedom crusader, the late Martin Luther King, Jr.: “we are free, free at last!”

The Way Forward

The struggle to defend, maintain and preserve the Rule of Law in Nigeria will likely persist, even during the democratic dispensation, because we have been so militarised and our psyche so badly battered. A fearless and courageous judiciary is a necessary condition for this struggle in order that the Rule of Law may triumph over that of force and absolutism, as the alternative may be a resort to violence. Indeed, in further support of this view, the Court of Appeal in one of its recent judgements in *Comptroller, Nigeria Prison Service, Ikoyi v. Adekanye* held that Judges and Courts bear a particular responsibility for ensuring that all branches of government — the Legislative, the Executive and the Judiciary conform with the principles of the Rule of Law. And where the provisions of the constitution are clear, strict compliance with them is not negotiable nor can it be circumscribed. It is also incumbent on Legal Practitioners who constitute the Bar, by virtue of their training, to be in the forefront of the struggle and be free and hold at all times to assist the judiciary to uphold the Rule of Law. It is their primary public service duty as the profession of law, as enunciated by Roscoe Pound, that great American jurist is primarily as public service calling. The permanent means of enthroneing the doctrine of the Rule of Law is to shut the door permanently to the military and restrict it to its constitutional role of defending the territorial integrity of the nation. To do this, coups have to be prevented by having in place a responsible democratic government comprising men and women of probity, competence and sense of mission. In addition, the military should be given a new orientation, good professional training, pre-occupying them with the performance of social services in times of peace, in social engineering and in functions to make them useful to society which has invested so much on their training and upkeep.

Finally, it is imperative for democratic governments to adhere to the tenets of the Rule of Law, separation of powers, promotion of fundamental human rights, tolerance of criticism, acceptance of opposition and assurance of a free press. They should frequently engage in consultation with trade unions, the organised private sector and various interest groups. It is not enough for them to pay lip service to the principles of freedom and the Rule of Law. Those in authority must realise that government is a call to duty, a sacred trust, and therefore do all it takes to create a conducive environment for the development of the full potential of its people socially, economically and politically.

Let me express my gratitude to the Vice Chancellor, the Acting Dean of Faculty of Law, the staff and students of this institution, located in a state which has produced most of the most distinguished legal giants and fathers of our noble profession and leaders of this Nation for giving me this opportunity to make my modest contribution to the principles and tenets of

good governance through the instrumentality of the law and the legal profession.

I thank you all for your attention.

NOTES

* A paper delivered by Chief J. K. Jegede, Director-General, Nigerian Law School, Abuja at the Ogun State University, Faculty of Law Annual Lecture on Wednesday, 18th August, 1999.

1(a) (Per Uwais JSC, now CJN, in *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR 621 p. 719

1. Abiola Ojo: *Constitutional Law and Military Rule in Nigeria* (1st ed.) Evans Brothers (Nigeria Publishers) Ltd., 1987 p. 239.

2. Ibid. p. 239

3. Aristotle (1962) — *The Politics* (translated with introduction by Sinclair T. A.) Harmonds Worth Penguin Books, p. 64.

4. Holdsworth W. S. (1960) — *A History of English Law Vol. X*. London, Methuen, p. 647

5. Ibid. p. 668

6. Quoted by Dambutshena E.: “The Rule of Law and the Judges” in *Conference Papers of the 10th Commonwealth Law Conference*, Nicosia, Cyprus, May, 1993 at pp. 38 and 39.

7. Aguda T. A.: “The Working of the Rule of Law in Nigeria” — A lecture delivered on 10th February, 1984 at Rivers State University of Science and Technology, Port Harcourt.

8. Ibid.

9. Ibid.

10. Dicey A. V. (1961): *Law of the Constitution*, p. 188

11. Nicolas Cowdery QC: “The Rule of Law” in *International Legal Practitioning*, June, 1999, p. 56.

12. Dr. O. B. C. Nwoli: “A Critical Analysis of the Provisions of the 1995 Draft Constitution on Nigeria Armed Forces and Police” in J. D. Ojo (ed.) *Proceedings of the Conference on the 1995 Nigerian Draft Constitution*, p. 83.

13. Cited in Ayua M.: *The Rule of Law in Nigeria* in Ayua I. A. (1995) *Law, Justice and the Nigerian Society*, NIALS, Intec., p. 69.

14. See Quotation in Abiola O. Op. Cit., p. 243.

15. See *Military Governor of Lagos State v. Ojukwu* (1986) 1 NWLR 621 at p. 719.

16. See *National Concord*, Thursday, January 28, 1988, pp. 1 and 10.

17. Nicholas Cowdery QC Op. Cit., p. 56.

18. See Section 5(1) *Constitution Suspension and Modification Decree 107 of 1993*.

19. See the *Newspaper Proscription and Prohibition (from Circulation Decree No. 115 of 1993)*.

20. See E. Azinge: *Law-making under Military Regimes — The Nigerian Experience* 1st Edition 1994, p. 37.

21. Culled from Abiola Ojo Op. Cit., p. 263.

22. E. Azinge, Op. Cit., p. 49.

23. 1971 U. I. L. R. 201.
24. 1970 L.D/28/69 (Unreported).
25. A. O. Otaluka: "Human Rights in the 21st Century Nigeria: 'The Challenges and opportunity it holds up for the Legal Industry'", being a Paper delivered at the Law Conference on "The Challenges of Legal Practice in the 21st Century" on 26th November, 1997, p. 26.
26. Ibid. p. 25.
27. 1974 3 All E. R. 217 at p. 223.
28. 1976, 6SC 175.
29. E. Azinge, Op. Cit., p. 43. See also International Commission of Jurists (ICJ), Nigeria and the Rule of Law, A Study (1996) pp. 53–54.
30. E. Azinge, Op. Cit., p. 45.
31. See also, The Special Tribunal (Miscellaneous Offences). Decree No. 20 of 1984.
32. ICJ Op. Cit., p. 66
33. The Exchange Control (Anti-Sabotage) Decree 167 of 1984; The Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984.
34. See The Punch, Tuesday, March 3, 1993 at pp. 1 and 3.
35. Culled from ICJ, Op. Cit., p. 47. (1999) 5 NWLR (pt. 602) page 167.