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THE PLACE OF THE RULE OF LAW IN DEMOCRACY

INTRODUCTION

It is my honour and privilege to have been invited to present this paper on this salient topic: **The place of the Rule of Law in Democracy.** The subject of the rule of Law must assume a topical dimension as we commemorate the nation's 47th independent anniversary, in a democratic dispensation. It is in this light that I must commend the pragmatic initiative of the organizers of this symposium to introduce this novel independence anniversary symposium. This is a welcome development. It is my fervent hope, that the symposium will be an annual event which will create a forum for us to take stock of the progress made so far in our democratic voyage.

To address this topic, I will focus on our democratic experience as a nation under the present political dispensation, furthermore, I will attempt to locate the rule of law in a democratic dispensation and finally, we will conclude with an assessment of the place of the rule of law in the Nigerian democratic experience.

DEMOCRACY IN NIGERIA

The theme of this symposium is "Democracy and the Rule of Law", while my topic is "The place of the Rule of Law in Democracy." The concept of Democracy has its early origin in the old Greek City states. But the concept has undergone many redefinitions and adaptations to suit the ideological backgrounds of divergent nation states. Nigeria has adopted the American model of democracy which was described by that great American Lawyer and President, **Abraham Lincoln**, as the government of the people, by the people and for the people, under the rule of law. Our own constitutional laureate, **Professor Nwabueze** amplified the definition in these terms:

"It is a form of government which recognizes and indeed, institutionalizes the people as the fountain of all powers, and enables them,

by means of elections at frequent interval on a universal adult franchise, to choose and mandate those to govern, a form of government on which the public good or the welfare of the people is the object”

In May 1999, Nigeria witnessed a successful transition from military to civil rule. This ushered us into the present democratic dispensation. Nigeria, like other African countries has largely retained the colonial structure which is not only undemocratic but has the potential of creating a state which is mainly coercive in authority, domination and hegemony¹.

For the purpose of this presentation, it is expedient to identify some of the salient characteristics of democracy. Among these characteristics is the place of authority in a democratic polity. Authority emanates from the people. Any authority that does not originate from the consent of the people is not democratic. Secondly, a democratic polity must be based on the foundation of law. The rock upon which a democratic government rests is its constitution, be it a written or an unwritten one. The constitution is a formal statement of its fundamental obligations, limitations, procedures and institutions. The constitution of the country is the supreme law of the land and all citizens are subject to its provisions. The constitution establishes the authority of the national government provides guarantees for fundamental human rights and sets forth the government’s basic operating procedures. Relating these basic tenets to the provisions of the 1999 Nigerian Constitution, one may safely posit that the Nigerian Constitution encapsulates the aforementioned principles.

The third characteristic of a democratic polity is that it must be legitimate. For our purpose, legitimacy involves two processes. One of these is that the leader has the right to rule, that is, according to the laid down rules for accession to power, he is the right person to be there. The other requirement is that he is ruling rightly. That is to say, that he is performing well according to his electoral mandate.

1. Prof. Ademola Popoola: The Rule of Law Versus the Rule of Politics In Nigeria’s Fourth Republic.

In addition to these, is the fourth characteristic, which is the element of choice. The people should have the right to effect changes in the leadership or the government of their country. Choice also includes all basic human freedoms, thought, movement, association, worship, etc, in relative terms. Fifthly, there must be accountability Leaders must be held responsible for their actions as representatives of the people who are trusted with power to achieve particular ends, and must so account for such actions periodically.

These five points may be seen as the minimum characteristics of democracy. However, the institutional framework for their operation may differ from one country to the other.² A critical appraisal of our present institutional framework as enshrined in the 1999 Nigerian Constitution will reveal that by and large the democratization of our political institutions is quite on course. We have a President and State Governors elected by popular votes. Similarly, we have legislatures elected by the same democratic process. We have an independent judiciary with a vibrant, dynamic and courageous Supreme Court at the apex of the judicial pyramid. The next issue to consider is whether we have the Rule of Law in our country

THE RULE OF LAW

The history of the doctrine of the rule of law is founded upon the theories of the early philosophers. According to **Aristotle**, “the rule of law is preferable to that of an individual”³. Similarly **Henry Bracton**, writing in the thirteenth century, maintained that ‘the king himself ought not to be subject to man, but to God and to the law, because it is the law that makes him king’

The last stage in this concept was propagated by **Professor A.V. Dicey** who maintained that the doctrine of the Rule of Law has three aspects.⁴

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2. TRANSITION TO TRANSITION: Prospects of an Enduring Democratic Polity in Nigeria by Prof. J. Isawa Elaigwu, NIALS Annual Lecture Series Vol. 16, pp.5-6.
 3. See Politics III, 16 (trans. Jowett Ed Davis)
 4. A.V. Dicey: Introduction to the study of the Law of the Constitution.

According to Dicey, first, the doctrine means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. He maintained that, powers, whatever their extent, must be exercised in accordance with the ordinary law of the land. Dicey's second aspect of the rule of law means equality before the law, or the equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts. Thirdly, according to Dicey, the 'Rule of Law' may be used as a formula for expressing the fact that in England, the law of the constitution is not the source but the consequence of the rights of individuals as defined and enforced by the courts.

Notwithstanding the wave of criticism of the views of Dicey on the Rule of Law, his postulations give us a pragmatic picture of the concept of the rule of law under a democratic dispensation such as ours. To properly appreciate the concept, we must understand that there is a salient dichotomy between the "rule by law" and the "rule of law". Under the rule "by" law, the law is an instrument of the government, and the government is actually above the Law. But under the rule "of" law, no one is above the law, not even the government. As a power regulator, the rule of law has two functions: it limits government arbitrariness, abuse of power, and it makes the government more rational and its policies more intelligent. The opposite of the rule of law is the rule of person(s). The common feature of the rule of person(s) is that "what pleases the ruler(s) is law". Thus, under the rule of person(s) there is no limit to what the government can do, and how they do things. In contrast, a salient aspect of the rule of law is "Limitation". The rule of law puts limits on the discretionary power of government.

If the government is to be restricted in its exercise of discretion, the government must follow legal procedures that are pre-fixed and pre-announced. As **F.A. Hayek** postulated: "the rule of law means that a government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."⁵

5. Friedrich Hayek: *The Road to Serfdom*. University of Chicago Press, 1994.

It is my view that democracy and the rule of law have a good chance of success in the present political dispensation if the following requirements, among others prevail:

- (i) No person shall be held under arrest without explicit, written charges;
- (ii) Persons charged with crimes should not be incarcerated for indefinite periods without speedy and public trials;
- (iii) The police may not apply torture or physical or psychological abuse against suspects under any circumstances;
- (iv) Persons shall not be subject to double jeopardy in criminal trials;
- (v) Retroactive laws are prohibited;
- (vi) The society should develop institutions which enjoy independent bases of power to act as a check on the exercise of power by government; and
- (vii) The judiciary should be independent.

CONCLUSION

In this paper, attention has been focused on the Rule of Law under the present democratic dispensation in Nigeria. The country has just witnessed a smooth transition from one civilian government to another. This is a sign of some measure of political stability in the democratic process. We have examined the concept of democracy both from the universal perspective and in the context of the Nigerian nation state. We have traced the origin of the doctrine of the rule of law, and have articulated some requirements that will promote the twin concepts of democracy and the rule of law.

The point must be made that the democratic state cannot guarantee that life will treat everyone equally, and it has no responsibility to do so. However, as the American constitutional law expert, **John P. Frank** postulated: *“Under no circumstances should the state impose additional inequalities; it should be required to deal evenly and equally with all of its people”*⁶

6. THE RULE OF LAW: USINFO Publications www.usinfo. State Gov.

In the present democratic dispensation the judiciary has been playing a pivotal role to check any arbitrary exercise of power on the part of the government. The courts have consistently championed the cause of upholding the rule of law in our nascent democracy. In the celebrated case of ATTORNEY GENERAL OF LAGOS STATE VS. ATTORNEYGENERAL OF THE FEDERATION (SUIT NO. SC.7012004)⁷, the case relating to the withholding of the Lagos local government councils allocations, the Supreme Court in a unanimous verdict condemned the brazen acts of illegality of the Federal government as follows:

“Nowhere in the Constitution is the President expressly or impliedly authorized to suspend or withhold the statutory allocation payable to Lagos State, pursuant to section 162(5) of the constitution. The executive powers of the Federation vested in the President, which extends to the execution and maintenance of the constitution does not extend to the President committing an illegality”

Fortunately, the present Federal Government under President Musa Yar’ Adua has made it clear that government will follow due process and the rule of law. The President has consistently asserted that government will obey court orders, and he demonstrated this fact when a few weeks after assuming office, the Supreme Court gave its verdict reinstating Peter Obi as the Governor of Anambra State. The President promptly instructed the Inspector General of Police to enforce the judgment. This is a clear demonstration of the rule of law in a democratic dispensation.

Here in Edo State, we are fortunate to have a government where the three arms are headed by members of the legal profession. The Executive Governor is a Professor of Law, the Chief Judge is an eminent Jurist and the Speaker of the House of Assembly is himself a legal practitioner. So we are well positioned to practice democracy under the rule of law in Edo State.

7. 2004 Vol. 122 L.R.C.N. p. 5042 at pp 5047 - 5048

In a recent interview with THIS DAY newspaper on the 4th of September, 2007 I spoke extensively on a range of issues relating to the justice delivery system in Edo State. In the concluding part of that interview, I maintained that *“the message is clear – nobody is above the Law. In Edo State it would be made clear that nobody is above the law. We must do things in accordance with the law. Equality of persons would be taken seriously. We would treat every person as equal, no matter whose ox is gored”*⁸

I will conclude this presentation on that note. I wish you all a happy independent celebration. Thank you.

8. THIS DAY, Tuesday September 4, 2007 pp 61-62

