RULE OF LAW, MILITARY GOVERNMENT AND DILEMMA OF NIGERIAN COURTS

I Introduction

THE RULE of Law (hereinafter referred to as the rule) under a military government is about the most controversial issue in Nigeria at present. Twice in its history the army had seized power from the democratic government[1] and on each occasion claimed to do so in order to uphold and maintain the rule. The claim in this respect has been more frequently and persistently made by the present military regime.[2] In his maiden broadcast to the nation, the President and Commander-in-Chief of the Armed Forces declared:

> We do not intend to rule by force. Fundamental rights and civil liberties will be respected, but their exercise must not degenerate into irrational expressions nor border on subversion.[3]

And in a recent nation-wide broadcast, he attempted to reaffirm this more forcefully when he remarked :[4]

> We have also re-established the principles of the Rule of Law.[5] It is for this very reason that we insisted that all political detainees and those that had been conditionally released should be brought to trial before appropriate judicial tribunals....[6]

Ironically, this claim has given rise to controversy among constitutional lawyers. On the one hand,some have spared no efforts in consistently indicting the military government for a gross violation of the rule rejecting the latter's claim to the contrary.[7] On the other hand, others have pointed out that there is as yet a failure on the part of critics to appreciate the pecularities of a military government and the unusual circumstances under which it operates within which

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1. The first military takeover was on 15 January 1966 while the second seizure of power from a democratic government took place on 31 December 1983.

2. The military Head of State appointed on 31 December 1983 was changed in a 'palace coup' on 27 August 1985.

3. See, Federal Ministry of Information, Lagos, *Collected Speeches of the President, Major General Ibrahim Babagida* 14.

4. *Id.* at 51.

5. He had earlier on in the broadcast accused the ousted functionaries of almost total neglect of fundamental human rights.

6. The performance of these tribunals is examined, *infra* at 466.

7. O. Fagbohun, "Liberty, Fair-hearding and the New Military Decrees", 4 *J.P.P.L* 17 (1985). B.O. Nwabueze, "Government Mustn't be a Lawless Leviathan", *New Nigerian* (1 October 1984, part III, Kaduna, Nigeria).

context to evaluate its adherence to the dictates of the rule.[8] Accounting for this failure, it is argued, is the rigid inclination to continually see the military government as an exception—an aberration. so to say—and from this perspective. condemn it to a permanent incapacity to uphold the rule in reality.

Truly, the army has ruled Nigeria more than the civilians since independence[9] and this fact ought to be given due consideration. To do otherwise would appear to be unrealistic. After all, the rule is universal and not exclusive to any system of government,[10] nor can its absence or violation be regarded as a peculiar feature of the military government.[11]

Accordingly, this paper attempts to present a balanced view of the rule and from this perspective, examines the claim of the military government with a view to determining whether the concept is viable under the regime.

II Rule of law

The rule is a concept of considerable antiquity, and the body of literature on the subject is now extensive to require any elaborate treatment here.[12] It simply means the predominance of law as opposed to the use of arbitrary power. Its origin dates back to early history. For instance, it had been a principle of the English Constitution from the Middle Ages and its supremacy had formed the basis of the struggle between the King and Parliament, later resolved in favour of the supremacy of the rule.[13] Great philosophers in early history had adverted to this concept. *E.g.*, Aristotle once wrote that "the rule of the law is preferable to that of any individual."[14] Bracton also supported the view that everyone—both the ruler and the ruled—should be subject to the law and declared that "the King himself ought not to be subject to man but subject to God and to the Law. because the Law makes the King."[15]

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8. Chike Ofodile, "Fundamental Rights are not Absolute", text of a paper presented at the Nigeria Bar Association Conference and serialised in *The Guardian* (8 and 10 Septber 1984, p. 13, Lagos, Nigeria) Chief Rotimi Williams, "Fundamental Rights under a Military Government", public lecture delivered at the Ogun State University and serialised in *The Guardian* (16-18 July, 1985, p. 13, Lagos, Nigeria).

9. Since independence on 1 October 1960 the civilians had ruled the country for a total of nine years, but as at 1987 the army has ruled for eighteen years.

10. Abiola Ojo, *Constitutional Law and Military Rule in Nigeria* 239-240 (1987).

11. There were also violations during the civilian regime. See, *e.g.*, *Shugaba A. Darman* v. *The Federal Minister of Internal Affairs*, (1981) 2 N.C.L.R. 459; Abiola Ojo, *id.* at 249.

12. Hood Phillips, *Constitutional and Administrative Law* 16-18, 35-40 (6th ed.); William Holdworth, *A History of English Law*, vol. II, pp. 406-46; vol. IV, pp. 647-49. O. Ohonbamu, *The Rule of Law in Nigeria* (1972); see also *infra* note 20.

13. F. Shyllon and Gen. O. Obasanjo, *The Demise of the Rule of Law in Nigeria under the Military : Two Points of View* 1 (1980).

14. Davis (ed.), *Aristotle's Politics*, book III, p. 16.

15. Quoted in Hood Phillips, *supra* note 15 at 35.

The original meaning of the concept arose from natural rights with the predominant idea that all human beings are born equal with certain inalienable rights and it was a popular concept normally referred to, perhaps without specific mention, by those demanding freedom in the society. For instance, the American Declaration of Independence in 1776 stated that "men are created equal, and among their inalienable rights are life, liberty and the pursuit of happiness". In 1791 a Declaration of the Rights of Man prefaced the French Constitution. And international organisations and conferences have also followed this trend. *E.g.*, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights in 1948 and this was followed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.[16] It is no surprise, therefore, that in modern times the rule appears more fully to be identified with the human rights incorporated into the constitutions of modern states.

However, the first systematic legal exposition of the rule was by A. V. Dicey who, in order to give it precision, resolved the expression into three distinct though kindred conceptions, the two most relevant being as follows:[17]

(*i*) The absence of arbitrary power. This emphasises the supremacy of the law as administered by the ordinary courts. According to him, no man is punishable or can be lawfully made to suffer in body or goods, except for a distinct breach of the law established in the ordinary manner before the ordinary courts of the land.

(*ii*) Equality before the law. Here, Dicey emphasises the equality of all persons—officials and private persons—before the law administered by the ordinary courts of law.[18]

In recent times however, various attempts had been made to accord the rule a broader application to enable its use more fully as an instrument of social, political, economic and cultural achievements,[19] especially in the just struggle for enhanced civil rights and liberties. Thus, at a conference in New Delhi in 1959, the International Commission of Jurists described the rule as a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural

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16. See, Hood Phillips, *id.* at 16-18; H. Lauterpacht, *International Law and Human Rights* 428-34; U.O. Umozurike, "The Present State of Human Rights in Africa", 1 *Cal.L.J.* 62 (1986); A.H. Robertson, *Human Rights in Europe* (1963); F.G. Jacobs, *The European Convention on Human Rights* (1975).

17. A .V. Dicey, *Law of the Constitution*, part II (10th ed.).

18. The third conception by Dicey is that the general principles of the British Constitution are judge-made.

19. See, *e.g.*, ch. II of the 1979 Constitution of Nigeria titled: "Fundamental Objectives and Directive Principles of States Policy" which attempts to give economic, social and political expression to the rule of law in Nigeria.

conditions under which his legitimate aspirations and dignity may be realised.[20]

It was the view of the commission that the rule abhors retroactive penal legislation, discriminatory laws, denial of responsible government and unnecessary restrictions on fundamental human rights. It therefore advocated "fair trial"[21] in the criminal process, and recommended a sound legal profession and an independent judiciary for the protection of the rule.[22]

Thus, although there is today no single universally accepted definition of the rule, it is clear that its contents embrace the principles, institutions and procedures which experience and traditions of lawyers in various countries with different political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and enable him to enjoy the dignity of man. Accordingly, it has been observed:

> When the law keeps everyone—both the government and the citizens—under control; when the law curbs the excesses of the strong and balances rights with duties as well as powers with safeguards, so that neither rights, nor powers shall be exceeded or abused; when the law exercises sway and has a decisive influence over rights, duties and obligations of every citizen of the state, then we have the dominion of the Law or the government of the Law or the Rule of Law.[23]

III Rule of law and Nigerian Constitution

The Nigerian Constitution of 1979[24] was the supreme law of the land, and its provisions had binding force on all authorities and persons in Nigeria[25] prior to the forcible assumption of political power by the military government in 1983.[26] The 'Fundamental Rights' contained therein embodied the principles of the rule as variously defined and applied, as well as any

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20. "Declaration of Delhi", 2 *Jo. Int. Com. of Jurists* 7-43 (1959); "The Rule of Law in a Free Society", *Report of International Congress of Jurists* (1959); N.S. Marsh, "The Rule of Law as a Supra-National Concept", in A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, ch. 9 (1961).

21. This involves such elements as certainty of the criminal law, the presumption of innocence, reasonable rules relating to arrest and detention pending trial, public trial, right of appeal and absence of cruel or unusual punishment.

22. At another conference held in Lagos, Nigeria, in 1961 the commission came to virtually the same conclusion. See, Abiola Ojo, *supra* note 10 at 242.

23. C.A. Oputa, *The Law and the Twin Pillars of Justice* 71 (1981).

24. The Constitution of the Federal Republic of Nigeria 1979.

25. *Id.*, s. 1(1).

26. Ch. IV, *id.*, ss. 30-42.

legislative or executive acts contrary to the provisions were rendered void for unconstitutionality.[27]

It provided amongst others, for the right to life,[28] dignity of human person,[29] liberty,[30] fair hearing,[31] privacy,[32] freedom of expression,[33] peaceful assembly and association[34] and freedom from discrimination.[35] It also prohibited compulsory acquisition of property without adequate compensation.[36]

So sacredly held were these rights that various other provisions of the Constitution were devoted to their safeguard. The most rigid amendment procedure was prescribed for alteration of any of these rights.[37] No derogation was allowed from the right of dignity of human person, fair hearing and freedom from discrimination. Even the derogation allowed from the other rights was subject to the qualification that a law to that effect must be reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality and for the purpose of protecting the rights and freedom of other persons.[38] Provision was made for legal aid to assist the poor in the enforcement of these rights.[39] Special original jurisdiction was vested in the High Courts[40] for protection of these rights, and pursuant to the powers vested in him by the Constitution[41] the Chief Justice of Nigeria had also made special rules[42] for enforcing the rights. Of particular note was the specific assurance to all persons of unlimited access to courts for redress against violation or threatened violation of these rights in relation to them in the following provision:

> Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in

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27. Ss. 1(1) and (3); *Attorney-General of Bendel State* v. *Attorney-General of the Federation*, (1982) 3 N.C.L.R. 1; *Tony Momoh* v. *Senate of the National Assembly*, (1981) 1 N.C.L.R. 21.

28. S. 30.

29. S. 31.

30. S. 32.

31. S. 33.

32. S. 34.

33. S. 36.

34. S. 37.

35. S. 39.

36. S. 40.

37. A proposal for their alteration was required to be approved by the votes of not less than four-fifths majority of all the members of each House of the National Assembly and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the states of the Federation : s. 9(3).

38. S. 41.

39. S. 42 (4)

40. S. 42 (2).

41. S. 42 (3).

42. Fundamental Rights (Enforcement Procedure) Rules 1980.

> relation to him may apply to a High Court in that State for redress.[43]

Other safeguards included specific vesting of the judicial powers of the Federation in the courts;[44] provision, (*i*) against ouster of the jurisdiction of courts of law;[45] and (*ii*) for separation of powers[46] which ensured insulation of the courts from undue influence from other arms of government.

IV Military government and rule of law

(1) Seizure of power

The 1979 Constitution neither anticipated nor provided for a transfer of political power from one body of persons to another except through the democratic process.[47] Indeed, it clearly provided against a forcible assumption of power by any person or group of persons. It states :

> The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.[48]

However, in 1983 the Nigerian army defied this provision, seized power from the government in what has been declared to be a revolution[49] and established a new government known as the Federal Military Government.[50] *Prima facie*, this is a violation of the rule. But the army appears

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43. S. 42(1).

44. S. 6. There was no such specific provision in the 1963 Republican Constitution of Nigeria.

45. S. 4(8).

46. Ss. 4-6.

47. Ch. V, VI, 1979 Constitution.

48. S. 1(2). Similar anti-revolutionary provisions are in ss. 37(1), 41, 47, Cap. 42, the Criminal Code; Laws of the Federation 1958; *The Republic* v. *Isaac A. Boro*, (1967) N.M.L.R. 163; *Omisade* v. *R.*, (1964) 1 All N.L.R. 233; *Enahoro* v. *R.* (1965) 1 All N.L.R. 125.

49. See the preamble to the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984. The literature on revolution is now extensive: see, H. Kelsen, *General Theory of Law and State* (1945); Lloyd, *Introduction to Jurisprudence* 290(4th ed. 1965); B.O. Nwabueze, *Constitutionalism in the Emergent States*, 219(1973); O. Achike, *Groundwork of Military Law and Military Rule in Nigeria* 93(1980). T.O. Elias, "The Nigerian Crisis in International Law", *Nig. L.J.*, vol 5, p. 1 (1971); Abiola Ojo, "The Search for a Grundnorm in Nigeria: the Lakanmi case", 20 *I.C.L.Q.* 11 (1971); S.A. De Smith, "Constitutional Lawyers in Revolutionary Situations", *Western Ontario L. Rev.* 93 (1968); J.W. Harris, "When and Why does the Grundnorm change?", *C.L.J.* 103 (1971); S.K. Date-Bah, "Jurisprudence's Day in Court in Ghana", 20 *I.C.L.Q.* 315; *etc.*

50. This nomenclature was also adopted during the first military takeover in 1966. For the view on the constitutional aspects of the latter, see, D.I.O. Eweluka, "The Constitutional Aspects of the New Military Take-over in Nigeria", *Nig. L.J.*, vol 2, p. 1 (1967).

to find justification for this action in the fact that it seized power at a time when the constitutional machinery for the change of government through electoral process had been brazenly violated, contrary to the legitimate expectations of the citizens. Furthermore, the country was faced with a danger of economic collapse as a result of reckless mismanagement of the economy by those in government who decided to remain in power against the democratic wishes of the people. The seizure of power in the circumstances would appear to be justified, as "knots which the law cannot untie may have to be cut by the Sword."[51]

No doubt, some measures taken by the military government may be justified in this way after a proper evaluation of the prevailing circumstances which dictated its action. But others appear to be entirely unjustifiable. Among the most notorious of its legislation so far are :

(*i*) The Constitution (Suspension and Modification) Decree;[52]
(*ii*) The State Security (Detention of Persons) Decree;[53]
(*iii*) Recovery of Public Property (Special Military Tribunals) Decree;[54]
(*iv*) Robbery and Firearms (Special Provisions) Decree;[55]
(*v*) Exchange Control (Anti-Sabotage) Decree;[56]
(*vi*) The Federal Military Government (Supremacy and Enforcement of Powers) Decree;[57]
(*vii*) Civil Service Commissions and other Statutory Bodies etc. (Removal of Certain Persons from Office) Decree;[58]
(*viii*) Public Officers (Special Provisions) Decree;[59] and
(*ix*) The Special Tribunal (Miscellaneous Offences) Decree.[60]

(2) Measures

It would appear that from the onset the military government did not pretend to volunteer any serious commitment to the rule, as borne out by its measures. Seen from this perspective, its profession to uphold the rule could be regarded as an afterthought.

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51. James Bryce, *Studies in History and Jurisprudence*, vol. 2, p. 107 (1904) quoted in 20 *I.C.L.Q.*, *supra* note 49 at 131. The 1983 General Elections were openly rigged by the ruling National Party of Nigeria which had become so unpopular that giving free and fair elections, it had no chances of being returned to power.

52. No. 1 of 1984.

53. No. 2 of 1984. This decree re-enacted the draconian provisions of the Armed Forces and Police (Special Powers) Decree, No. 24 of 1967, made to deal with the extra-ordinary emergency of the Civil War in Nigeria.

54. No. 3 of 1984.

55. No. 5 of 1984.

56. No. 7 of 1984.

57. No. 13 of 1984.

58. No. 16 of 1984.

59. No. 17 of 1984.

60. No. 20 of 1984.

The Constitution (Suspension and Modification) Decree suspended some provisions of the 1979 Constitution[61] and modified others[62] with the important caveat that the provisions of a decree shall prevail over the unsuspended provisions of the 1979 Constitution.[63] Some human rights provisions and all provisions relating to democratic government were suspended outright.[64] No clear provision was made for separation of powers between the legislature and the executive both at Federal and state levels.[65] The decree conferred absolute legislative powers on the Federal Military Government.[66] This illimitable legislature is fortified by the provision barring the courts from entertaining any question as to the validity of any decree or edict.[67]

Subsequent decrees provide impenetrable fortresses for the executive by rendering unchallengeable any executive action under any military legislation,[68] thus completing the rather frightening picture of an executicature[69] standing like the "Rock of Gibralter" in Nigeria. For example, Decree No. 2 provides :

> No suit or other legal proceedings shall lie against any person for any thing done or intended to be done in pursuance of this Decree.[70]

Provision is made for indefinite detention without trial[71] of persons suspected to be security risks and also excludes, like many other decrees, the entire chapter on human rights contained in the 1979 Constitution.[72]

Four decrees,[72a] provide for trial by special military tribunals with

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61. S. 1(1) and ch. 1 of the decree.

62. S. 1(2) and sch. 2 of the decree.

63. S. 1(2), Decree No. 1 and the preamble to Decree No. 13 of 1984.

64. See, *supra* note 61.

65. Some members of the legislature are also members of the executive and the President is the head of both. See ss. 4, 6, 7 of Decree No. 1 1984 as amended by ss.1-5, Decree No. 17 of 1985. Fusion of power as well as personnel is worse at the state level where the military governor, constitutes both the legislature as well as as the executive; see, ss. 2(2) and 8 of Decree No. 1 of 1984 as amended in 1985.

66. S. 2(1).

67. S. 5.

68. S. 10(2), Decree No. 5; s. 12(1), Decree No. 7; ss 3(3), Decree No. 16; s. 3(3), Decree No. 17; s. 18(2), Decree No. 9; s. 13(1), Decree No. 3; s. 1(2) (*i*), Decree No. 13; and s. 8(1), Decree No. 20 1984.

69. This term expresses the almost complete fusion of powers between the legislature and the executive under this regime.

70. S. 4(1).

71. Detention is for an initial period of three months but is renewable indefinitely at the pleasure of the executive; see, ss. 1, 2.

72. S. 4(1) of the decree. For a similar provision in other decrees see, s. 13(1), Decree No. 3; s. 5(1), Decree No. 6; s. 10(3), Decree No. 5, s. 12(2), Decree No. 7; s. 3(4), Decree No. 16; s. 3(4), Decree No. 17; s. 1(2) (*b*) (*ii*), Decree No. 13; s. 8(2), Decree No. 20,.

72*a*. Nos. 3, 5, 7, 20.

provisions barring any appeal to the regular courts,[73] notwithstanding the fact that conviction for some offences under some of these decrees carry the mandatory death penalty.[74]

Decree No. 6 simply ignores the right to privacy by authorising banks to disclose to the government a record of the financial transaction of any of their customers suspected of bribery, corruption, extortion or abuse of office.[75]

Decree No. 13 which emerged as a reaction to judicial activism of some of the Nigerian courts,[76] ousts their jurisdiction[77] even in matters relating to violation of human rights for which it renders the entire 1979 Constitution inapplicable.[78]

One of the most notorious features of this regime is the use of retroactive penal legislation, a thing prohibited by the 1979 Constitution in at least two powerful provisions. The prohibition in section 4(9) thereof was further strengthened by section 33(8) which provided :

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

These provisions have since rested in abeyance under this regime in which retroactive penal legislation has become accepted practice.[79] This kind of legislation is not only undesirable but also dangerous and indefensible, especially where trial is by special military tribunals and conviction attracts death penalty with no right of appeal to the regular courts.[80]

Another abuse of retroactive legislation by this regime was its use as legislative shield for irregularities, excesses and administrative lawlessness of the executive. For instance, months after the executive had carried out mass retrenchment of workers all over the country, Decree Nos. 16 and 17 were promulgated deliberately to validate this measure retrospectively.[81]

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73. S. 12(6), Decree No. 3; s. 9(4), Decree No. 5; s. 11, Decree No. 7; s. 1(2), Decree No 20.

74. S. 1(2), (3), Decree No. 5; s. 6(3) (*c*)-(*g*), Decree No. 20,

75. Ss. 1, 2 of the decree.

76. See the cases cited in *infra* note 110.

77. S. 1(2) (*b*) (*i*), Decree No. 13 1984.

78. S. 1(2) (*b*) (*ii*). Some other decrees also contain this kind of sweeping provision. See, s. 5(1), Decree No. 6; s. 8(2), Decree No. 20.

79. S. 21(1), Decree No. 1; s. 3, Decree No. 2; s. 15, Decree No. 3; s. 8, Decree No. 6; s. 20(2), Decree No. 9; s. 5, Decree No. 16; s. 5, Decree No. 17 and s. 11, Decree No. 20.

80. See, *supra* notes 73, 74.

81. Ss. 2, 5, Decree No. 16; ss. 1(2), 5, Decree No. 17 1984.

The most glaring adverse implications for the rule appear to be reflected in the provisions of these decrees affecting the judiciary.

(3) A fettered judiciary

The cardinal function of the judiciary is to sustain the rule and forestall societal chaos and anarchy.[82] Any system of government based on such rule should therefore concede to the courts as custodians of legal and constitutional rights the central role of serving as the final arbiter in disputes between citizens and the government on the one hand and, between governments on the other. The first of these is of paramount importance, since the relation of the individual to the state is the transcendental feature of the Nigerian Constitution,[83] reflected in the fundamental human rights conceded to the individual by the state. For this purpose, the 1979 Constitution had vested in Nigerian courts the judicial powers of the Federation which, shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[84]

The supervisory role of the judiciary over other arms of government was further confirmed by the provision which prohibited ouster of the jurisdiction of the courts of law.[85] And to enable the judiciary more effectively to carry out its function the Constitution had given expression to the principle of separation of powers,[86] and security of tenure of office of judges.[87]

However, this is no longer the position under the military government. *First*, the separation and independence of the judiciary now exist only in theory. In practice, the latter is now submerged in the absolute supremacy of the Federal Military Government,[88] and judges are removable from office at will.[89]

Second, the present regime now exhibits a clear official distrust of the

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82. Chief Folake Solanke, "The Role of the Judiciary under the Presidential System of Government", public lecture delivered at the Bendel State University, Ekpoma, Nigeria on 18 February 1983; Hon. Justice Ayo Irikefe, C.J.N., "There is Need to Hear the other side", text of the speech read on the occasion of the appointment of new Senior Advocates of Nigeria. *The Nigerian Law Times* (p. 8, 21-27 July 1986).

83. B.O. Nwabueze, "The Individual and the State under the New Constitution", public lecture delivered at the Nigerian Institute of International Affairs, Lagos, on 19 February 1979.

84. S. 6(6) (*b*).

85. S. 4(8).

86. Ss. 4-6.

87. S. 256.

88. See the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13, 1984, discussed more fully under ouster clauses, *infra*.

89. Removal of judges is now by one arm of government only, the Armed Forces Ruling Council; see, s. 256, sch. 2, Decree No. 1 1984 as amended by Decree No. 17 of 1985.

judiciary by resorting to special military tribunals instead of the regular courts for serious trials. Perhaps, this is not unconnected with the rather poor performance of our courts under the first and second Republics. In respect of this, authoritative sources accused the courts of yielding to political and trial influences thus failing in their role as the custodian of legal and constitutional rights.[90]

One thing that is not in doubt is that the powers and authority of the courts under this regime have been drastically and unnecessarily curtailed, particularly in respect of their traditional function of acting as a check on the excesses of the other arms of government. Two notorious devices employed to achieve this feat are trials by tribunals and ouster clauses.

(4) Trials by tribunals

To be candid, tribunal trials are not new to Nigeria. Section 33(1) of the 1979 Constitution laid down that, "In the determination of his civil rights and obligations...a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality," provided that the decision of such tribunal is not made final or conclusive[91] and the proceedings are held in public.[92] But the new military enactments on tribunal trials are clearly contrary to these provisions. The decisions of these tribunals are either final or subject only to the confirmation of the Armed Forces Ruling Council,[93] and supervisory powers of the regular courts are eroded as no appeal to them on any ground whatsoever is allowed.[94] The bold attempt by a Lagos High Court in *Chief V. O. Onabanjo* v. *The Special Military Tribunal, Lagos Zone Area*,[95] to assume supervisory jurisdiction over one of the tribunals afforded the military government an opportunity to assert its absolutism in stronger terms with more devastating ouster clauses in Decree No. 13 of 1984.[96] The danger in this kind of arrangement is glaring especially as some of the tribunals are empowered to impose death sentence upon conviction.[97]

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90. See Eweluka, *supra* note 50; Kayode Eso, *Nigerian Grundnorm* 67-68 (1986).

91. S. 33(2) (*b*).

92. S. 33(3).

93. S. 12(1)-(5), Decree No. 3; s. 10, Decree No. 7; s. 1(2), Decree No. 20, s. 9(1)-(3), Decree No. 5 1984. Confirmation under the latter section is by the military governor of a state. The Armed Forces Ruling Council is the highest policy making body of this regime. See, Decree No. 1, 1984 as amended by No. 17 of 1985.

94. S. 12(6), Decree No. 3; s. 11, Decree No. 7, s. 9(4), Decree No. 5; s. 1(2), Decree No. 20.

95. Suit No. M/106/84 delivered on 28 May 1984 (unreported).

96. *Supra* note 88.

97. S. 1(2), Decree No. 5; s. 6(3) (*c*)-(*g*), Decree No. 20.

One frightening feature of these tribunals is that armed forces personnel[98] are in the majority in each tribunal.[99] It is submitted that the independence and impartiality of the tribunals cannot be guaranteed, since these personnel in the majority can yield to subtle pressures from their superiors in government because of the hierarchical command structure of the armed forces. This is so even where the tribunal is headed as chairman by a judge, since its decision is by a majority of the members.[100]

Two recent events appear to lend credence to the above submission. *First*, the startling revelation made by a magazine[101] that the chairman of one of the tribunals[102] was pressurised by a top military personnel to convict and sentence an innocent citizen to a term of imprisonment.[103] *Second*, about nine-tenth of the convictions secured, sentences and fines imposed by some of these tribunals were recently quashed by the special review panels headed by judges.[104] These have obviously discredited trials by the tribunals.

It is clear, therefore, that transfer of judicial functions to these tribunals was a deliberate device by the military government to assume a direct control of a part of the judex order and nothing could be more violative of the rule.

(5) Ouster clauses

A notorious feature of military government in Nigeria is the use of ouster clauses in legislation. The courts often view them with great suspicion as they are detrimental to their role of protecting the rule of law.[105]

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98. This includes members of the police force.

99. One tribunal constituted under Decree No. 3 was headed by a military personnel and trial was in camera. This attracted the displeasure of the Nigerian Bar Association which in consequence boycotted the tribunal.

100. "Justice", it is said, "must not only be done, but also must be seen to be done." How can a judge be seen to be doing justice where he is flanked by two or more armed forces personnel from the executive in a military government?; see, Federal Ministry of Information, Lagos, *Proceedings of the Constituent Assembly*, vol. 1, p. 640.

101. *Newswatch* (p. 11, 21 April 1986, Lagos).

102. Exchange Control (Anti-Sabotage) Tribunal.

103. After investigation, the government released the prisoner unconditionally and retired the chairman. Although the latter later denied undue influence, the way the case was handled would seem to discredit this denial. The elder brother of the accused was the Vice-President of the Nigeria Medical Association (NMA) whose members were on a nationwide strike. As negotiations between the government and the body broke down, the Chief of Staff, Supreme Headquarters, who was next in command to the Head of State, was said to have openly vowed before journalists that accused would get rotten in jail if his brother failed to call off the NMA strike action. Shortly after this threat, accused's case was transferred from the High Court (a regular court) to the tribunal where he was convicted and jailed.

104. *Newswatch* (p. 4, 4 August 1986, Lagos, Nigeria.)

105. It is noted that the exercise of judicial powers can sometimes be subject to some constraints even in a democratic government. For instance, ss. 6(6) (*d*) of the 1979 Constitution provided that the judicial powers of the courts shall not extend to any action or

Thus, faced with ouster clauses under the first military regime, the courts had insisted that while the legislative competence of the military government could not be challenged, executive exercise of power under the decrees must comply strictly with their provisions.[106] *E.g.* where a decree provided for the detention of persons for "acts prejudicial to public order", such detention "in the interest of the security of the Federation of Nigeria" was held to be *ultra vires*.[107] And where a decree specified that the applicant was to be detained in a "police station", an order for his detention in "police custody" was set aside by the court as wrongful.[108]

The courts also adopted strict construction of ouster clauses under the present military regime. In *Maxwell Okudo* v. *Inspector-General of Police*[109] detention of the applicant for "acts prejudicial to public order" instead of "acts prejudicial to state security" as enacted by Decree No. 2 of 1984 was set aside by the court as wrongful.[110] But the present regime in a violent reaction has since frustrated this bold attempt by the courts to protect the rule inspite of these ouster clauses. Various formulae or a combination of them have been employed to ensure a complete exclusion of the regular courts by ouster clauses which have no parallel in the legal history of Nigeria, namely :

(*i*) Not only are military enactments unchallengeable in any court of law, executive exercise of power under them have similarly been shielded from judicial gaze.[111]

(*ii*) Civil proceedings instituted before or after the commencement of

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proceedings for determining any issue or question as to the legislative competence of the military government that relinquished power to the democratic government of 1979. This is understandable, since such question, if allowed would lead to unending and perhaps, unnecessary litigation challenging almost every measure taken by the military under its laws between 1966 and 1979. Other constraints include, the doctrine of "Political Questions" which appear to have been given approval by ss. 170(10) and 132(10) of the Constitution which barred the courts from intervening in the impeachment of the government or the President; the doctrine of judicial self-restraint, see, *Nkwocha* v. *The Governor of Anambra State*, (1984) 6 S.C. 362 and the *locus standi* doctrine, *Senator A. Adesayan* v. *The President of the Federal Republic of Nigeria*, (1981) 2 N.C.L.R. 358. But these are not to be compared with the paralysing effects on our courts of the devastating ouster clauses of this military regime.

106. *Barclays Bank Ltd.* v. *Central Bank of Nigeria*, (1976) 1 All N.L.R., pt. I, p. 409; (1976) 6 S.C. 421.

107. *Aqbaje* v. *Commissioner of Police*, (1969) 1 N.M.L.R. 137. For comments, see, Abiola Ojo, "Some Views on the Scope of Habaes Corpus in Nigeria", *Nig. J. of Contemporary Law*, vol. 1 no. 1, p. 33 (1970).

108. *Akaza* v. *Commissioner of Police*, (1974) 4 E.C.S.L.R. 443; *Onwudinwe* v. *Commissioner of Police*, (1970-71) 1 E.C.S.L.R. 1.

109. Suit no. M/32/84, delivered on 30 April 1984 (unreported).

110. See also *Arowoye* v. *Inspector-General of Police* (unreported), suit no. LD/14M/84 delivered on 6 April 1984; *Tai Solarin* v. *Inspector-General of Police*, suit no. M/55/84, delivered on 10 April 1984 (unreported).

111. S. 5, Decree No. 1; s. 13(1), Decree No. 3; s. 10(2), Decree No. 5; s. 12(1), Decree No. 7; s. 1(2) (*b*) (*i*), Decree No. 20.

such enactments shall abate, be discharged and made void.[112]

(*iii*) Constitutionally guaranteed rights are excluded and no question as to their violation by the legislature or executive shall be enquired into in any court of law.[113]

(*iv*) Persons acting pursuant to these enactments are relieved of liability for their acts.[114]

The Federal Military Government (Supremacy and Enforcement of Powers) Decree,[115] deserves special treatment in this connection. By this single enactment the military government appears to achieve the amazing feat of crippling the judiciary in its role of maintaining the rule of law.

With a preamble forming part of the decree, it was declared that: the successful *coup d'etat* of 31 December 1983 was a military revolution which effectively abrogated the pre-existing legal order in an abrupt political change not within the contemplation of the 1979 Constitution; the revolution established a new "Federal Military Government" with absolute legislative powers; what remained of the 1979 Constitution was only permitted and the provisions of a decree shall prevail over them. The remaining part states :

> It is hereby declared also that—
>
> (*a*) for the efficacy and stability of the government of the Federal Republic of Nigeria; and
>
> (*b*) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria—
>
> (*i*) no civil proceedings shall lie or be instituted in any court for or on account of or in respect of *any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict* and if any such proceedings are instituted before, on or after the commencement of this Decree the proceedings shall abate, be discharged and made void.
>
> (*ii*) the question whether any provision of Chapter IV of the Constitution has been, is being or would be contravened by any thing 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,

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112. *Id.*, all decrees except nos. 1, 3.

113. S. 4(2), Decree No. 2; s. 5(1), Decree No. 6; and the decrees listed in *supra* note 111 except no. 1. Some decrees excluded the entire 1979 Constitution—see, s. 18(1), Decree No. 9; s. 5(1), Decree No. 6; s. 12(2), Decree No. 7; s. 1(2)(*b*) (*ii*), Decree No. 13 and s. 8(2), Decree No. 20.

114. S. 4(1), Decree No. 2, 1984.

115. No. 13 of 1984.

> accordingly, no provision of the Constitution shall apply in respect of any such question.. .[116]

This decree affirms the legislative supremacy of the military government and the unquestionability of its enactments. It also renders unchallengeable any wrongful executive exercise of power under any decree or edict,[117] even if such exercise is *ultra vires* the enabling legislation or contravenes constitutionally guaranteed rights. This is the magic effect of the phrases : *purported to be done* and *proposed to be done* employed in the decree. It is obvious from these phrases that the principle established by the House of Lords (UK) in the case of *Anisminic Ltd.* v. *Foreign Compensation Commission*[118] that ouster clauses in statutes do not prevent the courts from intervening where an administrative body acted in excess of jurisdiction, cannot be extended to the interpretation of this decree.[119] Indeed, faced with the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970[120] the provisions of which were actually less devastating than the decree of the same name under review,[121] an intimidated Supreme Court of Nigeria[122] held in *Adebiyi Adejumo* v. *His Excellency, Col. Mobolaji Johnson, Military Governor of Lagos State*,[123] that the interpretation and reasonings in the *Anisminic* case could not be extended to the decree.

Giving the situation under the new military regime, the Nigerian courts have already accepted their declining role in the protection of the rule. In *Wang Ching Yao* v. *Chief of Staff (Supreme Headquarters)*[124] the Court of Appeal conceded that the enactments of this re-

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116. Emphasis added. A decree is a Federal enactment while an edict is a state enactment under this regime.

117. This decree also elevates an edict to the pedestal of a decree: see *Total Living Concept Ltd.* v. *Attorney-General, Bendel State*, Nigeria Law Times, vol. 1, no. 28, p. 6.

118. (1969) 2 A.C. 147.

119. *Contra*, Funke Fagbohun, *supra* note 7.

120. No. 28 of 1970.

121. Although with similarly worded preamble, Decree No. 28 of 1970 unlike No. 13 of 1984 did not expressly shield executive exercise of powers under all military enactments from judicial gaze, nor did it suspend the entire Constitution. This was particularly aimed at the Supreme Court's decision in *Lakanmi* case, *infra* note 122.

122. The stage for the intimidation of the court was set when the court nullified a decree, *viz.*, Forfeiture of Assets (Validation etc.) Decree No. 45 of 1968 in the case of *E.O. Lakanmi* v. *Attorney-General (West)*, (1971) 1 U.I.L.R., pt. II, p. 201, inspite of an ouster clause in the Constitution (Suspension and Modification) Decree No. 1 of 1966 barring the courts from entertaining any question pertaining to the validity of any decree or edict. The military government reacted to this by promulgating the 'Supremacy Decree' No. 28 of 1970 which nullified retrospectively the Supreme Court's decision in the case and "reduced the court to size". For comments, see, A.G. Karibi-Whyte, "The Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970" ,*Nig. J. of Contempt. Law*, vol. 1, no. 2 (1970) and Abiola Ojo, *supra* note 49.

123. Suit no. S.C. 158/70 (unreported).

124. Suit No. CA/L/25/85, delivered on 1 April 1985 (unreported).

gime have reduced the courts to the position where they now blow merely "muted trumpets". This appears to express the dilemma in which Nigerian courts have found themselves by virtue of the new military enactments. It may not be too fascinating to the courts that judicial review has been given a decent burial under this regime; but they have no choice but to administer justice according to these enactments irrespective of their merits. In a recent lecture, a judge of the Supreme Court impliedly expressed the resignation of the courts in the face of the incapacitating enactments of this regime. He declared :

> Let me say straight away that the law which is to be administered by the courts is not the concern of the judex. It is the business of the legislator.. .[125]

V Conclusion

The foregoing critical examination of the various laws and measures of the present military government in Nigeria has obviously betrayed the poverty of its claim to be a government under the rule. The claim appears to be based solely on the regime's misconception of the rule, namely: the powers exercisable by the government, however wide, are derived from these laws. From this arrangement, it is claimed that the military government is one organised by law with due cognisance of, and respect for, the rule.

It is submitted that this arrangement, without more, only qualifies this regime as a government by law, certainly not a government under the rule. There is a world of difference between the two. Indeed, the rule is not a statutory prescription. The concept is a principle of legality and constitutionality. Thus, a law may be validly made by the legislature and yet against the rule. Nor, is it sufficient for the executive to point to a statute under which it acts to establish compliance with the rule. In either case, it must be shown that the law or the action is consistent with the demand of a civilised legal order.[126]

We have established the various ways in which this regime has arrogated unlimited and unchallengeable powers to itself. Constitutionalism is neither recognised nor practised under this regime.[127] In fact, the government is so independent of the necessary control and checks that its actions

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125. Kayode Eso, *supra* note 90 at 76.

126. *Shugaba A. Darman* v. *The Federal Minister of Internal Affairs*, *supra* note 11.

127. Constitutionalism involves not only the proposition that the exercise of governmental powers must be bound by rules but also that the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, political groups are free to organise in opposition to the government in office, and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary—S.A. de Smith, *The New Commonwealth and its Constitutions* 106 (1964).

need not comply with the enabling legislation.[128] This being the case, it is doubtful if the regime can even be appropriately classified as a government under law; for, to qualify as such a government should at least comply with its own laws.

The inevitable conclusion from this enquiry is that the Federal Military Government of Nigeria is not a regime under the rule. This conclusion is however, not influenced by the mere fact that it is a military government, for, it has been conceded that the rule is not an exclusive preserve of any particular system of government.[129] The plain truth is that any government which as a deliberate policy, has by its laws, arrogated unlimited and unchallengable powers to itself while simultaneously rendering the courts of law important in their traditional role of maintaining the rule cannot, genuinely claim to be a government under the rule. Or, is there a "Military Rule of Law.?"

*P. Ehi Oshio**

128. This is the inevitable conclusion from the provisions of the enactments in *supra* notes 111-114.

129. See, *supra* note 10.

*LL.M., Barrister-at-Law, Lectuer in Law, University of Benin, Nigeria.