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THE JUDICIARY AND THE RULE OF LAW

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ABSTRACT

In order to safeguard the rights of the citizenry; promote accountability, transparency and other essential virtues of a decent and just society; it is necessary to promote, strengthen and protect the integrity of our judicial system as well as the integrity of the individual adjudicator that is charged with the onerous responsibility of the dispensation of justice. A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on rights and freedoms under the law. These observations apply both domestically- in the context of each nation State - and globally, viewing the global judiciary as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted. This paper discusses the principles of the rule of law as well as its extant

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application in Nigeria. Furthermore, the paper highlights the role of the judiciary in upholding the rule of law in furtherance of maintaining law and order in the society. The doctrinal method of legal research methodology was applied in conducting the research writing for this paper and findings were deduced. In the findings of this research paper, observations were made as to the non-chalant attitude of the Federal and state governments in disobeying court rulings and judgments as well as flagrant abuse of court orders by federal and state agencies. The paper further makes recommendations on the need to strengthen the rule of law in Nigeria with a view to promoting sanctity in our relatively young democracy.

Keywords: Rule of Law, Judiciary, Government, Constitution.

1. INTRODUCTION

The judiciary, as an arm of government, is responsible for the determination of the rights of the citizenry; amongst themselves and between them and the State. It is also saddled with the constitutional responsibility of providing essential checks on the executive arm by reviewing its actions to determine if they are in line or not with the standards prescribed by the Constitution. In addition, the judiciary possesses adjudicatory responsibilities as well as interpretation of the laws passed by the legislative arm and other established functions prescribed by the Constitution[1] in a young democracy like ours.[2]

However, it is essential to first appreciate that the authority of the Judiciary is neither supported by the purse nor the sword**,** regardless of its responsibilities. This can be evidenced in its lack of command of any armies neither does it collect taxes.[3] Its authority rests squarely on the public's perceptions of its propriety. This means confidence in its impartiality,

[1] Constitution of the Federal Republic of Nigeria, 1999, (As Amended)

[2] The lack of legislative experience occasioned by many years of military rule may result in the passing of laws that tend to work against the fundamental principles of constitutional democracy. For example, the dictatorial executive powers that were enjoyed by our numerous military regimes (wherein both executive and legislative functions were fused together coupled with the limitation of the jurisdiction of courts via ouster clauses) seem to affect the willingness of the Executive to allow the other two arms of government to exercise their functions without interference.

[3] Frankfurter J., opined that; "*The Court's authority-possessed of neither the purse nor the sword-ultimately rests on sustained public confidence in its moral sanction''*. See Barker v. Carr, 369 U.S. 186, 267 (1962)

fairness and ethical standards eventually lends to the credence and authority of the Judiciary.

Though the legal authority of the Judiciary emanates from the Constitution, it is important to appreciate that the efficacy of the exercise of such constitutional powers is necessarily anchored to a moral authority that is garnered from the public. Public confidence in the judge and the judicial system reinforces conviction for the attainment of justice and thereby enhances the willingness of the populace to subjugate themselves before the law.[4]

It follows, therefore, that where public confidence in the judicial system is high; the incidence of people taking the law into their own hands would be very low indeed. Whereas the reverse would be the case where public confidence is low, and accordingly, De Balzac aptly asserted that the lack of public confidence in the Judiciary is the beginning of the end of society[5].

Furthermore, in the unfortunate situation where either the Executive or the Legislature chooses to disobey court orders, it is the subsisting perception of the moral propriety of the Judiciary that buttresses the resistance of the civil society, the media and the general public against such gross violations of the Rule of Law. This fact further underscores the importance of public confidence in the judiciary. It is the all-important source of the judiciary's moral authority and as such the most precious asset of this branch of government.

No modern society can operate without efficient and expeditious performance of legal functions anchored by direct enforcement of rules together with the deterrent effect of threatened enforcement. The sense of personal security of the citizen as well as the sanity of the social order is to a large extent determined by the extent to which people can arrange their personal affairs and relationships on the assumptions that basic standard of propriety would be met. In any society, where the personal security of citizens is breached, a trusted system should exist to adjust any would be

[4] Confidence in the attainment of justice encourages the populace to seek redress for wrongs done unto them from the courts rather than taking the initiative into their own hands. This fact further underscores the importance of ensuring that the public perception of the judicial system remains positive in order to maintain sanity in society, for it would be terrible indeed if people take the law into their own hands. The natural consequence of this unwanted trend would ultimately be anarchy, - "might is right".

[5] See (De Balzac) in *Tzaban v Minister of Religious Affairs* H.C.732/84, 40 (4) P.D 141, 148

glitches. In other words, the system must be able to guarantee the safety of the citizen's fundamental rights and security at all costs.

Thus, societal perception of the integrity of the judicial system occupies a critical role in the promotion of social order by administering the law in a manner that satisfies the fundamental requirements of justice. This perception gives reassurance to the mass majority of society who bask in the comfort that no person, institution or government, no matter how powerful or wealthy, is outside the sphere of legal authority. This in turn encourages the public to willingly submit to the authority of the system.[6]

In view of the above, this paper seeks to highlight the need for the judiciary to exercise its powers within statutory limits in line with constitutional provisions and in line with the principles of the rule of law. The paper discusses the contributions of early philosophers to the conceptual development of the rule of law and also emphasizes on the need for judges to be guided by this principle in order to do justice to all manner of litigants before the courts. Furthermore, the paper discusses the dangers inherent in the refusal of judges to be guided by the Rule of Law as this can result in unwarranted resort to self-help and anarchy in the society.

2. HISTORICAL DEVELOPMENT OF THE RULE OF LAW AND CONCEPTUAL FRAMEWORK

The rule of law has been an important ideal in our political tradition for millennia (several thousands of years), and it is impossible to grasp and evaluate modern understandings of it without fathoming that historical heritage. Indeed, the concept of the rule of law has evolved from the ancient Greek scholars, through Medieval scholars till now.

Historically, it is on record that the heritage of the argument about the Rule of Law begins with Plato[7] and Aristotle[8]; it proceeds with medieval theorists like Sir John Fortescue[9], who sought to distinguish lawful forms of kingship from despotic forms of kingship; it goes on through the early

[6] The significance of the submission to legal authority in this context must be distinguished from forced submission. All authority seeks legitimacy. Before the *Magna Carta*, Medieval Kings in Europe legitimised their authority by claiming *divine right* and enforced their will by *forceful subversion*. *However, in this context legitimacy is firmly rooted in the public perception of the moral propriety of the system.*

[7] Plato, *The Laws*, Translated by Trevor Sanders (London: Penguin 1970).

[8] Aristotle, *Politics*, edited by Stephen Everson (Cambridge: Cambridge Univ. Press 1988) 1292a, p. 89

[9] Ibid. n4

modern period in the work of John Locke[10]; in the European Enlightenment in the writings of Montesquieu[11], Thomas Hobbes[12] and others; in American constitutionalism[13]. In the modern era, the concept of the Rule of Law was further embellished and enriched in Britain in the writings of A.V. Dicey[14], in addition to other scholars in Europe such as F.A. Hayek[15], Jurgen Habermas[16], Joseph Raz[17], Unger[18] and John Finnis[19]; and in America in the writings of Lon Fuller[20] and Ronald Dworkin[21]. Other important legal theorists that must be mentioned are Jeremy Bentham[22] and Jean-Jacques Rousseau[23].

2.1 The Contribution of Early Philosophers And Definition Of Rule Of Law

The contribution of early philosophers to the principles and concept of the rule of law has increasingly been accepted by different sectors of the global judiciary and by international agencies interested in the integrity of the judicial process. Furthermore, the fundamental contributions of the early philosophers to the concept of the rule of law are seen more and more as a foundation upon which governments of nation states can build (and have indeed built) their constitutions upon. This is worthy of note because the heritage of this idea is so much a part of its modern application. Many accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle. As recorded, neither Plato[24] nor

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[10] John Locke, *Second Treatise of Government* (Indianapolis: Hacket 1980) Chap. 2, p. 8-14

[11] Baron de Montesquieu, *Spirit of Laws*, edited by J.V. Pritchard, vol. 1 (London: Bell and Sons 1914) p. 161 (Book XI, s. 3)

[12] Thomas Hobbes, *Leviathan*, edited by J.C.A. Gaskin (Oxford: Oxford Univ. Press 1996) p. 176, 215.

[13] The Rule of Law was expounded in *The Federalist Papers* and (even more forcefully) in the writings of the Federalists' opponents. See James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, (New York: Arlington House 1966) No. 10, p. 82

[14] See A.V. Dicey, *Introduction to the Law of the Constitution* (Indianapolis: Liberty Fund 1982 [1908])

[15] F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press 1944)

[16] Habermas, Jurgen, *Beyond Facts and Norms*, translated by William Rehg (1996) (Cambridge: MIT Press).

[17] Joseph Raz, "The Rule of Law and Its Virtue," in Robert L. Cunningham, ed., *Liberty and the Rule of Law* (College Station: Texas A&M University Press 1979) p.4.

[18] See R.M. Unger, *Knowledge and Politics* (New York: Free Press 1975).

[19] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980)

[20] L.L. Fuller, *The Morality of Law,* 2nd revised ed. (New Haven: Yale University Press 1969)

[21] Ronald Dworkin, Taking Rights Seriously (London: Duckworth 1977); see also Ronald Dworkin, "Political Judges and the Rule of Law," 64 Proceedings of the British Academy 259.

[22] Jeremy Bentham, ''Bentham Manuscripts, LXIX'', 44, quoted in A. J. Ayer and Jane O'Grady, eds., *A Dictionary of Philosophical Quotations* (Oxford: Blackwell 1992) p. 48.

[23] Jean-Jacques Rousseau, *The Social Contract* (Middlesex: Penguin 1968).

[24] Ibid, n8

Aristotle[25] advocated rebellion against the law, even against unjust laws. On its own part, the Roman contribution to the rule of law tradition was advocated by Cicero in the first century BC. A contemporary of Julius Caesar, Cicero wrote during the stage where the Roman Republic was dying and giving way to autocratic rule. Cicero's *The Laws* contains the following passage on the rule of law:

> You appreciate, then, that a magistrate's function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact, it is true to say that a magistrate is a speaking law, and Law a silent magistrate.[26]

A key contribution Cicero made, echoing Plato and Aristotle, but put in more forceful terms, was his insistence that the law must be for good of the community and comport with natural law. Cicero conditioned the supremacy of law on its consistency with justice.

2.2 Definition of Rule Of Law

As a political ideal, the rule of law was largely neglected, taken for granted more than a subject of discussion. Dicey's *Introduction to the Study of the Law of the Constitution*[27], initially published in 1888, contained the first prominent modern formulation and analysis of the rule of law in a liberal democratic system. Dicey thereafter went on to articulate the rule of law as follows:

> no man is punishable or can be lawfully 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. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint[28]

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[25] Ibid, n9

[26] Cicero, *The Laws,* Book Three, 2-3, p. 151; see also Cicero, *The Republic and The Laws*, trans. Niall Rudd (Oxford: Oxford University Press 1998)

[27] Ibid, n15

[28] Ibid, *n*15 at p.110

Dicey reiterated the position that there can be no punishment without a pre-existing law. He further made the separate point that the ordinary courts were the proper institutions in which cases must be heard.

> The *Black's Law Dictionary* defines rule of law as:
> A legal principle that states that nobody, not even a king, president, or prime minister, is above the law. Rule of law is foundational in many countries, the concept of the rule of law goes back to ancient times and it can essentially be summed up by the well-known phrase, nobody is above the law. It is the predominance that is absolute of an ordinary law over every citizen regardless of that citizen's power.[29]

As defined above, rule of law means the equality of all persons before the law or equal subjugation of all classes to the ordinary laws of the land, administered by the ordinary courts. This, therefore, connotes that no man is above the law and that every man whatever his rank or status or condition is subject to the law of the land and the jurisdiction of the ordinary courts. Of course, it could not be gain said that though not the originator, A. V. Dicey contributed immensely to the exposition of the principle of the rule of law as we have it in the modern times. In practical parlance, the rule of law presupposes the following as enunciated by the Supreme Court in the case of *Military Governor of Lagos State & Ors v. Chief Emeka Odumegwu Ojukwu & Ors*[30] per Oputa JSC namely:

1. That the state is subject to the law;
2. That the judiciary is a necessary agency of the rule law;
3. That governments, should respect the right of the individual citizens under the rule of law;
4. That to the judiciary is assigned both by the rule and by our Constitution, the determination of all actions and proceedings relating to matters in dispute between persons or between government and or authority and any person in Nigeria. The import and connotation of the term "Rule of law" would be better appreciated if recourse is had to the observation of the Supreme Court in the case of *Apostolic*

[29] Blacks Law Dictionary, 2nd edition; accessed online via https://thelawdictionary.org accessed on May 16, 2023 at 4:52pm.
[30] (1986) 1 NWLR (PT. 18)621

Church vs. Olowoleni[31]. In that case, Obaseki JSC as he then was, put the matter in proper perspective in the following eloquent expression:

> The rule of law and the rule of force are mutually exclusive. Law rules by reason and morality, force rules by violence and immorality.[32]

2.2.1 Elements of the Rule of Law

The concept of the rule of law can be very wide. The basic elements, however, are a general idea postulated by ancient and modern scholars which, by and large include the following:

(i) That no one is punished or can lawfully be made to suffer, personally or materially, except for a distinct breach of the law, the proof of which is established by due process in the ordinary courts of the land.

(ii) That no person is above the law and that every person is subject to the jurisdiction of the courts.

(iii) That the constitution of every country is the supreme law of the land and everybody including governments, institutions and individuals are subject to the constitution as interpreted by the courts.

Thus, for the smooth running of a nation, whether in Nigeria or anywhere else in the world, the foundation is the rule of law.

2.3 Democracy Today and the Rule of Law

The doctrine of rule of law,[33] can be seen to go hand in hand with democracy. Thus, where there is true democratic governance, same must be tailored in its operation in accordance with the rule of law. Where rule of law is absent, it would be apparent that true democracy is absent in that society. It should be recalled, however, that the United States of America adhered to the rule of law even when slavery was legally enforced. It is, indeed, an aspect of the rule of law ideal that government acts through law; but everyone in the society is better off, no matter where they live and who they are regardless of ethnicity, race or religion, if government officials operate within a legal framework. This sort of framework in a democracy should be such that there are limits on law-making power and

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[31] (1990)6 NWLR (PT. 158)514

[32] Ibid, n26

[33] Ibid, n15

the makers of the law equally must be subject to same[34]. Even when this is more rhetoric than reality, it is of fundamental importance to set up mechanisms in society to remind government officials to sublimate their powers to existing laws[35].

2.4 Equality before the Law

This notion implies that no one is above the ordinary law of the land and that no matter how high or low anyone is in the society, he must be treated equally. Thus, a particular law under which a party is treated must also be used in treating the other party irrespective of their status in the society. From the foregoing, it is manifest that a person who is saddled with the responsibility of adjudication is expected to afford equal treatment and opportunity to litigants. Thus, a judge handling a case must be careful not to be personally interested in the case he is handling. He must not adjudicate on a matter in which he is interested as he may influence the judgment. Therefore, a judge handling a case should not be partial in his adjudicatory function and must be interested to hear both parties to the case irrespective of their status in the society before he reaches his decision[36]. It is another important precondition for real enthronement of the rule of law that judges saddled with the responsibility of administration of justice must be impartial adjudicators[37]. This means that a judge should, in keeping with the requirements of fair hearing must avoid being partial. He should not put himself in an embarrassing position of being partial to one before him to the detriment of the other.

Under the rule of law, an independent judiciary is an indispensable requisite of a free society. Such independence implies freedom from interference by the executive, judicial and legislative arms in the exercise of the judicial functions[38]; but this does not mean that a judge is entitled to act in an arbitrary manner. His duty is to interpret the law[39].

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[34] Aristotle, *Nichomachean Ethics*, edited by Terence Irwin (Indianapolis: Hackett 1985) 5.13,p. 117

[35] Olufemi Taiwo, "The Rule of Law: The New Leviathan?," 12 *Canadian Journal of Law & Jurisprudence* 151, 152 (1999).

[36] Section 36 (1) and (4) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provide not only for the right to fair hearing but a fair hearing by an independent and impartial court or tribunal.

[37] Ibid, n32

[38] See the case of *Lakanmi and Anor v. Attorney-General (West)* (1970) N.S.C.C. In that case, the court questioned the legality of Decree No. 45 of 1968. The military would not allow such judicial freedom

The principle and assumption that underlie the judiciary and the rule of law is that, there should be equal access to the law for the rich and poor alike as this is essential to the maintenance of the rule of law. It is not in doubt that the judiciary, which is a necessary agency of the rule of law, has powers, granted by the Constitution. However, the judiciary could easily be reduced to a mere paper tiger and the powers meaningless if the agencies of the state (the executive and the legislature) who control the financial and physical resources, including the police and the military, refuse to make those resources available for the enforcement of the orders given by the courts. Therefore, for the enforcement to be able to command respect and honour, it is imperative for it not only to be seen to be independent, but truly independent[40]. To earn this independence and integrity, the public or community must trust and believe that the judgments/decisions coming out from the courts and tribunals are not only in accordance with the rule of law and due process, but that they are also fair, equitable, reasonable and transparent[41].

3. THE JUDICIARY AND THE RULE OF LAW: EXPECTATIONS OF THE CITIZENRY

The concept of the judiciary and the rule of law is one of the prominent and important constitutional concepts. It is a fundamental principle accepted as a standard not only for judging the performance of government, but also for determining what is beneficial or destructive to humanity. This concept is the bedrock of our system of justice, as such, it is of great importance, so as to justify the legal order and legitimize the system of a given society. The rule of law collectively symbolizes the most important features of democratic governance such as government of the people, by the people and for the people; separation of powers and checks and balances; representative democracy and substantive limits of governmental actions against the individuals (the protection of human freedom and dignity); limited government; and the review by an independent judiciary as a central mechanism for constitutional

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and enacted the Military Government (Supreme and Enforcement of Power) Decree No. 28 of 1970 which made Decrees and Edicts supreme.

[39] See Section 6 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

[40] Ibid, n4

[41] Ibid, n29

enforcement[42]. In a constitutional democracy, it is of utmost importance that the judiciary should fully play its role in upholding the rule of law. For the judiciary to achieve this, independence, impartiality and easy accessibility to courts, must be guaranteed. The jurisdiction of the courts should also be protected and guarded jealously for the protection of rights of citizens. This proposition was expounded by Aniagolu, JSC, in *Safekun v. Akinyemi & Ors*[43] thus:

> It is essential in constitutional democracy such as we have in this country, that for the protection of rights of citizens, for the guarantee of the rule of law, which include according to fair trial to the citizen under procedural irregularity, and for checking arbitrary use of power by the executive or its agencies, the power and jurisdiction of courts under the Constitution must not only be kept intact and unfettered but also must not be nibbled at … Indeed, so important is that preservation of and non-interference with, the jurisdiction of the courts that our present Constitution has specifically provided in S. 4(8) that neither the National Assembly or House of Assembly shall enact any law that ousts or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law**.**[44]

The Constitution of the Federal Republic of Nigeria[45] preserves the jurisdiction of the courts precluding ouster of court's jurisdiction in legislations; this is very commendable of a constitutional democracy. Hence, there are checks and balances and arbitrariness is reduced. In *Governor of Lagos State v. Ojukwu*[46], the Supreme Court dealt passionately and extensively with the need to obey court orders and thus held inter alia, that ***"***it is a very serious matter for anyone to flout a positive order of a court and proceed to insult the court further by seeking a remedy in a higher court while still in contempt*."*[47]

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[42] Ibid, *n*18
[43] . (1980) 5 – 7 SC, p. 25
[44] . Ibid, n29
[45] . S. 4(8), the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[46] (1986) 1 NWLR (Pt. 18), p. 622
[47] Ibid., p. 622.

In *Nigerian Army v. Mowarin*,[48] Ubaezeonu, JCA reading the lead judgement of the Court of Appeal said inter alia that: "An order of Court must be obeyed even if such an order is perverse, until such a time that the order is set aside by a competent court … a flagrant flouting of an order of the court by the executive is an invitation to anarchy **…."**[49]

Furthermore, respect for civil liberty is the fundamental requirement of the rule of law and democracy. In other words, the rule of law serves to protect the shared liberty interests of all members of the society. It does this by establishing a dynamic equilibrium between power and law. Pure power is arbitrary might; law is a system by which institutions channel power so that it conforms with people's values and established patterns of expectations. Neither power nor law alone will lead to a stable society[50]. Advocating the need for respect of civil liberties and rule of law, Justice Louis D. Bradis of the United States Supreme Court in *Whitney v. California* opines as follows:

> In government, the deliberative forces should prevail over the arbitrary; the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of the political truth, that without free speech and assembly, discussion would be futile … That the greatest menace to freedom is an inert people … that it is hazardous to discourage thought, hope and indignation … that the part of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[51]**.**

In *A. G. Bendel State v. Aideyan*,[52] the appellant State Government purportedly acquired the plaintiff respondent's building. Not being satisfied, the respondent sued the State Government. On appeal, the Supreme Court of Nigeria held that the respondent was entitled to his building. Nnaemeka-Agu J.S.C. had this to say:

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[48] . (1992) 4 NWLR (Pt. 235), p. 345.
[49] Ibid., p. 345
[50] W.Y. Daniel, "The Rule of Law", Nigerian Law and Practice Journal, Nigerian Council of Legal Education, Nigerian Law School, 1997, p. 115
[51] (1957) 274 US, p. 357 at p. 367
[52] (1989) 4 NWLR (Pt. 118), p. 646; *Bello & Diocesan Synod of Lagos v. LEDR (1973) ALL NLR 1966 and Adewole v. Jakande* (1981) 1 NCLR, p. 262.

> The right to property in Nigeria is entrenched under Section 40 of the 1979 Constitution. That right is inviolable and such property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Further, such law must provide for the payment of adequate *compensation to the owner … It follows therefore that any* purported acquisition which is not according to a law containing the above provisions is no acquisition at all in the eyes of the Constitution[53].

In *Okogie v. A. G. Lagos State*[54], the defendant in this case, that is, the Lagos State Government abolished private ownership of primary schools by issuing Government circular dated 26th March, 1980, by which no private primary school would be allowed to operate in the State with effect from 1st September, 1980. The plaintiff contended that the Government's action was in breach of the right to freedom of expression and press under the Constitution[55]. The Court, per Agoro J. held that the Lagos State Government had no power under the relevant laws to abolish private ownership of primary schools in Lagos and that the right of the plaintiff to own and operate schools under the Constitution must be protected[56].

In *Director of SSS v. Agbakoba,*[57] the plaintiff/appellant brought an action for a declaration that the forceful seizure of his passport by agents of the State Security Services (SSS) was a violation of his right to personal liberty, freedom of thought, freedom of expression and freedom of movement as guaranteed by the Constitution, (as amended) and for an order of mandatory injunction directing the defendants/respondents to release the passport forthwith. On appeal to the Supreme Court, it held, inter alia, that the respondents were liable and were ordered to release the applicant's passport forthwith[58].

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[53] Ibid., p. 667*; Governor of Lagos State v. Ojukwu*, op. cit., p. 621.
[54] *Okogie v. A. G. Lagos* State (1981) 1 NCLR, p. 218.
[55] . S. 36, Constitution of the Federal Republic of Nigeria (C.F.R.N) 1979
[56] *Okogie v. A. G. Lagos State* (1981) 1 NCLR, p. 218.
[57] (1999) 3 NWLR (Pt. 595), p. 314 SC; *Ubani v. Director of SSS* (1999) 11 NWLR (Pt. 625), p. 129
[58] Ibid, n49

Also, the Constitution of the Federal Republic of Nigeria 1999 (as amended), preserves the jurisdiction of the courts; this is very commendable of a constitutional democracy. Hence, there are checks and balances and arbitrariness is reduced. Therefore, disputes as to the legality of acts of government must be decided by courts and by judges who are wholly independent of the executive. This is illustrated in the case of *All Nigerian Peoples Party & Ors. v. Benue State Independent Electoral Commission & Ors*.[59] Here, the appellants sponsored candidates for election into the offices of the Chairman and Vice Chairman of the Kwande Local Government Council of Benue State. After the elections, the results were collated and the officials of the respondents on 28/04/2004 declared the results of the poll and gave the copies of the certificate of return to agents of the appellants, the police and other agents present at the collation centre. To the appellants' greatest surprise, instead of the 1st respondent publishing the result and declaring same in the Gazette as required by law, they announced the following day over the State radio that the election had been postponed indefinitely. Aggrieved by this action, the appellants filed a suit in the State High Court. The State High Court said it has no jurisdiction. Dissatisfied, the appellants appealed to the Court of Appeal. The Court of Appeal, Jos Division unanimously allowing the appeal held that the Constitution of the Federal Republic of Nigeria 1999 (as amended), is founded on the rule of law, the primary meaning of which is that everything should be done according to law.

Disputes, as to the legality of acts of government, are to be decided by judges who are wholly independent of the executive. According to the Court of Appeal in this instance, the judiciary cannot ignore its sacred responsibility to the nation to maintain the rule of law, for this is in the interest of both the government and all the people of Nigeria[60]. It is worthy of note that the rule of law and the rule of force are mutually exclusive. Law rules by reason and morality, force rules by violence and immorality. Thus, where the rule of law operates, the rule of self-help by force is abandoned. Therefore, once the court is seized of a matter, no party has a right to take the matter into his own hands. This is the ratio in *Nwadiajuebowe v. Nwawo & Ors*[61], where the Court of Appeal, Benin Division per Augie, J.C.A. (as he

[59] (2006) 11 NWLR (Pt. 992), p. 587
[60] Ibid., *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt. 18), p. 621.
[61] (2004) 6 NWLR (Pt. 869), p. 439

then was) observed that there is no dispute to the fact that the Delta State Government published the said Delta State Legal Notice No. 6 of 1996. This was done on August 16, 1996, during the pendency of the suit, which had been filed by the plaintiffs/respondents on the 7th day of December, 1995, wherein they claimed that the rulership of Onicha-Olona was rotational. For the Delta State Government to go ahead and promulgate a legal notice, which favours one of the parties, is clearly to undermine the proceedings before the Court, and amounts to treating the Court with levity and contempt. The Court went further to state that the law is trite that once the court is seized of a matter, no party has the right to take the matter unto his own hands.

There is no gainsaying that the application of the rule of law principle is predominant in democratic system of government as can be seen in a plethora of cases discussed above. Moreover, it has gained tremendous credence with the new democratic dispensation in Nigeria. This is evident in a number of decided cases and issues in the polity. In *Peter Obi v. INEC*[62], the appellant aggrieved with the declaration of Dr. Chris Ngige, as the Governor of Anambra State by INEC, filed a petition at the Governorship and Legislative Houses Election Tribunal, challenging the declaration and return of Dr. Chris Ngige, as the candidate who won. The tribunal upheld the appellant's petition stating that he was the candidate who was validly and duly elected. Dr. Ngige dissatisfied appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the decision of the tribunal. Consequently, Peter Obi took the oath of office as the Governor of Anambra State on the 17th day of March, 2006. In 2007, INEC announced that the election to the Office of the Governor of Anambra State would be conducted on the 14th day of April, 2007. The appellant, that is, Peter Obi aggrieved, commenced an action at the Federal High Court against INEC asking the Court to declare that his tenure of office as Governor of Anambra State began to run from the date he took the oath of allegiance and office on the 17th day of March, 2006. That he, the incumbent Governor has not served his four-year tenure of office. The trial court held that it lacks jurisdiction, since the suit is related to election matters. On appeal, the Court of Appeal upheld the decision of the trial court that it indeed lacked jurisdiction and dismissed the appeal. The appellant then appealed to the

[62] . (2007) 11 NWLR (Pt. 1046), p. 436 at p. 616

Supreme Court and the Supreme Court unanimously allowed the appeal, stating that jurisdiction should be examined not when it is invoked, but when the cause of action arose. It is the claim of the plaintiff that determines the jurisdiction of a court entertaining same. For this, the four-year term of the office of Peter Obi, as Governor of Anambra State starts to run from the day he took his oath of allegiance and office, from the 17th day of March, 2006 to 16th day of March 2010, as is provided by Section 180 (2) (a)[63]. The Federal High Court has unfettered jurisdiction to entertain and determine the suit. The most striking issue was that this decision was welcomed by the President, who even ordered, the immediate reinstatement of Peter Obi as Governor of Anambra State, as directed by the Court. This decision by the Supreme Court is actually an example of the rule of law in action.

In *Ladoja v. INEC*[64], the appellant was elected as the Governor of Oyo State and took his oath of allegiance and office, later on, he was impeached. The impeachment was declared unconstitutional, null and void by the Supreme Court, resulting in his reinstatement into office. The appellant having been unlawfully removed from office for eleven months asked the court to declare that he is entitled to a period of four uninterrupted years, and that his tenure should be extended by eleven months. The Supreme Court held that neither itself nor any other Court has power to extend the period of four years prescribed for the Governor of a State beyond the terminal date calculated from the date he took the oath of office. To accede to this request will occasion much violence to the Constitution.

Furthermore, it is important to note that the Constitution[65]entrusts the Attorney General of the Federation with enormous powers, which are to institute or undertake criminal proceedings against any person before any court of law in Nigeria, to take-over and continue any such criminal proceedings that may have been instituted by any other authority or person; and to discontinue at any stage before judgement is delivered in any criminal proceedings instituted. These powers conferred on the Attorney General under the Constitution are important powers that ought to be exercised with utmost passion and the greatest sense of

[63] Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[64] (2007) 12 NWLR (Pt. 1047), p. 136
[65] S. 174, Constitution of the Federal Republic of Nigeria, 1999

responsibility, and always in the interest of the public, justice and the need to prevent the abuse of legal process. Such powers should not be exercised whimsically, so as not to detract from the rule of law. This is manifest in *Kalu v. EFCC*[66]. In this case, there was a Court Order on May 31st, 2007, restraining EFCC from arresting, detaining and prosecuting Orji Uzo Kalu, the then Governor of Abia State. But the EFCC went ahead and prosecuted him for flouting the Court Order. Therefore, the Counsel to Kalu petitioned the President of the Federal Republic Nigeria and the Attorney General of the Federation that the charge against his client was in breach of the rule of law. The Attorney General of the Federation wrote to EFCC directing it to comply with the Court Order. Having not complied with the court order, the Attorney General of the Federation came to Court on the adjourned date to take-over the matter and rightly too. This is actually in compliance with the rule of law.

The judiciary has in a long line of recently decided cases[67], carried out judicial review into the procedural irregularities of the legislature and giving wise and correct decisions following laid down rules and principles. Positively too, various election petition tribunals in the country have overturned the unlawful declarations of winners of elections made by INEC in the 2007 elections; where there were no elections but candidates were declared winners or elections were rigged. The tribunals in arriving at these decisions followed laid down principles and rules, hence upholding the rule of law.

4. **THE RULE OF LAW AND SEPARATION OF POWERS IN NIGERIA**

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) categorises the powers of the Federal Republic of Nigeria into three:

i. Legislative powers;
ii. Executive powers;
iii. Judicial powers.

Legislative powers are vested in the legislatures at the Federal and State levels, executive powers are vested in the President and the Governors of

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[66] Adesina Debo, "*The Attorney General takes over Kalu's case*." Guardian Newspaper, Guardian Newspapers Ltd., Lagos, 6th September, 2007, p. 2; Adefaye Gbenga – "*Attorney General takes over Kalu's cases*", Vanguard Newspaper, Vanguard Media Ltd., Lagos, 8th September, 2007

[67] *Inakaju & Ors. v. Adeleke & Ors*. (2007) 4 NWLR (Pt. 1025), p. 423 at p. 668; *Dapialong & Ors. v. Dariye & Ors*. (2007) 8 NWLR (Pt. 1036), p. 239; *Alamieyseigha v. Igoniwari* (No. 2), 2007, 7 NWLR (Pt. 1034), p. 443; *Maikyo v. Itodo* (2007) 7 NWLR (Pt. 1034), p. 412.

the States, while judicial powers are vested in the Courts established for the Federation and the States by the Constitution, and pursuant thereof. This point is underscored by the provisions of section 6 (6) (b) of the Constitution, which provides that the judicial powers vested in the courts:

> **..**shall extend to all matters between persons, or between government or authority and to 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**.**

For a nation which believes in, and upholds the rule of law as triumphant over the rule of man, it is necessary to examine, from time to time, the directional movement of this power of the court which constitutes its real arsenal. Interpretation of statutes constitutes the real bedrock of judicial activity. This is the true expression of the principle of separation of powers[68], meaning that every arm of government does its own duty as prescribed by the law. Each arm must equally see the law as being supreme, thus, the doctrine of separation of powers[69] can thrive where there is respect for the rule of law. This position was reiterated by Lord Goddard in *R. v. National Insurance Commissioners*,[70] where he emphasized that in the exercise of judges' judicial power, particularly in the construction of statutes, their duty is to interpret the words of the statute in their natural and ordinary meaning. It is not for the judge to fill in the gaps in order to make sense of the law which the parliament has enacted through judicial interpretation, as Lord Denning M.R. did in *St Melons v. Newport Corporation*[71]. The law is what the Parliament has enacted. If it is ambiguous, the duty of the court is to draw the attention to its ambiguity but not to correct it. In order to buttress the need for separation of powers, the courts of law are empowered by the Constitution[72] to intervene in the exercise of powers by the legislature, nevertheless the legislature is

[68] Ibid, n12
[69] The first modern formulation of the doctrine was that put forward by the French philosopher Montesquieu in De l'esprit des lois (1748; The Spirit of the Laws), although the English philosopher John Locke had earlier argued that legislative power should be divided between king and parliament.
[70] (1972) A.C. 914
[71] (1950) 2 All E.R. 1236
[72] Section 4 subsection (8) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

deliberately and expressly forbidden from making laws that would oust the jurisdiction of the court of law.

5. CONSTRAINTS TO THE RULE OF LAW IN NIGERIA

All arms of government are subject to law. However, certain constraints hamper the proper operation of the rule of law in Nigeria; for example:

i. *Bribery and Corruption*- This is a monster that requires no further description; corruption simply destroys the nerve system of any organisation. To put in a nutshell, the effectiveness of courts relies on their fairness and impartiality. Inequality of influence affects the courts in their fairness. Once impartiality and efficiency is undermined, the users of the system will not go to the courts to settle disputes so long as the playing field is skewed. In this situation, the more powerful and influential court users invest in bribing of individual or small group of public officials. At times, they go to the extent of acquiring media outlets or some authoritative connections to pervert the course of justice.

ii. *Limited Access to Justice*- Apart from corruption, there are also the problems of ethnicity, linguistic, geographic, social and other forms of bias which make the rule of law in many developing countries like Nigeria incomprehensible. Factors such as delays in the justice system, high cost of litigation and unfair proceedings marginalise the poor class.

iii. *Interference by the Executive Arm of Government*- It is fair to say that with regard to Nigeria, cases of direct (or indirect) interference by the executive with the work of the judiciary have not been eliminated. The more worrying phenomenon is the indirect interference, which manifests itself at state level, where a number of governors simply refuse to comply with the Constitutional provisions of the Nigerian Constitution regarding release of funds to the judiciary, particularly with regard to capital expenditure.

iv *Remuneration of Judges and Supporting Staff*- It can be validly argued that the remuneration of the Nigerian judges, even though comprehensively improved over the years, is still unsatisfactory; particularly having regard to the volume of work and the environment under which they operate. This is particularly more compelling with the judges of the lower courts. Low income and poor

working conditions usually lead to poor work output especially in Nigerian courts. So many cases remain in court due to poor working conditions of judiciary staff. In other developed jurisdictions, the court system works excellently well. In the American case of *Bush v. Gore*[73], the election petition in that case against President George Bush was disposed of before he was even sworn in for his first term in office. That indeed exemplifies a working judiciary. The underfunding of the Nigerian judiciary is such that ensures injustice is done to the masses. This, in no way, assures justice and the rule of law are shunned.

v. *Training and Manpower Development*- The efforts of the National Judicial Institute must be appreciated and commended for all the year-round programmes for the purpose of Induction courses and refresher courses for the various levels of the judiciary in Nigeria. However, the world is moving too fast. Innovations are being introduced in all sphere of life. Communication is taking the centre stage. Modern technologies are rapidly taking over activities hitherto being handled by the manual method. There have been spirited efforts to put in place modern technologies to assist the judiciary to move with time; but there are still some hurdles to jump to be able to utilise these facilities fully.

vi. *Politicians and their antics*- Politicians are willing to do anything to acquire power, they are willing to bribe judges, they are also willing to write callous and baseless accusations against judges in the event that their offer of bribe is not accepted.

vii. *Ability of Courts to enforce judgments and orders*- This leaves the question whether the judiciary in Nigeria is respected at all. Even when a court gives judgment against another arm of government in Nigeria, it is disobeyed; hence, the rule of law in practice in Nigeria is not followed to the letter.

viii. *Police and Prisons*- These two agencies are part and parcel of the machinery for the administration of justice, and the maintenance of law and order. As we know too well, the Police in Nigeria is even involved in the prosecution of cases. Thus, where the Police prosecutor chooses to take bribe, the party unable (or unwilling) to

[73] 1531 U.S.1 (2000)

pay bribe suffers in court and vice versa. It appears that the rule of law cannot function in such scenario. The Police structure in Nigeria have numerous loopholes. In addition, many prisoners are unable to get speedy trials due to the fact that the Nigerian Correctional Service is underfunded, thus they lack funds to maintain vehicles which are to convey prisoners to court. Thus, many prisoners languish in jail perpetually due to the inefficiency of the correctional system.

6. CONCLUSION

The rule of law is the most important feature of good governance in the polity. It preserves the jurisdiction of the courts and promotes checks and balances of governmental powers. Adherence to the rule of law is seen more in democratic system of government although in practice, there is no ideal promotion of the rule of law.

In order to tackle the impediments clogging the smooth operation of the rule of law, it is hereby recommended as follows:

i. Proper and adequate funding of the judiciary and adequate remuneration of judicial officers.
ii. Adequate provision of security personnel for the safety of judicial officers and court facilities.
iii. There should be mechanisms or bodies put in place to ensure fundamental rights and basic freedoms such as: right to life, right to personal liberty, freedom of speech and association, and others should be upheld.
ix. Review of code of conduct for judicial officers to meet up with contemporary social demands and practicability, enable Judicial officers live up to modern day standards.
x. All round training and retraining of all judicial officers especially on information and communication technology to enhance efficiency and speedy trial.
xi. Credible steps should be introduced or revisited in order to stop unwarranted interference of administration of justice by high profile personalities.
xii. Creation of more courts and refurbishment of existing court rooms

xiii. Appointments of more well-trained Judges/Magistrates and court staff

xiv. Mandatory attendance of continuing judicial education, training courses, seminars or conferences organized by the National Judicial Institute for judicial officers and their support staff.

With the foregoing recommendations, the rule of law will be a conventional concept in Nigerian democracy and justice administration for setting the agenda for the next government slated to take over from the leadership of President Muhammadu Buhari.