

CONSTITUTIONAL LAW I

Rule of Law

1. INTRODUCTION

The general concept of the Rule of Law can be traced to diverse ancient forms of governance. Although many authors represent the concept of the Rule of Law, or Government under Law, or Supremacy of the Law, as purely Western inventions, they are not. The concept is not a monopoly of any particular system or tradition of government. It is universal in nature, and is to some degree present everywhere you find men and women governed by publicly proclaimed and recognised laws and not by the whims of men and woman, including in ancient African societies. Indeed, as far back as 2000 B.C., the great Greek philosopher, Aristotle, had preached that the Rule of Law is preferable to rule of man.

The Rule of Law is at the foundation of contemporary constitutional law, and is a synonym for law and order. Basically, the concept of the Rule of Law emerged to progress society from the 'state of nature' where people's natural rights were easily transgressed by others without organised and adequate consequences. Thus, the concept advocates the establishment of an orderly community where the state and individuals are aware of their rights and limitations, and can enforce these through review of actions/omissions by an independent judiciary. Therefore, it is commonplace that societies that live under the Rule of Law enjoy greater benefits by comparison with those that do not, or do so to a more limited extent.

2. DEFINITIONS & ELEMENTS

The Rule of Law has been given several meanings, all pointing to the same end. Essentially, the rule of law broadly mean that everything should be done according to the law. There are THREE popular definitions by A.V. Dicey which are more specific, and have helped to highlight the various aspects of the concept, and are generally recognised and reflected in the Nigerian Constitution and case-law. In his well-considered view, the Rule of Law means:

1. The absolute supremacy of the Constitution and recognised laws, and excludes the exercise of arbitrariness or wide discretionary powers by the government and its agencies in order to check abuse.

In other words, governance should be conducted within the framework of recognised rules, under which government agencies must be able to justify their every action. Therefore, only where officials faithfully observe the constraints laid down in Constitutions and laws does the rule of law truly obtain. For example, under this principle, a citizen can only be punished for a

crime prescribed under a law, which law was in existence at the time when the crime was committed, and no penalty beyond what such law prescribes shall be imposed on the offender. In support of this notion, see:

- * Section 1 of the 1999 Nigerian Constitution (as amended)
- * *Shugaba v The Federal Ministry of Internal Affairs and Ors* (1981) 2 NCLR 460
- * *Balewa v Doherty*
- * *Aoko v Fagbemi* (1961) 1 ANLR (and in connection, Sections 4(9) and 36(8) of the 1999 Nigerian Constitution (as amended))
- * *Military Governor of Lagos State v Chief Emeka Odumegwu Ojukwu* [1986] 1 NWLR (PT 18) 621, *per* OBASEKI, JSC:

“The Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognised rules and principles which restrict discretionary power which Coke colourfully spoke of as ‘golden and straight metwand of law as opposed to the uncertain and crooked cord of discretion’.”

2. Equality before the law, or equal subjection of all classes to the ordinary laws of the land administered by the ordinary law courts.

First, this means that citizens who are wronged by the state should have a remedy against the state which should be given no advantage over the ordinary citizen; and that disputes as to the legality of the acts of the government/executive should be decided by judges who are independent of the executive. See:

- * *Bashir Alade Shitta-Bey v Federal Public Service Commission* (1981) 1 SC 40

Second, the definition connotes that the citizens are equal in the eye of the law, and before the law. The conferment of immunities from the operation of some laws on the holders of certain public, for example, may seem to contradict the idea of everyone being equal before the law; but that is necessarily not the case. So far as this privilege is provided for in the law, conferred in principle on an office (and not a particular person) to which anyone may aspire to, and is designed to serve the best interest of the public and not a personal interest, such can be taken as being compatible and not in conflict with the notion of the Rule of Law and, by extension, the equality of everyone in the eye of the law.

Third, it indicates that an independent judiciary should be the primary agency that ensures access to justice for aggrieved entities and maintains the Rule of Law. However, some legislation grants quasi-judicial functions to executive bodies; so long as the exercise of such a function generally does not exclude the jurisdiction of the judiciary over any matter, such

legislation and functions may be considered as compatible with this strand of the idea of the Rule of Law.

The three principles above are generally captured under:

* Section 6(6)(b) of the 1999 Nigerian Constitution (as amended).

****Military Governor of Lagos State v Chief Emeka Odumegwu Ojukwu* [1986] 1 NWLR (PT 18) 621, per OBASEKI JSC:**

“In the area where rule of law operates, the rule of self-help by force is abandoned. Nigeria, being one of the countries in the world, even in the third world, which profess loudly to follow the rule of law, gives no room for the rule of self-help by force to operate. Once a dispute has arisen between a person and the government or authority, and the dispute has been brought before the court, thereby invoking the judicial powers of the state, it is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course. The action the Lagos State Government took can have no other interpretation than the show of intention to pre-empt the decision of the court. The courts expect the utmost respect of the law from the government itself which rules by the law.”

“More relevant to the case in hand, the rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive... This is the position in this country where the judiciary has been made independent of the executive by the Constitution... The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. It is both in the interest of the government and all persons in Nigeria. The law should be even handed between the government and the citizens.”

3. The existence and enforcement of certain minimum rights guaranteed by the Constitution.

In support, the International Commission of Jurists in 1961 noted that the Rule of Law requires that there be established certain minimum legal standards, including the fundamental human rights of the citizens. See:

* Chapter IV of the 1999 Nigerian Constitution (as amended)

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Generally:

******Military Governor of Lagos State v Chief Emeka Odumegwu Ojukwu* [1986] 1 NWLR (PT 18) 621, per OPUTA, JSC:**

“The Rule of Law presupposes –

1. That the State... is subject to the Law.
2. That the Judiciary is a necessary agency of the Rule of Law.

3. That Government should respect the right of individual citizens under the rule of law.
 4. That the Judiciary is assigned both by the Rule of Law and by our Constitution the determination of all actions and proceeding relating to matters in dispute between persons or between government or an authority and any person in Nigeria.
- ... the law is no respecter of persons, principalities, governments or powers.”
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Dicey's theories as stated above have contributed to the emergency of various schools of thought on the nature of the Rule of Law. There is the procedural justice theory that stresses the supremacy of the law and the need for it to be administered in accordance with certain procedural safeguards. This is similar to the common law concept of legality and due process, which finds expression in the concept of natural justice and the requirement of certainty and predictability of law. There is also the law enforcement theory that defines the rule of law as no more than adherence to a supreme law, and can thus be used to justify the existence of rule of law in totalitarian states or the obedience of immoral laws that are opposed to the principle of natural justice. This danger thus led to the emergence of the material justice theory that posits that rule of law presupposes that the law must have certain minimum moral content, and that the concept is not concerned with just any type of law. in support of this position, the International Commission of Jurist stated that:

The rule of law... should be employed to safeguard and advance the will of the people, political rights of the individual, and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspirations.

2. ELEMENTS & CHALLENGES

Furthermore, from Dicey's three postulations concerning the import of the Rule of Law (as discussed earlier), it has been deduced that for the concept to exist in a society, the following elements must, to a reasonable degree, be in place:

A. Supremacy of the Constitution and regular laws made by lawmakers

Challenge/Critique:

- In cases of uncertainty created by unclear or inconsistent judicial interpretation or conflicting statutory provisions, which law is supreme?

B. Certainty and regularity of the law

Challenge/Critique:

- Rules are open to several interpretations, and judicial interpretation may, through judicial precedent, lead to 'rule of men (the judges), not of law'

- Sometimes, in a society with a large body of laws, statutory provisions may conflict and create a level of uncertainty

C. Absence of arbitrary or wide discretionary powers of the government or its agencies

Challenge/Critique:

- Sometimes, legislative relics of past authoritarian regimes are retained under new constitutional arrangements; e.g. Nigeria's 1992 Environmental Impact Assessment (EIA) Act and the power of the President under Section 14(1)(a) to exclude the entire process of EIA based on his/her subjective feelings.

D. Equality before the law

Challenge/Critique:

- In this regard, socio-economic inequalities – like poverty, illiteracy etc. – affecting access to justice is not adequately taken into consideration.
- Possible and usual VIP 'special treatments' also affect this requirement

E. Objective administration of the law by the ordinary independent law courts/judges

Challenge/Critique:

- In reality, how independent? How objective? Judges are humans, and like everyone else, their judgements are sometimes and to varying degrees influenced by the prevailing social, political, religious, economic and cultural norms and conditions of the society in which they live.

F. No punishment outside the authority of the law

Challenge/Critique:

- Extra-judicial killings and torture by government security agents
- 'Jungle justice' by citizens

G. Enforcement of some minimum rights

Challenge/Critique:

- In reality, enforcement is commonly capricious and biased. For example, it is widely argued that the Nigerian government hardly enforces rules that are protective of the rights of members of oil-producing communities but against the commercial interests of the oil companies, given their heavy reliance on the economic gains from the oil industry.

#Concerning the Military and the Rule of Law in Nigeria, see:

KM Mowoe, *Constitutional Law in Nigeria* (Malthouse Press, 2008) pp. 21 – 23.