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RULE OF LAW: CONSTITUTIONALISM AND THE QUEST FOR NATIONAL INTEREST

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Abstract

In a just society, void of chaos and illegality, the overriding factor is the rule of law. Rule of Law has been the guiding factor of human existentialism for centuries and over the years many nations have come to terms with this principle. From morality, to religiosity, down to natural laws, rule of law, and by extension, the constitution provides a framework that captures all the elements that will make both the governed and the government make informed decisions in terms of rights and obligations making the society better. This paper took an overview on the essence of rule of law and the quest for national interest. It analyzed the concept of rule of law and also attempted to give an exposition into the concept of national interest. Furthermore, it compared and contrasted the two concepts and weighed the options in terms of application during national issues without tampering with the absoluteness of the Nigerian Constitution. Data for the study were from primary and secondary sources. The paper drew conclusion on the study using the Nigerian narrative as an empirical study.

Keywords: Rule of Law, Constitution, National Interest, Judiciary, Federal Government.

Introduction

Nigeria is a Federal State guided by a written constitution. The country's independence in 1960 from England was after a series of constitutional conferences that took place before that year. In other words, the ideas of constitution and constitutionalism are not new in the state. Nigeria's idea of governance has taken multi forms. Before the colonial era, the different segments of communities had their traditional leaders who coordinated the process of governance of their

communities. In other words, it is safe to admit that monarchical system has since been an indigenous sort of government known to Nigerians. About 1860, the British conceptualized the indirect rule with the colonialists majorly coordinating the affairs of the regions and protectorates and then Nigeria as a nation after the integration. The colonial masters governed with their Rules, Proclamations and Orders-in-Council which were imposed on Nigerians with little or no inputs from the masses. This became the status quo till the period of independence. Preceding the independence, the concept of what Nigeria called constitution was initiated into our polity and same was carried over immediately after independence.

The concept of Constitutionalism was first experienced in Nigeria when the Willinks Commission proposed that the concept of Fundamental Human Rights be brought into the Independence Constitution to ease the tension of the minority tribes in the nation. Nonetheless, successive military governments that have truncated democracy have dealt a big blow on the whole ideology of constitution and constitutionalism in Nigeria.

Normalcy was only returned in 1999 when the nation reversed to civil rule. Since then the concept of constitutionalism has been a front burner issue in our political, judicial and academic discourse.

On the other hand, the backbone of the Nigerian constitution, like most constitution globally, is the concept of the rule of law. Rule of law being a constitutional concept is the cornerstone of democratic governance in any given society. It further implies that everything MUST be done based on the laws of the nation. This means that both the government and the citizenry must always justify their actions and in-actions in law. Also, governance should be conducted within the framework of constituted rules and principles which curtails discretionary/dictatorial power which Simon (2012) colourfully posited as "golden and straight network of law as against uncertainty and crooked cord of discretion." which many dictators tend to base their decrees on.

In recent years, the ideology of rule of law in the Nigerian constitution seems to have taken a negative turn. Most cases that have found their ways into the judiciary came out unsatisfactory. From the issues of corruption in the judiciary, to disobedience of court rulings by the government, down to illegal detention of some of the outspoken citizens, the story seems to be endless.

The Federal Government on their part has justified the two issues of disobedience of court rulings by the government and illegal detention of some of the outspoken citizens to "National Interest". At a quick glance, this implies that the unity or interest of the nation is more important

than the freedom of one man and as such that one man should be incarcerated. Besides, they believe the safety of the 'offender' is not guaranteed should he live in the midst of co-citizens hence staying in a prison is safer.

As laughable as this submissions may be, it is the reality on ground in the Nigerian society and this forms the basis of this paper in which the author wants to assess and marry the concept of Rule of Law, Constitutionalism and the Quest for National Interest.

The Concept of Rule of Law and Human Rights

Basically, rule of law is a liberty-based constitutional ideology which insists that everything must be done in line with stipulated tenets of the law. It encompasses such ideals as government based on the law, equality before the law and the independence, it also considers autonomy of the judiciary among others. The rule

of law is central and a prerequisite in a democratic system of government. It is the bedrock of constitutional democracy. It serves as a framework for creating an ideal legal system.

In A.V Dicey's exposition as paraphrased in The Black's Law Dictionary (1999), Rule of law is the absolute supremacy or predominance of regular law as opposed to the influence of absolute power and leaves out the state of arbitrariness, privilege or even of rule of wide unrestricted authority on the part of government … a man may be reprimanded for a breach of law but he can reproved for nothing else.

As much as this age-long definition has held sway for decades, it begs for answers in the present age due to lots of dynamics in politics. First is the supposition that a citizen can only be penalized for a breach of "the regular law" before the ordinary courts of law. The regular law here implies the common law of Nigeria and statutes. This assumption has been restrictive of the laws applicable now in modern societies which involve a large number of delegated legislation.

On the other hand, the essence of man indicates he is a being with value and the cognition of this intrinsic dignity and value shows imperative absolute rights of human beings. Those impregnable rights are the basis for justice and peace all over the globe. If the rights are ignored and disrespected, it will lead to barbaric actions which fall shorts of human moral sense. The world in which human person shall speak up, have freedom of speech, religious worship, freedom from fear, lack and want are the greatest dreams of human existentialism. Human rights then, are the basic rights which a human person possesses by default, i.e, inborn, simply because he or she is a human. Human rights are considered as universal, that is, it is for every person, no

matter where he or she originates from. These rights in national and international law could be in form of natural or legal rights. It is noteworthy that what is referred to as "Right" has brought about lots of contention and continued to be a topic of continuous philosophical discourse. Rights as freedom from unlawful incarceration, torment, and death penalty are regarded as belonging essentially to all humans. Human rights are fundamental rights and

freedom that all people are eligible to irrespective of nationality, gender, ethnic origin, race, religion, language spoken, or other status. It also involves civil and political rights, which includes the right to life, freedom of expression and social, cultural and economic rights. It also includes the right to engage in election, to work and get education.

Concept of National Interest at a Glance

The concept of national interest borders on the ideology that the common good of the people supersedes the interest of an individual or group of persons. It is on this premise that the illegal detention of people that oppose government policies are built on.

Many scholars of political science are usually at a loss in terms of precedence when it comes to these concepts. Should Rule of Law be considered above national interest or should it be the other way round? Should the supremacy of the law override the outcome of individual ideologies on the polity?

National interest, over the years, has been the reason for government's 'illegal' incarceration of people in some nations around the world. In countries where some people are spotted or regarded as threat to the unity or security of the people, the government resort to incarcerating such fellows regardless of court rulings in favour of the culprits.

The Nigerian narrative is not less unconnected. In recent times, the nation has witness the continual detention of various people that the law has freed but the government has failed to let them go. Amongst these individuals include the former National Security Adviser, Gen. Sambo Dasuki, a renowned political activist and the owner of Sahara Reporters, Omowole Sowere, and a few others. The founder of Indigenous People of Biafra, Mazi Nnamdi Kanu was also in detention for about two years before 'escaping' from the country.

The Nigerian Government are of the notion that the continuous incarceration of these individuals is for the common good of the people and at such moments the rule of law needs to be suspended.

As much as the Nigerian constitution enables the government to incarcerate members of the public on grounds of mental illness and conviction by a competent law court, the quest for national interest is usually being misused by government of the day to go after perceived 'enemies of the state' by reason of utterances.

Constitutionalism and the Quest for National Interest

Constitutionalism as deduced from the generic word, constitution, is a fuzzy word. The word comes from putting together two words 'constitution' and 'ism' which leaves us with constitutionalism. Literally, it may imply the concept of putting the constitution of a people to use, that is, a constitutional government.

Constitutionalism cannot be said to have been authoritatively defined. However, scholars have put the ideology in descriptive form. Nduka (2009) defined constitutionalism as a system of political setting where the law is supreme (generally called 'constitution'), in which all (particularly the whole machinery of government) is governed by the supremacy of the law, in which only the will of the masses (as defined through some pre-arranged institutional process, commonly through a super-majority voting system) can supersede and bring about change to the supreme law-constitution, in which changes can rarely be made due to the challenge of getting the required popular support, and in which checks and balances, separation of powers, and an independent judiciary committed to legal reasoning to safeguard the supremacy of the constitution holds sway'

Okoroafor (2008) covered the core of the descriptions rendered by different constitutional law gurus in a relatively few words when he posited that 'constitutionalism takes cognizance of the need for government but stresses on the fact that a limitation be placed upon its powers. It implies in essence therefore a regulation on government, it is the antithesis of absolute rule; its opposite is authoritarian government'. It further implies that constitutionalism could imply a constitutional government. This is a government that is coordinated with organized rules in a given constitution. However, the message needs to be gotten clearly. A nation may not expressly be running a constitutional government or practicing constitutionalism because it has a constitution. What is written in the constitution and its usability are the determinants to constitutional practice.

On the flip side, the quest for national interest remains an issue scholars continue to debate on. Many people are of the notion that national interest has continued to be the bane of our judicial system. They state further that national interest should not be at the expense of human rights.

According to Dada (2012), the protection of human rights in any nation's constitution is an acknowledgment and partial fulfillment of the global obligation of nations to take combined and individual action in cooperation with the United Nations for the realization of universal respect for, and recognition of, fundamental human rights and freedoms. While the desire for the guarantee and protection of human rights as enshrined in national constitutions cannot be doubted, it is imperative to do an in depth content-analysis of these constitutional provisions with the intent of noting their real essence against the ideology of universality, interrelatedness and interdependence of human rights.

The basic of constitutionalism includes governance according to constitution, a representative/democratic government, separation of power, respect for human rights, independent judiciary/judicial review, control of the police/military and a well defined constitutional amendment procedure.

From the above basics, respect for human rights forms the nucleus of rule of law which places the rights of the citizenry above whatever name any government uses in putting members of the public behind prison bars.

Umoh (2015) posits that one cardinal issue with the Nigerian constitution which one might consider as denying it of its constitutionalism is the fact that it was not the reflection of the people's will. In other words, it has failed to meet up with one of the primal values of a constitution. The 1999 constitution (as amended) is a clear reflection of military decree and the preamble to the constitution is nothing but a false declaration. As much as this is true, the citizens have generally considered the document as the constitution of the country.

Regardless of the fact that at face value, the constitution promulgate constitutionalism, the actions and inactions of the government of the day since 1999 till date and its machinery more often than not are not in conformity with the content of the constitution. The following are a few of the activities of the government that is not in tandem with the principle of constitutionalism with chief amongst them being national interest.

Pitching Rule of Law against National Interest

Essentially, it is not a bad idea to put security and the national interest first, over the rule of law and human rights. It is a philosophical theory in statesmanship, which is guided by the philosophy of necessity and the protection of the nation. This by no means puts an imponderable stress on the mind to grasp. It is a fundamental rule in politics and diplomacy when faced by existential issues that needs balancing between rights and necessity. At a time when the overwhelming bulk of Nigerians are longing for decisive means to tackling national security

challenges and making sure that there is a robust war against corruption, such efforts in the mire of contention and narrowed premises do not provide much of a substitute to look forward to. The constricting of the scope of action open to the nation, and circumscribing it by imposing boundaries apparently issuing from arguments foretold in the rule of law and following of human rights, would not be of much help when it comes to urging action towards addressing such necessities. (George, 2018)

In the Nigerian narrative, it should be understood that it not necessary to take issues with the President at every opportunity however propitious. A bit of respectful restraint is called for when following pronouncements made by a leader, who sees issues from a parallax viewpoint rather than the thinned visible prism of the habitual critics and the self-acclaimed public commentators.

In various platforms, the current Nigerian President, President Muhammadu Buhari has asserted that the rule of law must sometimes be placed under national security interests. The President's "philosophy of necessity" as one might term it, has been taken by many as an attempt to roll back some issues on the rule of law and respect for human rights, hence, the preliminary to degenerating into dictatorial rule in the country. According to Peterson (2019), such alarmist interpretations, or better put, misinterpretations and unfounded opinion to the President's remarks which he made at a forum of legal practitioners, can only be described as baseless intrusions into the private recesses of the President's mindset. They aim at drawing out from there unplanned ascription of contemplated alterations to our statutes, that would allegedly have far-reaching effects on the democratic dispensation that the nation is now experiencing.

Proclaiming that the rule of law can in certain circumstances, be subsumed under, and even be taken over by more important national security considerations, is a statement of transitional policy and not a doctrinal confirmation. It does portend towards a long term or an abiding modification of the constitutional principle and precedents that guides our philosophy of governance.

The demand of national security considerations sometimes taking over legal provisions can understandably be adjudged to be reality under some limited or circumscribed situations. There is no doctrine known to that states that the enjoyment of human rights per se, or the usages of the rule of law are absolute and have no extent, and are therefore ceaseless both in their construct and reach. The mere fact that the enjoyment of one's human rights ends at the point where the rights of other people are infringed upon, puts restraint if not in principle at least in practice, on unbound enjoyment of such rights. The law is objective and almost clinical in its composition. Elasticity in interpretation makes the law superfluous hence, of little impact when seen as a model for guiding individualistic conduct and establishing boundaries on planned acts and

activities. Even the freedom of thought becomes an impediment if a mental process is translated into activities that obstruct the enjoyment of life, liberty and joy of others. These are exactly the outcomes of corruption, terrorism and sundry threats to decorous society and the interest of the nation, which are formed in the minds of people as aforethought actions, and purposely carried out by the actors. Absolute freedom is an illusion either in natural law or in positive law. Such conceptions are bound by intrinsic limitations that can be called forth and applied under certain circumstances. One of such parameter is the paramount need of national security and the defense of the nation. The nation, in the mythical Hegelian conception, must uphold itself as a primary duty and responsibility, by any way possible. Such an outlook places the nation over and above any law, principle or philosophical system including the abstract perception of the rule of law and human rights, at least theoretically. Even the Marxian philosophy "withering away of the State" as propounded by Frederick Engels, is in itself a historical procedure in the achievement of which the nation must use all medium applicable to defend itself and maintain its supremacy and sovereignty, in guiding national policy before its theoretical obliteration.

Disu (2014) posits that every human rights and the rule of law can only be applicable under safe conditions of security and reasonable certainty about what the next day might bring. Giving grandness to law and order is plainly laying the foundation stone for the security of life and property, as well as empowering the perpetuation of the rule of law and human rights. This does not equate a recrudescent strategy or understanding of rule of law and enjoyment of human rights.

The Defense of the Realm Act (DORA) was passed into law by the House of Commons at the "Mother of Parliaments" on 8th August, 1914 at the eruption of World War I without a discussion in the United Kingdom. It was an anticipatory criterion chosen to curb the possible threats to the State and all activities that could sabotage the war effort. The Act severely circumscribed and even removed basic freedom like freedom of speech, press freedoms and allowed for imprisonment without trials, all were for the reason of national interest in war time.

During World War II, Germans were interned in the UK based on the ideology of national interest and possible threats to the security of the state. Likewise laws were passed in the United States, due to the surprise attacks launched by the Empire of Japan on Pearl Harbour on 7th December, 1941. One consequence of these laws was the incarceration of more than 100,000 Japanese in that country for the time period of the war. (Andrenjo 1987)

Few years ago, the United States brought in sweeping measures under its Homeland Security provisions, after it was attacked surprisingly by terrorists on 11th September, 2001. Prior to those attacks and its proclamation of "war on terror", the United States had made several modifications

to its position on the rule of law and human rights, which allowed for such things as involuntary public presentation of suspects and extraction of information under duress (using torture such as water boarding or other extreme interrogation strategies).

The paper is not to defend the positions used by the United States in those difficult periods and unexpected state of confusion and mystification that confronted its successive governments since the so-called 9/11 attacks. The paper is basically trying to make a point that under extreme situations and momentous challenges, states are duty-bound to mete out certain expedients that are predicated on principles and normative standards, and make use of practical and once in a while painful measures that could sometimes deviate from the rule of law and even morality. Such circumstances should not be the regular state of affairs, but should be seen as aberrations and extreme measures occasioned by, and put upon the State to adopt by force, to defend itself and its citizens against conspicuous threats and distractions that subvert the commonwealth and national interest.

This can be related to what President Muhammadu Buhari was advocating when he so frankly and courageously bared his mind at the Nigerian Bar Association (NBA) National Convention in 2018. Coming up with such a weighty suggestion before an audience of so critical and learned men and women, certifies to the President's mindset as a reformer. Any leader with a time period mindset but with a limited time and restricted situation is bound to feel strained by the limitations that are unnaturally set by the law in apprehending and reversing the state of rot in the nation today. The pace and momentum with which the law responds to the demand for action in handling those issues that jeopardizes national security such as pervasive corruption, communal clashes, terrorism, etc, would seem unrealistic hence painfully slow, to be of usefulness to the leader in registering headway in tackling the glaring existential threats to the nation.

Both the rule of law and human rights seek to establish the wellbeing of the state, without which they have no meaning. Calling forth the two principles and using them at the same time for an individual animal living in the state of nature would be a superfluous and empty exercise. They can only have impact and meaning when used in the light of their effectiveness on a living community of human beings, who are into different variation of transactions at both the individual and group stages. It is in such situations that the rule of law can be called forth, and human rights can be brought forth to guard the parameters of individual and group interests and obligations. President Muhammadu Buhari's viewpoint therefore, can be accepted from the radical position, especially as they tackle the unfruitful and cursory conception of the rule of law and human rights. His brave and radical decisive submission about the dominance of national interest cannot be contested from the viewpoint of history, even if tackled from the legal perspective.

Alternative facts do not necessarily imply re-enacting or rewriting the rules or repositioning the evident realities. They imply taking up fresh and different steps to issues and matters that has to do with the propagation of ideals that promotes progress and defend the common good of the polity. From this viewpoint, Nigerians must be redirected from their libertarian disposition towards the rule of law and unrealistic claim on the enjoyment of human rights under all situations. Rights in all conditions must be checked with privileges. This implies that anybody claiming the perquisite of rights and needing defense under the law must first and foremost be answerable for their actions and be responsible for their deeds. They must also take cognizance of the limits placed by the law itself to the enjoyment of human rights either as settled by global standards or established by the nation's juridical frameworks. This should also lead to the knowledge that the rule of law is of little usefulness without the consequential invocation of obligations of the person or group towards the nation. Essential rights which include the right to life and property, promotion of human dignity, and protection of activities and patterns of living that do stand against good morals, and equally not degrading to the larger society must all be based on the state of order and condition of security. Without going too far into the deep complexity of the law, it can be resolved by maintaining that there is a never-ending opposition between Natural Laws and Rights on one hand and Positive Laws and Rights on the other hand. In today's world, human rights discussion is depicted along the lines of leveling of the conflicting understanding of these two legal factors. Human rights, which are settled first in the Universal Declaration of Human Rights (UDHR) and afterwards in other processes among which is the Nuremberg Laws etc, must ultimately be foreseen upon protecting the peace and harmony in the nation. As so rightly posited by Newman, J. H. (2008), there can be no society that is void of order. It is pertinent that people of obscure enthusiasm who rush into the fry without having a rethink should take time to think over the issue of rule of law and national interest before crucifying those in support of national interest against rule of law on their hurriedly conception and passing modifications of self-righteousness and absence of foresight.

Conclusion

Governments trust in a range of measures, which include political, economic, and military power, and also diplomacy to implement national security. Sometimes, they may also resolve to build the framework of security in regions and globally by reducing international causes of insecurity, such as climate change, political exclusion, economic inequality, and nuclear development.

The concept of national security remains open to different perspective, having originated from simpler definitions which stressed on freedom from military threat and from political compulsion. Conversely, the rule of law has been noted as the "authority and influence of law on

the society, especially when considered as a restraint on individual and institutional behaviour; (hence) the rules whereby every member of a society (including government officials) are all considered equal.

Therefore, instead of dissipating energy on lashing out emotions and sentiments in condemning those in support of national interest which aligns with the provisions of the Nigerian constitution, people should be more interested in all-embracing public discussion on this matter if and only if veritable and legitimate concerns are directly focused towards curbing power abuse which is likely to arise from the power to decipher what makes up a threat to national security and national interest which is solely rest in the executive arm of government for now.

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