

A COMMENTARY ON DEMOCRACY,
FEDERALISM AND THE RULE OF LAW -
THE NIGERIAN EXPERIENCE

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The proclamation by President Yar Adua, that the “Rule of Law” would constitute the bedrock of his Administration has had a significant effect on the Nigerian polity and society. It has brought down social and political tension, promoted freedom and introduced tolerance and restraint in the governance and general psyche of the country.

The practical fall outs of this policy has been most beneficial for the health of the Nation. Now no one is to be detained for more than 48 hours without an order of Court. The prompt obedience to court orders as was clearly evident when the Supreme Court declared that Peter Obi remained the Governor of Anambra State and that the 14th April 2007 Governorship election in Anambra State was unlawful, null and void. Then there is the vigorous efforts being made by the Attorney-General of the Federation to prevent the EFCC from committing human rights and constitutional breaches, in the process of carrying out its duties. For example, it has taken over the criminal prosecution of Dr. Uzor Kalu, former Governor of Abia State because of the disobedience by the EFCC of an Abia State High Court Order restraining it from arresting Kalu. The EFCC ought to have gone to Abia State to get that Order discharged before arresting Kalu.

This new philosophy of the overriding authority of the Rule of Law is captured in the statement by the new Attorney-General that he would not allow any security agency to enforce the law by breaking the law in Nigeria.

All this is in sharp contrast with the bullying, bellicose, aggressive and predatory Obasanjo Administration which left the Nation, full of tension, anger, frustration and even fear. Obasanjo was brazen in his outright rejection of the Rule of Law and the rights of the citizens of this country. He not only disobeyed Court Rulings as in the cases of Rashid Ladoja whose impeachment as Governor of Oyo State was nullified and of course in the case of his illegal seizure of Lagos State Local Government Funds, in spite of the Supreme Court judgment, he sponsored violence and war Lords (garrison commanders) in Oyo and Anambra States, and in fact ordered a full scale military invasion of Bayelsa State in order to remove its Governor by illegal force of arms.

Relief was therefore palpable when the new Administration forswore such violation orientation and proclaimed its adherence and subjection to the Rule of Law and respect for human rights. If this is sustained, we might be at the threshold of ushering Nigeria into the comity of civilized societies.

Next we should examine what is meant by the terms, Democracy, Federalism and the Rule of Law and assess what impact they can have on our polity.

Today, the term, the 'rule of law' is now a convenient short hand for the full complement of our civil and political rights.

That term now denotes the minimum condition of existence in a free, open humane, civilized and democratic society. It encompasses the following:

- The supremacy of the law, including judicial decisions over all persons and authorities in a State.
- The supremacy of the Constitution
- Independence of the judiciary
- The right to personal liberty.
- Observance of democratic values and practices including;
The freedom of speech, thought, association and the press and regular, free and fair elections as the basis for assuming power in government .”

Democracy which is the indispensable Siamese twin of the rule of law is based on two key principles: (i) popular control over collective decision making and decision makers, and (ii) an equal right to share in the such control, i.e. political equality.¹ These two key principles require in the modern state a distinctive set of social components for their realization.

¹ See D. Beetham v. Key Principles and indices for a Democratic Audit. (London, Sage, 1994)

1. Free and fair elections, to provide the platform for popular control over government, electoral choice between candidates and programmes, open access to political office, and equality between electors.
2. Open and accountable government, guaranteeing the continuous public accountability of officials, both elected and non-elected, the rule of law upheld by independent courts and decision making that is responsive to public opinion.
3. Civil and political rights and freedoms, enabling citizens to associate freely with others, to express divergent or unpopular views, to create an informed public opinion, and to find their own solutions to collective problems.
4. A democratic society, or societal conditions for democracy:
 - Agreement on the political nation, i.e., agreement on nationhood within the current national or state boundaries
 - Independent and accountable institutions of civil society
 - A democratic culture.

From what has been stated above, at the very threshold of democracy, lies free and fair elections. Is it not therefore clear, why democracy cannot thrive in Nigeria in view of the massively rigged elections in 2003 and 2007? With the electoral travesty of both years, Nigeria is presently stuck at the threshold of democracy and cannot gain entrance into the society of modern civilized nations.

Professor Nwabueze who has subjected the concepts of Constitutional Democracy and arbitrary rule to considerable thought, states that the concept was established to limit the arbitrariness inherent in government and to ensure that its powers are used for public good. Says he:

“Constitutional government recognizes the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a “limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will

instead of law.” Arbitrary rule is government conducted not according to predetermined rules, but according to the momentary whims and caprices of the rulers; and an arbitrary government is no less so because it happens to be benevolent, since all unfettered power is by its very nature autocratic. A dictatorship, that is to say, a government of absolute, unlimited power, is thus clearly not a constitutional government, however benevolent it may be, and a totalitarian regime is even less so.”

In Nwabueze’s view, a constitutional government connotes not just a government under a constitution, but rather government under a constitution which has force of a supreme, overriding law, and which imposes limitations upon it. This type of constitutionalism is contrasted with what obtained in the former Soviet Union and its socialist allies in which constitutions were employed to legitimize total power and a totalitarian order. Such constitutions are not supreme. On the contrary they are instruments of unrestrained power.

Unlike the socialist and similar constitutions, constitutionalism presupposes a written constitution as a supreme overriding law.

“Government is a creation of the constitution. It is the constitution that creates the organs of government, clothes them with their powers, and in so doing delimits the scope within which they are to operate. A government operating under such a written constitution must act in accordance therewith; any exercise of power outside the constitution or which is unauthorized by it is invalid. The constitution operates therefore with a supreme, overriding authority.”

In other words, a constitutional government is a government according to rule, i.e., institutional government. It is an impersonal system of rules and offices that effectively binds the conduct of individuals involved in them. Contrary to our experience in this country, government being impersonal, should not have a temper.

By contrast, government in a regime of personal rule is uncertain and problematic because it is largely contingent on men, upon their interests and ambitions, their desires and aversions, their hopes and fears and all other predispositions that the political animal is capable of exhibiting and projecting upon political life, and further because it is restrained, to the extent that it is restrained at all, only by private tacit agreements, prudential concerns and personal ties - and dependencies, rather than by public rules and institutions.

In practical terms therefore, constitutionalism, democracy and the rule of law are practiced:

“In a country where 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, where political groups are free to organize 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 Constitution (1946) p. 106)

Thus in constitutional democracy, the constitution is the source of power welded by government over people. Under a written constitution as supreme law, government has no more powers than are granted to it, either expressly or impliedly, by the constitution, and any exercise by it of power not so granted or which is prohibited to it is unconstitutional and void.

Thus the doctrine of Separation of powers in a democratic system is designed deliberately to cause friction between the Legislative, the Executive and Judicial arms of government, in order to save the people from the oppression and autocracy of rulers. As Judge Brandeis of the United States Supreme Court declared more than a century ago.²

“The doctrine of separation of power was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary

² See Nwabueze, Constitutional Democracy in Africa vol 1, Spectrum Books 2003, p. 2.

power. The purpose was, not to avoid friction, but by means of the inevitable friction incident, to the distribution of governmental powers among the three departments, to save the people from autocracy.”

Again in contrast to all the fundamental conditions stated above for the operation of a constitutional democracy, in Nigeria there is no organ to which the executive is truly accountable. At the federal level, the legislature have since 2003 behaved like puppets of the executive, there are no free and fair elections and the political opposition are not free to even demonstrate against the Government in power.

How does federalism come into all this? First let it be stated, that democracy and the rule of law can thrive without federalism, but federalism cannot survive, without democracy and the rule of law. Since Nigeria is a multinational state and since federalism is inevitable in such a political society, federalism must come into our discussion.

Federalism therefore, may be described an arrangement whereby powers within a multinational country are shared between a federal or central authority, and a number of regionalised governments in such a way that each unit including the central authority exists as a government separately and independently from the others, operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of affairs and with an authority in some matters exclusive of all others. In a federation, each government enjoys autonomy, a separate existence and independence of the control of any other government. Each government exists, not as an appendage of another government (e.g. of the federal or central government) but as an autonomous entity in the sense of being able to exercise its own will on the conduct of its affairs free from direction by any government. Thus, the Central government on the one hand and the State governments on the other hand are autonomous in their respective spheres.²

As Wheare put it, "the fundamental and distinguishing characteristic of a federal system is that neither the central nor the regional governments are sub-ordinate to each other, but rather, the two are co-ordinate and independent".³ In short, in a federal system,

there is no hierarchy of authorities, with the central government sitting on top of the others. All governments have a horizontal relationship with each other.

As Stephanie Dion, the former Canadian Minister of Intergovernmental affairs has rightly observed:

“Without democracy, genuine federalism is impossible. To be sure, there have been dictatorship or totalitarian regimes that have claimed to be federations. Some still exist today. But genuine federalism presupposes the respect of a division of constitutional powers between two orders of government. If all the political power in the country is in fact under the control of a single party, it is difficult for the federative form of the state to be anything more than a façade. It is within a democracy that federalism finds its true meaning.”

Here lies the danger of the nurturing of a leviathan called “the biggest party in Africa”. Certainly, there can be no federalism under a civilian or military dictatorship or one party state.

Apart from various individual decrees, the very first decree issued by every successive military regime usually destroys the foundations of federalism. Thus section 3 and 4 of Decree No. 1 of 1966 stated as follows:

- “1. The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria **or any part thereof with respect to any matter whatsoever.**
2. The Military Governor of a Region:
 - a) Shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and

- b) Except with prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List.
3. Subject to subsection (2) above and to the Constitution of the Federation, the Military Governor of a Region shall have power to make laws for the peace, order and good government of that Regions.”

Thus, the first Federal Military Government, completely undermined the federal status of Nigeria by giving itself the power to make laws for the peace, order and good government for the whole of Nigeria with respect to any matter whatsoever. It is as if the regions or later states did not exist. The matter reached its climax in the Abacha era, when by Decree 12 of 1994 the Federal Military Government declared itself as being established “with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof (including of course all the states) with respect to any matter whatsoever”

Thus there is a strong and symbiotic relationship between democracy and federalism in the sense that federalism cannot exist without democracy, but at the same time it is a good school for democracy.

Stephanie Dion’s rich experience at the Intergovernmental Affairs Department of the Canadian Federal Government has provided us with valuable insight in this respect. Examining the related concepts of democracy, autonomy and solidarity in federalism, she states that autonomy is the hallmark of federalism, but the latter cannot function without solidarity. According to her, the on-going dialectic between autonomy and solidarity is a source of enrichment of democracy. She continues:

“Let’s look first at the virtues of autonomy. In a federation, the federal government and the governments of the federated entities, each with their own sphere of autonomy, experiment with different ways of doing things, which makes it possible to find the best solutions through healthy

emulation. So federalism, like democracy, is biased in favour of pluralism, experimentation and the competition of ideas.

The autonomy of each order of government is guaranteed by the principle of the rule of law and of constitutionalism. This valuation of the law serves democracy well. In effect, modern democracy is impossible without the rule of law, the principle whereby no one is above the law, especially the lawmakers. The state cannot flout the laws that it enacts, especially the fundamental law of the land: the Constitution. On her contrary, the state must set an example for citizens, by striving to act always within the legal framework and fully respecting the Constitution and its interpretation by an independent judicial branch.”

Whilst federalism and autonomy go hand in hand, no federation can survive without solidarity, cooperation and mutual tolerance between the federating units inter se and between them either individually or collectively, and the federal governments.

The vital nature of solidarity is revealed in the following views of an experienced federalist.³

“In a federal system, the state is made up of two orders of government, each possessing powers circumscribed by the Constitution, and because of this, respect for the Constitution becomes the object of mutual surveillance. Each order of government can go to the courts if it believes that the other is infringing on its jurisdiction, which provides citizens with additional protection against abuses of power.

The principle of solidarity strikes me as much as integral part of federalism as the principle of autonomy. Indeed, while each order of government, each federated entity, is autonomous, it is not so that they may ignore

³ See Generally of Federalism, Democracy and Solidarity; Stephanie Dion : Federalism and Democracy” - 200

each other. Rather, it is so that each, with its own characteristics and capitalizing fully on its potential, can better help the others. All the governments of a federation are interdependent and must work together for their citizens, over and above their political, regional or other differences. The ideal of federalism is the very opposite of internal separatism, it is genuine solidarity. Here again, it represents an enrichment of democracy.

Federalism, as the plural quest for common action that respects the autonomy of all parties, and a learning process of negotiation and conflict resolution, presupposes a large dose of tolerance. It necessitates an ongoing practice of pluralism and cultivates democratic values.”

Tragically, Nigerian federalism until recently was bereft of autonomy, democracy, the rule of law, solidarity, cooperation and tolerance.

As Nwabueze has accurately observed regarding the overwhelming of political power and resources in the hands of the Federal Government at the expense of the States:⁴

“By these vast accretions, federal power now overwhelmingly predominates over state power. The federal government is also overwhelmingly predominant in the financial relations between it and the state governments. Without going into the complex details of the revenue sharing formula, ... , the financial subordination of the state governments is clearly underlined by the mere fact that 95 percent of their revenue is derived from an account, the Federation Account, controlled and distributed by the federal government. The mechanism for the disbursement to the state governments of their share of the money due to them from the Account is not automatic or self-operating; they have to go physically to the federal government and hassle for it every month, and

⁴ Op. Cit. p.

the process creates in them an understandable docility towards the federal government as pay-master.”

Omokhodion in an article entitled “Anatomy of the Nigerian economy” has graphically and lucidly described the debilitating consequences of the abandonment of fiscal federalism in favour of concentrated economic power in an already over bloated federal Government.

“At the end of every month, the 36 honourable commissioners of finance of all the states of the federation gather in a classroom session in Abuja presided over by the Federal Minister of Finance to share money that has accrued to the federation account based on a formula no one really understands. This money comes from three main sources - the oil money from the Niger Delta, the customs duty collections from the coastal/ports states and the VAT money mainly from Lagos State. After the sharing, the commissioners now head back to their respective governors to report what they have received and how to allocate to the areas of defined priority. The way the funds is used is not the subject of this article but as you know easy come, easy go and because over two-thirds of the states do not suffer any pain in the generation of this federation account, they fritter the money away and wait for the next monthly allocation. And at the end of the next month, they all troop back to Abuja for the monthly routine. It is inconceivable for any state to grow with this type of economic structure that puts state governments on welfare benefits or what the Americans call the “dole”.

The seizure of local government funds of Lagos State and some other states, and the violent ejection of Lagos State traffic officials from so-called federal roads in Lagos, the withdrawal of police security details from the Governor of Anambra State and the proclamation of emergency rule in Plateau State (especially the suspension by the federal executive authority of the democratically elected institutions i.e., the Governor and the State House of Assembly, of the State) during the Obasanjo Administration, all

go to establish the total absence of democracy, the rule of law, solidarity, cooperation and tolerance in Nigerian Federalism.

The refusal of the former President to accede to the Order of the Supreme Court to release money for the payment of primary school teachers, council employees and pensioners, of Lagos State was particularly significant. This seizure of the funds of a unit of government in Nigeria by another unit which is entrusted with the funds of all the states and 774 local governments, is particularly disturbing. It is a measure of Nigeria's ascent from the dark age of despotism, that the Yar Adua Government has returned the illegally seized funds.

It should be noted that the provisions of section 162 of the Constitution regarding the allocation of funds to local governments are mandatory. The Federal Government has no discretion in the matter.

The money is taken from the Federation Account, which is a joint account of the Federal Government, the States and Local Governments. The Federal Government is a mere custodian of the funds, not the owner.

It is important to also note that the former President's order prohibited ANY allocations of funds in respect of all local governments in the affected states, not just the extra allocation to their new local governments. In other words, for daring to create new local governments, declared valid by the Supreme Court and conducting elections into them, the Federal Government also seized the allocations to the old local governments listed in the Constitution. Such high handedness, hostility and aggression are the very antithesis for the operation of a federation and democratic government.

It is also a significant insight into the psyche of this Federal Government that it preferred to engage in the aggressive self help, of seizing States funds, rather than going to the Supreme Court to seek a declaration that the new local governments were illegally created.

The action of the Federal Government was particularly grave because the matter had already been taken to courts before it engaged in self help against a fellow government

in the federal set-up. This type of conduct had been strongly condemned by the Supreme Court in Lagos State v. Ojukwu in 1986 as an act of executive lawlessness. Reading the lead judgment, Eso JSC declared:

“I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the Court further by seeking a remedy in a higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court, the contempt of the court, is by the Executive. Under the Constitution of the Federal Republic of Nigeria, 1979, the Executive, the Legislative (while it lasts) and the Judiciary are equal partners in the running of a successful government. The powers granted by the Constitution to these organs by s. 4 (Legislative powers) s. 5 (executive powers) and s. 6 (judiciary powers) are classified under an omnibus umbrella known under Part II to the Constitution as “Powers of the Federal Republic of Nigeria”. The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed there will be no federal government. I think, for one organ, and more especially the Executive, which holds all the *physical powers*, to put up itself in sabotage or deliberate contempt of the other is to stage an executive subversion of the Constitution it is to uphold. Executive lawlessness is tantamount to a deliberate violation of the Constitution.

It is a great relief indeed, that the Yar Adua Administration has proclaimed the subjection of Government to the Supremacy of the Rule of Law, which it is strictly adhering to. If this policy is sustained over a period of time, a culture of democracy, constitutionalism and the Rule of Law will develop in Nigeria. This will set the stage for social and economic development and a leap in the Nigerian standard of living. This country will once again become an attractive home for young Nigerians and qualified professionals and a preferred destination for foreign investors and even tourists.