



THE RULE OF LAW AND OUSTER CLAUSES UNDER MILITARY RULE IN NIGERIA

John Uzoma Eke Esq

Department of Public Law,
Faculty of Law, Rivers State University,
Port Harcourt, Nigeria
Email: jhoneke15@gmail.com

Abstract

Democracy being the most acceptable system of government is clothed with certain basic features which include the rule of law, separation of powers, independence of the judiciary etc. These basic features are never upheld during military rule in Nigeria. The rule of law which is fundamental for good governance is trampled on the ground, the court's jurisdiction to hear some matters bothering on the rule of law are denied via the instrumentality of ouster clauses. The brevity with which the ouster clause ridden court have always called the military rulers to order propelled me to writing on the subject matter; "Ouster Clauses Under Military Rule and the Rule of Law". It is therefore, the aim of this article to look at how the court have pioneered and safeguarded the rule of law even when bombarded with legislations geared toward making it impossible for it to perform its adjudicative role. The effect of ouster clauses on the rule of law, the interpretation of ouster clauses by the judiciary and how to avert the military from coming into our political arena inter alia are all x-rayed in this work.

Keywords: Military Regimes, Constitution, Rule of Law.

INTRODUCTION

The doctrine of the Rule of Law is of great antiquity. According to Chinwo,¹ "The concept of the rule of law is another fundamental concept that has evolved over years... legal and political philosophers from the earliest times, in both secular and theological jurisprudence have given much thought to this issue." However, from the days of the Greek Philosophers, there has been recourse to the notion of law as a primary means of subjecting governmental powers to control. The possession of absolute powers by kings and their nobles made them to exercise arbitrary powers.

¹. C A Chinwo: Principles and Practice of Constitutional Law in Nigeria (2006) P.92

Kings, because of the absolute powers they wielded saw themselves as the law. Consequently, the government that existed then were governments by men rather than government by law. The king seeing himself as the law, therefore he was not subject to any law. The aftermath was the abuse of powers, inhuman and degrading treatment of subjects. It was as a result of the various abuses that men started canvassing to be ruled by law: therefore, the rule of law. Earlier proponents of the rule of law like the Greeks were of the view that the government should rule by the law. Aristotle was of the view that: "Government by law is preferable and superior to government by men or any individual"².

This postulation by Aristotle was made over two thousand years BC. In the Middle Ages various scholars postulated the need for the rule of law as against the rule of man. They continually maintained that the rulers are subject to law. The medieval people, never surrendered the thought that law is by its origin equal rank with the state and does not depend on the state for its existence. Bracton writing in the 13th Century postulates that: "The king shall not be subject to man but to God and the law: since the law made him king."³ During the French Revolution, the Supremacy of Law was emphasized over arbitrariness. The Declaration of Rights of Man and the Citizens in August 1789 which was passed by the French National Assembly provides as follows:

- No man should be accused, arrested, or held in confinement, except in cases determined by law, and according to the forms which it has prescribed.
- The law ought to impose no other penalties but such as are absolutely and evidently necessary; and no one ought to be punished, but by virtue of a law promulgated before the offence and legally applied.
- Every man being presumed innocent till he has been convicted.
- No man ought to be molested on account of his opinions, not even on account of his religious opinions, provided his avowal of them does not disturb the public order established by the law.⁴

On above declaration, lie the modern day principles of fundamental human right. The United State Bill of Right, 1791 also asserted the Supremacy of the rule of law over individual whims and caprices of the government. Consequently, Article V provides that "No person shall ... be deprived of life, liberty or property without due process of law..." It will suffice to mention here that the "Declaration of Right" of 1789 is the first enshrinement of the fundamental human right, which is found in the constitution of every modern state⁵.

OUSTER CLAUSES IN NIGERIAN CONSTITUTION

The history of ouster clauses is traceable to the history of military intervention in Nigerian political history. Consequently, it will be fair tracing the history of the military in our politics. Nigeria received a democratic constitution at independence. The independence constitution provided for the supremacy of the constitution, as

² Aristotle, "The Politics" Translated by Sinclair T.A. Harmonds, Worth Penguin Book, pg 64.

³ C.K Agorno: "Rule of Law and The Rule of Man in a Military Dictatorship" in I.O, Agbcde & E.Akanki (cd.) Current (Themes in Nigerian Laws. (Faculty of Law, Uni. Lagos. 1997) p. 74.

⁴ Williams: Revolutions 1775-1830 (1971) p98-99 Merryyn, ed

⁵ . CF chapter IV of the Constitution whose provisions are almost impair material with the Declaration Right Bill of 1789.

well as conduct of free and fair elections. Some of the attributes of the 1960 Constitution were re-enshrined in the 1963 Republic Constitution. However, following the 1964 and 1965 general elections that were marred by wide spread rigging and irregularities coupled with corruption of government officials, the polity was in shamble — following the arrest and detention of opposition party members in western Nigeria. There were also the western region crisis and the state of emergency in the region and other politically propelled crisis all over the federation. On the 15th January, 1966 some young Nigerian Army officers led by Major Chukwuma Kaduna Nzeogwu staged a successful bloody coup d'état. The young Major in a National broadcast after the coup gave the following reasons for their action:

“The aim of the revolutionary council is to establish a strong and prosperous nation, free from corruption and internal strife, our enemies are the political class criminals on the one hand and between these and crime — control agencies and personnel's (from law makers to policemen and other enforcement agencies), themselves either elite, working — class, or commoner in the other all within the pressures of the country's capitalist development strategy. These interactions (dictated by the nature of Nigeria's system) would explain most, if not all, the identifying attributes and characteristics of the crime of corruptions”⁶

The coup d'état brought a revolutionary change in the government and laws of Nigeria. This coup gave birth to a counter coup whose outcome was the civil war. Major Nzeogwu having set the pace Nigeria became a breeding ground for the test of all forms of military dictatorship.

MEANINGS OF THE RULE OF LAW

The rule of law due to its invaluable features to the success or failure of any democratic government aimed innumerable meanings and definitions. Consequently, the meanings of the rule of law have continued to evolve with time and society. Several conceptions of the rule of law have developed throughout the history of western societies and every other society. Despite the meaning among those conceptions, the underlying purpose of the rule of law has remained constant: namely, to justify the legal order and legitimize the legal system of a given society. The various meanings given to the rule of law and varies in its applicability and observance from country to country and from government to government notwithstanding it presupposes that government which rule by law should as well abide by the law. De Smith opined that the rule of law whatever it may mean is splendid. At the International Congress of Jurists held in Delhi in 1959 the rule of law was defined as:

“A dynamic concept for the expansion and fulfilment of which jurist are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social,

⁶. John Adeniola Yakub: Constitutional Law in Nigeria (2003) pg 483-484.

economic, educational and cultural conditions under which his legitimate aspiration and dignity may be realized”⁷

The Congress further opined that the underlying concept of the rule of law is that:

- a) “all powers in a state should be derived from and exercised in accordance with the law, and
- b) that the law itself must be based upon respect for the supreme value of human personality”⁸

Oputa⁹ JSC opined that: “The rule of law is a shield and a fortress against tyranny and oppression. It is the defender and custodian of individual rights and liberty, an asylum and comfort to the oppressed, a guarantee of hope for the innocent, a chilling terror to the malignant and vile, an encouragement to good behaviour by both government and governed”. To Justice Oputa, it is only under the wings of the rule of law that the citizens of a nation can find shelter from arbitrariness. The concept of the rule of law is a tradition that embodies at least three indispensable elements, as postulated by the modern-day father of the rule of law concept Prof. A.V. Dicey. He gave to the rule of law three meanings. According to him: “In the first place, the absolute supremacy or predominance of regular law as opposed to influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government., a man may with us be punished for a breach of law, but he can be punished for nothing else¹⁰” This means that no man is to be punished or be made to suffer in body or goods save as presented in the ordinary law of the land and for a distinct breach of law.

It follows from the above that the ordinary law of the land is supreme and above all other consideration and authority in any 16 A.V. Dicey Introduction to the Study of the Constitution (1885). Society where the concept of the rule of law is allowed to operate and is observed. Consequently, the 1999 constitution of the Federal Republic of Nigeria have a supremacy clause. By virtue of that clause which provides that: “This constitution is Supreme and its provisions shall have binding force on all authorities and persons through the Federal Republic of Nigeria.”¹¹ Consequently, the constitution is the fundamental or Grund norm of Nigeria. Therefore, all actions of persons or the government or its agents, etc powers and the citizens must be guided by the Constitution. The constitution is the determining factor for the lawfulness or unlawfulness of any act by the government and its officials as well as by the citizens.

Another aspect of the supremacy clause of the constitution is that it makes the constitution the litmus test for the validity or otherwise of any other legislation. It

⁷. Rule of Law in a free society, Int’l Commission of Jurist, 1959, p.3

⁸. Sabastine T: ‘Rule of Law; Theory and Practice under the Constitution of the FRN, 1999” being a lecture

presented on the 17/11/2004 at RSUST Port Harcourt.

⁹. J.K Jegede: “The Rule of Law in a Military Government — An Appraisal” (Nigerian Law and Practice

Journal October 1999)3 p. 22

¹⁰. A. V. Dicey Introduction to the Study of the Constitution (1885).

¹¹. S. 1 (1) 1999 Constitution

will be safe to say that every other law dies or lives to the extent of its inconsistency or consistency with the constitution respectively. Thus, “If any other law is inconsistent with the provisions of this constitution, this constitution shall prevent and that other law shall to the extent of the inconsistency be void.”¹²

The constitution also acts as litmus test for the validity of executive acts, and as well as that of the legislature. In *Elesco V. Government of Ogun State*¹³ a state statute vested on the Commissioner for Chieftaincy Affairs with powers concerning chieftaincy matters. These powers were hijacked by the State Governor. In an action against the arbitrary exercise of power by the executive the Supreme Court held that all persons and authorities are bound by the constitution. Eso JSC held in the instant case that: In the exercise of his power as a matter of order, peace and good government, the governor must have recourse to law...

Former President of Nigeria, Obasanjo on the rule of law posited that my understanding of the rule of law .., is enthronement of supremacy of law on all members of a society, both governors and governed alike.

OUSTER CLAUSES

It is imperative give some juristic and judicial construction of the term “ouster clauses”. In *A.G of Ogun State V. Coker*¹⁴ Oputa JSC held that: “Ouster means to take away, remove, force out, to eject, dispossess, to drive a thing out in a democratic setting by an appropriate authority.

From the meaning of ouster above, ouster clauses are special provisions in an enactment that rob the court of jurisdictions to hear matters it once had jurisdiction. Such clauses take away, remove, force out ... eject...” the jurisdiction of the court to entertain some questions. This ouster clause in a Decree bars the courts from questioning either the validity of the Decree itself or of acts done thereto. It is usually a blanket legal fetter. It prevents access of aggrieved persons to court.¹⁵

According to Agbede & Akanki,¹⁶ Military laws by nature have qualities... which include... Ouster clauses; Here the jurisdiction of courts is ousted to prevent access to aggrieved persons seeking redress in courts to question the provisions or actions taken in the name of a Decree. The validity or otherwise of Decrees are not within the jurisdiction of the court to examine, once ouster clauses are entered.” From the foregoing it is clear that ouster clauses remove or limits the jurisdiction of courts. This brings us to the issue of what is jurisdiction and its ouster.

JURISDICTION

In *Braithwaite V. G.D.M.* (1998) 7 NWLR (pt 557) it was held that: “... jurisdiction is... the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or

¹². Ibid 13, Sub (3)

¹³. (1990) 2 NWLR (Pt. 133) 420

¹⁴. (2002) 17 NWLR (pt 796) pg 305 at 332(2002) 17 NWLR (pt 796) pg 305 at 332.

¹⁵. Op. cit Current Themes

¹⁶. Current Themes

commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited...” In page 341 of the same case the court further held that: “Jurisdiction defines the powers of court to inquire into facts, apply the laws, make decisions and declare judgment. The legal right by which judges exercise authorities.

On when jurisdiction will exist, the court held that: “...it exists when court has cognizance of class (sic) involved, proper parties are present and points to be decided are within the power of the court. It is the power and authority of a court to hear and determined judicial proceedings and power to render a particular judgment in question...”

The issue of jurisdiction is so important that where there is any defect in jurisdiction of the court, the entire proceedings however well conducted are thereby rendered a complete nullity. In *NEPA V. Ugbaja*¹⁷ the court while ruling on the importance of jurisdiction held that: it is trite law that the question of jurisdiction is fundamental to the hearing of any case because if a court has no jurisdiction to hear a case, no matter how that case is well conducted, it is simply a nullity.

It is obvious that a court of law cannot be back on a case it has no jurisdiction or power to hear and decide upon. It is also clear from the Braithwaite’s case that the limit of a court’s jurisdiction is determined by the law of the land (statute establishing such court)¹⁸. Consequently, the military whenever they take over government always oust the jurisdiction of the court to hear certain matter.

OUSTER CLAUSES UNDER MILITARY ADMINISTRATION

Obviously, of the three independent arms of government under the 1963, 1979 and 1999 constitution it is only the courts that have always survived the military. The other two arms of government, the executive and legislative powers are usually fused. The judicial function of adjudication and construction of the law is normally vested in the courts. Thus S.6 of the 1979 Constitution which is *impari material* with S.6 of the 1999 Constitution which vest judicial powers in the court provide in sub. Section (1) that “The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the federation. Also provided in the constitution are provisions to protect the fundamental rights of the citizens which the courts are constantly called upon as the hope of the common man to protect. Thus, free access to court to enforce these inalienable rights are provided in the 1979 and 1999 Constitution. S. 36 of the 1999 Constitution provides that: “in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

To further secure the fundamental rights of the citizen, which is the third leg of the rule of law under the constitution, as entrenched in S. 4 (9) very cumbersome

¹⁷. (1998) 5 NWLR (pt.546)106 at 115-116

¹⁸. See chapter VII of the constitution

procedure for the alteration or repeal of the chapter IV¹⁹ which deals with the rule of law, fundamental human right to be precise. The framers of the constitution in their wisdom subjected exercise of legislative powers to the jurisdiction of the court and also forbid the legislature from enacting laws that purport to oust the court's jurisdiction. Unfortunately, these provisions which confer jurisdiction on the courts are compromised, and the court denied jurisdiction to hear matters relating to them or relating to the exercise of executive powers.

In other words, under military administrations in Nigeria SS. 4 (8) (9), S.I, Chapter IV and some parts of S.6 are always modified and suspended through the instrumentality of ouster clauses. The aftermath of the suspension being that, the courts no longer have powers to inquire into any matter relating them.

OUSTER CLAUSES AND THE JURISDICTION OF COURT

As explained earlier on, ouster clauses under the military are traceable to the notorious case of *Lakami*. In that case the Supreme Court held the Constitution (Suspension and Modification) Decree No. 1 of 1966 which dealt with the general power of the Federal and Regional Military Government to make laws, void Decree No 1, 1966 contained in section 6 an ouster clause to the effect that: "no question as to the validity of this or any other Decree or any Edict shall be entertained by any court of law in Nigeria".

The Supreme Court held the Decree and Edict to be null and void to the extent of its inconsistency with the constitution. The court also upheld its authority to inquire into the validity of the Edict despite the ouster clause, on the grounds that the Edict is inconsistent with an existing Decree. The Federal Military Government thundered back with the Federal Military Government (Supremacy and Enforcement Power) Decree No. 28 of 1970 which did not only nullify the verdict of the apex court but also ousted its power to hear matter relating to the Decree. S. 1(2) of Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 1970 provides that: "Any decision made before or after the commencement of this Decree, by any court of law in the exercise or purported exercise of any power under the constitution or any enactment or law of the federation which purport to declare or shall hereafter purport to declare the validity of any Decree or Edict... or the incompetence of any of the government in the federation to make same is or shall be null and void and of no effect whatsoever as from the date of the making thereof". This carefully worded statute meticulously ousted the jurisdiction of the court to question the legality or other wise of executive action. This hydra headed monster (ouster clauses) with its element of recklessness and insipidity successfully found its way into our legislation. The floodgate of ouster clauses having being opened subsequently military administrations 'sky rocketed' the trend with harsher and unfair clauses to the jurisdiction of the court.

ATTITUDES OF THE COURT TOWARDS OUSTER CLAUSE

The courts have not always folded its hand under the notion that their hands are tied in the face of ouster clause. Ouster clauses notwithstanding, the courts have come up with some brave interpretations of legislations ousting the jurisdiction. It

¹⁹. See also S. 33 1979 Constitution

is a rule of construction that nothing shall be intended to be out of the jurisdiction of the superior court but that which specially appears to be so. The Courts have always guided their jurisdiction zealously and jealously. However, “for an ouster clause to be enforceable, it must be clear, precise, and unambiguous and not err on the side of clarity.”²⁰

It therefore follows that a legislation ousting the court’s jurisdiction in respect of a particular matter must be clearly expressed before it becomes effectives. In other words, where there is any ambiguity in a statute that ousts the court’s jurisdiction, the courts will construe it in such a way as to preserve its ordinary jurisdiction. In *Barclay Bank of Nigeria Ltd V Central Bank of Nigeria*²¹ the Supreme Court held that:

“In considering whether or not a court has jurisdiction to entertain any claim, it is our view that while a person’s right of access to the courts may be taken away or restricted by statute, the language of any such statute will be watched by the courts and will not extend beyond its onerous meaning unless clear words are used to justify such extension... it is now well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that if such provision is reasonably capable of having two meanings, that shall be taken which preserves the ordinary jurisdiction of the court... thus a court may, by statute lack jurisdiction to deal with a particular matter, but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matter”.

According to Pats Acholonu JCA (as he then was) I believe and I hold the view that the fact that an ouster clause is provided in a decree or edict should not frighten any judge worth his salt”²².

RECOMMENDATIONS AND CONCLUSION

The brevity, which the court displayed in the face of tyrannical governments whose law ousted its jurisdiction, cannot be over commended. Although, some of the judges been frightened by the arms of the military gave very timid verdict when it has to do with ouster clause, the Nigerian courts have exhibited great prowess in upholding the inalienable rights of the citizens.

The legislature in the exercise of its legislative duty must exercise caution in making laws so as not to impinge on the sacred duty of the courts. Ouster clauses are not original creation of the military but an imitation from our civilian legislations²³.

²⁰. Ouster Clauses in Forfeiture cases, AG Fed V. C.D SODE & Ors. Pub. In “Justice, Journal of Contemporary Legal Problems, January 1991 Vol. 2, page 79

²¹. (1976), All N.L.R p. 409

²². Hon, Justice I.C. K Pats-Acholonu (JCA); “Threats to the jurisdiction of the Court and the rule of law in Nigeria,” Conference Papers 1995 – Kanu, pg 120.

²³. See S.S. 161 (3), 165 (1), the 1963 constitution

Democracy is the way out of ouster clauses. I therefore recommend the continuation of democracy which allows the rule of law to exist and each arm of the government serving as a check on the other arm of government.

In a democracy which Nigeria is practicing at present, the constitution is the supreme law. The constitution in S. 4 (8) forbids the ousting of the court's jurisdiction by any legislative Act. Also, the judiciary is vested with the sacred role of interpreting the constitution and every other enactment. This means that if any law is enacted that purport to oust the court's jurisdiction such law having contravene the 1999 constitution (i.e. S.4 (8)) which is the supreme law such Legislation should be declared null and void to the extent of its inconsistency. In other words, in so far as the constitution remains, no law should be enacted by the legislature to oust the jurisdiction of the court.

Also, good governance must not be substituted for any form of civilian lawlessness as was the case some regimes which was notorious for abuse of court orders. The executive must be subject to the rule of law. President Yar'Adua should be commended for his observance and respect to the rule of law which he demonstrated following the Supreme Court judgment restoring Governor Obi as the executive Governor of Anambra State. The court on its part must be vigilant at all times in safeguarding its jurisdiction and the rule of law as it is clear that the branch of government which has the greatest responsibility to enforce the constitution is the judiciary. The court should ensure that government, which rule by the law obeys the law. And the independence of the judiciary must be meticulously maintained.

It is argued that ouster clauses robs the court of jurisdiction to hear certain matter especially on the rule of law. It is also the case that ouster provisions are features of military administrations and most military administrations in Nigeria were dictatorial. Therefore, not tolerance of any form of opposition. However, the courts under the military were never frightened by their draconian laws. The courts always stood alert to see that the military obey the law and rule by the rule of law and not might. Consequently, in Ojukwu's case the supreme held that even under a military regime the law is no respecter of persons, principalities and powers and that the courts stand at alert to see that the government which rule by law, should respect the law.

The court under the military have continually held that courts are not frightened by ouster clause. Justice I.C.K. Pats - Acholonu (JCS as he then was) opined that the courts must not fear to assume jurisdiction in questionable circumstances in order to give remedy where the right of the individual may be impaired or under assault. The courage of this law lords must be commended.

If our law lords could exhibit such courage under military rule, and in the face of ouster clause, then our judiciary under the 1999 constitution and without ouster clauses should exhibit more courage and ensure that the other arms of government confirm with the principles of the Rule of Law. Where the constitutional provisions are clear, strict compliance with them is non-negotiable nor should it be circumscribed. Our courts have started showing this courageousness with various

Supreme Court cases like Obi's, Dariye, Ladoja etc. The court in performing its adjudicative function must not tolerate executive lawlessness.

Learned gentlemen at the Bar by virtue of their professional training should be in the front burner in assisting the judiciary to uphold the rule of law. To permanently uphold the rule of law the door must be shut against the military and they should be restricted to their constitutional role of defending the territorial integrity of the nation. The military should be reoriented, professional training, proper welfare and pre-occupying them with the performance of social services in times of peace etc should be in the minds of our politicians.

Finally, good governances as I have postulated earlier have no alternative to keep the military and its ouster clauses out of — the corridors of powers. Those in authority must realize that “servant — leadership” is the key to good governance. Consequently, oppositions must be tolerated. The press must be given the necessary freedom and the government should carry out adequate consultations with various interest groups, like the Civil Society, NLC etc before major policy decisions are reached.

It is my submission that if these recommendations are adhered to by our democratically elected governments, then the military usurper will be permanently kept out of government and the rule of law will thrive in our polity.